



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Report 5 of 2017

14 June 2017

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ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

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This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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## 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.<sup>1</sup> **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 **rationaly 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**).

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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).

# Table of contents

<b>Membership of the committee .....</b>	<b>iii</b>
<b>Committee information .....</b>	<b>iv</b>
<b>Chapter 1—New and continuing matters .....</b>	<b>1</b>
<b>Response required</b>	
Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132] .....	2
Electoral and Other Legislation Amendment Bill 2017 .....	14
Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 .....	22
Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210] .....	31
<b>Further response required</b>	
Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 .....	34
<b>Advice only</b>	
Appropriation Bill (No. 1) 2017-2018 and Appropriation Bill (No. 2) 2017-2018 .....	42
Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017 .....	45
<b>Bills not raising human rights concerns .....</b>	<b>49</b>
<b>Chapter 2—Concluded matters .....</b>	<b>51</b>
Australian Citizenship Regulation 2016 [F2016L01916] .....	51
Defence Legislation Amendment (2017 Measures No. 1) Bill 2017 .....	62
Social Services Legislation Amendment Bill 2017 .....	67
<b>Appendix 1— Deferred legislation .....</b>	<b>73</b>
<b>Appendix 2— Short guide to human rights.....</b>	<b>75</b>
<b>Appendix 3— Correspondence.....</b>	<b>89</b>
<b>Appendix 4— Guidance Note 1 and Guidance Note 2.....</b>	<b>101</b>



# Chapter 1

## New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 9 May and 1 June 2017 (consideration of 2 bills from this period has been deferred);<sup>1</sup>
  - legislative instruments received between 7 April and 11 May 2017 (consideration of 3 legislative instruments from this period has been deferred);<sup>2</sup> 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.

### Instruments not raising human rights concerns

- 1.3 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.<sup>3</sup> Instruments raising human rights concerns are identified in this chapter.
- 1.4 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.

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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](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate).

3 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](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate).

## Response required

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

### **Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132]**

<b>Purpose</b>	Sets up a code of practice that is to be complied with by persons in respect of building work as permitted under section 34 of the <i>Building and Construction (Improving Productivity) Act 2016</i> (ABCC Act)
<b>Portfolio</b>	Employment
<b>Authorising legislation</b>	<i>Building and Construction (Improving Productivity) Act 2016</i>
<b>Last day to disallow</b>	15 sitting days after tabling (F2016L01859 tabled in the Senate 7 February 2017; F2017L00132 tabled in the Senate 20 March 2017)
<b>Rights</b>	Freedom of expression; freedom of association; collectively bargain; form and join trade unions; just and favourable conditions of work (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### **Background**

1.6 The committee previously examined the *Building and Construction (Improving Productivity) Act 2016* (ABCC Act) which is the authorising legislation for this instrument in its *Second Report of the 44<sup>th</sup> Parliament, Tenth Report of the 44<sup>th</sup>*



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*Parliament, Fourteenth Report of the 44<sup>th</sup> Parliament and Thirty-fourth Report of the 44<sup>th</sup> Parliament and Report 7 of 2016.*<sup>1</sup>

### **Code for tendering and performance of building work**

1.7 Under section 34 of the ABCC Act the Minister for Employment is empowered to issue a code of practice that is required to be followed by persons in respect of building work. The instrument sets up a code of practice for all building industry participants that seek to be, or are, involved in Commonwealth funded building work (a code covered entity). The code of practice contains a number of requirements which engage and limit human rights and are discussed further below.

### **Content of agreements and prohibited conduct**

1.8 Section 11(1) of the code of conduct provides that a code covered entity must not be covered by an enterprise agreement in respect of building work which includes clauses that:

- impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity;
- discriminate, or have the effect of discriminating against certain persons, classes of employees, or subcontractors; or
- are inconsistent with freedom of association requirements set out in section 13 of the code of practice;

1.9 Section 11 (3) further provides that clauses are not permitted to be included in the enterprise agreement in relation to a range of matters including the number of employees, consultation on particular matters, the engagement of particular classes of staff, contractors and subcontractors, casualisation and the type of contracts to be offered, redundancy, demobilisation and redeployment, loaded pay, allocation of work to particular employees, external monitoring of the agreement, encouraging, discouraging or supporting people being union members, when and where work can

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1 The committee originally considered the Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 1-30; *Tenth Report of the 44th Parliament* (26 August 2014) 43-77; and *Fourteenth Report of the 44th Parliament* (28 October 2014) 106-113. These bills were then reintroduced as the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]; see *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 2. The bills were reintroduced to the Senate on 31 August 2016, following the commencement of the 45<sup>th</sup> Parliament; see *Report 7 of 2016* (11 October 2016) 62-63. See also, International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, Direct Request, adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

be performed, union access to the workplace beyond what is provided for in legislation, granting of facilities to be used by union members, officers or delegates.

1.10 Section 11A additionally provides that code covered entities must not be covered by enterprise agreements that purport to remedy or render ineffective other clauses that are inconsistent with section 11.

1.11 The effect of a failure to meet the requirements of section 11 by a code covered entity is to render the entity ineligible to tender for, or be awarded, Commonwealth funded work.

***Compatibility of the measure with the right to collectively bargain and the right to just and favourable conditions of work***

1.12 The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. The right to just and favourable conditions of work includes the right to safe working conditions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>2</sup>

1.13 The interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.<sup>3</sup> The principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential element' of Article 4 of ILO Convention No. 98 which envisages that parties will be free to reach their own settlement of a collective agreement without interference.<sup>4</sup>

1.14 Providing that certain code covered entity employers cannot be awarded Commonwealth funded work if they are subject to an enterprise agreement containing a range of terms is likely to act as a disincentive for the inclusion of such terms in enterprise agreements. The measure is likely to have a corresponding restrictive effect on the scope of negotiations on a broad range of matters including those that relate to terms and conditions of employment and how work is

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2 See, article 22 of the ICCPR and article 8 of the ICESCR.

3 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

4 ILO *General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994), [248]. See, also, ILO Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Australia (ratification: 1973)*, ILO Doc 062009AUS098 (2009).

performed. As such, the measure interferes with the outcome of the bargaining process and the inclusion of particular terms in enterprise agreements. Accordingly, the measure engages and limits the right to just and favourable conditions of work and the right to collectively bargain.

1.15 Measures limiting the right to freedom of association including the right to collectively bargain may be permissible providing certain criteria are satisfied. The right to collectively bargain may only be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*),<sup>5</sup> or public health or morals. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective.<sup>6</sup> Further, Article 22(3) of the ICCPR and article 8 of ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.

1.16 The ILO's Committee on Freedom of Association (CFA Committee), which is a supervisory mechanism that examines complaints about violations of the right to freedom of association and the right to collectively bargain, has stated that 'measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98'.<sup>7</sup> The CFA Committee has noted that there are some circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, stating that 'any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement.'<sup>8</sup>

1.17 In relation to the limitation that section 11 imposes on the right to collectively bargain, the statement of compatibility argues:

...the limitation is reasonable, necessary and proportionate in pursuit of the legitimate objective of seeking to ensure that enterprise agreements

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5 'The expression "public order (*ordre public*)" ...may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*): *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

6 See ICCPR article 22.

7 See *ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897, [473]).

8 *ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 330th Report, Case No. 2194, [791]; and 335th Report, Case No. 2293, [1237]).

are not used to limit the ability of code covered entities to manage their businesses efficiently or restrict productivity improvements in the building and construction industry more generally.<sup>9</sup>

1.18 Limited information is provided in the statement of compatibility as to whether the stated objective addresses a pressing and substantial concern such that it may be considered a legitimate objective for the purpose of international human rights law or whether the measure is rationally connected to (that is, effective to achieve) that stated objective.

1.19 Further, no information is provided about the proportionality of the measure. In this respect it is noted that section 11 imposes practical restrictions on the inclusion of a very broad range of matters relating to terms and conditions of employment in enterprise agreements. It is noted that section 11(1)(a) is particularly broad and provides a practical restriction on the inclusion of a clause in an enterprise agreement which imposes or purports to impose limits on the right of the code covered entity to manage its business or to improve productivity. This clause raises concerns for it may be understood to cover many matters that are usually the subject of enterprise agreements such as ordinary working hours, overtime, rates of pay and any types of work performed.

1.20 Additionally, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), which is another supervisory mechanism, has recently reported on Australia's compliance with the right to collectively bargain in respect of matters which will also be covered by section 11. In relation to restrictions on the scope of collective bargaining and bargaining outcomes, the committee noted that 'parties should not be penalized for deciding to include these issues in their negotiations' and requested that Australia review such matters 'with a view to removing these restrictions on collective bargaining matters'.<sup>10</sup>

1.21 The CFA Committee has also raised concerns in relation to similar measures previously enacted by Australia under the *Building and Construction Industry Improvement Act 2005* and stated that:

The Committee recalls that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and

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9 Code for the Tendering and Performance of Building Work 2016, Explanatory Statement (ES), statement of compatibility (SOC) 6.

10 ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia  
[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID,P1110\\_COUNTRY\\_ID,P11110\\_COUNTRY\\_NAME,P11110\\_COMMENT\\_YEAR:3299912,102544,Australia,2016](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P1110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3299912,102544,Australia,2016) (last accessed 10 May 2017).

working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes... The Committee considers that the matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc.; these matters should not be excluded from the scope of collective bargaining by law, or as in this case, by financial disincentives and considerable penalties applicable in case of non-implementation of the Code and Guidelines.<sup>11</sup>

1.22 Concerns about restrictions Australia has imposed on the right to freedom of association and the right to collectively bargain have also been raised by the United Nations Committee on Economic, Social and Cultural Rights in its Concluding Observations on Australia.<sup>12</sup> Such comments from supervisory mechanisms were not addressed in the statement of compatibility. Addressing such matters in the statement of compatibility would generally be of assistance to the committee's task of assessing the human rights compatibility of legislation.

1.23 The committee has also previously commented on other measures which engage and limit these rights and raised concerns.<sup>13</sup>

### **Committee comment**

**1.24 The preceding analysis identifies that the measure engages and limits the right to freedom of association, the right to collectively bargain, and the right to just and favourable conditions of work; and raises questions as to its compatibility with these rights. The statement of compatibility has not sufficiently justified these**

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11 ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004  
[http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002\\_COMPLAINT\\_TEXT\\_ID:2908523](http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523) (last accessed 10 May 2017).

12 UN Committee on Economic, Social and Cultural Rights, Concluding Observations, Australia, E/C.12/AUS/CO/4 (12 June 2009).

13 See, for example, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 1-30; *Tenth Report of the 44th Parliament* (26 August 2014) 55-56; *Report 7 of 2016* (11 October 2016) 21-24, 62-63; *Report 8 of 2016* (9 November 2016) 62 – 64.

limitations. Accordingly, the committee seeks the advice of the Minister for Employment as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible);
- whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure; and
- the government's response to the previous comments and recommendations made by international supervisory mechanisms including whether the government agrees with these views.

#### **Prohibiting the display of particular signs and union logos, mottos or indicia**

1.25 Section 13(2)(b)-(c) provides that the code covered entity must ensure that 'no ticket, no start' signs, or similar are not displayed and signs that seek to 'vilify or harass employees who participate, or do not participate, in industrial activities are not displayed'.

1.26 Section 13(2)(j) provides that union logos, mottos or indicia are not applied to clothing, property or equipment supplied by, or which provision is made by, the employer or any other conduct which implies that membership of a building association is anything other than an individual choice for each employee.

#### ***Compatibility of the measure with the right to freedom of expression***

1.27 The right to freedom of opinion and expression is protected by article 19 of the ICCPR. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.<sup>14</sup>

1.28 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*), or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by

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14 ICCPR, article 19(2).

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law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.<sup>15</sup>

1.29 By providing certain signs cannot be displayed and providing that union logos, insignias and mottos are not to be applied to certain clothing or equipment, the measures engage and limit the right to freedom of expression.<sup>16</sup> The statement of compatibility acknowledges that the right to freedom of expression is engaged and identifies the following as the objective of the measures:

The intimidation of employees to join or not join a building association is clearly an unacceptable infringement on their right to freedom of association...

The right to freedom of association can also be infringed by the presence of building association logos, mottos or indicia on clothing, property or equipment that is supplied by, or which provision is made for by, the code covered entity...

...pursuing the legitimate policy objective of protecting the rights and freedoms of employees in the building and construction industry to choose to become, or not become, a member of a building association and ensuring that this choice does not impact on an employee's ability to work on a particular site.<sup>17</sup>

1.30 The statement of compatibility provides limited information about the importance of these objectives. However, 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.<sup>18</sup>

1.31 Furthermore, the reasoning articulated in the statement of compatibility does not accurately reflect the scope of freedom of association under international law. The scope of the right to freedom of association in a workplace under international law focuses on a positive right to associate rather than a right not to

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

16 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [154]-[173].

17 ES, SOC 8.

18 See Attorney-General's Department, *Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues*, at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Documents/Template2.pdf>.

associate.<sup>19</sup> ILO supervisory mechanisms have found that under Convention 87 it is a matter for each nation state to decide whether it is appropriate to guarantee the ability of workers *not* to join a union.<sup>20</sup> As a matter of international human rights law, the display of particular union signs, union logos, mottos or indicia on clothing does not appear to 'infringe' the right to freedom of association but rather constitutes an element of this right.<sup>21</sup>

1.32 Further, it is unclear whether the measure is rationally connected to (that is, effective to achieve) the stated objective of 'protecting...employees in the building and construction industry to choose to become, or not become, a member of a building association [union] and ensuring that this choice does not impact on an employee's ability to work on a particular site'.

1.33 The statement of compatibility provides the following information on whether the measure prohibiting certain signs (contained in section 13(2)(b)-(c)) is rationally connected to the stated objective:

...intimidation can take the form of signs implying that employees who are not members of a building association cannot work on the building site or, where such employees are present, seek to intimidate, harass or vilify such employees...

1.34 However, the statement of compatibility does not address how the display of specific signs rises to the level of intimidation, harassment or vilification. Without further information it is unclear that the removal of such signs would be effective in achieving the stated objective of protecting the choice to become, or not become, a member of a union.

1.35 The statement of compatibility further provides the following information on whether the measure prohibiting union logos, mottos or indicia on certain clothing, property or equipment (contained in section 13(2)(j)) is rationally connected to the stated objective:

... [union] signage on clothing or equipment that is supplied by a code covered entity carries a strong implication that membership of the building association in question is being actively encouraged or endorsed by the relevant employer and is against the principle that employees should be

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19 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161] – [163].

20 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [365] – [367].

21 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161] – [163].



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free to choose whether to become or not become a member of a building association.<sup>22</sup>

1.36 It is acknowledged that the explanatory statement outlines the findings of the final report of the Royal Commission into Trade Union Governance and Corruption (the Heydon Royal Commission) including general issues of intimidation in the building and construction industry.<sup>23</sup> However, without further information, it is unclear how merely viewing, for example, a union logo on clothing or equipment would prevent an employee who did not wish to join the relevant union from their choice to do so or from working on a particular site. Further, it is unclear that such signs and logos would necessarily be seen as an employer endorsement of joining the union, and even if so, that this would affect an employee's freedom of choice or ability to decide not to join the union.

1.37 In relation to the proportionality of the measure prohibiting union logos, mottos or indicia on certain clothing, property or equipment (contained in section 13(2)(j)), the statement of compatibility provides that:

This prohibition only applies to clothing, property or equipment that is supplied by, or which provision is made for by, the code covered entity. Section 13 would not prevent these items from being applied to clothing, property or equipment that was supplied by other individuals at the site or by the relevant building association.<sup>24</sup>

1.38 No further information is provided in the statement of compatibility about proportionality of the measures including any relevant safeguards in relation to the right to freedom of expression.

### **Committee comment**

**1.39 The preceding analysis raises questions as to the compatibility of the measures with the right to freedom of expression. Accordingly, the committee seeks the advice of the Minister for Employment as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible); and**

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22 ES, SOC 8.

23 ES 3.

24 ES, SOC 8.

- **whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.**

***Compatibility of the measure with the right to freedom of association and the right to form and join trade unions***

1.40 Article 22 of the ICCPR guarantees the right to freedom of association generally, and also explicitly guarantees everyone 'the right to form trade unions for the protection of [their] interests.' Article 8 of the ICESCR also guarantees the right of everyone to form trade unions. As set out above, the right to freedom of association may only be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*), or public health or morals. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective.<sup>25</sup> Further, no limitations on this right are permissible if they are inconsistent with the rights contained in ILO Convention No. 87.<sup>26</sup>

1.41 As noted above, the understanding of the right to freedom of association expressed in the statement of compatibility and the code of conduct does not fully reflect the conception of this right as a matter of international human rights law. The ILO supervisory mechanisms have noted, for example, that 'the prohibition of the placing of posters stating the point of view of a central trade union organization is an unacceptable restriction on trade union activities.'<sup>27</sup> As the measures restrict communication about union membership, including joining a union, the measures engage and may limit the right to freedom of association. This potential limitation was not addressed in the statement of compatibility.

**Committee comment**

**1.42 The committee notes that the preceding analysis identifies that the measure engages and may limit the right to freedom of association. The committee therefore seeks the advice of the minister 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**

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25 See ICCPR article 22.

26 See ICESCR article 8, ICCPR article 22.

27 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161] – [163].

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

## Electoral and Other Legislation Amendment Bill 2017

<b>Purpose</b>	Seeks to amend various Acts in relation to electoral, broadcasting and criminal matters to: amend authorisation requirements in relation to political, electoral and referendum communications; replace the current criminal non-compliance regime with a civil penalty regime to be administered by the Australian Electoral Commission; amend the <i>Criminal Code Act 1995</i> to criminalise conduct amounting to persons falsely representing themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth body; and create a new aggravated offence where a person engages in false representation
<b>Portfolio</b>	Special Minister of State
<b>Introduced</b>	House of Representatives, 30 March 2017
<b>Rights</b>	Freedom of expression; fair trial; criminal process; presumption of innocence (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### Requirement to authorise and notify particulars in respect of electoral matters and referendum matters

1.43 Proposed section 321D would amend the *Commonwealth Electoral Act 1918* (Electoral Act) to provide that communications about 'electoral matters' on behalf of particular entities (disclosure entities) are required to be authorised and would impose a requirement to notify particulars such as the entity's name, address and the person who has authorised the communication.<sup>1</sup> Under proposed section 321D, subject to exceptions, all types of communication fall within the authorisation and notification requirements including, for example, printed material, leaflets, text messages, voice messages, telephone calls and conversations in the course of door-knocking.<sup>2</sup>

1.44 'Electoral matter' is currently defined in sections 4(1) and 4(9) of the Electoral Act. Section 4(1) currently provides that 'electoral matter' means a 'matter which is intended or likely to affect voting in an election'. The proposed legislation would amend section 4(9) to provide that a matter is taken to be intended or likely to affect voting in an election if it contains an express or implicit comment on: the

1 Proposed section 321D includes a table specifying what authorisations are required for different forms of communications about an 'electoral matter'.

2 See proposed section 321D(b)-(c).

election; or a political party, candidate or group of candidates in the election; an issue submitted to, or otherwise before, the electors in connection with the election.

1.45 A 'disclosure entity' is defined under proposed section 321B as:

- a registered political party;
- current members of parliament and current and former candidates (for the previous 4 years for candidates for election to the House of Representatives or 7 years for candidates for election to the Senate);
- an associated entity (defined under Part XX of the Electoral Act to include unions that pay affiliation fees to political parties and organisations that are set up as fundraising vehicles by political parties);
- individuals or organisations who are required, or have been required in previous financial years, to submit returns to the Australian Electoral Commission because they have donated to a party or a candidate.

1.46 Proposed sections 321D(3)-(4) provide for exceptions to the authorisation requirements for certain types of communications (including, for example, clothing or anything that is designed to be worn; reporting of the news; communication for satire; academic or artistic purposes; and personal or internal communications).

1.47 A failure to comply with the new authorisation requirements is a civil penalty provision of 120 penalty units (currently \$21,600) for an individual.

1.48 Proposed Part IX, section 110C applies similar provisions in relation to referendum matters (defined as a matter intended or calculated to affect the result of a referendum).<sup>3</sup>

### ***Compatibility of the measure with the right to freedom of expression***

1.49 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.<sup>4</sup>

1.50 By expanding authorisation and notification requirements in relation to communication about electoral and referendum matters, the measure imposes a practical limitation on the right to freedom of expression. By requiring the statement of certain particulars including, for example, the address of the entity, the relevant town or city of the entity and the name of the natural person responsible for giving

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3 See proposed section 110A.

4 ICCPR, article 19(2).

effect to the authorisation, the measure imposes a restriction or burden on the form of communication.<sup>5</sup>

1.51 The statement of compatibility acknowledges that the measure engages and limits the right to freedom of expression but argues that this limitation is permissible.<sup>6</sup> In relation to the objectives of the measure, the statement of compatibility notes:

There is a strong public interest in ensuring that voters are aware of who is communicating to them without adversely impacting public debate. These authorisation requirements facilitate transparency and public confidence in Australia's electoral processes. They allow voters to assess the credibility of the information they rely on when forming their political judgment and selecting their representatives in the Parliament.

Ultimately, this Bill facilitates free and informed voting at elections, an object which is essential to Australia's system of representative democracy...the Bill's restrictions on anonymous electoral communications supports the right of participants in public debate to protection against unlawful attacks on reputation by providing key information necessary to commence appropriate civil action under Australia's defamation laws.<sup>7</sup>

1.52 These objectives are likely to constitute legitimate objectives for the purposes of international human rights law and the measure appears to be rationally connected to these objectives.

1.53 In relation to the proportionality of the measure, the statement of compatibility notes:

The Bill limits the restriction on anonymous speech to circumstances strictly necessary to protect the public interest by providing explicit exemptions for:

- the reporting of news, current affairs and editorial content in news media
- communication solely for genuine satirical, academic or artistic purposes
- personal or internal communications of disclosure entities
- opinion polls and research relating to voting intentions.

1.54 These exceptions provide important scope to freedom of expression in a range of circumstances.

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5 Schedule 1, proposed section 321D (5).

6 Explanatory Memorandum (EM) 7.

7 EM 7.

1.55 However, there remain concerns the proportionality of the measure given the breadth of communications covered by the authorisation requirements and the burden that the notification requirement may impose depending on the type of communication being made. The measure applies not only to political parties but potentially to a range of advocacy groups, interest groups, unions and civil society organisations including those who may have a large number of volunteers. These volunteers may be actively involved in a range of campaign activities such as, for example, phone calls or door-knocking. Where communication activities occur in the context of telephone calls or door-knocking, it may be impractical to convey the required notification to each individual recipient while still attempting to communicate about electoral matters. In the voluntary context, it may also be potentially challenging for organisations to ensure that volunteers notify the required particulars. As noted above, failure to comply with section 321D(5) is a civil penalty provision of 120 penalty units. The explanatory memorandum notes in relation to the potential effect on individuals that:

Where a notifying entity that is not a legal entity, for example, a citizens' group, contravenes subsection (5), subsection 321D(6) provides that for the purposes of the Electoral Act and the Regulatory Powers Act, each member, agent or officer (however described) of the entity who contributed to the contravention through action or inaction in their role would be individually responsible for not meeting the authorisation obligation of the notifying entity as required by subsection 321D(5).<sup>8</sup>

1.56 This could act as a potential disincentive for some civil society or citizens organisations to use volunteers or convey information about electoral or referendum matters in light of the penalties to be applied. In other words, the measure could have a particular 'chilling effect' on freedom of expression for certain groups, individuals and volunteers. The statement of compatibility does not address whether there will be any additional safeguards in place to ensure that the measure is the least rights restrictive way of achieving its objectives.

### **Committee comment**

**1.57 The preceding analysis raises questions about the compatibility of the measure with the right to freedom of expression.**

**1.58 Accordingly, the committee requests the advice of the minister as to whether the limitation is a reasonable and proportionate measure to achieve its stated objective including (the existence of relevant safeguards and whether the measure is the least rights restrictive way of achieving its objective noting the potential impact on some groups and individuals including volunteers).**

### ***Compatibility of the measure with criminal process rights***

1.59 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the new civil penalty provision is considered 'criminal' for the purposes of international human rights law, it will engage the criminal process rights under articles 14 and 15 of the ICCPR.

1.60 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. It is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being classified as 'civil' under Australian domestic 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.<sup>9</sup> Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is necessarily 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 right not to be tried and punished twice (the prohibition against double jeopardy) apply.<sup>10</sup>

1.61 In relation to whether the civil penalty provision may be regarded as criminal, the statement of compatibility states only that:

The Bill's civil penalty provisions do not constitute a criminal penalty for the purposes of human rights law as they are not classified as criminal under Australian law and are restricted to people in a specific regulatory context.<sup>11</sup>

1.62 As set out in the committee's *Guidance Note 2*, as the civil penalty provisions are not classified as 'criminal' under domestic law they will not automatically be considered 'criminal' for the purposes of international human rights law.

1.63 The next step in assessing whether the civil penalties are 'criminal' under international human rights law is to look at the nature and purpose of the penalty. A penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context and proceedings are instituted by a public authority with statutory powers of enforcement. In this respect it is noted that while the proposed regime applies to regulate electoral and

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9 *Guidance Note 2* – see Appendix 4.

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

11 EM 7.



referendum matters, the regime could apply quite broadly including to volunteers, such that it is unclear whether the regime can categorically be said not to apply to the public in general. Enforcement is to be undertaken by a public authority under the *Regulatory Powers (Standard Provisions) Act 2014*.

1.64 The third step in assessing whether the penalties are 'criminal' under international human rights law is to look at their severity. In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the maximum amount of the pecuniary penalty that may be imposed under the civil provision in context is relevant. In this respect, as noted above, a penalty of 120 penalty units (currently \$21,600) is substantial. It would apply for each breach including for each individual who contributed to the breach where the organisation is unincorporated. These issues were not addressed in the statement of compatibility.

### **Committee comment**

**1.65 The committee seeks the advice of the minister as to whether the civil penalty provisions in the bill 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*), addressing in particular:**

- **whether the nature and purpose of the penalties is such that the penalties may be considered 'criminal';**
- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be considered 'criminal';**
- **whether the application of the civil penalties could be limited so as to not apply as broadly to individuals; and**
- **if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measure accords with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).**

### **Reverse evidential burden of proof**

1.66 Proposed section 150.1 of the Criminal Code would make it an offence for a person to falsely represent that the person is, or is acting on behalf of, or with the authority of, a Commonwealth body (and makes it a higher level offence to do so with the intention of obtaining a gain, causing a loss, or influencing the exercise of a public duty or function).<sup>12</sup>

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12 Schedule 2, item 2, proposed section 150.1(4).

1.67 Subsection 150.1(4) provides that if the Commonwealth body is fictitious, these offence provisions do not apply unless a person would reasonably believe that the Commonwealth body exists. This would appear to provide an exception to the relevant offences.

1.68 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

### ***Compatibility of the measure with the right to be presumed innocent***

1.69 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. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, engage and limit this right.

1.70 Reverse burden 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. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

1.71 The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences in order to assist legislation proponents (including reverse burden offences).

1.72 In this case it appears that the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter). However, the reversal of the evidential burden of proof in proposed section 150.1(4) has not been addressed in the statement of compatibility. In this instance, the proposed offence appears to require the defendant to raise evidence that suggests a reasonable possibility that 'a person would reasonably believe that the Commonwealth body exists'. This seems to be an objective fact and not one that is peculiarly within the knowledge of the defendant. Accordingly, it appears that the limitation may not be proportionate.

### **Committee comment**

**1.73 The committee draws to the attention of the minister its *Guidance Note 2* which sets out information specific to reverse burden offences.**

**1.74 The committee requests the advice of the minister as to:**

- **whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law;**

- **how the reverse burden offence 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.**

## Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017

<b>Purpose</b>	Seeks to introduce reforms to the funding, provision and administration of higher education in Australia
<b>Portfolio</b>	Education and Training
<b>Introduced</b>	House of representatives, 11 May 2017
<b>Rights</b>	Education; equality and non-discrimination (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### Background

1.75 The committee has previously commented on proposed reforms to the funding of higher education in its *Twelfth Report of the 44<sup>th</sup> Parliament*, *Eighteenth Report of the 44<sup>th</sup> Parliament* and its *Twenty-second Report of the 44<sup>th</sup> Parliament*.<sup>1</sup>

### Decrease in funding for commonwealth supported students in higher education

1.76 Schedule 1 of the bill seeks to decrease the amount of commonwealth funding or subsidies for commonwealth supported students at universities and increase the amount of student contribution to higher education funding.<sup>2</sup> From 1 January 2018 a 2.5 percent efficiency dividend will be applied to Commonwealth contribution amounts in each of 2018 and 2019. Student contribution amounts for commonwealth supported students will increase by 1.8 percent from 2018 to 2021 (7.5 percent in total.)

### *Compatibility of the measure with the right to education*

1.77 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to education. It specifically requires, with a view to achieving the full realisation of the right to education, that:

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1 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44<sup>th</sup> Parliament* (24 September 2014) 8-13; *Eighteenth Report of the 44<sup>th</sup> Parliament* (10 February 2015) 43-64; *Twenty-second Report of the 44<sup>th</sup> Parliament*

2 A commonwealth supported student place is part subsidised by the Australian government through the government paying part of the fees for the place directly to the university. Students are also required to contribute towards the study and pay the remainder of the fee called the 'student contribution amount' for each unit they are enrolled in at the higher education institution.

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Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

1.78 Australia has obligations to progressively introduce free higher education by every appropriate means but also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation to the right to education.<sup>3</sup>

1.79 The statement of compatibility acknowledges that the decrease in commonwealth funding is counter to progressive introduction of the right to free higher education,<sup>4</sup> that is, it constitutes a retrogressive measure.

1.80 Retrogressive measures may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the United Nations Committee on Economic, Social and Cultural Rights has noted that:

There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.<sup>5</sup>

1.81 The statement of compatibility argues that the reduction of funding is a permissible limitation on the right to education including the progressive introduction of free higher education:

Recalibration of Commonwealth contribution and student contribution amounts in Schedule 1 will result in decreased Government funding and an increase in student contributions. This measure is counter to the goal of progressive introduction of free education however the savings measure is proportionate to the policy objective of ensuring long-term financial sustainability necessary to support opportunities in higher education. It also sits within student loan arrangements that ensure no domestic student need pay upfront fees for access to higher education. The savings

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3 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999).

4 SOC 3.

5 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999) [45].

as a result of this measure will be an important contribution towards Budget repair.<sup>6</sup>

1.82 In general terms, budgetary constraints and financial sustainability have been recognised as a legitimate objective for the purpose of justifying reductions in government support that impact on the progressive realisation of the right to education. However, limited information has been provided to support the characterisation of financial sustainability or budgetary constraints as a pressing or substantial concern in these specific circumstances. Evidence explaining why a proposed cut in funding of this size is a proportionate reduction in terms of the right to education was not provided in the statement of compatibility. Further, no information has been provided about the consideration of alternatives, in the context of Australia's use of its maximum available resources.

### **Committee comment**

**1.83 The preceding analysis raises questions as to the compatibility of the measure with the obligation to progressively introduce free higher education (right to education).**

**1.84 The committee therefore seeks the advice of the minister as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;**
- **whether the limitation is a reasonable and proportionate measure to achieve its stated objective;**
- **whether alternatives to reducing higher education funding have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.**

### **Increase in student contributions for enabling courses**

1.85 Currently, students undertaking enabling courses cannot be required to pay a student contribution amount.<sup>7</sup>

1.86 Schedule 2 of the bill seeks to introduce a student contribution amount fixed at a rate of \$3,271 for a full time study load in 2018. Students will be able to borrow their contribution amount through the Higher Education Loan Program (HELP).

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6 SOC 8.

7 An enabling course is a course of instruction that enables a person to undertake a course leading to a higher education award (sometimes referred to as a bridging course).

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**Compatibility of the measure with the right to education**

1.87 As set out above, article 13 of the ICESCR protects the right to education including the progressive introduction of free higher education by every appropriate means. By requiring students to make a financial contribution towards the costs of enabling courses, the measure engages and limits the right to education.

1.88 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible. The committee's usual expectation where a measure limits a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

**Committee comment**

**1.89 Accordingly, the committee requests the further advice of the minister 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;**
- **whether alternatives to reducing higher education funding have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.**

**Eligibility of Australian permanent residents and New Zealand citizens to a commonwealth supported university place**

1.90 Schedule 3 of the bill seeks to provide that Australian permanent residents and New Zealand citizens will no longer be eligible for commonwealth supported higher education places.<sup>8</sup> Permanent humanitarian visa holders and New Zealand Special Category Visa holders who arrived in Australia as dependent children will remain eligible for commonwealth supported places.<sup>9</sup>

1.91 A commonwealth supported place is partly subsidised by the Australian government through the government paying part of the fees for the place directly to

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8 Item 3, new section 36-10(2)(b); EM 45.

9 Item 3, new section 36-10(2)(b); EM 45.

the university. Students are also required to contribute towards their study and they pay the remainder of the fee called 'student contribution amount' for each unit they are enrolled in.

***Compatibility of the measure with the right to education***

1.92 As set out above, article 13 of the ICESCR protects the right to education including ensuring it is equally accessible and through the progressive introduction of free higher education by every appropriate means.

1.93 By providing that Australian permanent residents and New Zealand citizens will no longer be eligible for commonwealth supported higher education places, the measure engages and limits the right to education and specifically the progressive introduction of free higher education. Australia's obligations with respect to the right to education apply regardless of citizenship status to persons within Australia.

1.94 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible.

**Committee comment**

**1.95 Accordingly, the committee requests the further advice of the minister 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;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**
- **whether alternatives to reducing higher education funding have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.**

***Compatibility of the measure with the right to equality and non-discrimination (direct discrimination)***

1.96 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. 'Discrimination' under the ICCPR encompasses a distinction based on a



personal attribute (for example, race, sex or on the basis of disability),<sup>10</sup> which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.<sup>11</sup>

1.97 The proposed measure, by providing that New Zealand citizens and Australian permanent residents are no longer eligible for commonwealth supported places, appears to directly discriminate against people on the basis of their nationality.

1.98 Differential treatment<sup>12</sup> will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

1.99 However, the statement of compatibility did not identify this measure as engaging the right to equality and non-discrimination and accordingly did not provide an assessment of whether the limitation is permissible or constitutes unlawful discrimination.

### **Committee comment**

**1.100 Accordingly, the committee requests the further advice of the minister 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.**

### **Lowering repayment threshold for HELP debts**

1.101 Schedule 3 of the bill lowers the current minimum repayment threshold for HELP loans to \$41,999 per annum (currently, the repayment threshold is \$55,000). It also introduces additional repayment thresholds and rates (1 percent at \$42,000 and increasing to 10 percent on salaries over 119,882 per annum).<sup>13</sup>

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10 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation: UN Human Rights Committee, *General Comment 18, Non-discrimination* (1989).

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

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

13 EM 45.

1.102 From 1 July 2019 repayment thresholds including the minimum repayment amount will be indexed using the Consumer Price Index rather than Average Weekly Earnings.<sup>14</sup>

***Compatibility of the measures with the right to education***

1.103 As set out above, article 13 of the ICESCR protects the right to education including ensuring it is equally accessible and through the progressive introduction of free higher education by every appropriate means.

1.104 The Australian system of higher education allows students to defer the costs of their education under a HELP loan until they start earning a salary above a certain threshold. The proposed lowering of the repayment threshold engages and may limit the right to education as it imposes payment obligations on those who earn lower incomes. This would be contrary to the requirement under article 13 to ensure that higher education is equally accessible and progressively free. Similarly, the proposed change to indexation also engages and may limit the right to education as it may increase the amount to be paid, relative to earnings, in the event that growth in the Consumer Price Index exceeds growth in Average Weekly Earnings.

1.105 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible.

**Committee comment**

**1.106 Accordingly, the committee requests the further advice of the minister 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.**

***Compatibility of the measure with the right to equality and non-discrimination (indirect discrimination)***

1.107 As set out above, the right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR, and includes indirect discrimination.

1.108 The change in indexation may have a disproportionate negative effect on women. On average, women earn less over a lifetime of employment, are more likely to take time out of the workforce to care for children and are more likely to be

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14 EM 45.

engaged in part-time employment.<sup>15</sup> Where a person takes longer to repay HELP debt, the change to indexation may result in increased levels of debt to be repaid relative to earnings. The longer period that women, on average, take to pay their HELP debt<sup>16</sup> leads, consequently, to higher education costs than their male counterparts.

1.109 Reducing the minimum repayment income threshold for HELP debts to \$41,999 may also have a disproportionate impact on women, given that they are more likely to earn less than men, and therefore more likely to be affected by the reduction in the repayment threshold to cover those earning between \$41,999 and \$55,000.

1.110 Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.<sup>17</sup> Differential treatment (including the differential effect of a measure that is neutral on its face)<sup>18</sup> will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

1.111 The statement of compatibility acknowledges that the measures engage the right to equality and non-discrimination due to their disproportionate impacts on women:

introduction of new HELP repayment thresholds, may be seen as limiting the right to non-discrimination due to disproportionate impacts on women and other low income groups.

The Government currently carries a higher deferral subsidy from demographic groups that tend to have lower incomes. This includes women, individuals in part-time work or individuals in low paid professions. As a result, many of these individuals, including many women, will be making repayments for the first time as a result of the introduction

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- 15 See, Australian Bureau of Statistics (ABS), Employee Earnings and Hours (May 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/0/27641437D6780D1FCA2568A9001393DF?OpenDocument>; ABS, Gender indicators, Australia (August 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~August%202016~Main%20Features~Economic%20Security~6151>; Workplace Gender Equality Agency, Gender pay gap statistics (March 2016) [https://www.wgea.gov.au/sites/default/files/Gender\\_Pay\\_Gap\\_Factsheet.pdf](https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf) (last accessed 24 May 2017).
- 16 See, for example, Senate Standing Committee on Education and Employment, The Future of HECS (28 October 2014) 52.
- 17 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).
- 18 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

of the new, lower thresholds. Addressing this income inequality, however, is not the role of the higher education loans system.<sup>19</sup>

1.112 In this respect, the statement of compatibility does not provide a substantive assessment of whether the measure amounts to indirect discrimination. To state that a negative impact on women results from income inequality is not a justification of the measure – which has the potential to exacerbate inequality – as a proportionate limitation on the right to equality and non-discrimination.

### **Committee comment**

**1.113 Accordingly, the committee requests the further advice of the minister as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

## Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210]

<b>Purpose</b>	Amends the Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Determination 2015 and Social Security (Administration) (Trial Area - East Kimberley) Determination 2016 to extend trials of cashless welfare arrangements
<b>Portfolio</b>	Social Services
<b>Authorising legislation</b>	<i>Social Security (Administration) Act 1999</i>
<b>Disallowance</b>	15 sitting days after tabling (tabled Senate and House of Representatives 20 March 2017)
<b>Rights</b>	Social security; private life; equality and non-discrimination (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### Extending a trial of cashless welfare arrangements

1.114 The Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210] (the determination) extends trials of cashless welfare arrangements in Ceduna and its surrounding region, and East Kimberley for six months. This extension will bring the total period of the trials to 18 months in each location.<sup>1</sup>

### *Compatibility of the measure with human rights*

1.115 The committee has considered these measures in previous reports in relation to the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card bill),<sup>2</sup> and the Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248] (declinable transactions determination).<sup>3</sup> The Debit Card bill amended the *Social Security (Administration) Act*

1 The trials were initially extended to a period of twelve months in two instruments: Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424] and Social Security (Administration) (Trial Area – East Kimberley) Amendment Determination 2016 [F2016L01599]. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 53.

2 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36.

3 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 58-61.

1999 to provide for a trial of cashless welfare arrangements in prescribed locations. Persons on working age welfare payments in the prescribed locations would have 80 percent of their income support restricted, so that the restricted portion could not be used to purchase alcoholic beverages or to conduct gambling. The trial arrangements are currently operating in two trial locations of Ceduna and East Kimberley. Explanatory material for the Debit Card bill and declinable transactions determination noted that the policy intention was for the trial to take place for only 12 months in each location.<sup>4</sup>

1.116 The explanatory statement to the determination does not provide detail as to why the extension is required, but states:

While the early indications of the Trial's impact are positive, the Trial's extension will allow the Government to make fully informed decisions about the future of welfare conditionality in Australia.

1.117 The previous human rights assessments of the cashless welfare trial measures raised concerns in relation to the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets. These concerns related to the right to social security, the right to a private life and the right to equality and non-discrimination.<sup>5</sup>

1.118 By extending the trials in each location for a further six months, this instrument engages and limits the abovementioned human rights. As outlined in the committee's *Guidance Note 1*, where a limitation on a right is proposed, the committee expects the statement of compatibility to provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate. While the committee previously accepted that the cashless welfare trial measures may pursue a legitimate objective,<sup>6</sup> it has raised concerns as to whether the measures are rationally connected to and proportionate to their objective.<sup>7</sup> In this instance, the statement of compatibility has not provided enough information to establish why extending the

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4 See Social Security Legislation Amendment (Debit Card Trial) Bill 2015, explanatory memorandum 4; Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248], explanatory statement 6.

5 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; and *Report 7 of 2016* (11 October 2016) 58-61.

6 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 27.

7 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; and *Report 7 of 2016* (11 October 2016) 42.

trials is necessary and will be effective to achieve the objectives of the trials, and is a proportionate limitation on the above human rights.

### **Committee comment**

**1.119** The effect of the determination is to extend the trials of cashless welfare arrangements in Ceduna and its surrounding region and East Kimberley for six months, bringing the total period of the trials to 18 months. The statement of compatibility does not provide information as to why it is considered necessary to extend the trials beyond 12 months, as originally envisaged in the Debit Card Bill.

**1.120** Noting the human rights concerns raised by the previous human rights assessments of the trials, and related concerns regarding income management identified in the committee's *2016 Review of Stronger Futures measures*, the committee seeks the advice of the Minister for Social Services as to:

- why it is necessary to extend the trials for a further six months;
- how the extension is effective to achieve (that is, rationally connected to) the stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the objective of the trials.

## Further response required

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

### Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017

<b>Purpose</b>	Seeks to make a range of amendments to the <i>Australian Federal Police Act 1979</i> , <i>Crimes Act 1914</i> , and the <i>Criminal Code Act 1995</i> including clarifying the functions of the Australian Federal Police to enable cooperation with international organisations, and non-government organisations; clarifying the custody notification obligations of investigating officials when they intend to question an Aboriginal person or Torres Strait Islander; creating separate offence regimes for 'insiders' and 'outsiders' for the disclosure of information relating to controlled operations in the <i>Crimes Act 1914</i>
<b>Portfolio</b>	Justice
<b>Introduced</b>	House of Representatives, 30 March 2017
<b>Rights</b>	Privacy; life; freedom from torture, cruel, inhuman or degrading treatment or punishment (see <b>Appendix 2</b> )
<b>Previous report</b>	4 of 2017
<b>Status</b>	Seeking further additional information

#### Background

1.122 The committee first reported on the bill in its *Report 4 of 2017*, and requested a response from the Minister for Justice by 26 May 2017.<sup>1</sup>

1.123 The minister's response to the committee's inquiries was received on 29 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

#### Functions of the Australian Federal Police – assistance and sharing information

1.124 Schedule 1 of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the bill) seeks to make amendments to the *Australian Federal Police Act 1979* (AFP Act) to enable the Australian Federal Police (AFP) to provide assistance and cooperation to international organisations and non-

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 3-6.



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government organisations in relation to the provision of police services or police support services.

1.125 Under section 4 of the AFP Act, 'police services' is defined as services by way of the prevention of crime and the protection of persons from injury or death, and property from damage, whether arising from criminal acts or otherwise. 'Police support services' means services related to: (a) the provision of police services by an Australian or foreign law enforcement agency; or (b) the provision of services by an Australian or foreign intelligence or security agency; or (c) the provision of services by an Australian or foreign regulatory agency.

***Compatibility of the measure with human rights***

1.126 The statement of compatibility states that this measure allows for information sharing with a range of bodies such as Interpol, United Nations organisations and non-government organisations (NGOs) and accordingly:

...may engage the right to protection against arbitrary and unlawful interferences with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), as the amendments to the AFP Act provide for information sharing with international organisations, including international judicial bodies.<sup>2</sup>

1.127 The right to privacy may be subject to permissible limitations which are provided by law and not considered arbitrary for the purpose of international human rights law. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.128 The statement of compatibility states that the objective of the measure is to ensure:

...the AFP can engage fully with international organisations, including judicial bodies, and NGOs, in relation to the provision of police services and police support services.<sup>3</sup>

1.129 This is likely to be, in broad terms, a legitimate objective for the purposes of international human rights law. However, the committee's initial analysis raised questions about the adequacy of safeguards that are in place with respect to AFP assistance and cooperation with such bodies, including the sharing of information. First, it is not readily apparent from the statement of compatibility the extent to which the minister considers that the existing safeguards in the Privacy Act will apply with respect to AFP sharing of information with international organisations and NGOs. Second, the initial analysis noted that the sharing of information overseas in the context of law enforcement raises concerns in respect of the right to life, which

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2 Explanatory memorandum (EM) 8.

3 EM 8.

were not addressed in the statement of compatibility. Third, the initial analysis noted the possibility that the sharing of information, or cooperation in investigation, may result in torture, or cruel, inhuman and degrading treatment or punishment. This issue was not addressed in the statement of compatibility, including any relevant safeguards.

1.130 Accordingly, in relation to the right to privacy, the committee sought the advice of the Minister for Justice as to the proportionality of the measure, including the availability of effective and adequate safeguards, and the extent to which the provisions of the Privacy Act will act as a safeguard against the use and disclosure of personal information for a secondary purpose.

1.131 In relation to the right to life, the committee sought the advice of the minister about the compatibility of the measure with this right (including the existence of relevant safeguards).

1.132 In relation to the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the committee sought the advice of the minister in relation to the compatibility of the measure with this right (including any relevant safeguards).

### **Minister's response**

1.133 The minister's response further explains the scope of the measure, how it is anticipated that it will operate in practice and addresses whether it imposes a proportionate limit on human rights:

The Bill would insert a new function in section 8 of the AFP Act to allow the AFP to assist or cooperate with an international organisation, or with a non-government organisation in relation only to acts, omissions, matters or things outside Australia, in relation to the provision of police services or police support services. The Bill also inserts a definition of an 'international organisation' to include public international organisations as defined in the Criminal Code and bodies established by an international agreement or arrangement.

Under its existing functions, the AFP already engages with a range of international bodies. The AFP's engagement with international bodies, both currently and under the new AFP function, may be for the purposes of sharing information and intelligence, policy development, or otherwise facilitating the provision of police services. In many cases, the provision of information will not involve personal information or information relating to any particular investigation. This might include, for example, the provision of information relating to law enforcement methodologies or trends of criminal activity. In such cases, as the circumstances of specific individuals are not at issue, the right to privacy, the right to life, and the prohibition on torture, cruel, inhuman and degrading treatment will not be enlivened. In all cases, the AFP has a robust set of governance and

procedures in place to ensure such engagement is compatible with human rights.

In summary, the measure to insert a new function in the AFP Act is compatible with the right to privacy, the right to life and the prohibition on torture, cruel, inhuman and degrading treatment. In particular, with respect to any relevant disclosure of information pursuant to the new function:

- the Privacy Act 1988 will apply
- the AFP National Guideline on international police-to-police assistance in death penalty situations (the National Guideline on Death Penalty) will be applied, and
- the AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment (the National Guideline on TCIDTP) will be applied.

Although the National Guideline on Death Penalty and the National Guideline on TCIDTP do not specifically reference international organisations, the AFP already applies the Guidelines to relevant information disclosures it makes to international organisations under its existing functions. Should the amendment pass, the AFP will review internal AFP governance and procedures, including both Guidelines, to ensure they reflect legislative and operational requirements.

1.134 The response clarifies that much of the assistance and information provided will not relate to individual investigative cases so, as a practical matter, the proposed new function may not impact upon human rights in these instances. While this may be the case, as acknowledged in the minister's response, the proposed new function still engages a range of human rights by permitting the sharing of information overseas.

1.135 The AFP's commitment to review both the National Guideline on Death Penalty and the National Guideline on TCIDTP (the guidelines) in light of the measure is welcome. However, as set out below, in relation to the right to life and the prohibition on torture, cruel, inhuman and degrading treatment, the committee would be assisted by additional information regarding these guidelines, to assess whether they provide an adequate and effective safeguard in relation to these rights.

#### *Compatibility of the measure with the right to privacy*

1.136 In relation to the right to privacy, the minister's response clarifies how the Privacy Act and the Australian Privacy Principles (APPs) will apply and operate as a safeguard in relation to disclosure of personal information for the proposed measure:

The proposed new function in section 8 of the AFP Act does not override the Privacy Act. To the extent that the new function will enable the disclosure of personal information with international organisations and non-government organisations, the Privacy Act, the AFP Act and AFP policy

provide effective and adequate safeguards to protect the right to privacy. Furthermore and as noted above, only a small proportion of the cooperation undertaken pursuant to the new function is likely to relate to specific individuals or cases where personal information would be relevant.

As an Australian Privacy Principle entity, the AFP is bound by the Australian Privacy Principles (APPs) which are contained in Schedule 1 of the Privacy Act. The APPs govern the way the AFP collects, uses, discloses and stores personal information. The APPs apply irrespective of whether the AFP is cooperating with a domestic or international body.

The APPs contain some exceptions allowing the use and disclosure of personal information for a purpose other than the primary purpose for which it was collected. As noted by the Committee, one such exception is where use or disclosure of information is required or authorised by law. The government does not consider that the new AFP function inserted by the Bill operates as a 'requirement or authorisation by law' for the purpose of this exception.

1.137 The minister's advice notes that the measure is not considered to create a broad authorisation for the disclosure of personal information for secondary purpose under the Privacy Act. It follows that the Privacy Act and the APPs appear capable of operating as a safeguard in relation to the disclosure of personal information in a range of circumstances.

1.138 However, the minister's response acknowledges that other exceptions to the prohibition on disclosure of information for a secondary purpose under the APPs may be applicable:

As also noted by the Committee, another of these exceptions includes where the use or disclosure is reasonably necessary for enforcement related activity conducted by, or on behalf of, an enforcement body. 'Enforcement related activity' is defined broadly and includes prevention, detection, investigation, prosecution or punishment of criminal offences. 'Enforcement body' includes the AFP together with a number of other domestic agencies.

The use or disclosure of personal information pursuant to the new AFP function inserted by the Bill may, in some circumstances, qualify under this exception. That is, where the use or disclosure of personal information with respect to the international organisation or non-government organisation is reasonably necessary for enforcement related activity conducted by, or on behalf of, an enforcement body as defined by the Privacy Act. As noted above, in many cases, the provision of information will not involve personal information or relate to any particular investigation.

In all cases involving the use or disclosure of personal information, AFP appointees must consider whether the Privacy Act permits use or disclosure of the personal information. In relation to information

disclosure, AFP appointees are also bound by the secrecy provision in section 60A of the AFP Act and must consider whether the release of information is consistent with AFP functions. Each disclosure must be considered on a case-by-case basis.

The AFP's National Guideline on Privacy also outlines AFP appointees' obligations under the Privacy Act and all AFP appointees are required to be familiar and comply with the Guideline.

1.139 While noting that an exception to the prohibition on disclosure may be available in particular cases, the general prohibition on disclosure of personal information under the APPs for a secondary purpose appears to provide a significant safeguard in relation to the right to privacy. On this basis, the measure would appear to provide a proportionate limitation on the right to privacy.

*Compatibility of the measure with the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment*

1.140 In relation to whether the measure is compatible with the right to life and the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the minister provided the following information:

Information and intelligence sharing with international organisations and non-government organisations for the purposes of the proposed new function will often not relate to any particular individual under investigation, and therefore will not raise death penalty, or torture, cruel, inhuman or degrading treatment or punishment (TCIDTP), implications.

Where information provided to an international organisation or a non-government organisation has potential death penalty or TCIDTP implications, the AFP will apply the National Guideline on Death Penalty or the National Guideline on TCIDTP. For example, this might arise when providing information via Interpol to a law enforcement agency in a country that has not abolished the death penalty or where TCIDTP concerns exist.

As noted above, the National Guideline on Death Penalty and the National Guideline on TCIDTP do not specifically refer to the proposed new function of cooperating with international organisations. Should the amendment pass Parliament, the AFP will review both National Guidelines to ensure they reflect legislative and operational requirements.

The AFP already applies the National Guideline on Death Penalty and the National Guideline on TCIDTP to relevant information disclosures it makes to international organisations under its existing functions. The AFP will continue to treat any disclosures of information that may involve the death penalty or TCIDTP implications with the same process as it would for the exchange of information between law enforcement agencies.

*National Guideline on Death Penalty*

All AFP appointees are required to comply with the National Guideline on Death Penalty. Inappropriate departures from the National Guideline may constitute a breach of AFP professional standards and be dealt with under Part V of the AFP Act.

Under the National Guideline on Death Penalty, the AFP is required to consider relevant factors before providing information to foreign law enforcement agencies if it is aware the provision of information is likely to result in the prosecution of an identified person for an offence carrying the death penalty. Ministerial approval is required for any case in which a person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty.

The Government has committed to make improvements to the National Guideline on Death Penalty. On 1 March 2017, the Government tabled its response to the Joint Standing Committee on Foreign Affairs, Defence and Trade's report: *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*. In its response, the Government agreed to implement a number of recommendations, including:

- the National Guideline be amended by 'explicitly applying the Guideline to all persons, not just Australian citizens';
- the National Guideline be amended by 'including a provision that, in cases where the AFP deems that there is a 'high risk' of exposure to the death penalty, such cases be directed to the Minister for decision' (the Government accepts this recommendation in principle, however re-affirms that the decision-making in the pre-arrest phase is best made within the AFP)
- The National Guideline be amended by 'articulating the criteria used by the AFP to determine whether requests are ranked 'high', 'medium' or 'low' risk'. These amendments will enhance the existing safeguards against the provision of information in death penalty cases.

#### *National Guideline on TCIDTP*

The National Guideline on TCIDTP outlines the obligations for AFP appointees where a person is in danger of being subjected to TCIDTP. All AFP appointees are required to comply with the National Guideline on TCIDTP. Inappropriate departures may constitute a breach of AFP professional standards and be dealt with under Part V of the AFP Act.

The National Guideline on TCIDTP provides a list of mandatory considerations before information can be disclosed to foreign authorities in situations where there are substantial grounds for believing a person that is detained would be in danger of being subjected to TCIDTP. It also sets out a formal approval process for the release of such information. The information, if provided, must include a caveat to protect against unintended use of the information, and on-disclosure to third parties.

1.141 The guidelines relied upon by the minister are significant in relation to whether the measure is compatible with the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment. However, without knowing what the guidelines state it is not possible to conclude that they would provide adequate and effective protection of these rights. While some copies have been made publically available through the *Freedom of Information Act 1982*, they are undated and it is unclear whether these versions are current. Accordingly, in order to complete the human rights assessment of the measure against the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment, the committee would be assisted by a current copy of these guidelines.

### **Committee response**

**1.142 The committee thanks the minister for his response.**

**1.143 As set out in the preceding analysis, the minister has provided a range of information that indicates that the measure is likely to be compatible with the right to privacy.**

**1.144 In order to complete its examination of the compatibility of the measure with the right to life and the right not to be subject to torture, cruel, inhuman and degrading treatment, the committee requests a copy of the following guidelines:**

- **AFP National Guideline on international police-to-police assistance in death penalty situations; and**
- **AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment.**

## Advice only

1.145 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. 1) 2017-2018

### Appropriation Bill (No. 2) 2017-2018

<b>Purpose</b>	Appropriation Bill (No. 1) 2017-2018 seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government; and Appropriation Bill (No. 2) 2017-2018 seeks to do so for services that are not ordinary annual services of the government
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives, 9 May 2017
<b>Rights</b>	Multiple rights (see <b>Appendix 2</b> )
<b>Status</b>	Advice only

### Background

1.146 The committee has previously considered the human rights implications of appropriations bills in a number of reports,<sup>1</sup> and they have been the subject of correspondence with the Department of Finance.<sup>2</sup>

1.147 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*.<sup>3</sup>

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- 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) *Report 2 of 2017* (21 March 2017) 44-46.
  - 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

1.148 As previously stated in respect of the 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).<sup>4</sup>

1.149 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.<sup>5</sup>

### **Compatibility of the bills with multiple rights**

1.150 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'.<sup>6</sup> 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.<sup>7</sup> They also state that '[d]etailed information on the relevant appropriations...is contained in the portfolio [Budget] statements'.<sup>8</sup> No further assessment of the human rights compatibility of the bills is provided.

1.151 The full human rights analysis in respect of such statements of compatibility can be found in the committee's *Report 9 of 2016*.<sup>9</sup>

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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. 1) 2017-2018: explanatory memorandum (EM), statement of compatibility (SOC) 3. Appropriation Bill (No. 2) 2017-2018: EM, SOC 4.

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

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

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

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

**1.153 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.**

**1.154 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.**

## Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017

<b>Purpose</b>	This bill seeks to amend the <i>Social Security (Administration) Act 1999</i> to allow the Income Management element of Cape York Welfare Reform to continue for two additional years until 30 June 2019
<b>Portfolio</b>	Social Services
<b>Introduced</b>	House of Representatives, 24 May 2017
<b>Rights</b>	Equality and non-discrimination; social security; privacy and family (see <b>Appendix 2</b> )
<b>Status</b>	Advice only

### Background

1.155 The *Social Security (Administration) Act 1999* provides the legislative basis for the income management regime in place for certain welfare recipients in prescribed locations.<sup>1</sup> Income management limits the amount of income support paid to recipients as unconditional cash transfers and imposes restrictions on how the remaining 'quarantined' funds can be spent. A person's income support can be subject to automatic deductions to meet 'priority needs', such as food, housing and healthcare. The remainder of the restricted funds can only be accessed using a 'BasicsCard', which can only be used in certain stores and cannot be used to purchase 'excluded goods' or 'excluded services'.<sup>2</sup>

1.156 A person on welfare benefits can voluntarily sign up for income management, or be made subject to compulsory income management.

1.157 The committee examined the income management regime, focusing on its operation in the Northern Territory, in its *2013* and *2016 Reviews of the Stronger*

1 See *Social Security (Administration) Act 1999*, Part 3B. Income management currently applies in the Perth Metropolitan, Peel and Kimberley regions, Laverton, Kiwirrkurra and Ngaanyatjarra Lands in Western Australia; Anangu Pitjantjatjara Yankunytjatjara Lands, Ceduna, Playford and Greater Adelaide in South Australia; Cape York, Rockhampton, Livingstone and Logan in Queensland; Bankstown in New South Wales; Greater Shepparton in Victoria; and in the Northern Territory. See also Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 37-38.

2 See, further, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 39, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Committee\\_Inquiries/strongerfutures2](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2).

*Futures measures*.<sup>3</sup> In its 2016 review, the committee noted that the income management measures engage and limit the right to equality and non-discrimination, the right to social security and the right to privacy and family.<sup>4</sup>

### **Extending Cape York income management**

1.158 The Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017 (the bill) proposes to amend the *Social Security (Administration) Act 1999* to continue income management under the Cape York welfare reform package for a further two years.<sup>5</sup> The Cape York welfare reforms were introduced in 2008, jointly funded by the Commonwealth and Queensland state government. As part of the reforms, the Family Responsibilities Commission (Queensland Commission) was created as an independent statutory authority to:

...support the restoration of socially responsible standards of behaviour and local authority in welfare reform community areas; and...to help people in welfare reform community areas to resume primary responsibility for the wellbeing of their community and the individuals and families of the community.<sup>6</sup>

1.159 The Queensland Commission may, in certain circumstances, direct Centrelink to place a person under compulsory income management.<sup>7</sup> Individuals who may be placed on income management under the Cape York measures must be referred to the Queensland Commission by a relevant Queensland department, after having failed to meet certain pre-determined obligations.<sup>8</sup>

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3 See Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (27 June 2013) and *2016 Review of Stronger Futures measures* (16 March 2016).

4 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 61.

5 The Cape York Welfare Reform package applies to the communities of Aurukun, Coen, Hope Vale, and Mossman Gorge. In 2016, income management under these measures was also extended to the community of Doomadgee.

6 See *Family Responsibilities Commission Act 2008* (Qld), section 4.

7 See *Social Security (Administration) Act 1999*, section 123UF.

8 See, Family Responsibilities Commission, *FRC Processes* at: <http://www.frcq.org.au/?q=content/frc-processes>. Referrals are made by agency notice from the relevant departments. Agency notices are received by the Queensland Commission in the following circumstances:

- The Department of Education and Training (DET) must submit a School Attendance Notice to the Commission if a child is absent for three full, or part days of a school term without reasonable excuse, or submit a School Enrolment Notice where a child of compulsory school age is not enrolled to attend school.
- The Department of Communities, Child Safety and Disability Services must submit a Child Safety and Welfare Notice where the Chief Executive becomes aware of an allegation of harm or risk to a child.

1.160 On receipt of the notice, a local commissioner will then hold a conference with the person, and, as an alternative to placing a person on income management, the commission can refer the person to support services.<sup>9</sup>

***Compatibility of the measure with human rights***

1.161 Subjecting a person to compulsory income management for any length of time engages and limits the following rights:

- the right to equality and non-discrimination;
- the right to social security; and
- the right to privacy and family.

1.162 Each of these rights is discussed in detail in the context of the income management regime in the committee's *2016 Review of Stronger Futures measures* (2016 Review).<sup>10</sup>

1.163 In the 2016 Review, the committee accepted that the income management regime pursues a legitimate objective for the purposes of international human rights law, but questioned whether the measures were rationally connected to achieving the stated objective and were proportionate.<sup>11</sup> The committee's report noted:

While the income management regime may be of some benefit to those who voluntarily enter the program, it has limited effectiveness for the vast majority of people who are compelled to be part of it.<sup>12</sup>

1.164 As noted above, the income management regime as applied by the Cape York welfare reform measures appears targeted at a more limited range of welfare recipients, and allows for individual assessments of the particular circumstances of the affected individuals and the management of their welfare payments. This regime, as facilitated through the Queensland Commission, may accordingly be less rights restrictive than the blanket location-based scheme as applied in the Northern Territory, and other place-based income management sites. However, while an

- The Department of Justice and Attorney-General must submit a Court Offence Notice if a person is convicted of an offence.
- The Department of Housing and Public Works or the provider of social housing must submit a Tenancy Breach Notice if the tenant has breached their social housing tenancy agreement.

9 Explanatory memorandum (EM) 3.

10 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 43-63.

11 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 42.

12 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 52.

individual assessment is required, the application of income management may be compulsory rather than voluntary. The concerns raised in 2016 Review regarding compulsory income management therefore remain.

**Committee comment**

**1.165** The effect of the bill is to extend the income management element of the Cape York welfare reform measures in the communities of Aurukun, Coen, Hope Vale, Mossman Gorge and Doomadgee for two years.

**1.166** Noting the human rights concerns regarding income management identified in the committee's *2016 Review of Stronger Futures measures*, the committee draws the human rights implications of the bill to the attention of the Parliament.

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## **Bills not raising human rights concerns**

1.167 Of the bills introduced into the Parliament between 9 May and 1 June 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):

- Appropriation (Parliamentary Departments) Bill (No. 1) 2017-2018;
- Australian Education Amendment Bill 2017;
- Clean Energy Finance Corporation Amendment (Carbon Capture and Storage) Bill 2017;
- Comcare and Seacare Legislation Amendment (Pension Age and Catastrophic Injury) Bill 2017;
- Customs Tariff Amendment (Tobacco Duty Harmonisation) Bill 2017;
- Education Legislation Amendment (Provider Integrity and Other Measures) Bill 2017;
- Excise Tariff Amendment (Tobacco Duty Harmonisation) Bill 2017;
- Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining and Other Measures) Bill 2017;
- Government Procurement (Judicial Review) Bill 2017;
- Industrial Chemicals Bill 2017;
- Industrial Chemicals Charges (Customs) Bill 2017;
- Industrial Chemicals Charges (Excise) Bill 2017;
- International Monetary Agreements Amendment Bill 2017;
- Major Bank Levy Bill 2017;
- Medicare Guarantee (Consequential Amendments) Bill 2017;
- Medicare Guarantee Bill 2017;
- Public Service Amendment (Supporting a Regional Workforce) Bill 2017;
- Safe Work Australia Amendment (Role and Functions) Bill 2017;
- Social Services Legislation Amendment (Ending Carbon Tax Compensation) Bill 2017;
- Social Services Legislation Amendment (Energy Assistance Payment and Pensioner Concession Card) Bill 2017;
- Social Services Legislation Amendment (Relieving Domestic Violence Victims of Debt) Bill 2017;
- Statute Update (Winter 2017) Bill 2017;
- Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017;

- Treasury Laws Amendment (2017 Measures No. 2) Bill 2017;
- Treasury Laws Amendment (Accelerated Depreciation For Small Business Entities) Bill 2017;
- Treasury Laws Amendment (Enterprise Tax Plan No. 2) Bill 2017;
- Treasury Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Bill 2017;
- Treasury Laws Amendment (GST Integrity) Bill 2017;
- Treasury Laws Amendment (Major Bank Levy) Bill 2017;
- Treasury Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2017;
- Veterans' Affairs Legislation Amendment (Budget Measures) 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**.

### Australian Citizenship Regulation 2016 [F2016L01916]

<b>Purpose</b>	Remakes existing regulations (which are sunseting) to prescribe a number of matters in relation to citizenship
<b>Portfolio</b>	Immigration and Border Protection
<b>Authorising legislation</b>	<i>Australian Citizenship Act 2007</i>
<b>Last day to disallow</b>	9 May 2017
<b>Rights</b>	Privacy; equality and non-discrimination (see <b>Appendix 2</b> )
<b>Previous report</b>	2 of 2017
<b>Status</b>	Concluded examination

### Background

2.3 The committee first reported on the Australian Citizenship Regulation 2016 (2016 regulation) in its *Report 2 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 13 April 2017.<sup>1</sup>

2.4 The minister's response to the committee's inquiries was received on 17 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.5 In 2014 the committee considered the Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014.<sup>2</sup> 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.

2.6 Section 37 of the *Australian Citizenship Act 2007* provides that a person may make an application for evidence of their Australian citizenship (citizenship

1 Parliamentary Joint Committee on Human Rights, *2 Report of 2017* (21 March 2017) 33-40.

2 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.

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.

2.7 The 2016 regulation remakes existing regulations (which are sunseting). It is in the same form as the amended 2007 regulation.

2.8 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 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.<sup>3</sup>

### **Releasing information concerning a person's change of name**

2.9 The 2016 regulation, like the amended 2007 regulation, provides that previous names may be listed on the back of a citizenship notice.

### ***Compatibility of the current measure with the right to privacy***

2.10 The initial human rights analysis of the 2016 regulation noted that 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

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3 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.

control the dissemination of information about one's private life.<sup>4</sup> 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.<sup>5</sup>

2.11 Proof of Australian citizenship may be required to be provided in a 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.

2.12 However, limitations on the right to privacy will be permissible where they are not arbitrary; pursue a legitimate objective; are rationally connected to that 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.<sup>6</sup>

2.13 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.<sup>7</sup>

2.14 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

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4 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.

5 Explanatory statement (ES) 5-6.

6 ES 6.

7 ES 7.

details of previous names on the back of a citizenship notice appears to be rationally connected to the legitimate objective of the measure.

2.15 However, the initial human rights analysis raised questions as to the proportionality of the measure, in particular, whether there could be other, less rights restrictive, ways of achieving the legitimate objective. 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).<sup>8</sup>

2.16 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 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.<sup>9</sup>

2.17 The initial analysis noted that 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.

2.18 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 a birth certificate, indicates that there may be a less rights restrictive approach to achieving the legitimate objective of the current legislation. A notation on a citizenship notice that the individual has undergone a change of name since acquiring Australian citizenship rather than

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8 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>.

9 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>.

including previous names would appear to be one such less rights restrictive approach.

2.19 As noted in the initial analysis 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.<sup>10</sup>

2.20 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.

2.21 The initial analysis stated that 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 restrictive way of achieving its legitimate objective.<sup>11</sup> 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.<sup>12</sup>

2.22 However, as noted in the initial analysis, 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

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10 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/changeofsexdoborpop.aspx>.

11 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>.

12 ES 8.

relevant to a decision being made.<sup>13</sup> 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.

2.23 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.

2.24 Accordingly, the committee sought 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***

2.25 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

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13 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.

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are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.26 '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).<sup>14</sup> 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.<sup>15</sup>

2.27 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 to that legitimate objective and is a proportionate means of achieving that objective.<sup>16</sup>

2.28 The initial analysis noted that 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, as outlined in the initial analysis, the fact that some Australian citizens by birth may be able to rely on identity documents which do not reveal a change of gender indicates that the measure could potentially also have a disproportionate negative effect on the grounds of national origin.

2.29 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

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14 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'.

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

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

26 of the ICCPR; individuals who have undergone sex or gender reassignment are not being treated differently than other individuals.

2.30 However, as noted in the initial analysis 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).

2.31 The initial analysis 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 a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination,<sup>17</sup> and where the group is particularly vulnerable, the burden of justification for the measure to be proportionate is higher. The proportionality of this effect was not fully addressed in the statement of compatibility.

2.32 Accordingly, in relation to the compatibility of the measure with the right to equality and non-discrimination, the committee sought the further advice of the Minister for Immigration and Border Protection as to whether, in relation to the apparent disproportionate negative effect on individuals who have undergone sex or gender reassignment or a change in gender identity, the measure is reasonable and proportionate for the achievement of its objective and in particular the matters set out at [2.24] above.

### **Minister's response**

2.33 In relation to whether the measure is a proportionate limit on the right to privacy, the minister provides the following response:

I note the Committee's views that although the limitation on the right of privacy resulting from this Regulation is for a legitimate objective, there remains a concern that the information that may be included on the back of a notice of evidence of Australian citizenship is not a proportionate limitation. However, I am of the view that the measure (which appears in Regulation 12) is in fact a proportionate response to the legitimate objective of reducing the opportunity for identity fraud and ensuring continuity of identity in the Department of Immigration and Border Protection's (the Department's) records.

In particular, if included, the information would appear on the back of the notice of evidence of Australian citizenship. It is not made available to the general public, and it is the individual concerned who has control of the notice of evidence and, consequently, over the disclosure of the

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17 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).



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information. Notices of evidence of Australian citizenship are generally used when individuals are dealing with government or other bodies and are used as primary evidence to establish the person's identity and citizenship status. This means that the need to disclose any information appearing on the back of a notice of evidence is limited. Persons holding a notice of evidence maintain control over who or what organisation(s) they wish to disclose the notice to and for what purpose.

2.34 In relation to whether a less rights restrictive approach than listing previous names on the back of a notice is available, the minister states:

I note the Committee's suggestion that a less restrictive approach such as not listing previous names and/or having internal government records regarding previous names would be feasible. However, I respectfully consider that these options, and that of only listing those details which appear on a passport, would weaken the integrity of the document which is utilised to provide continuity of a record of an individual's identity. As previously stated to the Committee in the Statement of Compatibility with Human Rights that accompanied the Explanatory Statement to this amendment, I maintain that this measure complies with the relevant Australian Government Guidelines on the Recognition of Sex and Gender. In addition to providing continuity of a record of an individual's identity, as the Committee has noted, the Guidelines propose that - consistent with Australian Privacy Principle 11 - government departments and agencies 'should ensure that 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' (paragraph 38 of the Guidelines refers).

I submit that the Regulation complies with this recommendation as I understand that another body would only access the relevant information - with the consent of the individual concerned - when the information was relevant to a particular decision. Further, an individual's information would only be recorded at the discretion of the processing officer when that officer considered it was relevant to the notice of evidence.

It is also my view that the processing officer's discretion not to include previous names and/or dates of birth on the back of a notice of evidence is a safeguard which, under policy, supports an individual where there may be concerns regarding the inclusion of certain information. For example, if an officer is satisfied that inclusion of a particular name will endanger the client or another person connected to them, an officer would take that into account in considering whether or not to exercise his or her discretion to include that information on the back of a notice of evidence. There may also be other situations such as cases involving witness protection in which an officer chooses to exercise their discretion not to include a person's previous names and/or dates of birth in the notice of evidence of citizenship.

2.35 It is noted that the minister does not consider it would be feasible to adopt a less rights restrictive approach of listing only those details provided on a passport as

this would 'weaken the integrity of the document which is utilised to provide continuity of a record of an individual's identity'.

2.36 The minister's response also identifies a relevant discretionary safeguard for the processing officer not to include previous names on the back of a notice where there are concerns that the inclusion of this information would endanger the person. It is relevant to the proportionality of the measure that departmental officers will have this power available to them. However, while this discretion is important, discretionary safeguards alone may be insufficient to ensure that a limitation is permissible in each individual case.<sup>18</sup> Further, it is unclear whether or not the potential harm caused by indirectly revealing that a person has undergone a change in sex and gender would be perceived by departmental officers as potentially 'endangering' the client. It may be more effective to have specific safeguards in this context in relation to people who have undergone a change of gender.

2.37 On the basis of the information provided by the minister, the measure may be capable of being compatible with human rights in many cases, however, the discretionary nature of the departmental safeguards mean that there is a risk that in individual cases the limitation on the right to privacy will not be proportionate.

2.38 In relation to the compatibility of the measure with the right to equality and non-discrimination, the minister's response provides that:

The Australian Citizenship Act 2007 and the Australian Citizenship Instructions (ACIs) on notice of evidence provide sufficient flexibility for officers to treat different cases differently, including vulnerable individuals such as refugees and transgender persons and persons in witness protection.

As detailed above, I maintain that the recording of certain information on the back of a notice of evidence to enhance the identity framework is a reasonable measure which is necessary and proportionate to the legitimate objective of reducing the opportunity of identity fraud.

2.39 The minister's response does not directly address the disproportionate effect of the measure on particular groups. As in relation to the right to privacy, the existence of discretionary safeguards in relation to the measure may assist the measure to operate in a proportionate manner. However, discretionary safeguards do not completely mitigate against or address the risks of the disproportionate effect of the measure in all cases.

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18 See, for example, *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84]; UN Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

### **Committee response**

**2.40** The committee thanks the minister for his response and has concluded its examination of this issue.

**2.41** The committee notes that the measure may be capable of operating in a manner compatible with human rights. However, the discretionary aspect to the safeguards relied upon by the minister leaves a risk that there will be cases where the inclusion of previous names on a notice of Australian citizenship may not constitute a proportionate limitation on human rights.

## Defence Legislation Amendment (2017 Measures No. 1) Bill 2017

<b>Purpose</b>	This bill seeks to amend several Acts relating to defence to: allow a positive test result for prohibited substances to be disregarded under certain circumstances; simplify termination provisions to align with the new Defence Regulation 2016 [F2016L01568]; ensure greater protections for all Reservists in relation to their employment and education; include the transfer of hydrographic, meteorological and oceanographic functions from the Royal Australian Navy to the Australian Geospatial-Intelligence Organisation; and align a small number of provisions in the <i>Australian Defence Force Cover Act 2015</i> with other military superannuation schemes and provide clarity in definitions
<b>Portfolio</b>	Defence
<b>Introduced</b>	House of Representatives, 29 March 2017
<b>Rights</b>	Fair trial; to be presumed innocent; not to be tried and punished twice; not to incriminate oneself (see <b>Appendix 2</b> )
<b>Previous report</b>	4 of 2017
<b>Status</b>	Concluded examination

### Background

2.42 The committee first reported on the bill in its *Report 4 of 2017*, and requested a response from the Minister for Defence by 26 May 2017.<sup>1</sup>

2.43 The minister's response to the committee's inquiries was received on 26 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

### Civil penalty provisions

2.44 Schedule 2, Part 2 of the Defence Legislation Amendment (2017 Measures No. 1) Bill 2017 (the bill) seeks to amend the *Defence Reserve Service (Protection) Act 2001* (the Act) so that various existing criminal offences in the Act are also civil penalty provisions. The range of existing criminal offences to which the new civil penalty provisions would apply relate to discrimination in employment and partnerships, and discrimination against commission agents and contractors. Each of these criminal offences carries a penalty of 30 penalty units (currently \$5,400). The

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 7-11.

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proposed corresponding civil penalty would be 100 penalty units (currently \$18,000).<sup>2</sup>

2.45 Schedule 2, Part 2 of the bill also seeks to amend the Act to introduce a new offence provision. The offence in proposed section 76B relates to victimisation of a person for reasons that include where the person has made a complaint; given information or documents; or brought proceedings under the Act. Contravention of proposed section 76B would amount to a criminal offence with 30 penalty units and the proposed civil penalty would be 100 penalty units.

2.46 Schedule 2, Part 3 of the bill also seeks to amend the Act to introduce three new offence provisions. The new offence in proposed section 18A relates to dissolving a partnership, expelling a partner from a partnership, requiring a partner to forfeit their share in a partnership, or subjecting another partner to detriment concerning the partnership. The new offence in proposed section 23A prohibits the harassment of a protected worker,<sup>3</sup> partner or protected co-worker,<sup>4</sup> if it is engaged in because the subject of the harassment may volunteer to render defence service, is rendering defence service, or has previously rendered defence service.

2.47 Contravention of proposed sections 76B, 18A and 23A would amount to a criminal offence with 30 penalty units and the proposed civil penalty would be 100 penalty units.

### ***Compatibility of the measure with criminal process rights***

2.48 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the new civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

2.49 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. It is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that

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2 If the Crimes Amendment (Penalty Unit) Bill 2017 passes the parliament a penalty unit will increase to \$210 so that 100 penalty units would be \$21,000.

3 Protected worker is defined as being an employee, commission agent or contractor, a person seeking to become an employee, commission agent or contractor, or an officer or employee of a commission agent or contractor. See explanatory memorandum (EM) 32.

4 The definition of protected co-worker incorporates relationships where people are working together, even if they are not strictly employed by the same person. See EM 32.

create offences and civil penalties.<sup>5</sup> Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is necessarily 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 right not to be tried and punished twice (the prohibition against double jeopardy) apply.<sup>6</sup>

2.50 The statement of compatibility explains that many of the civil penalty provisions are intended to promote the right to safe and healthy working conditions and 'enhance the anti-discrimination protections in the Act, and introduce new anti-victimisation and anti-harassment provisions'.<sup>7</sup>

2.51 However, the statement of compatibility does not address whether the civil penalty provisions might be considered 'criminal' for the purposes of international human rights law.

2.52 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look at its classification in domestic law. As the civil penalty provisions are not classified as 'criminal' under domestic law they will not automatically be considered 'criminal' for the purposes of international human rights law.

2.53 The second step in assessing whether the civil penalties are 'criminal' under international human rights law is to look at the nature and purpose of the penalties. In this regard, the explanatory memorandum explains:

Civil penalty provisions provide a less cumbersome and technical enforcement process than criminal prosecutions. Contraventions of the Act can be insidious and indirect, making it difficult to prove an offence beyond reasonable doubt. For example, establishing that an employee was dismissed or disadvantaged for [...] prohibited reasons will often be very difficult to prove to the criminal standard, whereas the standard of proof for a civil penalty could be met. Including a civil penalty regime will provide an important deterrent to indirect discrimination against Reserve members. Civil penalties are also more appropriate when dealing with government employers, who are not liable to criminal remedies.<sup>8</sup>

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5 *Guidance Note 2* – see Appendix 4.

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

7 Statement of compatibility (SOC) 9.

8 EM 28.

2.54 Civil penalty provisions are more likely to be considered 'criminal' in nature if they are intended to punish or deter, irrespective of their severity; and apply to the public in general. There is no indication that the regime is intended to be punitive, and it appears restricted to a particular employment context rather than applying to the public in general.

2.55 The third step in assessing whether the penalties are 'criminal' under international human rights law is to look at their severity. In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the maximum amount of the pecuniary penalty that may be imposed under the civil provision relative to the penalty that may be imposed for a corresponding criminal offence is relevant.

2.56 The amount of the pecuniary penalties that would be imposed under the proposed civil penalty provisions in the bill is 100 penalty units (currently \$18,000). The penalties that would be imposed for the corresponding criminal offences is 30 penalty units (currently \$5,400). As such, the civil penalties that would be imposed for the same offences under the Act are substantially higher than the penalties that may be imposed for the corresponding criminal offences (currently \$12,600 higher). These higher penalties may indicate that the civil penalties could be considered 'criminal'.

2.57 The initial human rights analysis therefore raised questions about whether the civil penalties may be considered 'criminal' for the purposes of international human rights law. The committee drew the attention of the Minister for Defence to its *Guidance Note 2* and sought the advice of the minister as to whether:

- the civil penalty provisions introduced by the bill 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 the penalties are considered 'criminal' for the purposes of international human rights law, whether the measures accord with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1))).

### **Minister's response**

2.58 Applying *Guidance Note 2*, the minister's response addresses each element of the test for whether the penalty provisions should be considered 'criminal' for the purposes of international human rights law.

2.59 In relation to the nature of the penalty, the response relevantly provides:

The civil penalties introduced in the Bill will only apply in employment and similar contexts, and not to the public at large. For the most part, the

proposed civil penalties deal with the conduct of employers. The purpose of the civil penalties is to promote the right to safe and healthy working conditions, and to discourage behaviour in civilian employment-like environments that could dissuade a person from providing Australian Defence Force (ADF) Reserve service. The civil penalties are not intended to be punitive or deterrent in nature but, rather, they are intended to bring employers to the discussion table with the employees and Defence, so that an agreement can be reached through mediation.

2.60 In relation to the severity of the penalty, the response relevantly provides:

The maximum civil penalty levels proposed are consistent with the range and type of person who are likely to engage in the relevant conduct. The proposed civil penalty provisions are, for the most part, concerned with the conduct of employers and similar, which can range in size from small businesses through to large enterprises, with a corresponding range in turnover and profit. The maximum level of the civil penalty, 100 penalty units, needs to allow for this variation, providing sufficient discouragement even for the largest employers. It is important from a defence capability perspective to discourage conduct by employers and others that could work to dissuade people from joining the ADF Reserves or from providing ADF Reserve service. A person is far less likely to provide ADF Reserve service if they are afraid of adverse consequences in their civilian employment.

2.61 Noting the particular regulatory context, the purpose of the penalties in relating to the employment of ADF personnel and the severity of the penalty, there appears to be sufficient basis to conclude that the civil penalties are unlikely to be considered 'criminal' for the purposes of international human rights law. Accordingly, the criminal process rights contained in articles 14 and 15 of the ICCPR are unlikely to apply.

2.62 In any event, the minister's response notes that there are also relevant safeguards that would prevent persons being found liable for both a criminal and civil penalty in relation to the same conduct contained in sections 88 to 91 of the *Regulatory Powers (Standard Provisions) Act 2014*.

### **Committee response**

**2.63 The committee thanks the minister for her response and has concluded its examination of this issue.**

**2.64 In light of the additional information provided, the committee notes that the measure appears unlikely to be 'criminal' for the purpose of international human rights law and therefore does not engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights. The committee notes that this information would have been useful in the statement of compatibility.**



## Social Services Legislation Amendment Bill 2017

<b>Purpose</b>	Contains a number of reintroduced measures including extension of the ordinary waiting period to persons claiming youth allowance (other) or parenting payments
<b>Portfolio</b>	Social Services
<b>Introduced</b>	Senate, 22 March 2017
<b>Right</b>	Social security (see <b>Appendix 2</b> )
<b>Previous reports</b>	4 of 2017
<b>Status</b>	Concluded examination

### Background

2.65 The committee first reported on the Social Services Legislation Amendment Bill 2017 (the bill) in its *Report 4 of 2017*, and requested a response from the Minister for Social Services by 26 May 2017.<sup>27</sup>

2.66 The bill passed both Houses of Parliament on 29 March 2017 and received Royal Assent on 12 April 2017.

2.67 The minister's response to the committee's inquiries was received on 25 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.68 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—Indexation;<sup>28</sup>
- Schedule 2—Automation of income stream review processes;<sup>29</sup> and
- Schedule 4—Family tax benefit.<sup>30</sup>

27 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 35-38.

28 Previously contained in the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 51.

29 Previously contained in the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 52.

30 Previously contained in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014. See Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 94-95.

2.69 In relation to Schedule 3—Ordinary Waiting Periods, the committee previously considered this measure in a number of reintroduced bills.<sup>31</sup> In its *Twelfth report of the 44th Parliament* the committee concluded that the measure, as well as a number of other measures contained in the bill, was compatible with the right to social security and the right to an adequate standard of living on the basis of budget constraints articulated at the time constituting a legitimate objective for the purposes of international human rights law.

### **Schedule 3—Ordinary Waiting Periods**

2.70 Schedule 3 of the bill extends the ordinary waiting period to youth allowance (other) and the parenting payment. Currently, the ordinary waiting period is a one-week period that new claimants must serve before they are able to start accessing payments, and applies to recipients of Newstart Allowance and sickness allowance. A number of exemptions and waivers are available in certain circumstances, including for persons experiencing severe financial hardship.

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

2.71 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, 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.

2.72 The committee has previously considered that the measure engages and limits the right to social security and an adequate standard of living. This is because, in imposing a waiting period for further recipients of social security payments, the measure is a retrogressive measure or backward step for the purposes of international human rights law.<sup>32</sup>

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31 Previously contained in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014. See Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 78-80; and *Twelfth report of the 44th Parliament* (24 September 2014) 61-62. The measure has since been included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014, Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015, Social Services Legislation Amendment (Youth Employment) Bill 2015, Social Services Legislation Amendment (Youth Employment) Bill 2016 and Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017.

32 For more information on retrogressive measures see *Guidance Note 1* at Appendix 4.

2.73 As noted above, the committee concluded at that time that the measures were likely to be compatible in the context of budgetary constraints that were relied upon at the time as constituting a legitimate objective for the purposes of international human rights law.<sup>33</sup>

2.74 The initial human rights analysis noted that, as set out in the committee's *Guidance Note 1*, in order 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. The statement of compatibility does not explain how the measure still pursues the same pressing or substantial concern of budgetary restraints as it did during the committee's consideration of the measure more than two years ago.

2.75 The statement of compatibility sets out that an objective of the measures is 'ensuring a sustainable and well-targeted payment system'.<sup>34</sup> While this may be considered legitimate for the purposes of international human rights law, a legitimate objective must be supported by a reasoned and evidence-based explanation. No information is provided in the statement of compatibility as to why the reforms are necessary from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare scheme. Further, while some information is provided about emergency payments where a person is unable to meet basic necessities during the waiting period, it was noted in the previous analysis that the qualifying criteria for these emergency payments is also being tightened by the bill.<sup>35</sup> The analysis stated that, in this context, it is unclear whether there will be persons who are left without the means of meeting basic necessities during the waiting period. The availability of emergency payments will affect the proportionality of the measure.

2.76 Accordingly, the committee sought further advice from the Minister for Social Services as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

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33 See Parliamentary Joint Committee on Human Rights, *Twelfth report of the 44th Parliament* (24 September 2014) 61-62.

34 Explanatory memorandum (EM), statement of compatibility (SOC) 26.

35 EM, SOC 23.

**Compatibility of the measure with the right to equality and non-discrimination (indirect discrimination)**

2.77 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. The initial human rights analysis stated that, as women are the primary recipients of parenting payments, and social security payments more broadly, reductions to access to such payments under the bill would disproportionately impact upon this group and the right to equality and non-discrimination is therefore also engaged.

2.78 The statement of compatibility acknowledges the engagement of this right, and sets out that:

As more than 90 per cent of parenting payment recipients are women, the changes may more significantly impact on women in that regard. However, the changes are reasonable and proportionate to achieving the legitimate objective of providing consistency across similar working age payments by ensuring that all new claimants meet their own living costs for a short period before receiving Government assistance, where they are able.<sup>36</sup>

2.79 As noted above, for the purposes of international human rights law a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. It has not been set out in the statement of compatibility as to why 'providing consistency across payments' is a legitimate objective, or why it is necessary to extend the ordinary waiting period to recipients of further social security payments at this time.

2.80 Accordingly, the committee sought further advice from the Minister for Social Services as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

**Minister's response**

2.81 The response from the minister provides some further information about the objective of the measure in respect of budget repair and fiscal constraints:

Budget repair remains a key focus for this Government as outlined in the Treasurer's Budget speech on 9 May 2017 and the 2017-18 Budget papers. The Government has made, and continues to make, necessary and

sensible decisions to keep spending under control in order to return the Budget to surplus. This is important to maintain Australia's AAA credit rating and support longer term economic growth. A number of Budget repair measures that have been legislated to date to help achieve this, including the measure at Schedule 3 of the Bill and other measures designed to ensure welfare payment expenditure is sustainable into the future.

The Ordinary Waiting Period is a period of one week during which claimants with the means to support themselves are expected to do so. As noted in the Statement of Compatibility with Human Rights on the Bill, this reflects a central principle underpinning Australia's social security system that support should be targeted to those in the community most in need in order to keep the system sustainable and fair.

2.82 The minister's response also provides a range of further information as to the proportionality of the measure:

It is important to note that this measure maintains an exemption from the Ordinary Waiting Period for those who are unable to accommodate their own living costs for that one week period because they are in severe financial hardship. The existing severe financial hardship waiver has been modified to better target it to claimants who have experienced a personal financial crisis and are most in need of immediate support, such as those who have experienced domestic violence or have incurred reasonable or unavoidable expenditure. The domestic violence provision in particular is aimed at supporting women, who are more likely to be a victim of domestic violence than men, and ensuring they are able to access support immediately in these circumstances. Additional circumstances that constitute a personal financial crisis may also be prescribed by the Secretary by legislative instrument.

The measure is compatible with the rights to social security, an adequate standard of living, and equality and non-discrimination as any limitation on these rights is proportionate to the policy objective of ensuring a payments system that is well-targeted and sustainable in the context of broader, necessary Budget repair, noting that there will continue to be a safety net for those in need through the new waiver provisions.

2.83 As such, the minister's response details that there is an exception to the Ordinary Waiting Period for those unable to accommodate their own living costs due to severe financial hardship. Further, the minister's response notes that there is also specific support for those who have experienced domestic violence (most of whom are women) to ensure they will have immediate support.

2.84 Each of these measures appear to provide a safeguard such that eligible individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of severe financial hardship including leaving situations of domestic violence. This supports an assessment that the measure is a proportionate limitation on the right to social security and the right to an adequate standard of

living. Accordingly, the measure appears likely to be compatible with the right to social security, the right to an adequate standard of living and the right to equality and non-discrimination.

### **Committee response**

**2.85** The committee thanks the Minister for Social Services for his response and has concluded its examination of this issue. The committee notes that the additional information provided would have been useful in the statement of compatibility.

**2.86** In light of the additional information provided about the safeguards that exist in relation to the operation of the measure, the measure appears likely to be compatible with the right to social security, the right to an adequate standard of living and the right to equality and non-discrimination.

**Mr Ian Goodenough MP**

**Chair**

## **Appendix 1**

### **Deferred legislation**

1.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Aviation Transport Security Amendment (Persons in Custody) Regulations 2017 [F2017L00440];
- Imported Food Control Amendment Bill 2017;
- Federal Financial Relations (National Partnership payments) Determination No. 117 (March 2017) [F2017L00413];
- National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017;
- Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450];

1.2 The committee continues to defer its consideration of the following legislation:

- Competition and Consumer Amendment (Competition Policy Review) Bill 2017;
- Federal Financial Relations (National Partnership payments) Determination No. 116 (February 2017);
- Law Enforcement Integrity Commissioner Regulations 2017 [F2017L00304];
- Telecommunications Integrated Public Number Database Scheme 2017 [F2017L00298].





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## Appendix 2

### Short guide to human rights

1.1 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*.<sup>1</sup>

1.2 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).<sup>2</sup>

#### 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*

1.3 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, [1.5]).

1.4 Australia is also prohibited from imposing the death penalty.

#### Duty to investigate

*Articles 2 and 6 of the ICCPR*

1.5 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;

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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)*

1.6 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.

1.7 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, [1.9] to [1.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

1.8 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, [1.18]).

### **Non-refoulement obligations**

*Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR*

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

1.10 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.

1.11 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.

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## **Prohibition against slavery and forced labour**

### *Article 8 of the ICCPR*

1.12 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.

1.13 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.

1.14 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).

1.15 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***

1.16 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***

1.17 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*

1.18 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, [1.6] to [1.8]). 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*

1.19 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*

1.20 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.

1.21 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*

1.22 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*

1.23 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, [1.22]);
- 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, [1.6] to [1.8]));
- 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*

1.24 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).

1.25 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*

1.26 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).

1.27 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)*

1.28 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.

1.29 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*

1.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

1.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

1.32 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).

1.33 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)*

1.34 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.

1.35 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*

1.36 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*

1.37 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.



1.38 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.

1.39 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*

1.40 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.

1.41 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)*

1.42 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.

1.43 '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).<sup>3</sup> 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.<sup>4</sup>

1.44 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*

1.45 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*

1.46 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

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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.

1.47 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, [1.29]).

### ***Right of the child to be heard in judicial and administrative proceedings***

#### *Article 12 of the CRC*

1.48 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.

1.49 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*

1.50 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.

1.51 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*

1.52 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.

1.53 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***

1.54 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***

1.55 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*

1.56 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.

1.57 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*

1.58 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*

1.59 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*

1.60 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*

1.61 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.

1.62 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*

1.63 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.

1.64 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**

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### **Correspondence**







**THE HON PETER DUTTON MP  
MINISTER FOR IMMIGRATION  
AND BORDER PROTECTION**

Ref No: MS17-001272

Mr Ian Goodenough MP  
Chair  
S1.111  
Parliament House  
CANBERRA ACT 2600

*Ian,*  
Dear Mr Goodenough

Thank you for your letter of 28 March 2017 in which further information was requested on the following:

- Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016; and
- Australian Citizenship Regulation 2016 [F2016L01916]

My response in respect of the above-named bill and Regulation is attached.

I trust the information provided is helpful.

Yours sincerely

PETER DUTTON

*16/05/17*

## ***Australian Citizenship Regulation 2016 [F2016L01916]***

**1.137 ... 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.**

I note the Committee's views that although the limitation on the right of privacy resulting from this Regulation is for a legitimate objective, there remains a concern that the information that may be included on the back of a notice of evidence of Australian citizenship is not a proportionate limitation. However, I am of the view that the measure (which appears in Regulation 12) is in fact a proportionate response to the legitimate objective of reducing the opportunity for identity fraud and ensuring continuity of identity in the Department of Immigration and Border Protection's (the Department's) records.

In particular, if included, the information would appear on the *back* of the notice of evidence of Australian citizenship. It is not made available to the general public, and it is the individual concerned who has control of the notice of evidence and, consequently, over the disclosure of the information. Notices of evidence of Australian citizenship are generally used when individuals are dealing with government or other bodies and are used as primary evidence to establish the person's identity and citizenship status. This means that the need to disclose any information appearing on the back of a notice of evidence is limited. Persons holding a notice of evidence maintain control over who or what organisation(s) they wish to disclose the notice to and for what purpose.

I note the Committee's suggestion that a less restrictive approach such as not listing previous names and /or having internal government records regarding previous names would be feasible. However, I respectfully consider that these options, and that of only listing those details which appear on a passport, would weaken the integrity of the document which is utilised to provide continuity of a record of an individual's identity. As previously stated to the Committee in the Statement of Compatibility with Human Rights that accompanied the Explanatory Statement to this amendment, I maintain that this measure complies with the relevant Australian Government Guidelines on the Recognition of Sex and Gender. In addition to providing continuity of a record of an individual's identity, as the Committee has noted, the Guidelines propose that - consistent with Australian Privacy Principle 11 - government departments and agencies 'should ensure that 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' (paragraph 38 of the Guidelines refers).

I submit that the Regulation complies with this recommendation as I understand that another body would only access the relevant information - with the consent of the individual concerned - when the information was relevant to a particular decision. Further, an individual's information would only

be recorded at the discretion of the processing officer when that officer considered it was relevant to the notice of evidence.

It is also my view that the processing officer's discretion not to include previous names and/or dates of birth on the back of a notice of evidence is a safeguard which, under policy, supports an individual where there may be concerns regarding the inclusion of certain information. For example, if an officer is satisfied that inclusion of a particular name will endanger the client or another person connected to them, an officer would take that into account in considering whether or not to exercise his or her discretion to include that information on the back of a notice of evidence. There may also be other situations such as cases involving witness protection in which an officer chooses to exercise their discretion not to include a person's previous names and/or dates of birth in the notice of evidence of citizenship.

The Australian Citizenship Act 2007 and the Australian Citizenship Instructions (ACIs) on notice of evidence provide sufficient flexibility for officers to treat different cases differently, including vulnerable individuals such as refugees and transgender persons and persons in witness protection.

***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.***

As detailed above, I maintain that the recording of certain information on the back of a notice of evidence to enhance the identity framework is a reasonable measure which is necessary and proportionate to the legitimate objective of reducing the opportunity of identity fraud.



**Senator the Hon Marise Payne**  
**Minister for Defence**

Parliament House  
CANBERRA ACT 2600

Telephone: 02 6277 7800

MC17-001287

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

Dear Chair

Thank you for your letter of 10 May 2017 seeking my advice about the human rights compatibility of the *Defence Legislation Amendment (2017 Measures No. 1) Bill 2017* (the Bill), as set out in the Committee's report.

I understand the Committee is seeking advice on whether the civil penalty provisions introduced by the Bill may be considered to be 'criminal' in nature for the purposes of international human rights law and, if so, whether the measures accord with criminal process rights. The measures in Schedule 2 of the Bill insert civil penalty provisions corresponding to each criminal offence in the *Defence Reserve Service (Protection) Act 2001*.

In accordance with the Committee's *Guidance Note 2*, the criteria for assessing whether a penalty is 'criminal' for the purpose of human rights law include the following steps:

- **Step one:** Is the penalty classified as criminal under Australian law?
- **Step two:** What is the nature and purpose of the penalty?
- **Step three:** What is the severity of the penalty?

For the reasons outlined below, I am advised that the civil penalty provisions proposed in the Bill would not be considered 'criminal' for the purposes of international human rights law.

*(1) Classification of the penalty under domestic law*

The classification of the penalty as 'civil' under domestic law is not determinative. However, if the penalty is 'criminal' under domestic law, it will also be regarded as 'criminal' under international law.

The Bill clearly identifies the penalties as being civil penalties, which are distinguishable from the corresponding criminal offences in the Act relating to the same conduct.

### *(2) The nature of the penalty*

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee has 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;
- 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 civil penalties introduced in the Bill will only apply in employment and similar contexts, and not to the public at large. For the most part, the proposed civil penalties deal with the conduct of employers. The purpose of the civil penalties is to promote the right to safe and healthy working conditions, and to discourage behaviour in civilian employment-like environments that could dissuade a person from providing Australian Defence Force (ADF) Reserve service. The civil penalties are not intended to be punitive or deterrent in nature but, rather, they are intended to bring employers to the discussion table with the employees and Defence, so that an agreement can be reached through mediation.

The type of conduct that will engage the proposed civil penalty provisions includes refusing to employ a person because of their service in the ADF Reserves, dismissing an employee because of their service in the ADF Reserves, hindering an employee from serving in the ADF Reserves, and analogous conduct in other work environments (such as partnerships or contractor relationships).

The Bill also introduces civil penalties to correspond to new criminal offences in the Act, dealing with conduct that amounts to harassment in employment contexts (proposed section 23A) and victimisation because a person has complained or otherwise sought relief under the Act (proposed section 76B). A civil penalty provision is also proposed so that employers are liable for harassment by their employees (proposed section 23B).

### *(3) The severity of the penalty*

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

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with the 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;
- 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 maximum civil penalty levels proposed are consistent with the range and type of person who are likely to engage in the relevant conduct. The proposed civil penalty provisions are, for the most part, concerned with the conduct of employers and similar, which can range in size from small businesses through to large enterprises, with a corresponding range in turnover and profit. The maximum level of the civil penalty, 100 penalty units, needs to allow for this variation, providing sufficient discouragement even for the largest employers. It is important from a defence capability perspective to discourage conduct by employers and others that could work to dissuade people from joining the ADF Reserves or from providing ADF Reserve service. A person is far less likely to provide ADF Reserve service if they are afraid of adverse consequences in their civilian employment.

For these reasons, the proposed civil penalty provisions appear unlikely to be criminal for the purposes of international human rights law, and the criminal process rights contained in articles 14 and 15 of the ICCPR are unlikely to apply. Accordingly, I have not provided advice as to the compatibility of these civil penalty provisions with criminal process rights. However, I also note that there are safeguards in sections 88 to 91 of the *Regulatory Powers (Standard Provisions) Act 2014* that will apply so that a person found to have committed a criminal offence cannot be subject to a civil penalty for the same conduct, and so that evidence given by an individual in civil proceedings is not admissible against them in criminal proceedings.

Yours sincerely

**MARISE PAYNE**

**26 MAY 2017**





**The Hon Christian Porter MP**  
Minister for Social Services

MC17-007459

25 MAY 2017

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

Dear ~~Chair~~ *Chair*

Thank you for your letter of 10 May 2017 regarding the Committee's report on the Social Services Legislation Amendment Bill 2017. I appreciate the time you have taken to bring this to my attention.

I have noted the comments in the Committee's Report 4 of 2017 in relation to this Bill and have provided my response to these comments in the enclosed document.

I also note that the Bill was passed by both Houses of the Parliament on 29 March 2017 and received Royal Assent on 12 April 2017 as the *Social Services Legislation Amendment Act 2017*.

Thank you again for writing *1*

Yours sincerely

**The Hon Christian Porter MP**  
Minister for Social Services

Encl.



## Social Services Legislation Amendment Bill 2017

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 the Social Services Legislation Amendment Bill 2017 (the Bill) is compatible with international human rights law, as defined in that Act. The Bill was passed by both Houses of the Parliament on 29 March 2017 and received Royal Assent on 12 April 2017 as the *Social Services Legislation Amendment Act 2017*.

Specifically the Committee has questioned the compatibility of the measure at Schedule 3 of the Bill with the right to social security, to an adequate standard of living, and to equality and non-discrimination. This document provides responses to the Committee's request for advice on compatibility of the measure with those rights.

### **Ordinary Waiting Periods**

#### *Schedule 3*

- **Extend the Ordinary Waiting Period to Youth Allowance (other) and Parenting Payment; include additional evidentiary requirements for the 'severe financial hardship' exemption from the Ordinary Waiting Period; and remove the ability for claimants to serve the Ordinary Waiting Period concurrently with other waiting periods**

**1.149** The preceding analysis indicates that the right to social security and right to an adequate standard of living are engaged and limited by the measure. The above analysis raises questions as to whether the measure is a permissible limitation on those rights.

**1.150** The committee therefore seeks further advice from the Minister for Social Services as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

**1.154** The right to equality and non-discrimination (indirect discrimination) is engaged and limited by the measure by reason of its particular impact on women. The above analysis raises questions as to whether the measure is a permissible limitation on those rights.

**1.155** The committee therefore seeks further advice from the Minister for Social Services as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

The measure at Schedule 3 of the Bill was originally included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the Bill No. 1) and subsequently a number of further Bills prior to being legislated as part of this Bill. The Committee concluded its examination of the measure as included in Bill No. 1 in its *Twelfth Report of the 44th Parliament*. The Committee concluded that the measure was compatible with the right to social security and to an adequate standard of living on the basis of Budget constraints articulated at the time constituting a legitimate objective for the purposes of international human rights law.

Budget repair remains a key focus for this Government as outlined in the Treasurer's Budget speech on 9 May 2017 and the 2017-18 Budget papers. The Government has made, and continues to make, necessary and sensible decisions to keep spending under control in order to return the Budget to surplus. This is important to maintain Australia's AAA credit rating and support longer term economic growth<sup>1</sup>. A number of Budget repair measures that have been legislated to date to help achieve this, including the measure at Schedule 3 of the Bill and other measures designed to ensure welfare payment expenditure is sustainable into the future.

The Ordinary Waiting Period is a period of one week during which claimants with the means to support themselves are expected to do so. As noted in the Statement of Compatibility with Human Rights on the Bill, this reflects a central principle underpinning Australia's social security system that support should be targeted to those in the community most in need in order to keep the system sustainable and fair.

The Ordinary Waiting Period currently applies to Newstart Allowance and Sickness Allowance but this measure extends it to Youth Allowance (other) and Parenting Payment from 1 July 2017. These working age payments play similar roles within the broader welfare payments system – to assist people who are temporarily unable to support themselves through work or have a limited capacity to work due to disability or caring responsibilities for young children<sup>2</sup>. The extension of the Ordinary Waiting Period to these payments will promote a consistent expectation across these similar payment types that people should support themselves in the first instance before drawing on the welfare payments system. Reducing ongoing welfare payment expenditure by encouraging self-support will contribute to Budget repair.

The majority of Parenting Payment recipients are female and therefore the extension of the Ordinary Waiting Period to this payment will have a particular impact on women. Parenting Payment is nonetheless classified as a working age payment and expenditure on Parenting Payment represents nearly a third of estimated total working age payment expenditure in 2017-18<sup>3</sup>. In the context of current fiscal constraints, it is reasonable and proportionate that the Ordinary Waiting Period is applied to this payment, in line with other similar working age payments.

It is important to note that this measure maintains an exemption from the Ordinary Waiting Period for those who are unable to accommodate their own living costs for that one week period because they are in severe financial hardship. The existing severe financial hardship waiver has been modified to better target it to claimants who have experienced a personal financial crisis and are most in need of immediate support, such as those who have experienced domestic violence or have incurred reasonable or unavoidable expenditure. The domestic violence provision in particular is aimed at supporting women, who are more likely to be a victim of domestic violence than men, and ensuring they are able to access support immediately in these circumstances. Additional circumstances that constitute a personal financial crisis may also be prescribed by the Secretary by legislative instrument.

The measure is compatible with the rights to social security, an adequate standard of living, and equality and non-discrimination as any limitation on these rights is proportionate to the policy objective of ensuring a payments system that is well-targeted and sustainable in the context of broader, necessary Budget repair, noting that there will continue to be a safety net for those in need through the new waiver provisions.

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<sup>1</sup> 2017-18 Budget glossies – *Living within our means*, [budget.gov.au/2017-18/content/glossies/means/html/](http://budget.gov.au/2017-18/content/glossies/means/html/)

<sup>2</sup> DSS Annual Report 2015-16, Part 2 Annual Performance Statement, pg. 53 – Program 1.10 Working Age Payments, [www.dss.gov.au/sites/default/files/documents/10\\_2016/part\\_2\\_annual\\_performance\\_statement.pdf](http://www.dss.gov.au/sites/default/files/documents/10_2016/part_2_annual_performance_statement.pdf)

<sup>3</sup> DSS Portfolio Budget Statement, pp. 43-45, [https://www.dss.gov.au/sites/default/files/documents/05\\_2017/2017-18\\_social\\_services\\_pbs\\_-\\_final\\_for\\_online\\_and\\_accessible\\_publication\\_-\\_7\\_may\\_17.pdf](https://www.dss.gov.au/sites/default/files/documents/05_2017/2017-18_social_services_pbs_-_final_for_online_and_accessible_publication_-_7_may_17.pdf)

## **Appendix 4**

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### **Guidance Note 1 and Guidance Note 2**



## GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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*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.*

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### 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.<sup>1</sup> 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.<sup>2</sup>

#### ***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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<sup>1</sup> 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.

<sup>2</sup> 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.aprh.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.<sup>3</sup>

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.

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<sup>3</sup> The Attorney-General's Department guidance may be found at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx>.

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 a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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

December 2014

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

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### 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)).<sup>1</sup>

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.<sup>2</sup>

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.<sup>3</sup> 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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<sup>1</sup> 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/Join/PJCHR/Guide%20to%20Human%20Rights.pdf>.

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

<sup>3</sup> See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, 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).<sup>4</sup> 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

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<sup>4</sup> See, for example, *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [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.<sup>5</sup>

### **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.<sup>6</sup> 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 civil penalty provision 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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<sup>5</sup> 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 2/3 of the head sentence).

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

### ***When a civil penalty provision is 'criminal'***

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

#### ***a) Classification of the penalty under domestic law***

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

#### ***b) The nature of the penalty***

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

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

#### ***c) The severity of the penalty***

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

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

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

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

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

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

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

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

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

### ***Criminal process rights and civil penalty provisions***

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

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

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

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