
# Parliamentary Joint Committee on Human Rights

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

Bills introduced 14 – 19 November 2014

Legislative Instruments received
11 – 23 October 2014

Sixteenth Report of the 44th Parliament

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# Membership of the committee

**Members**

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| Senator Carol Brown | Tasmania, ALP |
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| Senator Claire Moore | Queensland, ALP |
| Ms Michelle Rowland MP | Greenway, New South Wales, ALP |
| Senator Penny Wright | South Australia, AG |
| Mr Ken Wyatt AM MP | Hasluck, Western Australia, LP |

# Functions of the committee

The Committee has the following functions:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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# Abbreviations

| Abbreviation | Definition |
|---|---|
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CEDAW | Convention on the Elimination of Discrimination against Women |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| EM | Explanatory Memorandum |
| FRLI | Federal Register of Legislative Instruments |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| PJCHR | Parliamentary Joint Committee on Human Rights |

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# Executive summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 14 to 19 November 2014 and legislative instruments received during the period 11 to 23 October 2014. The committee has also considered responses to the committee's comments made in previous reports.

**Bills introduced 14 to 19 November 2014**

The committee considered 15 bills, all of which were introduced with a statement of compatibility. Of these 15 bills, four do not require further scrutiny as they do not appear to give rise to human rights concerns. The committee has decided to defer its consideration of eight bills.

The committee has identified three bills that it considers require further examination and for which it will seek further information.

Of the bills considered, those which are scheduled for debate during the sitting week commencing 24 November 2014 include:

- Broadcasting and Other Legislation Amendment (Deregulation)
- Counter Terrorism Legislation Amendment Bill (No. 1) 2014
- Statute Law Revision Bill (No. 2) 2014
- Telecommunications Legislation Amendment (Deregulation)
- Telecommunications (Industry Levy) Amendment

**Legislative instruments received between 11 and 23 October 2014**

The committee considered 61 legislative instruments received between 11 and 23 October 2014. All instruments tabled in this period are listed in the Journals of the Senate.[1]

Of these 61 instruments, none appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate.

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

**Responses**

The committee has considered three responses relating to matters raised in relation to bills and legislative instruments in previous reports. The committee has concluded its examination relating to one Act and two instruments.

**Senator Dean Smith**
**Chair**

# Chapter 1 – New and continuing matters

This chapter includes the committee's consideration of seven bills which have been previously deferred, as identified by the committee at its meeting on 24 November 2014. The committee will write to the relevant proponent of the bill or instrument maker in relation to substantive matters seeking further information.

Matters which the committee draws to the attention of the proponent of the bill or instrument maker are raised on an advice-only basis and do not require a response.

## Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014

*Portfolio: Communications*
*Introduced: House of Representatives, 22 October 2014*

### Purpose

1.1 The Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014 (the bill) seeks to amend the *Broadcasting Services Act 1992* (BSA), the *Radiocommunications Act 1992* and the *Australian Communications and Media Authority Act 2005* to:

- remove certain requirements related to the initial planning of services in the broadcasting services bands spectrum;
- remove the requirement for reports made by certain subscription television licensees and channel providers under the New Eligible Drama Expenditure Scheme to be independently audited;
- remove the requirement for codes of practice to be periodically reviewed;
- remove the requirement for certain licensees to provide an annual list of their directors and captioning obligations;
- clarify the calculation of media diversity points in overlapping licence areas;
- provide for grandfathering arrangements for certain broadcasting licensees;
- make technical amendments for references to legislative instruments; and
- remove redundant licensing and planning provisions that regulated the digital switchover and restack processes.

1.2 The bill would also amend the *Broadcasting Services Act 1992* to:

- remove existing reporting requirements on free-to-air broadcasters to report on whether they have complied with captioning requirements;

- introduce a new formula for captioning for subscription sports services, allowing the captioning target to be averaged across a group of sports channels; and
- exempt new subscription services from meeting captioning targets for a period of 12 months (which could extend to almost two years depending on when the new service commences).

## Committee view on compatibility

### *Rights to equality and non-discrimination*

1.3 The rights to equality and non-discrimination are protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR), and article 9 of the Convention on the Rights of Persons with Disabilities (CRPD).

1.4 These are fundamental human rights that are essential to the protection and respect of all human rights. They 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 without discrimination to the equal and non-discriminatory protection of the law.

1.5 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[1] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[2] 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.[3]

1.6 The CRPD further describes the content of these rights, describing the specific elements that State parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others. Article 9 of the CRPD requires State parties to take measures to ensure persons with disabilities have access to information and communications, including identifying and eliminating obstacles and barriers to accessibility. Article 33 also requires that State parties establish mechanisms to independently monitor implementation of these obligations.

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1 The protected attributes 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 be protected attributes: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

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

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

*Changes to captioning requirements for the deaf and hearing impaired*

1.7 As noted above, the bill seeks to make certain changes relating to captioning requirements for the deaf and hearing impaired, including removing reporting requirements, introducing a new formula for captioning for subscription sports services and providing an exemption to new subscription services from meeting captioning targets.

1.8 The statement of compatibility recognises that these changes to captioning requirements engage the right of persons with disabilities to access information and communications, but concludes that the right will not be limited because the changes will not 'reduce existing captioning quality standards or targets or legislated future captioning targets', and will provide broadcasters with 'increased flexibility to direct captioning towards events of greater interest to viewers'.[4]

1.9 However, the committee notes that captioning is a means of implementing the right of persons with disabilities (the deaf and hearing impaired) to access information and communications. In this respect, the committee is concerned that the proposed changes to captioning requirements for sports channels may result in a reduction in the amount of sports content being made available to those who are deaf or hearing impaired. For example, broadcasters may focus their captioning target on a few major sporting events, meaning more varied and smaller events may no longer be made accessible for the deaf or hearing impaired. To the extent that such outcomes may occur, the committee considers that the measure would represent a limitation on the right of persons with disabilities to access information and communications.

1.10 Further, the committee notes that the removal of annual reporting requirements, which demonstrate compliance with captioning requirements, may also represent a limitation on the right to equality and non-discrimination. This is because any reduction in annual reporting requirements that led to a reduction in transparency around, or capacity to monitor, compliance with captioning requirements, would represent a limitation on the obligation on State parties to establish mechanisms to independently monitor implementation of their obligations under the CRPD (which may, of itself, lead to further limitation of the right of persons with disabilities to access information and communications).

1.11 Finally, the committee notes that the 12-month (and possibly longer) exemption from captioning requirements for new subscription television channels, by allowing for a lower level of captioning of such services than is currently mandated, also appears to represent a limitation on the right of persons with disabilities to access information and communications.

4 Statement of compatibility 7.

1.12 The committee's usual expectation where a measure may operate to limit human rights is that the accompanying statement of compatibility provide an assessment of whether that limitation may be regarded as permissible for the purposes of human rights. To do this, proponents of legislation must provide reasoned and evidence-based explanations as to whether measures may be regarded as reasonable, necessary and proportionate in pursuit of a legitimate objective.

1.13 In this respect, in addition to its concerns as to the potential human rights limitations of the measures, the committee does not consider that the statement of compatibility adequately demonstrates that the proposed amendments are for the purpose of addressing a legitimate objective, in the sense of being intended to address a substantial and pressing concern. The statement of compatibility identifies the objective of the measures as being 'to reduce the regulatory and compliance reporting burden on providers of those services, to better reflect existing industry practice'.[5] However, the committee does not consider the reduction of regulatory and compliance reporting burdens on television service providers represents a legitimate objective for human rights purposes.

1.14 The committee notes that the Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[6] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.15 The committee notes that, in the absence of a legitimate objective, any limitations on human rights as discussed above will be likely to be impermissible for human rights purposes. In the event that further information was provided to establish that the measures are proposed in pursuit of a legitimate objective, any limitations on the right to equality and non-discrimination and related rights under the CRPD would need to be shown to be reasonable, necessary and proportionate in pursuit of that objective. For example, it is not apparent why a 12-month exemption is necessary as all broadcasters would be aware of captioning requirements, which have been in place for some years.

1.16 **The committee therefore seeks the advice of the Minister for Communications as to the compatibility of the amendments to the captioning obligations with the right to equality and non-discrimination and the related rights**

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5 Explanatory memorandum 7.

6 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx [accessed 8 July 2014].

**of persons with disabilities under the CRPD (including monitoring compliance with obligations under the CRPD), and particularly:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

# Civil Law and Justice Legislation Amendment Bill 2014

*Portfolio: Attorney-General*
*Introduced: Senate, 29 October 2014*

## Purpose

1.17 The Civil Law and Justice Legislation Amendment Bill 2014 (the bill) seeks to:

- amend the *Bankruptcy Act 1966* in relation to the Official Trustee, the Official Receiver, the National Disability Insurance Scheme, the offence of concealment, declarations in statements received electronically, indictable and summary offences, and the location of certain offences in the Act;
- amend the *International Arbitration Act 1974* to clarify the application of the Act to certain international arbitration agreements;
- amend the *Family Law Act 1975* to make technical amendments, modify the appeal rights available for court security orders, and create access to the Family Court of Australia for court security orders made by the Family Court of Western Australia;
- amend the *Court Security Act 2013* to provide for the disposal of unclaimed items seized by or given upon request to court security officers and modify the processes by which court security orders can be varied and revoked;
- amend the *Evidence Act 1995* to reflect changes to the Model Uniform Evidence Bill, remove all references to the Australian Capital Territory, and make technical amendments;
- amend the *Protection of Movable Cultural Heritage Act 1986* to enable the National Cultural Heritage Committee to continue to function when membership falls below the maximum number; and
- amend the *Copyright Act 1968* to extend the legal deposit scheme to include work published in electronic format.

## Committee view on compatibility

1.18 **The committee considers that the bills are compatible with human rights and has concluded its examination of the bills.**

# Counter-Terrorism Legislation Amendment Bill (No. 1) 2014

*Portfolio: Attorney-General*
*Introduced: Senate, 29 October 2014*

## Purpose

1.19 The Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (the bill) seeks to amend the *Criminal Code Act 1995* (the Criminal Code) to:

- expand the objects of the control order regime to include prevention of the provision of support for, or the facilitation of, a terrorist act or engagement in a hostile activity in a foreign country;
- replace the current requirement for the Australian Federal Police (AFP) to provide all documents to the Attorney-General that will subsequently be provided to the issuing court, with a requirement that the AFP provide the Attorney-General with a draft of the interim control order, information about the person's age and the grounds for the request, when seeking the Attorney-General's consent to apply for a control order;
- permit a senior AFP member to seek the Attorney-General's consent to an interim control order where the order would substantially assist in preventing the provision of support for, or the facilitation of, a terrorist act or the engagement in a hostile activity in a foreign country;
- expand the grounds on which an issuing court can make a control order to include circumstances where the court is satisfied on the balance of probabilities that making the order would substantially assist in preventing the provision of support for, or the facilitation of, a terrorist act or the engagement in a hostile activity in a foreign country;
- replace the existing requirement for the AFP member to provide an explanation as to why 'each' obligation, prohibition and restriction should be imposed with a requirement to provide an explanation as to why 'the control order' should be made or varied;
- replace the existing requirement for the issuing court to be satisfied on the balance of probabilities that 'each' obligation, prohibition and restriction 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of the objects in section 104.1 of the Criminal Code with a requirement to be satisfied on the balance of probabilities that 'the control order' (as a whole) to be made or varied 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of those objects; and
- extend the time before the material provided to an issuing court must subsequently be provided to the Attorney-General from four hours to 12 hours where a request for an urgent interim control order has been made to an issuing court.

1.20 Schedule 2 of the bill makes a number of amendments to the *Intelligence Security Act 2001* (ISA), including:

- making it a statutory function of the Australian Secret Intelligence Service (ASIS) to provide assistance to the Australian Defence Force (ADF) in support of military operations, and to cooperate with the ADF on intelligence matters;
- enabling the issuing of ministerial authorisations for ASIS to undertake activities in relation to classes of Australian persons, for the purpose of performing this function;
- enabling the Attorney-General to specify classes of Australian persons who are, or who are likely to be, involved in activities that are, or are likely to be, a threat to security, and to give his or her agreement to the making of a ministerial authorisation in relation to any Australian person in that specified class; and
- amending the emergency authorisation powers to enable authorisations by security agency heads (rather than ministerial authorisations) in limited circumstances.

## Background

1.21 The bill proposes to further amend the control order regime under division 104 of the Criminal Code. The committee recently considered the extension and amendment of control orders in its *Fourteenth Report of the 44th Parliament* as part of its examination of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Foreign Fighters Bill). In that report, the committee noted that the control orders regime involves very significant limitations on human rights. Notably, it allows the imposition of a control order on an individual without needing to follow the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.

1.22 Essentially, the control orders regime under the Criminal Code is coercive in nature. The control order regime grants the Federal Court the power to impose a control order on a person at the request of the AFP with the Attorney-General's consent. The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person the subject of the order.[1]

1 These include: requiring a person to stay in a certain place at certain times, preventing a person from going to certain places; preventing a person from talking to or associating with certain people; preventing a person from leaving Australia; requiring a person to wear a tracking device; prohibiting access or use specified types of telecommunications, including the internet and telephones; preventing a person from possessing or using specified articles or substances; and preventing a person from carrying out specified activities (including in respect to their work or occupation).

1.23 The committee noted in its assessment of the Foreign Fighters Bill that the control orders regime was legislated prior to the establishment of the committee, and had not previously been subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Accordingly, the committee sought from the Attorney-General a foundational assessment of the compatibility with human rights of the control order regime. The committee has yet to receive a response from the Attorney-General in relation to this request.

1.24 The Foreign Fighters Bill made a number of changes to the control order regime including introducing new grounds on which a control order can be issued, namely engaging in 'hostile activity' in a foreign country, and being convicted of an offence related to terrorism in Australia or a foreign country.

1.25 The Foreign Fighters Bill also lowered the required threshold for an AFP member to seek the Attorney-General's consent to a control order. This allows an order to be sought where the AFP member 'suspects' rather than 'considers' on reasonable grounds that the order would substantially assist in preventing a terrorist act, or that the person has provided or received training from a listed terrorist organisation.

1.26 Further, the committee considered that the Foreign Fighters Bill would increase intelligence and law enforcement authorities' access to, and usage of, control orders and therefore would limit human rights to a greater degree than the existing powers.

1.27 In light of these concerns, the committee sought the advice of the Attorney-General as to the compatibility of each of the proposed amendments to the control orders regime, with the rights listed below at paragraph 1.30. The committee has yet to receive a response from the Attorney-General in relation to this request.

1.28 The Foreign Fighters Bill extended the operation of the control order regime for 10 years until December 2025. The committee recommended that the Attorney-General refer the extension and amendments to the control orders regime to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for review and report, and that the extension and amendments to the control order regime not proceed until the PJCIS has reported. The committee also recommended that the extension and amendments to the control orders regime not proceed until such time as an appropriately qualified person is appointed as Independent National Security Legislation Monitor, and has conducted a review of the control orders regime and the amendments proposed in the Foreign Fighters Bill. These recommendations were not accepted by the Attorney-General and the Foreign Fighters Bill was enacted on 3 November 2014 without these reviews being conducted.

1.29 Finally, the committee sought the advice of the Attorney-General as to the compatibility of the proposed 10-year extension of the control orders regime, with

the rights listed below at paragraph 1.30. The committee has yet to receive a response to this request.

## Committee view on compatibility

### Schedule 1

### *Multiple rights*

1.30 The control order regime, and the amendments to that regime proposed by the bill, engage a number of human rights, including:

- right to equality and non-discrimination;[2]
- right to security of the person and freedom from arbitrary detention;[3]
- right to freedom of movement;[4]
- right to a fair trial and the presumption of innocence;[5]
- right to privacy;[6]
- right to freedom of expression;[7]
- right to freedom of association;[8]
- right to the protection of family;[9]
- prohibition on torture and cruel, inhuman or degrading treatment;[10]
- right to work;[11] and
- right to social security and an adequate standard of living.[12]

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2 Articles 2, 16 and 26, International Covenant on Civil and Political Rights (ICCPR). Related provisions are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child (CRC) and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

3 Article 9, ICCPR.

4 Article 12, ICCPR.

5 Article 14, ICCPR.

6 Article 17, ICCPR.

7 Article 19, ICCPR.

8 Article 22, ICCPR.

9 Article 23 and 24, ICCPR.

10 Article 7, ICCPR, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

11 Article 6, International Covenant on Economic, Social and Cultural Rights (ICESCR).

*Proposed amendments to the control order regime*

1.31 The committee is concerned that the bill has been introduced so soon after the Foreign Fighters Bill. The intervening period has not been sufficient to allow the Attorney-General to consider the committee's recommendations and requests regarding amendments to the Foreign Fighters Bill. The control order regime raises significant human rights issues, and the committee considers it important that, as far as possible, legislative processes allow it to exercise its statutory functions of scrutiny and review. The committee considers that having the opportunity to consider the pending response from the Attorney-General in relation to the Foreign Fighters Bill would enable it to effectively review the amendments to the control order regime proposed by the bill.

1.32 Schedule 1 of the bill proposes further significant changes to the control order regime. As the committee noted in its assessment of the Foreign Fighters Bill, providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts in Australia may properly be regarded as a legitimate objective for the purposes of international human rights law. The committee, however, is concerned that the limits on human rights imposed by the amendments as drafted may not be reasonable, necessary and proportionate.

1.33 The committee notes that the statement of compatibility identifies a number of the rights set out above at paragraph 1.30 as engaged by this bill. It provides a discrete and short analysis of the engagement of each right. However, the analysis does not properly contextualise the amendments in terms of the serious limitation that control orders may have on human rights.

1.34 Specifically, the statement of compatibility states:

> The control order regime has been used judiciously to date—at September 2014, two control orders have been issued. This reflects the policy intent that these orders do not act as a substitute for criminal proceedings. Rather they should only be invoked in limited circumstances and are subject to numerous legislative safeguards that preserve the fundamental human rights of a person subject to a control order.[13]

1.35 These amendments would significantly expand the circumstances in which control orders could be sought against individuals, and significantly alter the purpose of control orders. As a result, control orders are likely to be used more widely and, as such, circumvent ordinary criminal proceedings as set out in paragraph 1.21 above.

1.36 The current grounds for seeking and issuing a control order, including those introduced by the Foreign Fighters Bill, are directed at serious criminal activity

12 Article 9 and 11, ICESCR.

13 Explanatory memorandum (EM) 7.

(namely, participation in terrorism, terrorist training or hostile activities). The amendments in Schedule 1 of the bill are not attached to any particular criminal offence. By extending the grounds to acts that 'support' or 'facilitate' terrorism, the bill would allow a control order to be sought in circumstances where there is not necessarily an imminent threat to personal safety.[14] The protection from imminent threats has been a critical rationale relied on by the government for the need to use control orders rather than ordinary criminal processes. Accordingly, the committee considers that the amendments to control orders impose limits on the human rights set out above in paragraph 1.30 that are neither necessary nor reasonable.

1.37 In addition, currently when requesting the court to make an interim control order under existing sections 104.2(d)(i) and (ii) and 104.3(a) of the Criminal Code, a senior AFP member is required to provide the court with an explanation of 'each' obligation, prohibition and restriction sought to be imposed by the control order as well as information regarding why 'any of those' obligations, prohibitions or restrictions should not be imposed. The amendments in the bill propose to reduce this obligation by requiring the AFP member to provide an explanation only as to why the proposed obligations, prohibitions or restrictions generally should be imposed and, to the extent known, a statement of facts as to why the proposed obligations, prohibitions or restrictions—as a whole rather than individually—should not be imposed.

1.38 The committee therefore considers that these amendments will result in control orders not being proportionate because they are not appropriately targeted to the specific obligation, prohibition or restriction imposed on a person. This is not addressed in the statement of compatibility. As a control order is imposed in the absence of a criminal conviction, it is critical that the individual measures comprising the control order are demonstrated in each individual instance to be proportionate. As a result, the committee considers that these amendments are not proportionate to the stated legitimate objective.

1.39 **The committee considers that the amendments in Schedule 1 to the control order regime are likely to be incompatible with the rights set out in paragraph 1.30, and therefore seeks the Attorney-General's advice on how the limits it imposes on human rights are reasonable, necessary or proportionate to achieve the legitimate aim of responding to threats of terrorism.**

14 For example, the Law Council warns in its submission to the PJCIS inquiry into the bill that control orders could be sought against persons to prevent online banking, online media or community and/or religious meetings. See, Law Council of Australia, *Submission 16,* Parliamentary Joint Committee on Intelligence and Security, Inquiry into report on the *Counter-Terrorism Legislation Amendment Bill (No.1) 2014.*

## Schedule 2

### *Statement of compatibility*

1.40 As set out above, Schedule 2 of the bill would make a number of amendments to the *Intelligence Security Act 2001* (ISA). The statement of compatibility states that the amendments have no human rights implications:

> The Government is of the view that the provisions of Schedule 2 to the Bill do not engage any human rights, on the basis that the provisions are directed to clarifying and streamlining – without reducing safeguards – the procedural arrangements that enable ISA agencies to undertake activities, with appropriate authorisation to do so.[15]

1.41 In saying this, the statement of compatibility does not distinguish between engaging and limiting human rights. The provisions of Schedule 2 to the bill engage human rights because they raise human rights considerations. Whether the provisions of Schedule 2 promote or limit those human rights is a separate question, to which the issue of safeguards, for example, is relevant.

1.42 Nevertheless, the statement of compatibility also acknowledges that a contrary view may be taken that the amendments do have human rights implications. On the basis that such a view was taken, the statement of compatibility provides that the amendments engage the right to privacy and the right to an effective remedy. The committee considers that these rights are engaged. The committee also considers that the amendments engage the right to life, the right to equality and non-discrimination and the prohibition on torture.

### *Right to privacy*

1.43 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

1.44 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

*Providing for ASIS to support the ADF*

1.45 The bill would make it a statutory function of ASIS to provide assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters. This includes using a range of covert surveillance powers available to ASIS under ISA.

1.46 The statement of compatibility provides the following assessment of the engagement by the measure with the right to privacy:

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15 EM 11.

> To the extent that the measures in the Bill extend the ability of ISA agencies to obtain a Ministerial authorisation to undertake activities permitted under the ISA for the purpose of collecting intelligence on, or undertaking other activities in relation to, persons or entities outside Australia, they might be said to engage the right to protection against arbitrary and unlawful interferences with privacy and reputation of persons who may be the subject of, or otherwise affected by, such activities.[16]

1.47 The statement of compatibility recognises that the measures in the bill limit human rights, but states that the measures are necessary for the achievement of a legitimate objective:

> Any interference with personal privacy as a result of the authorised activities of ISA agencies relevant to the performance by those agencies of their statutory functions is necessary for the achievement of a legitimate objective. In the case of the amendments to the statutory functions of ASIS, this legitimate objective is to ensure that ASIS is able to provide critical support to the ADF in support of military operations, and for the purpose of cooperating with the ADF on intelligence matters, in a timely way (including in circumstances that may enable ASIS to assist in saving lives of Australian soldiers and other personnel deployed to conflict zones).[17]

1.48 The committee agrees that providing for ASIS to support the ADF may be a legitimate activity on the basis that this may assist in ensuring Australia's national security. It may also assist in furthering Australia's foreign policy objectives which may be considered a legitimate objective if Australia's national security is at stake.

1.49 The committee notes that the analysis asserts, without explaining, the necessity of these amendments. The EM explains:

> In the context of the Government’s decision to authorise the Australian Defence Force (ADF) to undertake operations against the Islamic State terrorist organisation in Iraq, there is an urgent need to make amendments to the ISA.[18]

1.50 The EM acknowledges that ASIS already assists the ADF under existing legislation. For example:

> ASIS provided essential support to the ADF in Afghanistan. The support ranged from force protection reporting at the tactical level, through to strategic level reporting on the Taliban leadership. ASIS reporting was instrumental in saving the lives of Australian soldiers and civilians

16 EM 13.

17 EM 13.

18 EM 1.

> (including victims of kidnapping incidents), and in enabling operations conducted by Australian Special Forces. However, differences in the circumstances in Iraq mean that reliance on existing provisions of the ISA in relation to the functions of ASIS (which are not specific to the provision of assistance to the ADF) is likely to severely limit ASIS's ability to provide such assistance in a timely way.[19]

1.51 The committee notes that where a right is limited a legislation proponent must demonstrate that the limitation is reasonable, necessary and proportionate. The statement of compatibility and EM do not set out why these amendments are necessary. It is not enough to say only that there are differences in circumstances between the situations in Afghanistan and Iraq. An analysis of the differences and why they give rise to the need for the amendments is required.

1.52 **The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to privacy and, in particular, why the amendments are necessary to achieve the legitimate objective of ensuring Australia's national security.**

***Right to an effective remedy***

1.53 Article 2 of the ICCPR requires State parties to ensure access to an effective remedy for violations of human rights. State parties 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, State parties may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

1.54 State parties 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.

1.55 Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of person including, and particularly, children.

*Providing for ASIS to support the ADF*

1.56 Under section 14 of the ISA, intelligence agencies and their staff and agents are covered by an immunity from civil and criminal liability in the course of their duties. The bill would make it a statutory function of ASIS to provide assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters. This immunity would extend to activities undertaken pursuant to this new

19 EM 2.

statutory function. This includes using a range of covert surveillance powers available to ASIS under ISA.

1.57 The statement of compatibility acknowledges that the bill may be considered to engage the right to an effective remedy. Specifically:

> To the extent that the measures in the Bill might be said to expand the ability of the ISA agencies to obtain a Ministerial authorisation to undertake activities permitted under the ISA, they might also be said to expand the circumstances in which the immunity from criminal or civil liability under section 14 of the ISA applies, in respect of staff members or agents of an ISA agency who carry out activities in reliance on an authorisation.[20]

1.58 The statement of compatibility also states that the measures are necessary to achieve a legitimate objective:

> To the extent that the amendments in Schedule 2 to the Bill may engage the right to an effective remedy, they are necessary to achieve a legitimate purpose – namely, to ensure that ASIS is able to provide critical support to the ADF in support of military operations, and for the purpose of cooperating with the ADF on intelligence matters, in a timely way (including in circumstances that may enable ASIS to assist in saving lives of Australian soldiers and other personnel deployed to conflict zones).[21]

1.59 For the reasons set out above at 1.43 - 1.51 in relation to the right to privacy, the committee does not consider that the analysis provided in the statement of compatibility and EM have demonstrated that the amendments are necessary.

1.60 **The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to an effective remedy, and in particular why the limits imposed on human rights by the amendments are necessary to achieve the legitimate objective of ensuring Australia's national security.**

***Right to life***

1.61 The right to life is protected by article 6(1) of the ICCPR and article 1 of the Second Optional Protocol to the ICCPR. 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 by identified risks; and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

20 EM 14.

21 EM 15.

1.62 The use of force by state authorities resulting in a person's death can only be justified if the use of force was necessary, reasonable and proportionate in the circumstances. For example, the use of force may be proportionate if it is in self-defence, for the defence of others or if necessary to effect arrest or prevent escape (but only if necessary and reasonable in the circumstances).

1.63 In order to effectively meet this obligation, states must have in place adequate legislative and administrative measures to ensure police and the armed forces are adequately trained to prevent arbitrary killings.

1.64 The right to life requires that there be an effective official investigation into all deaths which result 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;
- independent and impartial;
- adequate and effective;
- carried out promptly;
- open to public scrutiny; and
- inclusive of the family of the deceased, and must allow the family access to all information relevant to the investigation.[22]

*Providing for ASIS to support the ADF*

1.65 As noted above, the bill provides that ASIS may 'provide assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters'.

1.66 The committee notes that military operations are not defined in the bill and accordingly could include all forms of military operations. While ASIS is prohibited by the ISA from planning or undertaking violence against the person by ASIS officers, ASIS is not prohibited by the ISA from assisting the ADF from undertaking such acts or for assisting other nation states to undertake such acts with cooperation from the ADF.

22 See, for example, *McCann v United Kingdom* (1996) 21 EHRR 97, [3], [188]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC, 653, [19]-[20]; *Osman v United Kingdom* (1998) 29 EHHR 245, [115]. See, also, Concluding Observations of the Human Rights Committee, 9 November 1995, Hong Kong, para 11; Concluding Observations of the Human Rights Committee, 9 August 2005, Syrian Arab Republic, para 9; Concluding Observations of the Human Rights Committee, 1 December 2005, Brazil, para 13; the United Nations Basic Principles of the Use of Force and Firearms by Law Enforcement Officials (UN Force and Firearms Principles); and the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal Executions.

1.67 In this respect, the committee notes that the measures in question are drafted so broadly as to allow ASIS to support the ADF in activities that may include militarily targeting Australians and other persons overseas (including targeted killings as an alternative to arrest and trial).

1.68 The committee therefore considers that this aspect of the bill engages, and may limit, the rights to life and to a fair trial. The committee considers that the breadth of the measures is such that the limitation is not proportionate to achieving the legitimate objective.

1.69 **The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to life, and in particular whether the limits imposed on human rights by the amendments are proportionate to achieving the legitimate objective of ensuring Australia's national security.**

***Rights to equality and non-discrimination***

1.70 The rights to equality and non-discrimination are protected by articles 2, 16 and 26 of the ICCPR.

1.71 These are fundamental human rights that are essential to the protection and respect of all human rights. They 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 without discrimination to the equal and non-discriminatory protection of the law.

1.72 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[23] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[24] 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.[25]

*Providing for ASIS to support the ADF*

1.73 Schedule 2 of the bill would amend the ISA to enable the Minister for Foreign Affairs to give an authorisation to ASIS to undertake activities for a purpose which includes producing intelligence on a specified class of Australian persons or to

23 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.

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

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

undertake activities that will, or are likely to, have a direct effect on a specified class of Australian persons. This class authorisation would only apply in relation to ASIS support to the ADF following a request from the Minister for Defence.

1.74 The committee notes that the statement of compatibility does not separately identify this measure as engaging human rights and therefore does not explain why it is necessary in pursuit of a legitimate objective.

1.75 As a result of these proposed amendments, ASIS would be able to collect intelligence on an Australian person, including using surveillance techniques on that person, simply because that person belongs to a specified class. The committee is concerned that in the absence of detailed legislative criteria for the determination of a class of persons, a class of persons may include, for example, all Australian persons:

- adhering to certain religious beliefs;
- adhering to certain political or ideological beliefs; or
- who have certain ethnic backgrounds.

1.76 While the committee acknowledges that there are a number of safeguards in the ISA,[26] the committee considers that a class authorisation power has the potential to apply intrusive interrogation powers to a group, which do not apply to the broader community and as such could be indirectly discriminatory because, although neutral on its face, it disproportionately affects people with a particular personal attribute such as religious or political belief, or ethnic background.

1.77 **The committee therefore seeks the advice of the Attorney-General as to whether the amendments in Schedule 2 are compatible with the right to equality and non-discrimination, and in particular whether the limits imposed on human rights by the amendments are in pursuit of a legitimate objective, and are proportionate to achieving that objective.**

**Prohibition against torture, cruel, inhuman or degrading treatment**

1.78 Article 7 of the ICCPR and the Convention against Torture provide an absolute prohibition against torture, cruel, inhuman or degrading treatment or punishment. This means torture can never be justified under any circumstances. The aim of the prohibition is to protect the dignity of the person and relates not only to acts causing physical pain but also those that cause mental suffering. Prolonged solitary confinement, indefinite detention without charge, corporal punishment, and medical or scientific experiment without the free consent of the patient, have all

26 For example, the Minister must be satisfied of the preconditions set out in subsection 9(1) of the ISA. The Minister must also be satisfied that: the class relates to support to the Defence Force in military operations as requested by the Minister for Defence; and all persons in the class of Australian persons is, or is likely to be, involved in one or more of the activities set out in paragraph 9(1A)(a).

been found to breach the prohibition on torture or cruel, inhuman or degrading treatment.

1.79 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;
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

*Providing for ASIS to support the ADF*

1.80 The amendments proposed in Schedule 2 raise broader issues in relation to the ISA and in particular the lack of a specific prohibition on acts that may constitute torture or cruel, inhumane or degrading treatment.

1.81 Under the ISA, ASIS staff are not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency.[27] ASIS staff also have civil and criminal immunity in certain circumstances for acts done inside Australia.[28] ASIS staff may be involved in a range of intelligence gathering activities so long as they do not involve planning for, or undertaking, paramilitary activities, violence against the person, or the use of weapons (other than the provision and use of weapons or self-defence techniques). However, torture or cruel, inhuman or degrading practices, is not specifically mentioned. A range of techniques may constitute torture or cruel, inhuman or degrading practices, that do not fall within the prohibition of violence against the person. This may include, for example, death threats, hooding, stress positions or deprivation of food or water.

1.82 In addition, the prohibition on ASIS staff undertaking paramilitary activities, undertaking acts that involve violence against the person, or the use of weapons does not preclude ASIS staff being involved in the planning of the activities to be carried out by other organisations.

1.83 Australia's obligation to prohibit torture is absolute. Accordingly, to comply with Australia's obligations under the ICCPR and CAT, when providing for civil and criminal immunities for acts done by ASIS, there should be a clear and explicit prohibition on acts or support for torture or cruel, inhuman or degrading treatment or punishment.

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27 Section 14 (1) of the Intelligence Service Act 2001.

28 Section 14 (2) of the Intelligence Service Act 2001.

1.84 **The committee therefore recommends that, to be compatible with human rights, the ISA be amended to explicitly provide that no civil or criminal immunity will apply to acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.**

1.85 **The committee also recommends that, to be compatible with human rights, the ISA be amended to explicitly provide that ASIS must not provide any planning, support or intelligence where it may result in another organisation engaging in acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.**

# Statute Law Revision Bill (No. 2) 2014

*Portfolio: Attorney-General*
*Introduced: House of Representatives, 22 October 2014*

## Purpose

1.86 The Statute Law Revision Bill (No. 2) 2014 (the bill) seeks to:

- amend 35 Acts to correct technical errors and 49 Acts to replace references to 'servants' with references to 'employees';
- amend the *Acts Interpretation Act 1901* and *Defence Act 1903* to remove gender-specific language;
- amend the *Broadcasting Services Act 1992*, *Parliamentary Entitlements Act 1990*, *Radiocommunications Act 1992* and *Telecommunications Act 1997* to repeal spent and obsolete provisions;
- amend the *Snowy Mountains Engineering Corporation Limited Sale Act 1993* to make an amendment consequential on a repeal; and
- repeal the *Conciliation and Arbitration (Electricity Industry) Act 1985*, *Immigration (Education) Charge Act 1992* and *Snowy Mountains Engineering Corporation Act 1970*.

## Committee view on compatibility

1.87 The statement of compatibility for the bill notes that it does not engage any human rights issues. However, the committee considers that aspects of the bill engage and promote human rights.

1.88 Amending the *Acts Interpretation Act 1901* and *Defence Act 1903* to remove gender-specific language ensures that legal obligations apply regardless of gender, and thereby promotes the right to equality and non-discrimination in articles 2, 16 and 26 of the International Covenant on Civil and Political Rights.

1.89 Amending 49 Acts to replace references to 'servants' with references to 'employees' promotes the right to gain a living by work freely chosen in article 6 of the International Covenant on Economic, Social and Cultural Rights.

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

# Telecommunications Legislation Amendment (Deregulation) Bill 2014

# Telecommunications (Industry Levy) Amendment Bill 2014

*Portfolio: Communications*
*Introduced: House of Representatives, 22 October 2014*

## Purpose

1.91 The Telecommunications Legislation Amendment (Deregulation) Bill 2014 seeks to:

- repeal the *Telecommunications Universal Service Management Agency Act 2012* to abolish the Telecommunications Universal Service Management Agency (TUSMA);
- repeal the *Telecommunications (Universal Service Levy) Act 1997* to remove the redundant universal service levy;
- transfer TUSMA's functions and contractual responsibilities to the Department of Communications;
- amend the *Australian Communications and Media Authority Act 2005*, *Export Market Development Grants Act 1997* and *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Consumer Protection Act) to make amendments consequential on the regulation of the supply of telephone sex services via a standard telephone service being removed from the Consumer Protection Act;
- amend the *Do Not Call Register Act 2006* to enable an indefinite registration period for numbers on the register;
- amend the *Telecommunications Act 1997* to remove the arrangements for the Australian Communications and Media Authority to register e-marketing industry codes and reduce obligations on telecommunications providers to provide pre-selection;
- amend the *Australian Communications and Media Authority Act 2005* and *Telecommunications Act 1997* to remove certain record-keeping and reporting requirements;
- amend the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to remove gazettal publishing requirements; and
- reduce requirements on carriage service providers in relation to customer service guarantees.

1.92 The Telecommunications (Industry Levy) Amendment Bill 2014 seeks to amend the *Telecommunications (Industry Levy) Act 2012* to provide that the imposition of the industry levy will continue to operate under the

*Telecommunications (Consumer Protection and Service Standards) Act 1999* following the repeal of the *Telecommunications Universal Service Management Agency Act 2012*.

## Committee view on compatibility

### Rights of the child

1.93 Children have special rights under human rights law taking into account their particular vulnerabilities. Under a number of treaties, particularly the Convention on the Rights of the Child (CRC), children's rights are protected. All children under the age of 18 years are guaranteed these rights.

1.94 The rights of children includes the right of children to develop to the fullest; protection from harmful influences, abuse and exploitation; family rights; and access to health care, education and services that meet their needs.

1.95 Under article 19 of the CRC, Australia is required to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of harm

*Repeal of Part 9A of the Consumer Protection Act*

1.96 The bill would repeal Part 9A of the Consumer Protection Act, which regulates the supply of telephone sex services via a standard telephone service. The explanatory memorandum (EM) states that Part 9A is outdated and no longer necessary due to changes in technology and consumer behaviour.[1]

1.97 The statement of compatibility for the bill states that no human rights have been engaged by this amendment. However, the committee considers that, as Part 9A was introduced in order to address community concerns that telephone sex services were too easily accessed by children, the deregulation of these services may expose children to a risk of harm currently minimised under Part 9A. Accordingly, the committee considers that the measure engages article 19 of the CRC and the obligation to protect children from harm.

1.98 **The committee therefore seeks the advice of the Minister for Communications as to whether the proposed repeal of Part 9A of the Consumer Protection Act is compatible with the rights of the child, and particularly:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

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1 EM 102.

# Treasury Legislation Amendment (Repeal Day) Bill 2014

*Portfolio: Treasury*
*Introduced: House of Representatives, 22 October 2014*

## Purpose

1.99 The Treasury Legislation Amendment (Repeal Day) Bill 2014 (the bill) seeks to amend the *Superannuation Industry (Supervision) Act 1993*, the *Taxation Administration Act 1953*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, and the *Taxation Administration Act 1953*.

1.100 The bill would seek to make the following amendments:

- Schedule 1 would amend the *Superannuation Industry (Supervision) Act 1993* to repeal the payslip reporting provisions;
- Schedule 2 would consolidate duplicated taxation administration provisions contained in various taxation Acts into a single set of provisions in Schedule 1 to the *Taxation Administration Act 1953*, repeal spent or redundant taxation laws, and move longstanding regulations into the primary law;
- Schedule 3 would amend the *Financial Sector (Shareholdings) Act 1998* to remove the deemed shareholding applied to an associate where the associate has no actual shareholding in the company; and
- Schedule 4 would rewrite provisions from the *Income Tax Assessment Act 1936* into the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* in order to define 'Australia' for income tax purposes.

## Committee view on compatibility

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

# Deferred bills and instruments

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

**Acts and Instruments (Framework Reform) Bill 2014**

**Australian Citizenship and Other Legislation Amendment Bill 2014**

**Counter-Terrorism Legislation Amendment Bill (No. 1) 2014**

**Migration Amendment (Character and General Visa Cancellation) Bill 2014**

**Omnibus Repeal Day (Spring 2014) Bill 2014**

**Racial Discrimination Amendment Bill 2014**

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

**Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014**

**Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) Amendment List 2014 (No. 2) [F2014L00970]**

**Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) Amendment List 2014 [F2014L01184]**

**Criminal Code (Terrorist Organisation—Islamic State) Regulation 2014 [F2014L00979]**

# Chapter 2 - Concluded matters

This chapter list matters previously raised by the committee and considered at its meeting on 24 November 2014. The committee has concluded its examination of these matters on the basis of responses received by the proponents of the bill or relevant instrument makers.

## Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014

*Portfolio: Immigration and Border Protection*
*Authorising legislation: Migration Act 1958*
*Last day to disallow: 17 July 2014 (Senate)*

### Purpose

2.1 The Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622] (the regulation) amends Part 1 and Schedules 1 and 2 to the Migration Regulations 1994 to provide for the repeal of the following classes of visa from 2 June 2014:

- the Aged Dependent Relative visa classes and subclasses (for a person who is single, meets the aged requirements and both is, and has for a reasonable period been, financially dependent on their Australian relative);
- the Remaining Relative visa classes and subclasses (for a person whose only near relatives are those usually resident in Australia);
- the Carer visa classes and subclasses (for a person to care for a relative in Australia with a long-term or permanent medical condition or for a person to assist a relative providing care to a member of their family unit with a longterm or permanent medical condition); and
- the Parent and Aged Parent visa classes and subclasses (for a person who is the parent of an Australian citizen, Australian permanent resident or eligible New Zealand citizen, and where the parent does not pay a significant financial contribution towards their own future health, welfare and other costs in Australia).

### Background

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

## Committee view on compatibility

### *Right to protection of the family*

*Repeal of visa classes for relatives*

2.3 The committee requested the Minister for Immigration and Border Protection's further advice on the compatibility of the repeal of the specified visa classes with the protection of the family, and particularly:

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

## Minister's response

> The Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 was disallowed by the Senate on 25 September 2014.[1]

## Committee response

2.4 **The committee thanks the Minister for Immigration and Border Protection for his response. The committee notes that the instrument has been disallowed and has therefore concluded its examination of the matter.**

1 See Appendix 1, Letter from the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 21 October 2014) 4.

# Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014

*Portfolio: Immigration and Border Protection*
*Authorising legislation: Migration Act 1958*
*Last day to disallow: 26 June 2014 (Senate)*

## Purpose

2.5 The Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286] (the regulation) amends the Migration Regulations 1994 and the Australian Citizenship Regulations 2007 in relation to visa evidence charges, members of the family unit for student visas, skills assessment validity, foreign currencies and places, substitution of AusAID references, Australian citizenship fees and other measures, and infringement notices.

## Background

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

## Committee view on compatibility

### *Right to privacy*

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

2.7 The committee sought the Minister for Immigration and Border Protection's further advice on whether Schedule 6 to the regulation is a proportional measure, with regard to the requirements for including details of previous names on the back of citizenship certificates noting that this was not required for passports.

## Minister's response

> The committee sought my advice regarding the right to privacy and this was provided to the committee. The committee has since stated that a passport is a foundational identity document and that the committee considers the requirements in relation to citizenship certificates to be more intrusive on an individual's privacy. I have provided my advice on why I am of the view that Schedule 2 (sic) of the regulation is a proportionate measure and I do not intend to provide comparative advice as to the rationale or requirements of a travel document, not subject to amendment by this regulation, used for different purposes and under the responsibility of a different portfolio.[1]

1 See Appendix 1, Letter from the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 21 October 2014) 5.

## Committee response

2.8 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.9 The minister in his previous response to the committee in relation to this bill stated that notices of evidence of citizenship are treated as a foundation identity document by many Australians and recording the particulars of previous names on the back of a notice of evidence of citizenship helps prevent misuse of identity.

2.10 As the committee has noted, the inclusion of previous names engages and limits the right to privacy, particularly where a change of name may reveal a change of gender. Given this, it is incumbent on the minister to show that this limitation on the right to privacy is reasonable, necessary and proportionate.

2.11 In considering whether a limitation on a right is proportionate, it is relevant to consider whether there are other less restrictive ways to achieve the same aim. Accordingly, the committee raised the fact that a passport does not include past names whilst also being a foundational document for proving identity, to illustrate why the inclusion of previous names on citizenship certificates may not be necessary, and may therefore not be a proportionate limitation on the right to privacy.

2.12 It was for this reason that the committee sought further information, in order to determine that the measures were compatible with human rights, particularly in relation to the proportionality of the measure. The minister has declined to provide the information that the committee requested.

2.13 **The committee therefore considers that, on the information available, the measure in Schedule 6 of the regulation is likely to be incompatible with the right to privacy.**

***Rights to equality and non-discrimination***

*Impact of release for persons who have undergone sex or gender reassignment procedures*

2.14 The committee sought the minister's further advice on whether the regulations are consistent with the Australian Government Guidelines on the Recognition of Sex and Gender.

## Minister's response

> The proposed regulations are consistent with the Australian Government Guidelines on Recognition of Sex and Gender. The regulations already allow for previous names and dates of birth to be printed on the back of an evidence of Australian citizenship, the proposed amendments simply expand the range of information to include the date of any notice of evidence of Australian citizenship previously given to the person.
>
> The Guidelines recognise the importance of departments ensuring the continuity of the record of an individual's identity. In addition, 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 individual.
>
> The Guidelines refer to the importance of the Information Privacy Principles in managing use and disclosure of personal information possessed or controlled by the Department, stating that these principles should also apply to information relating to a person's sex and/or gender. Those principles have now been replaced by the Australian Privacy Principles. The proposed regulation complies with APP 6, concerning use and disclosure of personal information, and APP 11 concerning security of personal information.
>
> As has been stated previously, persons holding a notice of evidence maintain control over who or what organisation they disclose the notice to and for what purpose. In addition, the Australian Citizenship Instructions provide that officers have the discretion not to include previous names and/or dates of birth, for example if they are satisfied that the inclusion of a particular name will endanger the individual or another person connected to them. [2]

## Committee response

2.15 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.16 The committee notes that, in July 2013, the government introduced *Australian Government Guidelines on the Recognition of Sex and Gender* in order to better protect individuals who identify as sex and/or gender diverse from discrimination in their interactions with government, and to give those individuals greater control over the recording of their sex and/or gender in government documents. The minister's response does not explain how individuals have control over the recording of changes of name on their citizenship certificate. Moreover a person cannot control who asks for evidence of citizenship and for what purpose it is requested. The committee considers control over the recording of previous names is important for individuals who are sex and/or gender diverse in managing their interactions with government departments in a manner that respects equality and is non-discriminatory. Such control ensures that individuals who are sex and/or gender diverse do not have to reveal their sex and/or gender status in their interactions with

2 See Appendix 1, Letter from the Hon Scott Morrison, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 21 October 2014) 5-6.

government departments where it is not relevant and as such ensures the least possible limitation on the right to privacy.

2.17 **The committee therefore considers that, on the information available, Schedule 6 of the regulations is likely to be incompatible with the right to equality and non-discrimination.**

# National Security Legislation Amendment Bill (No 1) 2014

*Portfolio: Attorney-General*
*Introduced: House of Representatives, 16 July 2014*

## Purpose

2.18 The National Security Legislation Amendment Bill (No. 1) 2014 (the bill) seeks to amend the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) and the *Intelligence Services Act 2001* (the IS Act) to implement the government's response to recommendations of the Parliamentary Joint Committee on Intelligence and Security's Report of Inquiry into Potential Reforms of Australia's National Security Legislation (PJCIS report).[1]

2.19 The bill would expand ASIO's intelligence-collection powers by:

- enabling it to obtain intelligence from a number of computers (including a computer network) under a single computer access warrant, including computers at a specified location or associated with a specified person;
- allowing ASIO to use third-party computers and communications in transit to gain access to a target computer under a computer access warrant;
- establishing an identified person warrant for ASIO to utilise multiple warrant powers against an identified person of security concern;
- allowing the search warrant, computer access, surveillance devices and identified person warrant provisions to authorise access to third-party premises to execute a warrant; and
- allowing the use of force at any time during the execution of a warrant, not just on entry.

2.20 In addition, the bill would:

- introduce an evidentiary certificate regime in relation to special intelligence operations and specific classes of warrants issued under the ASIO Act;
- provide protection from criminal and civil liability for ASIO employees and affiliates, in relation to authorised special intelligence operations, subject to appropriate safeguards and accountability arrangements;
- provide ASIO with the ability to co-operate with the private sector;
- enable breaches of section 92 of the ASIO Act (publishing the identity of an ASIO employee or affiliate) to be referred to law enforcement for investigation;

1 Parliamentary Joint Committee on Intelligence and Security, *Report of Inquiry into Potential Reforms of Australia's National Security Legislation* (June 2013).

- enable the minister responsible for ASIS to authorise the production of intelligence on an Australian person who is, or is likely to be, involved in activities that pose a risk to, or are likely to pose a risk to, the operational security of ASIS;
- expand the power of ASIS to co-operate with ASIO, without ministerial authorisation, when undertaking less intrusive activities to collect intelligence relevant to ASIO's functions on an Australian person or persons overseas in accordance with ASIO's requirements;
- expand the ability of ASIS to train staff members of a limited number of approved agencies that are authorised to carry weapons in the use of weapons and self-defence;
- provide that ASIS, in limited circumstances, is not restricted from using a weapon or self-defence technique in a controlled environment (such as a gun club or rifle range or martial arts club);
- extend the immunity available to a person who does an act preparatory to, in support of, or otherwise directly connected with, an overseas activity of an IS Act agency to an act done outside Australia;
- increase the penalties for existing unauthorised communication of information offences in the ASIO Act and the IS Act from two to 10 years;
- extend the existing unauthorised communication offences in the IS Act to the Defence Intelligence Organisation (DIO) and the Office of National Assessments (ONA);
- create a new offence in the ASIO Act and the IS Act, punishable by a maximum of three years imprisonment, for intentionally dealing with a record in an unauthorised way; and
- create a new offence in the ASIO Act and the IS Act, punishable by a maximum of three years' imprisonment, for intentionally making a new record of information or matter without authorisation.

## Background

2.21 The committee reported on the bill in its *Thirteenth Report of the 44th Parliament*.

2.22 The bill was passed by both Houses of Parliament, and received Royal Assent on 5 September 2014.

## Committee view on compatibility

### *Multiple rights*

2.23 The committee noted that the measures in Schedules 2 to 6 of the bill engage a number of human rights, including:

- the right to security of the person and the right to be free from arbitrary detention;[2]
- the right to an effective remedy;[3]
- the right to freedom of expression;[4]
- the right to freedom of movement;[5]
- the right to a fair trial;[6] and
- the right to privacy.[7]

*Inadequate statement of compatibility*

2.24 The statement of compatibility for the bill provided a description of the proposed measures in the bill and generally identified the human rights engaged. The committee noted that many of the measures represented serious limitations on a range of human rights, and noted that the general descriptions provided in the statement of compatibility were insufficient for the committee to assess the limits on human rights as justified.

2.25 The committee sought the advice of the Attorney-General as to whether each of the measures in Schedules 2, 3, 4, 5, and 6 of the bill are compatible with Australia's international human rights obligations, and for each individual measure limiting human rights:

- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

## Minister's response

> I am aware that the Committee has expressed a view that the Statement does not provide sufficient information for it to conduct any assessment of whether various provisions in the Bill (now Act) constitute permissible limitations on the rights engaged and, therefore, to reach a conclusion on whether the Bill (now Act) is compatible with human rights.

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

3 Article 2 of the ICCPR.

4 Article 19 of the ICCPR.

5 Article 12 of the ICCPR.

6 Article 14 of the ICCPR.

7 Article 17 of the ICCPR.

## Committee response

2.26 **The committee thanks the Attorney-General for his response.**

2.27 The committee acknowledges the Attorney-General's remarks on the committee's requirements in relation to statements of compatibility. The committee also acknowledges the Attorney-General's remarks on the committee's approach more generally to fulfilling its function of examining legislation for compatibility with human rights, and reporting to both Houses of Parliament. The committee welcomes dialogue on such matters as an opportunity to clarify and promote better understanding of the committee's expectations and processes.

2.28 The committee notes that the second reading speech to the then Human Rights (Parliamentary Scrutiny) Bill 2010 identified dialogue on human rights as a reason for establishing the committee, and requiring statements of compatibility to be prepared for proposed legislation. It states:

> Essentially the implementation of these two measures - statements of compatibility on human rights and a new Joint Parliamentary Committee on Human Rights establish a dialogue between the Executive, the Parliament and ultimately the citizens they represent.[8]

2.29 As the second reading speech also makes clear, these two aspects of the Act are designed to:

> …improve parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of the human rights issues in Australia'.[9]

2.30 Accordingly, the committee's request for further information should be seen in the context of a dialogue around the human rights compatibility of the measures in the bill.

## Minister's response

> The Committee's principal concern appears to be that the Statement deals collectively with a number of related or 'like' measures that have been identified in the Statement as engaging identical rights in an identical or substantially similar way, and are consequently supported by an identical or substantially similar justification. (I note that this approach has been explained in the introduction to the Statement at p. 6 of the Revised Explanatory Memorandum.)

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8 Hon. Mr McClelland MP (Attorney-General), Second Reading Speech on the Human Rights (Parliamentary Scrutiny) Bill 2010, *House of Representatives Hansard,* Thursday, 30 September 2010, 271.

9 Hon. Mr McClelland MP (Attorney-General), Second Reading Speech on the Human Rights (Parliamentary Scrutiny) Bill 2010, *House of Representatives Hansard,* Thursday, 30 September 2010, 271.

> The Committee appears to have recently adopted a preference that Statements should include an itemised analysis of individual measures (per p. 9 of its report). The Committee further appears to suggest (at pp. 8-9 of its report) that its expectation in this regard is conveyed in *Practice Note 1* (issued by the Committee as constituted in September 2012) and in the guidance materials published by my Department, which supports me in administering the *Human Rights (Parliamentary Scrutiny) Act 2011*, under which the Committee is established.

## Committee response

2.31 **The committee thanks the Attorney-General for his response.**

2.32 However, the committee's remarks are to be understood in the context of it identifying measures that significantly engage human rights. There has been no change in the committee's approach which has always been to seek further information where the analysis in the statement of compatibility was inadequate or insufficient.

2.33 In the committee's initial analysis of the bill, the committee noted that four new warrant powers granted to ASIO by Schedule 2 of the bill were the subject of a single analysis against the right to privacy. The committee considered that each of the four warrant powers needed to be shown by the Attorney-General, as the proponent of the legislation, to be a reasonable, necessary and proportionate limitation on the right to privacy. The warrant powers involve serious limitations of the right to privacy. As the statement of compatibility noted, the warrant powers would:

> enable ASIO to exercise a wide range of powers such as entering and searching people's homes and places of business, searching a person on or near specified premises, access their computer or computers at their workplace or computers of friends and associates at their premises, interfering with data and using surveillance devices to record, listen to or track a person.[10]

2.34 As each warrant power would permit different activities in differing contexts, those warrant powers will have varied and distinct engagements with the right to privacy. Accordingly, it is not possible to undertake a single assessment (as was provided in the statement of compatibility) of their reasonableness, necessity and proportionality on the basis that they are each separate warrant-based intelligence gathering powers.

2.35 In light of the significance of the measure, the committee considers its requirement for an individual assessment of each warrant power as reasonable and consistent with the requirements of international human rights law.

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10 EM 11.

2.36 The committee also notes that the statement of compatibility prepared for the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, which the committee considered in its *Fifteenth Report of the 44th Parliament*, provided an excellent analysis of the human rights issues. The statement of compatibility appropriately identified the rights engaged and provided a detailed, yet succinct, analysis of why the measures should be considered compatible with human rights.

## Minister's response

> While acknowledging that this [an itemised analysis of measure in legislation] is the Committee's preference based on its interpretation of these materials, I do not agree with its apparent suggestion that there is a formal requirement that Statements must include "a separate and detailed analysis of each measure that may limit human rights" (at p. 9 of its report). More particularly, I do not agree with the Committee's contention that such an itemised account is necessary in order for it to discharge, or to document in its reports any demonstrable attempt to discharge, its statutory mandate to undertake an analysis of the human rights compatibility of Bills introduced to the Parliament (especially those Bills which may limit human rights).
>
> I note, in particular, that the guidance materials prepared by my Department, and endorsed in *Practice Note 1,* expressly provide that Statements "should describe, in general terms, the most significant human rights issues thought to arise on the Bill, together with the conclusions on compatibility". This is consistent with the intention, expressed in the Explanatory Memorandum to the Human Rights (Parliamentary Scrutiny) Bill 2010, that there is no prescribed form for Statements, which are "intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights" (at p. 4).
>
> As the Minister administering the *Human Rights (Parliamentary Scrutiny) Act 2011,* I place on record my concern that this Committee's apparent insistence upon a formal requirement to this effect - as a precondition to discharging its statutory scrutiny functions - may serve to undermine the policy objectives of the Human Rights (Parliamentary Scrutiny) Act which include to inform the Parliament of the significant human rights issues in legislation through the provision of concise and accessible Statements of Compatibility.

## Committee response

2.37 **The committee thanks the Attorney-General for his response.**

2.38 However, the committee regards its approach as being consistent with the requirements of international human rights law. It is a fundamental principle of international human rights law that proposed limitations of human rights must be justified as reasonable, necessary and proportionate in pursuit of a legitimate

objective. In this respect, while there is, as the Attorney-General notes, no prescribed form for statements of compatibility, section 8(3) the *Human Rights (Parliamentary Scrutiny) Act* requires an 'assessment' of whether proposed legislation is compatible with human rights. On the ordinary meaning of the term, and in the context of supporting a dialogue model for the consideration of human rights, the committee regards the requirement for an 'assessment' as more than a mere description of a measure accompanied by assertions as to its necessity and compatibility. As the committee has regularly stated, analytical reasoning and evidence is required as a basis for conducting human rights assessments of legislation.

2.39 The committee also notes that an insistence that the committee conclude its assessment of legislation on the basis of an inadequate statement of compatibility is inimical to the utility of the dialogue model described in the second reading speech to the Act. In this respect, the committee's remarks on the inadequacy of the statement of compatibility should not be taken as a 'contention' that the committee is not able to provide an analysis or reach conclusions as to the human rights compatibility of proposed legislation. Instead, they should be seen as seeking to promote, consistent with the Act, a dialogue to inform the committee's reports to the Houses of Parliament.

## Minister's response

> An insistence on such a form requirement has not been the practice of the previous Committee. The adoption of such a practice would, in my view, represent a departure from established practice in the drafting of Statements, under which related measures which limit human rights have often been analysed collectively, and have been relied upon by previous Committees to support findings of compatibility. For example, I refer the Committee to Statements of Compatibility for the Biosecurity Bill 2012, the Regulatory Powers (Standard Provisions) Bill 2012 and the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2013, and to statements of the former Chair, Mr Harry Jenkins.[11]

## Committee response

2.40 **The committee thanks the Attorney-General for his response.**

2.41 However, the committee's remarks accord with its longstanding expectation that, where a proposed measure significantly engages and limits (or may limit) human rights, an individual assessment of the measure is required. This expectation has been expressed previously. For example, in a speech by the former chair, Mr Harry Jenkins MP, in February 2013, he stated:

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11 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 23 October 2014) 1-2.

> Where limitations on rights are proposed, the committee expects the statement [of compatibility] to set out clear and adequate justification for each limitation and demonstrate that there is a rational and proportionate connection between the limitation and a legitimate policy objective.[12]

2.42 In light of these clarifying remarks, the committee welcomes further dialogue with the Attorney-General on the requirements of statements of compatibility as set out in the *Human Rights (Parliamentary Scrutiny) Act 2011.*

**Schedule 2–Improving ASIO's powers including in relation to warrants**

***Right to privacy***

*Expansion of ASIO's intelligence gathering powers under warrant*

2.43 Schedule 2 expands ASIO's warrant-based intelligence collection powers. Specifically, the Schedule would create four new warrant powers:

- computer access warrants;
- identified person warrants;
- surveillance devices warrants; and
- foreign intelligence warrants.

2.44 In its earlier report, the committee noted that a selective and generalised approach in the statement of compatibility to assessing the proposed new powers provided an insufficient basis for conducting an assessment of their compatibility with human rights.

2.45 The committee acknowledged that the stated objective of the measures may be regarded as a legitimate objective for human rights purposes. It noted that the proposed new warrant powers would involve significant limitations on human rights and that a foundational assessment of the powers that were augmented was required in addition to an individual assessment of each of the proposed new powers. The committee pointed to the absence of information going to the proportionality of the proposed new powers and noted that, in the absence of further information, the committee would not be able to conclude that the proposed powers are compatible with human rights.

## Minister's response

> The 38-page Statement accompanying the present Bill (now Act) provides, in my view, an adequate basis on which the Committee could have undertaken, or documented in its report a demonstrable attempt to

12 Mr Harry Jenkins MP, Chair, Parliamentary Joint Committee on Human Rights, speech to the NSW Bar Association Human Rights Committee Professional Development Seminar, 28 February 2013.

> undertake, an assessment of the compatibility of its substantive measures with those human rights obligations within its statutory remit.
>
> I do not intend to revise, on a retrospective basis, the Statement accompanying the Bill (now Act) that is the subject of this correspondence. Similarly, I do not intend to impose upon Commonwealth departments or agencies responsible for preparing Statements accompanying Government Bills a general form requirement to the effect of that described at p. 9 of the Committee's report.[13]

## Committee response

2.46 **The committee thanks the Attorney-General for his response.**

2.47 As noted in the committee's initial assessment of the bill, the statement of compatibility provides detailed descriptions of each of the four new warrant powers and then provides a single analysis of how the new warrant powers are a justifiable limitation on the right to privacy. As stated above, the committee does not consider the single analysis sufficient as those warrant powers will have varied and distinct engagements with the right to privacy.

2.48 The statement of compatibility and the Attorney-General's response highlight the existence of safeguards as demonstrating that the warrant powers are proportionate to the right to privacy. Those safeguards include oversight by the Inspector General of Intelligence and Security (IGIS), parliamentary scrutiny of budgets and administration by the PJCIS, and the Attorney-General's Guidelines which are issued under the ASIO Act. The committee acknowledges that these are important safeguards but notes that the IGIS has no role prior to the issuing of a warrant, and only can review the legality and procedural appropriateness of the issuing of the warrant after the fact. Prior to the issuing of a warrant, the IGIS has no role to consider whether, in all the circumstances, the warrant should be issued based on the information provided by ASIO.

2.49 In addition, the warrant powers are not subject to independent judicial oversight. In this respect, the oversight mechanisms of ASIO are less rigorous than those which apply to other law enforcement agencies. The committee has not been provided with any information as to how existing safeguards are sufficient in the absence of judicial oversight, notwithstanding the significant increase in ASIO warrant-based intelligence powers.

2.50 **On the information provided, the committee considers that the ASIO warrant powers provided by Schedule 2 are likely to be incompatible with the right to privacy because the warrant powers appear to impose a disproportionate limit on that right.**

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13 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 23 October 2014) 1-2.

***Right to security of the person***

*Use of force in the execution of a warrant*

2.51 Schedule 2 provides that reasonable and necessary force may be used at any time during the execution of a warrant and not just on entry. Force may be used against both property and persons.

2.52 The statement of compatibility correctly identifies this measure as engaging and limiting the right to security of the person, and states that they are necessary. The statement of compatibility does not explicitly identify the legitimate objective of the amendments. Accordingly, the legitimate objective of the amendments has not been established. Even if a legitimate objective could be inferred, the committee considers that the need for the amendments has also not been demonstrated.

2.53 The statement of compatibility explains that when executing a warrant, circumstances may require the use of force to obtain access to a thing, and against a person who tries to obstruct the execution of a search warrant. The statement of compatibility also notes that in most instances 'there would be no call to use force against a person'. In assessing the measure as compatible with the right to security, it states that:

> In most cases, police officers accompany ASIO when undertaking searches and the police would exercise the power to use reasonable force against a person where it was both reasonable and necessary for the purposes of executing the warrant. Any use of force in accordance with these provisions would be lawful and would not be arbitrary as it would be reasonable and necessary in the particular circumstances. In these circumstances, it would also be proportionate to ensuring that an appropriately authorised search warrant could be exercised.[14]

2.54 The statement of compatibility does not explain when or why it will be necessary for ASIO officers (rather than the police) to use force against a person. The committee notes that the PJCIS report did not recommend that ASIO officers be given the power to use force against persons, because such powers are unnecessary as they are already available to police officers accompanying ASIO during searches.

2.55 The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is]

14 EM 15.

important'.[15] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

2.56 **Accordingly, on the information provided, the committee considers that the powers to use force against persons provided by Schedule 2 are likely to be incompatible with the right to security of the person because the powers limit that right without appearing to be necessary to achieve a legitimate objective.**

**Schedule 3 – Protection for Special Intelligence Operations**

***Right to an effective remedy***

***Right to a fair trial***

*ASIO Special Intelligence Operations*

2.57 Schedule 3 establishes a statutory framework for the conduct by ASIO of special intelligence operations (SIOs). Key elements of the SIO scheme include:

- granting protection to a participant in an authorised SIO from civil and criminal liability in limited circumstances (new section 35K);
- providing statutory guidance in the exercise of this discretion in relation to the admission of evidence in judicial proceedings of information obtained as part of a SIO (new section 35A);
- allowing for a certificate to be issued under the scheme to create a rebuttable presumption as to the existence of the factual basis on which the criteria for issuing a SIO were satisfied (new section 35R); and
- creating two new offences, one being an aggravated offence, in relation to the unauthorised disclosure of information relating to a SIO (new section 35P).

2.58 The committee sought further information on whether these measures are compatible with Australia's international human rights obligations.

**Minister's response**

> The Government is firmly of the view that all measures in the Act are compatible with Australia's human rights obligations for the reasons set out in the Statement of Compatibility with Human Rights (Statement) accompanying the (then) Bill (now Act). All of the new or amended powers in the Act are accompanied by rigorous and appropriate safeguards, including independent oversight and reporting measures. These measures have been the subject of extensive Parliamentary scrutiny, including two

15 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx [accessed 8 July 2014].

> reviews by the Parliamentary Joint Committee on Intelligence and Security and bipartisan support of the Parliament.
>
> …
>
> The 38-page Statement accompanying the present Bill (now Act) provides, in my view, an adequate basis on which the Committee could have undertaken, or documented in its report a demonstrable attempt to undertake, an assessment of the compatibility of its substantive measures with those human rights obligations within its statutory remit.
>
> I do not intend to revise, on a retrospective basis, the Statement accompanying the Bill (now Act) that is the subject of this correspondence. Similarly, I do not intend to impose upon Commonwealth departments or agencies responsible for preparing Statements accompanying Government Bills a general form requirement to the effect of that described at p. 9 of the Committee's report.[16]

**Committee response**

2.59 The statement of compatibility explains that the Schedule implements the Government's response to recommendation 28 of the PJCIS report. The SIO scheme is stated to be similar to the AFP's controlled operations regime in Part IAB of the *Crimes Act 1914* (Crimes Act).

2.60 The statement of compatibility correctly notes that the scheme engages and limits the right to an effective remedy and the right to a fair trial,[17] and identifies the objective of the measure as being to ensure [ASIO's]…capacity to gain close access to sensitive information via covert means.

2.61 The scheme is said to be necessary because currently 'some significant investigations either do not commence or are ceased due to the risk that an ASIO employee or ASIO affiliate…could be exposed to criminal or civil liability'.[18] Prosecution of an ASIO officer is dependent on the exercise of a prosecutorial discretion, and the statement of compatibility states that 'a limited immunity is, as a matter of policy, considered preferable to prosecutorial and investigative discretion alone'.[19]

2.62 To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence

16 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 23 October 2014) 1-2.

17 EM 21.

18 EM 18.

19 EM19.

of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[20] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

2.63 The committee considers that the information provided in the statement of compatibility does not establish that the limitations on the right to an effective remedy and the right to a fair trial are aimed at a legitimate objective, in the sense of a pressing or substantial public policy concern. For example, no information on the number, type or nature of investigations thwarted by the lack of immunities is provided.

2.64 Even if it were accepted that the scheme was proposed in pursuit of a legitimate objective, there is no detailed or evidence-based discussion to show that a limited immunity is necessary, rather than the usual prosecutorial and investigative discretion to deal with criminal acts committed by ASIO officers in the course of their work. It is not a sufficient justification of a limit on rights to an effective remedy and to a fair trial to assert that a measure is 'considered preferable'.

2.65 Further, there is no detailed or evidence-based discussion to show that a limited immunity is a proportionate limit on rights to an effective remedy and to a fair trial. In terms of proportionality, the statement of compatibility states that the SIO scheme has a number of safeguards:

> These include the high level of authorisation required for SIOs, being the Minister, the exclusion of a range of offences for which immunity will be available, reporting requirements and the commencement provisions.[21]

2.66 The committee welcomes these safeguards. However, the committee notes that the PJCIS recommended a SIO scheme on the basis that such a scheme would be subject to similar safeguards and accountability arrangements as apply to law enforcement agencies conducting controlled operations under the Crimes Act. The committee notes that the SIO scheme has not been implemented with these recommended safeguards.

2.67 A comparison with safeguards that apply in respect of similar operations by the AFP under the Crimes Act illustrates that the safeguards in the SIO scheme are inadequate.

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20 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx [accessed 8 July 2014].

21 EM 21.

2.68 For example, the bill provides that a SIO may refer to an operation that is carried out for a purpose relevant to the performance of one or more 'special intelligence functions' and the circumstances are such as to justify the conduct of a SIO.[22] Special intelligence functions include: obtaining intelligence relevant to security, communicating intelligence for security purposes, obtaining foreign intelligence and cooperating with other intelligence and law enforcement bodies. This very broad definition would apply to most of ASIO's core operations. In contrast, the power to carry out similar functions under a controlled operation in the Crimes Act is limited to the purpose of obtaining evidence that may lead to the prosecution of a person for a 'serious Commonwealth offence'.[23]

2.69 Further, the test for authorising a SIO is that the minister must be satisfied that the operation 'will assist ASIO in the performance of one or more special intelligence functions'. In contrast, a similar operation under a controlled operations scheme under the Crimes Act must not be authorised unless an authorising officer is satisfied on reasonable grounds of a number of matters, including that a serious Commonwealth offence has been, is being, or is likely to be committed.

2.70 In addition, the SIO scheme provides immunity from civil and criminal liability to ASIO officers involved in a SIO, provided the statutory criteria are met. In contrast, participants in a controlled operations scheme under the Crimes Act have only criminal immunity if certain conditions are met, but preserves the civil liability of an officer for loss of or serious damage to property, and for personal injury, in the course of or as a direct result of a controlled operation, although the officer is indemnified by the Commonwealth.[24]

2.71 Finally, the requirements for the granting of authority to conduct a SIO are less stringent than those that apply for a controlled operation under the Crimes Act. For example, with respect to a SIO the request for authority need only provide the names of persons authorised to engage in conducted under the SIO and a description of the special intelligence conduct in which those persons are authorised to engage. In contrast, the formal authority for a controlled operation must specify a range of important details, including the principal law enforcement officer who is responsible for the conduct of the controlled operation. In addition, the formal authority for the controlled operation must specify the nature of the criminal activity in respect of which the controlled conduct is to be engaged in. It must also specify the nature of the controlled conduct that participants may engage in. It must also identify (to the extent known) the person or persons targeted.

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22 Paragraphs 35C(2)(a) and (b)

23 A serious Commonwealth offence is one that is punishable on conviction by imprisonment for a period of three years or more.

24 Sections 15HB, 15HF Crimes Act.

2.72 **On the information provided, the committee considers that the SIO scheme is likely to be incompatible with the right to an effective remedy and the right to a fair trial because the scheme appears to impose disproportionate limits on those rights.**

***Prohibition against torture, cruel, inhuman or degrading treatment***

*Immunity from prosecution for action part of special intelligence operations*

2.73 The committee recommended, for consistency with Australia's international obligations, that the term 'torture' used in the bill be defined by reference to the definition set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

## Minister's response

The provisions of new Division 4 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) expressly exclude conduct constituting torture from the new scheme of special intelligence operations. In particular, subparagraph 35C(2)(e)(ia) provides that the Attorney-General cannot grant an authority to conduct a special intelligence operation involving conduct that constitutes torture.

As an additional safeguard, subparagraph 35K(l)(e)(ia) provides that the limited immunity from legal liability in relation to conduct engaged in as part of an authorised special intelligence operation does not apply to conduct constituting torture.

As I indicated to the Senate on 25 September 2014, and as recorded in the Revised Explanatory Memorandum' to the Bill (at pp. 112 and 118), the Government is of the firm view that these prohibitions are declaratory of the existing legal position that no Australian agency or official can engage in torture under any circumstances. This is consistent with the established principle of legality in statutory interpretation.

As Gleeson CJ observed in *Al Kateb v Godwin* (2004) 219 CLR 562 at 577:

> *Courts do not impute to the legislature an intention to abrogate or curtain certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases. It is not new.*
>
> *A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.*

I further note the remarks of Mason CJ, Brennan, Gaudron and McHugh JJ in Coco v R (1994) 179 CLR 427 at 437 that, in order to accept an interpretation that a provision curtails a basic human right, it must be apparent that:

> *[T]he legislature has not only directed its attention to the question of the abrogation or curtailment of such basic human rights, freedoms or immunities, but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must clearly be manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.*

The express exclusions in sections 35C and 35K have been inserted for the sole purpose of providing explicit reassurance of this position, as sought by some members of the Parliament. As I advised the Senate in the debate of the Bill on 25 September, ASIO cannot, does not, and has never engaged in conduct constituting torture.

There can, in my view, be no sensible suggestion that such conduct is in any way relevant to, or necessary for, the performance by ASIO of its statutory functions. As such, conduct constituting torture is not, as a matter of law, capable of being the subject of a valid authority to conduct a special intelligence operation issued under section 35C. As the limited immunity from liability in section 35K applies only to conduct that is authorised, in advance, under section 35C, it is has no application to conduct constituting torture.

As the Committee has noted, the term 'torture' is not defined for the purposes of sections 35C and 35K. As noted at p. 27 of the Statement of Compatibility, the term is undefined to ensure that it will be interpreted consistently with Australia's international human rights obligations to prohibit torture, in accordance with established principles of statutory interpretation.

I note that the Committee has stated (at p. 12 of its report) it is "concerned that torture ... would be a matter of statutory interpretation by the courts". In my view, the approach taken in the Act serves to enhance, rather than detract from, the compatibility of the Bill with Australia's international human rights obligations to prohibit torture, having regard to the principle of legality in my remarks above. The drafting of the provisions mean that it is open to a court, should a matter proceed to prosecution or litigation, to examine the term in light of Australia's human rights obligations and any relevant, contemporary international law jurisprudence. (Similarly, it would be open to other oversight or scrutiny bodies empowered to examine matters of human rights compliance - including the Inspector-General of

Intelligence and Security, or the Australian Human Rights Commission - to apply such an interpretation.)

Further, the Explanatory Memorandum expressly provides, at pp. 112 and 118, that the term 'torture' as it is used in subparagraphs (e)(ia) of subsections 35C(2) and 35K(l) is intended to be interpreted consistently with the definition of that term in the Convention Against Torture. The commentary in the Explanatory Memorandum is relevant to the application of the principles of statutory interpretation set out in section l 5AB of the *Acts Interpretation Act 1901* to sections 35C and 35K of the ASIO Act. (Subsection 15AB(l) provides that a court may have recourse to extrinsic materials, including an Explanatory Memorandum, to confirm the ordinary meaning of a provision, or to determine the meaning of a provision in the event of ambiguity or if it is considered that the ordinary meaning would produce a manifestly absurd or unreasonable result.)

In addition, I note that the Government's amendment to insert subparagraph (e)(ia) in each of subsections 35C(2) and 35K(l) received unanimous support when I moved them in the Committee stage of debate in the Senate on 25 September 2014. The meaning of the term 'torture' was examined in detail at that time, and was expressly supported by the Opposition and members of the cross-bench. (See *Senate Hansard*, 25 September 2014, p. 117.)[25]

## Committee response

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

*Authorising torture in special intelligence operations*

2.75 The Attorney-General states that the provisions of new Division 4 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) expressly exclude conduct constituting torture from the new scheme of special intelligence operations (SIO). The committee considers that this is not accurate. New Division 4 of Part III of the ASIO Act does not expressly exclude conduct constituting torture from the new scheme of SIOs.

2.76 In order to authorise a SIO, the minister must be 'satisfied that there are reasonable grounds on which to believe' that any conduct will not constitute torture. Accordingly, the terms of the provisions are directed to the approval process, and require the minister to form a belief on reasonable grounds. The provisions are not a statutory prohibition on torture.

2.77 The Attorney-General also states that conduct constituting torture is not, as a matter of law, capable of being the subject of a valid authority to conduct a SIO. However, conduct is not the subject of the minister's authority. Rather, the minister

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25 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 23 October 2014) 3-5.

authorises a SIO, satisfied that there are reasonable grounds on which to believe that any conduct involved in the operation will not constitute torture. If the minister's authority is properly given, later conduct involved in the operation may nevertheless constitute torture, and the minister's authority remains valid.

*Immunity for torture in special intelligence operations*

2.78 In the absence of a prohibition against torture, the legislation relies on the threat of civil or criminal liability should torture occur. The Attorney-General states that subparagraph 35K(l)(e)(ia) provides immunity from legal liability in relation to conduct engaged in as part of a SIO provided those acts do not constitute torture.

2.79 The committee notes that this provision is not a prohibition against torture. It operates as a safeguard only to the extent that an officer in a SIO will face the risk of civil or criminal liability if they engage in acts that constitute torture.

2.80 Further, the denial of immunity is only for 'engaging in any conduct that constitutes torture'. Immunity is available for all conduct that is not covered by the term 'torture' in the legislation. This could include conduct that is torture as defined by the Convention, and could include conduct which is likely to (but does not actually) cause others to engage in torture.

*Defining torture*

2.81 Under Division 274 of the Criminal Code the term 'torture' is defined in Australian law consistently with the definition in the Convention and applies to the conduct of a person who is a public official, acting in an official capacity, or acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity. The committee notes that the bill defines torture differently, for conduct by the same category of persons.

2.82 The Attorney-General agrees with the committee that the term 'torture' is not defined for the purposes of sections 35C and 35K, and states that the term will be interpreted consistently with Australia's international human rights obligations to prohibit torture in accordance with established principles of statutory interpretation. The Attorney-General refers to two matters to explain 'established principles of statutory interpretation'. The first is the principle of legality, and the second is section 15AB of the *Acts Interpretation Act 1901*. Each of these principles is discussed below.

*Principle of legality*

2.83 The principle of legality protects 'fundamental rights' recognised in common law. The principle of legality, as it has been expounded in Australia, takes no account of human rights recognised in international law.

2.84 The principle of legality arises only when a court believes that legislation may limit a common law fundamental right. If legislation does limit such a right, then the principle of legality enables the court—unless the legislature's intention is clear—to preserve the right by statutory interpretation.

2.85 There is no list of fundamental rights recognised in common law; the courts identify the rights as they arise from time to time. To have recourse to the principle of legality in relation to the bill, a court would have to think that there is a common law fundamental right to freedom from torture, and support for such a right is very limited.

2.86 Whether 'freedom from torture' is a common law fundamental right is contested among commentators and has not been decided by an Australian court. For example:

- in extra-curial writing both Spigelman CJ and French CJ have listed what they understand to be the fundamental rights recognised in common law in Australia, but neither of them lists 'freedom from torture' or anything similar.
- Kirby J in *Builders Labourers' Federation v Minister for Industrial Relations* (1986) 7 NSWLR at 406, Street CJ and Glass and Mahoney JJ agreeing, noted that 'imprisonment, solitary confinement as a punishment and other severe physical and financial restraints have clearly been considered, even in recent times within the power of Parliament'.
- in New Zealand, Cooke J said in *Taylor v. NZ Poultry Board* [1984] 1 NZLR 395, 398, 'I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament'.

2.87 If a court did think that there is a common law fundamental right to 'freedom from torture', then the bill does seem to limit that right because, despite efforts to ensure that torture will not occur, it contains no prohibition against torture. Rather, it allows torture that may arise despite the minister's properly approving a SIO, and it offers only a disincentive to torture by limiting any immunity.

2.88 In those circumstances, a court could, for example, interpret paragraph 35C so that the minister, when authorising a SIO, is taken to be prohibiting torture in the conduct of that operation. If this is the anticipated interpretation of the bill, then the bill should be drafted in such terms, rather than relying on a party to pursue litigation.[26]

*Acts Interpretation Act*

2.89 The Attorney-General relies on the Explanatory Memorandum which states that the term 'torture' in paragraphs 35C(2) and 35K is intended to be interpreted

26 There would, however, remain the question of the meaning of the word 'torture'. This is unknown as there is no common law definition of torture. In light of observations in Builders Labourers above, the scope of torture-like conduct that is within parliament's power to enact is quite wide, so that were the principle of legality to operate it may reassert only a very narrow idea of torture. Any common law definition is likely to far less comprehensive than the Convention definition.

consistently with the Convention Against Torture. Under s.15AB(l) of the Acts Interpretation Act 1901 a court may have recourse to the Explanatory Memorandum only to confirm a provision's ordinary meaning, or to determine the meaning of the provision when it is ambiguous or obscure, or the ordinary meaning leads to a manifestly absurd or unreasonable result. It is open to a court to decide that 'torture' has an ordinary meaning that is neither manifestly absurd or unreasonable in the circumstances, and that therefore no recourse to external materials is permitted.

2.90 The Attorney-General states:

> …it is open to a court, should a matter proceed to prosecution or litigation, to examine the term in light of Australia's human rights obligations and any relevant, contemporary international law jurisprudence.

2.91 However, in the committee's view, the principle of legality—were it to operate because of a yet-to-be-established-and-defined pre-existing common law right to be free of torture—is applied only with regard to the Australian common law, and is not applied with regard to Australia's human rights obligations or any relevant, contemporary international law jurisprudence.

2.92 Subsection 15AB(l) of the *Acts Interpretation Act 1901*—were it to operate because a court considers paragraphs 35C(2) or 35K to be ambiguous or obscure or have an ordinary meaning that leads to a manifestly absurd or unreasonable result—does not permit a court to refer to Australia's human rights obligations or any relevant, contemporary international law jurisprudence.

2.93 **Accordingly, the committee reconfirms its recommendation that for consistency with Australia's international obligations, the term 'torture' used in the bill be defined by reference to the definition set out in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.**

2.94 **In the absence of such an amendment, the committee considers that the SIO scheme in the bill is incompatible with the prohibition against torture and the rights contained in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment because it does not prohibit an Australian agency or official from engaging in all forms of conduct that are prohibited by that Convention.**

*Immunity from prosecution for action part of special intelligence operations*

2.95 The committee also recommended that the bill be amended to ensure that the proposed immunity afforded to ASIO officers or affiliates involved in special intelligence operations, does not extend to any acts of cruel, inhuman or degrading treatment.

## Minister's response

> I note that the Committee has stated (at pp. 12-13 of its report) that it is concerned that:

> *Acts which may fall short definition of torture, but may nevertheless constitute cruel, inhuman or degrading treatment may therefore be permitted under the Bill. For example, a number of investigative techniques which cause psychological distress or physical pain may not be considered serious injury or torture, but may nevertheless constitute cruel, inhuman or degrading treatment. Such acts would be covered by the immunity provided in the Bill.*

The Committee's conclusion that conduct constituting cruel, inhuman or degrading treatment "would be covered by the immunity provided in the Bill" reveals a misunderstanding of the application of the limited immunity from legal liability in section 35K of the Bill, and the conduct capable of being authorised by the Attorney-General under section 35C.

In particular, it is incorrect to assert that the limited immunity in section 35K operates to "permit" any, or all, conduct that is not expressly excluded in subsection 35K(l)(d) or (e). Rather, subsection 35K(l) expressly limits the immunity to conduct that is the subject of a valid authorisation issued under section 35C. As I have noted above in relation to conduct constituting torture, the Government is of the firm view that conduct constituting cruel, inhuman or degrading treatment is not capable, as a matter of law, of being authorised under section 35C. Accordingly, it is not legally necessary to exclude such conduct from new Division 4.

ASIO's actions are limited to those activities that are relevant to its performance of its statutory functions. Conduct constituting cruel, inhuman or degrading treatment is in no way necessary for, or relevant to, the performance by ASIO of its statutory functions. As such, I do not accept that there are any circumstances in which it would be open to an Attorney-General to find that the authorisation criteria in subsection 35C(2) are satisfied in respect of a special intelligence operation that would involve conduct constituting cruel, inhuman or degrading treatment. Accordingly, the limited immunity in section 35K is incapable, as a matter of law, of applying to such conduct.

Moreover, an interpretation of s 35K to the effect of that advanced by the Committee would produce a manifestly absurd result. It appears to involve an assumption that the Parliament intended (notwithstanding the absence of clear or express language on the face of the provision) to contravene the fundamental human rights obligations to which Australia is subject in respect of prohibiting cruel, inhuman or degrading treatment.

This is contradictory to fundamental and well-established principles of legality in the interpretation of legislation. Such an assumption would also lead to the impracticable outcome that it would be necessary to make express reference to conduct that contravenes all of Australia's international human rights obligations in the exclusions in subparagraph 35K(l)(e).

As such, the Government is satisfied - as was the Parliament as a whole in passing the Bill into law - that new Division 4 of Part III of the ASIO Act is

> consistent with Australia's international human rights obligations in respect of prohibiting torture and other cruel, inhuman or degrading treatment. The Government, therefore, has no intention to introduce or support any amendments to these provisions of the Act.[27]

## Committee's response

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

*Authorisation*

2.97 The Attorney-General states that conduct constituting cruel, inhuman or degrading treatment is not, as a matter of law, capable of being the subject of a valid authority to conduct a SIO. Conduct constituting cruel, inhuman or degrading treatment or not, is not the subject of the Minister's authority. The Minister authorises a SIO, satisfied that there are reasonable grounds on which to believe that any conduct involved in the operation will not constitute torture, cause the death of, or serious injury to, any person; involve the commission of a sexual offence against any person; or result in significant loss of, or serious damage to, property. The minister is not specifically and separately required to consider whether any of the conduct involved in the operation would involve cruel, inhuman or degrading treatment. Moreover, if the Minister's authority is properly given, later conduct involved in the operation may nevertheless constitute cruel, inhuman or degrading treatment, and the Minister's authority remains valid.

*Principle of legality*

2.98 The Attorney-General asserts that the principle of legality would protect against conduct pursuant to a SIO that constitutes cruel, inhuman or degrading treatment being afforded an immunity by the bill. As stated above, the principle of legality protects 'fundamental rights' recognised in common law. The principle of legality, as it has been expounded in Australia, takes no account of human rights recognised in international law.

2.99 The principle of legality arises only when a court believes that legislation may limit a common law fundamental right. If legislation does limit such a right, then the principle of legality enables the court – unless the legislature's intention is clear – to preserve the right by statutory interpretation.

2.100 There is no list of fundamental rights recognised in common law; the courts identify the rights as they arise from time to time. To have recourse to the principle of legality in relation to the bill, a court would have to think that there is a common

27 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 23 October 2014) 5-6.

law fundamental right to freedom from cruel, inhuman or degrading treatment, and support for such a right is very limited.[28]

2.101 If a court did think that there is a common law fundamental right to 'freedom from cruel, inhuman or degrading treatment, then the bill does seem to limit that right because the bill contains no prohibition against cruel, inhuman or degrading treatment nor does the immunity explicitly exclude conduct that involves cruel, inhuman or degrading treatment. There are many law enforcement techniques that do not result in serious injury and are less severe than torture. The bill does not expressly prohibit such conduct in the course of a SIO. The Attorney-General asserts that ASIO would never undertake conduct that constitutes cruel, inhuman or degrading treatment. Accordingly, there is no explicit reason why such conduct should not, and cannot, be prohibited under the bill.

2.102 **Accordingly, the committee reconfirms its recommendation that the bill be amended to ensure that the proposed immunity afforded to ASIO officers or affiliates involved in special intelligence operations, does not extend to any acts of cruel, inhuman or degrading treatment.**

2.103 **In the absence of this amendment, the committee, therefore, considers that the SIO scheme in the bill is incompatible with the prohibition against cruel, inhuman or degrading treatment and the rights contained in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment because it does not prohibit an Australian agency or official from engaging in all forms of conduct that are prohibited by that Convention.**

***Right to freedom of expression***

*New offence provisions for disclosing information regarding SIOs*

2.104 Schedule 3 creates two new offences, sections 35P (1) and (2), in relation to the unauthorised disclosure of information relating to a SIO. The second offence is an aggravated offence intended to apply to deliberate disclosures intended to endanger health and safety or the effectiveness of a SIO. The offences apply to disclosures by any person, including:

- participants in a SIO;
- other persons to whom information about a SIO has been communicated in an official capacity; and
- persons who are the recipients of an unauthorised disclosure of information, should they engage in any subsequent disclosure.

2.105 The committee sought further information on whether these measures are compatible with Australia's international human rights obligations.

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28 See Kirby J in *Builders Labourers' Federation v Minister for Industrial Relations* (1986) 7 NSWLR at 406, and *Taylor v. NZ Poultry Board* [1984] 1 NZLR 395, 398.

## Minister's response

> The 38-page Statement accompanying the present Bill (now Act) provides, in my view, an adequate basis on which the Committee could have undertaken, or documented in its report a demonstrable attempt to undertake, an assessment of the compatibility of its substantive measures with those human rights obligations within its statutory remit.
>
> I do not intend to revise, on a retrospective basis, the Statement accompanying the Bill (now Act) that is the subject of this correspondence. Similarly, I do not intend to impose upon Commonwealth departments or agencies responsible for preparing Statements accompanying Government Bills a general form requirement to the effect of that described at p. 9 of the Committee's report.[29]

## Committee response

2.106 The statement of compatibility correctly identifies these offence provisions as engaging and limiting the right to freedom of expression:

> These offences engage and limit the right to freedom of expression in that they prohibit the disclosure of information relating to an SIO, including publication of such information. The limitation is to achieve a permissible purpose set out in Article 19(3), being matters of national security.[30]

2.107 The committee considers that the offence provisions have not been shown to be a reasonable, necessary and proportionate limitation. On this question, the statement of compatibility relies on the existence of defences and safeguards as facilitating the operation of oversight and accountability bodies in respect of the measure.[31]

2.108 However, the committee notes that, as the non-aggravated offence applies to conduct which is done recklessly rather than intentionally, a journalist could be found guilty of an offence even though they did not intentionally disclose information about a SIO. As SIOs can cover virtually all of ASIO's activities, the committee considers that these offences could discourage journalists from legitimate reporting of ASIO's activities for fear of falling foul of this offence provision. This concern is compounded by the fact that, without a direct confirmation from ASIO, it would be difficult for a journalist to accurately determine whether conduct by ASIO is pursuant to a SIO or other intelligence gathering power.

2.109 The committee notes that the potential 'chilling effect' of the new offences on journalists reporting on ASIO activities raises could undermine public reporting

29 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 23 October 2014) 1-2.

30 EM 22.

31 EM 23.

and scrutiny of ASIO's activities, such as in cases where it is alleged that mistakes have been made by ASIO.

2.110 The committee notes that the available defences are primarily designed to protect disclosure to the IGIS. The committee notes that there is no general defence related to public reporting in the public interest or general protections for whistle-blowers other than for disclosure to the IGIS. The defence provisions can therefore reasonably be described as very narrow, and the committee considers that they do not offer adequate protection of the public interest in respect of public reporting.

2.111 The committee therefore considers that, in light of these considerations, the Attorney-General has not demonstrated that the offence provisions are reasonable or proportionate limitations on the right to freedom of expression.

2.112 **On the information provided, the committee considers that the new offence provisions for disclosing information regarding SIOs are incompatible with the right to freedom of expression because the provisions appear to impose disproportionate limits on that right.**

**Schedule 4–Co-operation and information sharing**

***Right to privacy***

*Cooperation with the private sector*

2.113 Schedule 4 permits ASIO to co-operate with the private sector in the fulfilment of its statutory functions.

2.114 The committee sought further information regarding the compatibility of the measure to the right to privacy.

## Minister's response

> The 38-page Statement accompanying the present Bill (now Act) provides, in my view, an adequate basis on which the Committee could have undertaken, or documented in its report a demonstrable attempt to undertake, an assessment of the compatibility of its substantive measures with those human rights obligations within its statutory remit.
>
> I do not intend to revise, on a retrospective basis, the Statement accompanying the Bill (now Act) that is the subject of this correspondence. Similarly, I do not intend to impose upon Commonwealth departments or agencies responsible for preparing Statements accompanying Government Bills a general form requirement to the effect of that described at p. 9 of the Committee's report.[32]

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32 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 23 October 2014) 1-2.

## Committee response

2.115 The statement of compatibility identifies the measure as engaging and limiting the right to privacy insofar as personal information may be shared between ASIO and the private sector.

2.116 The committee noted in its initial assessment of the bill that further information was required in order to determine that the measures were compatible with human rights, particularly in relation to the necessity of the measure. The committee requested that information but it was not provided.

2.117 **On the information provided, the committee considers that the measures in Schedule 4 are incompatible with the right to privacy because the measures limit that right without appearing to be necessary to achieve a legitimate aim.**

**Schedule 5–Activities and functions of Intelligence Services Act 2001 agencies**

***Right to privacy***

***Right to an effective remedy***

***Right to a fair trial***

***Right to security of the person***

*Amending the functions of certain agencies under the IS Act*

2.118 Schedule 5 made a number of amendments to the IS Act including to:

- enable Australian Secret Intelligence Service (ASIS) to co-operate with ASIO in relation to the production of intelligence on Australian persons in limited circumstances;
- create a new ground of ministerial authorisation enabling ASIS to protect its operational security; and
- allow ASIS to train certain individuals in the use of weapons and self-defence techniques.

2.119 The committee sought further information in relation to the compatibility of the measures with the right to privacy, the right to an effective remedy, the right to a fair trial and the right to security of the person.

## Minister's response

> The 38-page Statement accompanying the present Bill (now Act) provides, in my view, an adequate basis on which the Committee could have undertaken, or documented in its report a demonstrable attempt to undertake, an assessment of the compatibility of its substantive measures with those human rights obligations within its statutory remit.
>
> I do not intend to revise, on a retrospective basis, the Statement accompanying the Bill (now Act) that is the subject of this correspondence. Similarly, I do not intend to impose upon Commonwealth departments or agencies responsible for preparing Statements accompanying Government

Bills a general form requirement to the effect of that described at p. 9 of the Committee's report.[33]

## Committee response

2.120 The statement of compatibility identifies the measures as engaging and limiting the right to privacy, the right to an effective remedy and the right to a fair trial. The committee notes that, in relation to the measure permitting ASIS to train individuals to use weapons, the Schedule may also engage the right to security of the person.

2.121 The committee noted in its initial assessment of the bill that further information was required in order to determine that the measures were compatible with human rights, particularly in relation to the necessity of the measure. The committee requested that information but it was not provided.

2.122 **On the information provided, the committee considers that the measures in Schedule 5 are incompatible with the right to privacy, the right to an effective remedy, the right to a fair trial and the right to security of the person because the powers limit those rights without appearing to be necessary to achieve a legitimate aim.**

**Schedule 6–Protection of information**

***Right to freedom of expression***

***Right to a fair trial***

***Right to freedom from arbitrary detention***

***Prohibition on cruel, inhuman or degrading treatment or punishment***

***Right to freedom of movement***

***Presumption of innocence***

*Amendments to offences for the unauthorised communication of information*

2.123 The measures in Schedule 6 increase the maximum penalty applying to the offences of unauthorised communication of certain information protected by the ASIO Act from 2 years to 10 years. The Schedule also extends these unauthorised communication offences to information held by additional agencies being the Office of National Assessments (ONA) and the Defence Intelligence Organisation (DIO). The Schedule also includes new offences in respect of intentional unauthorised dealings with certain records of an intelligence agency.

2.124 The committee sought further information in relation to the compatibility of the measures with the right to freedom of expression, the right to a fair trial, right to freedom from arbitrary detention, the prohibition on cruel, inhuman or degrading

33 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 23 October 2014) 1-2.

treatment or punishment, the right to freedom of movement, and the presumption of innocence.

## Minister's response

> The 38-page Statement accompanying the present Bill (now Act) provides, in my view, an adequate basis on which the Committee could have undertaken, or documented in its report a demonstrable attempt to undertake, an assessment of the compatibility of its substantive measures with those human rights obligations within its statutory remit.
>
> I do not intend to revise, on a retrospective basis, the Statement accompanying the Bill (now Act) that is the subject of this correspondence. Similarly, I do not intend to impose upon Commonwealth departments or agencies responsible for preparing Statements accompanying Government Bills a general form requirement to the effect of that described at p. 9 of the Committee's report.[34]

## Committee response

2.125 The statement of compatibility identifies these measures as engaging and limiting the right to freedom of expression, the right to a fair trial, right to freedom from arbitrary detention, the prohibition on cruel, inhuman or degrading treatment or punishment, the right to freedom of movement, and the presumption of innocence.

2.126 The committee noted in its initial assessment of the bill that further information was required in order to determine that the measures were compatible with human rights, particularly in relation to the necessity of the measure. The committee requested that information but it was not provided.

2.127 **On the information provided, the committee considers that, the measures in Schedule 6 are incompatible with the right to freedom of expression, the right to a fair trial, right to freedom from arbitrary detention, the prohibition on cruel, inhuman or degrading treatment or punishment, the right to freedom of movement, and the presumption of innocence because the powers limit those rights without appearing to be necessary to achieve a legitimate objective.**

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34 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (received 23 October 2014) 1-2.

# Dissenting Report

1.1 The Committee has concluded that Schedule 6 of the *Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014* is likely to be incompatible with the right to privacy, equality and non-discrimination (paragraphs 2.13 and 2.17). The Committee particularly takes issue with the new requirements of this regulation that require previous names to be listed on the back of citizenship certificates. I disagree with these findings.

1.2 The Committee's sole argument for concluding that this regulation is a breach of privacy is that passports do not include information about previous names but this regulation would require citizen certificates to do so. The relevance of this comparison is not clear.

1.3 First, citizenship certificates are different documents to passports. Citizenship certificates are foundational documents that are issued permanently with no expiry date. They record a significant event just as a birth certificate or a marriage certificate does. Passports are temporary documents that must be renewed periodically. They record no notable event except the acquisition of a passport. They are principally used for travel, and hence will be seen by a wider variety of government officials from different countries. It is not surprising then that passports may, and possibly should, pay more attention to privacy issues and only include a narrower form of information.

1.4 Second, it is not clear why the information currently included on passports is some sort of human rights standard as relied on by the Committee. Presumably, the information included on passports does not breach the right to privacy, but it does not follow that documents that require additional information to that of passports would constitute a breach.

1.5 The Committee notes that the Minister has not responded to its comparison between citizenship certificates and passports. In my view, however, there is no clear link between the two so it is not necessary for the Minister to explain the comparison. Further, as the Minister points out, the issuing of passports is under the responsibility of a different portfolio.

1.6 The merits of the new regulations should be assessed on their own merits against human rights standards. The Government has concluded that it does require information on changes in names to reduce identity fraud. As the Explanatory Statement to the regulation states:

> The intention is that this will assist agencies that use the notices in determining identity to more readily identify cases of fraud. This is because the notice will

provide agencies with a comprehensive picture of when and why a person has applied for a notice.[1]

1.7 There is nothing unreasonable about requiring new citizens to record any alternative names they had on a citizenship certificate. While such information may be included on other registers, having it included on the document provides another layer of protection, especially against the potential for a lack of coordination between government departments and agencies to lead to mistakes.

1.8 The proposed changes in Schedule 6 of the regulation provide for a necessary, reasonable and proportionate change to target the problem of identity fraud.

1.9 The Committee has found that the changes in section 6 are likely to be incompatible with the right to equality and non-discrimination. The Committee expresses concerns that the inclusion of previous names may reveal a change of gender.

1.10 The Committee argues that the regulatory changes will deprive individuals of the ability to exercise control of the recording of their gender in government documents. It is not evident that requiring previous names to be recorded on citizenship documents represents the kind of loss of control by individuals so as to constitute such a breach. As noted above, citizenship documents are foundational documents, they are not used on a day-to-day basis the way driver's licences, passports and other forms of identification are. Individuals are able to maintain a high level of control over who they show citizenship documents to. Further, in interactions with government agencies, all such agencies are subject to Australian Privacy Principles concerning the use and disclosure of personal information, with which the proposed regulations comply.

1.11 The Committee also sought information from the Minister on whether the regulations are consistent with the *Australian Government Guidelines on the Recognition of Sex and Gender*. The Minister's response noted that the regulations already allow for previous names and dates of birth to be printed on the back of an evidence of Australian citizenship, and the proposed amendments simply expand the range of information to include the date of any notice of evidence of Australian citizenship previously given to the person.

1.12 As noted by the Minister, the importance of departments ensuring the continuity of the record of an individual's identity and of maintaining one record for each individual is already an accepted principle.

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[1] Explanatory Statement, *Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014*, p. 8.

1.13 On this basis, Schedule 6 of the regulations, is clearly aimed at achieving a legitimate objective, is directly linked to the achievement of that objective, and is a reasonable and proportionate measure for the achievement of the objective.

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|---|---|---|
| **Senator Matthew Canavan**<br>**Committee Member** | **Dr David Gillespie MP**<br>**Committee Member** | **Mr Ken Wyatt MP**<br>**Committee Member** |

# Appendix 1

# Correspondence

The Hon Scott Morrison MP
Minister for Immigration and Border Protection



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

Dear Senator

**Response to questions received from Parliamentary Joint Committee on Human Rights**

Thank you for your letters of 23 September 2014 in which further information was requested on the following bill and legislative instruments:

- *Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622]*
- *Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00726]*

My response to your requests is attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
**Minister for Immigration and Border Protection**
21 / 10 /2014

*Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014* [F2014L00622]

**Paragraph 1.164 – The committee therefore requests the Minister for Immigration and Border Protection's further advice on the compatibility of the repeal of the specified visa classes with the protection of the family, and particularly:**

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

The Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 was disallowed by the Senate on 25 September 2014.

**1.173** ***Accordingly, the committee seeks the Minister for Immigration and Border Protection's further advice on whether Schedule 2 to the regulation is a proportional measure, with regard to the requirement for identity document of the same value.***

The committee sought my advice regarding the right to privacy and this was provided to the committee. The committee has since stated that a passport is a foundational identity document and that the committee considers the requirements in relation to citizenship certificates to be more intrusive on an individual's privacy. I have provided my advice on why I am of the view that Schedule 2 of the regulation is a proportionate measure and I do not intend to provide comparative advice as to the rationale or requirements of a travel document, not subject to amendment by this regulation, used for different purposes and under the responsibility of a different portfolio.

**1.178** ***As the guidelines are an important measure in protecting against discrimination, the committee seeks the minister's further advice on whether the regulations are consistent with the Australian Government guidelines on Recognition of Sex and Gender.***

The proposed regulations are consistent with the *Australian Government Guidelines on Recognition of Sex and Gender.* The regulations already allow for previous names and dates of birth to be printed on the back of an evidence of Australian citizenship, the proposed amendments simply expand the range of information to include the date of any notice of evidence of Australian citizenship previously given to the person.

The Guidelines recognise the importance of departments ensuring the continuity of the record of an individual's identity. In addition, 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 individual.

The Guidelines refer to the importance of the Information Privacy Principles in managing use and disclosure of personal information possessed or controlled by the Department, stating that these principles should also apply to information relating to a person's sex and/or gender. Those principles have now been replaced by the Australian Privacy Principles. The proposed regulation complies with APP 6, concerning use and disclosure of personal information, and APP 11 concerning security of personal information.

As has been stated previously, persons holding a notice of evidence maintain control over who or what organisation they disclose the notice to and for what purpose. In addition, the Australian Citizenship Instructions provide that officers have the discretion not to include previous names and/or dates of birth, for example if they are satisfied that the inclusion of a particular name will endanger the individual or another person connected to them.

ATTORNEY-GENERAL

CANBERRA

14/12474

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

Dear Chair Dean

**National Security Legislation Amendment Act (No 1) 2014**

I refer to your Committee's Thirteenth Report of the 44th Parliament, as tabled on 1 October 2014, which included comments on the National Security Legislation Amendment Bill (No 1) 2014. That Bill was passed by the Parliament on 1 October and received the Royal Assent on 2 October.

I note that your Committee raised three matters in relation to the (then) Bill (now Act), comprising a request for my advice in relation to the compatibility of certain measures with human rights, and two recommendations for amendments to the provisions of Schedule 3 (protection for special intelligence operations).

My responses to these matters are enclosed, which may be of assistance in clarifying the issues your Committee has raised, particularly with respect to established practice in the drafting of Statements of Compatibility with human rights in accordance with the objectives of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Yours faithfully

(George Brandis)

Encl: Responses to matters raised in the 13th Report of the 44th Parliament, 1 October 2014.

**Enclosure**

**National Security Legislation Amendment Act (No 1) 2014**

**Responses to the Parliamentary Joint Committee on Human Rights**

**Thirteenth Report of the 44th Parliament (tabled 1 October 2014)**

**Compatibility of measures in Schedules 2-6**

***Committee comment (p. 11)***

*The Committee therefore seeks the advice of the Attorney-General as to whether each of the measures in Schedules 2, 3, 4, 5 and 6 of the Bill are compatible with Australia's international human rights obligations, and for each individual measure limiting human rights:*

- *whether there is a rational connection between the limitation and that objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

***Attorney-General's response***

The Government is firmly of the view that all measures in the Act are compatible with Australia's human rights obligations for the reasons set out in the Statement of Compatibility with Human Rights (Statement) accompanying the (then) Bill (now Act). All of the new or amended powers in the Act are accompanied by rigorous and appropriate safeguards, including independent oversight and reporting measures. These measures have been the subject of extensive Parliamentary scrutiny, including two reviews by the Parliamentary Joint Committee on Intelligence and Security and bipartisan support of the Parliament.

I am aware that the Committee has expressed a view that the Statement does not provide sufficient information for it to conduct any assessment of whether various provisions in the Bill (now Act) constitute permissible limitations on the rights engaged and, therefore, to reach a conclusion on whether the Bill (now Act) is compatible with human rights.

The Committee's principal concern appears to be that the Statement deals collectively with a number of related or 'like' measures that have been identified in the Statement as engaging identical rights in an identical or substantially similar way, and are consequently supported by an identical or substantially similar justification. (I note that this approach has been explained in the introduction to the Statement at p. 6 of the Revised Explanatory Memorandum.)

The Committee appears to have recently adopted a preference that Statements should include an itemised analysis of individual measures (per p. 9 of its report). The Committee further appears to suggest (at pp. 8-9 of its report) that its expectation in this regard is conveyed in *Practice Note 1* (issued by the Committee as constituted in September 2012) and in the guidance materials published by my Department, which supports me in administering the *Human Rights (Parliamentary Scrutiny) Act 2011,* under which the Committee is established.

While acknowledging that this is the Committee's preference based on its interpretation of these materials, I do not agree with its apparent suggestion that there is a formal requirement that Statements must include "a separate and detailed analysis of each measure that may limit human rights" (at p. 9 of its report). More particularly, I do not agree with the Committee's contention that such an itemised account is necessary in order for it to discharge, or to document in its reports any demonstrable attempt to discharge, its statutory mandate to undertake an analysis of the human rights compatibility of Bills introduced to the Parliament (especially those Bills which may limit human rights).

I note, in particular, that the guidance materials prepared by my Department, and endorsed in *Practice Note 1*, expressly provide that Statements "should describe, in general terms, the most significant human rights issues thought to arise on the Bill, together with the conclusions on compatibility". This is consistent with the intention, expressed in the Explanatory Memorandum to the Human Rights (Parliamentary Scrutiny) Bill 2010, that there is no prescribed form for Statements, which are "intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights" (at p. 4).

As the Minister administering the *Human Rights (Parliamentary Scrutiny) Act 2011,* I place on record my concern that this Committee's apparent insistence upon a formal requirement to this effect – as a precondition to discharging its statutory scrutiny functions – may serve to undermine the policy objectives of the Human Rights (Parliamentary Scrutiny) Act which include to inform the Parliament of the significant human rights issues in legislation through the provision of concise and accessible Statements of Compatibility.

An insistence on such a form requirement has not been the practice of the previous Committee. The adoption of such a practice would, in my view, represent a departure from established practice in the drafting of Statements, under which related measures which limit human rights have often been analysed collectively, and have been relied upon by previous Committees to support findings of compatibility. For example, I refer the Committee to Statements of Compatibility for the Biosecurity Bill 2012, the Regulatory Powers (Standard Provisions) Bill 2012 and the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2013, and to statements of the former Chair, Mr Harry Jenkins.

The 38-page Statement accompanying the present Bill (now Act) provides, in my view, an adequate basis on which the Committee could have undertaken, or documented in its report a demonstrable attempt to undertake, an assessment of the compatibility of its substantive measures with those human rights obligations within its statutory remit.

I do not intend to revise, on a retrospective basis, the Statement accompanying the Bill (now Act) that is the subject of this correspondence. Similarly, I do not intend to impose upon Commonwealth departments or agencies responsible for preparing Statements accompanying Government Bills a general form requirement to the effect of that described at p. 9 of the Committee's report.

**Special intelligence operations – definition of torture**

**Committee comment (p. 12)**

*For consistency with Australia's international obligations, the Committee recommends that the term 'torture' used in the Bill be defined by reference to the definition set out in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

**Attorney-General's response**

The provisions of new Division 4 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) expressly exclude conduct constituting torture from the new scheme of special intelligence operations. In particular, subparagraph 35C(2)(e)(ia) provides that the Attorney-General cannot grant an authority to conduct a special intelligence operation involving conduct that constitutes torture.

As an additional safeguard, subparagraph 35K(1)(e)(ia) provides that the limited immunity from legal liability in relation to conduct engaged in as part of an authorised special intelligence operation does not apply to conduct constituting torture.

As I indicated to the Senate on 25 September 2014, and as recorded in the Revised Explanatory Memorandum to the Bill (at pp. 112 and 118), the Government is of the firm view that these prohibitions are declaratory of the existing legal position that no Australian agency or official can engage in torture under any circumstances. This is consistent with the established principle of legality in statutory interpretation.

As Gleeson CJ observed in *Al Kateb v Godwin* (2004) 219 CLR 562 at 577:

> *Courts do not impute to the legislature an intention to abrogate or curtain certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases. It is not new.*
>
> *A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.*

I further note the remarks of Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v R* (1994) 179 CLR 427 at 437 that, in order to accept an interpretation that a provision curtails a basic human right, it must be apparent that:

> *[T]he legislature has not only directed its attention to the question of the abrogation or curtailment of such basic human rights, freedoms or immunities, but has also determined upon abrogation or curtailment of them. The courts should not impute to*

> *the legislature an intention to interfere with fundamental rights. Such an intention must clearly be manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.*

The express exclusions in sections 35C and 35K have been inserted for the sole purpose of providing explicit reassurance of this position, as sought by some members of the Parliament. As I advised the Senate in the debate of the Bill on 25 September, ASIO cannot, does not, and has never engaged in conduct constituting torture.

There can, in my view, be no sensible suggestion that such conduct is in any way relevant to, or necessary for, the performance by ASIO of its statutory functions. As such, conduct constituting torture is not, as a matter of law, capable of being the subject of a valid authority to conduct a special intelligence operation issued under section 35C. As the limited immunity from liability in section 35K applies only to conduct that is authorised, in advance, under section 35C, it is has no application to conduct constituting torture.

As the Committee has noted, the term 'torture' is not defined for the purposes of sections 35C and 35K. As noted at p. 27 of the Statement of Compatibility, the term is undefined to ensure that it will be interpreted consistently with Australia's international human rights obligations to prohibit torture, in accordance with established principles of statutory interpretation.

I note that the Committee has stated (at p. 12 of its report) it is "concerned that torture ... would be a matter of statutory interpretation by the courts". In my view, the approach taken in the Act serves to enhance, rather than detract from, the compatibility of the Bill with Australia's international human rights obligations to prohibit torture, having regard to the principle of legality in my remarks above. The drafting of the provisions mean that it is open to a court, should a matter proceed to prosecution or litigation, to examine the term in light of Australia's human rights obligations and any relevant, contemporary international law jurisprudence. (Similarly, it would be open to other oversight or scrutiny bodies empowered to examine matters of human rights compliance – including the Inspector-General of Intelligence and Security, or the Australian Human Rights Commission – to apply such an interpretation.)

Further, the Explanatory Memorandum expressly provides, at pp. 112 and 118, that the term 'torture' as it is used in subparagraphs (e)(ia) of subsections 35C(2) and 35K(1) is intended to be interpreted consistently with the definition of that term in the Convention Against Torture. The commentary in the Explanatory Memorandum is relevant to the application of the principles of statutory interpretation set out in section 15AB of the *Acts Interpretation Act 1901* to sections 35C and 35K of the ASIO Act. (Subsection 15AB(1) provides that a court may have recourse to extrinsic materials, including an Explanatory Memorandum, to confirm the ordinary meaning of a provision, or to determine the meaning of a provision in the event of ambiguity or if it is considered that the ordinary meaning would produce a manifestly absurd or unreasonable result.)

In addition, I note that the Government's amendment to insert subparagraph (e)(ia) in each of subsections 35C(2) and 35K(1) received unanimous support when I moved them in the

Committee stage of debate in the Senate on 25 September 2014. The meaning of the term 'torture' was examined in detail at that time, and was expressly supported by the Opposition and members of the cross-bench. (See *Senate Hansard*, 25 September 2014, p. 117.)

**Special intelligence operations – cruel, inhuman or degrading treatment**

**Committee comment (p. 13)**

*The Committee therefore recommends that the Bill be amended to ensure that the proposed immunity afforded to ASIO officers or affiliates involved in special intelligence operations does not extend to any acts of cruel, inhuman or degrading treatment.*

**Attorney-General's response**

I note that the Committee has stated (at pp. 12-13 of its report) that it is concerned that:

> *Acts which may fall short definition of torture, but may nevertheless constitute cruel, inhuman or degrading treatment may therefore be permitted under the Bill. For example, a number of investigative techniques which cause psychological distress or physical pain may not be considered serious injury or torture, but may nevertheless constitute cruel, inhuman or degrading treatment. Such acts would be covered by the immunity provided in the Bill.*

The Committee's conclusion that conduct constituting cruel, inhuman or degrading treatment "would be covered by the immunity provided in the Bill" reveals a misunderstanding of the application of the limited immunity from legal liability in section 35K of the Bill, and the conduct capable of being authorised by the Attorney-General under section 35C.

In particular, it is incorrect to assert that the limited immunity in section 35K operates to "permit" any, or all, conduct that is not expressly excluded in subsection 35K(1)(d) or (e). Rather, subsection 35K(1) expressly limits the immunity to conduct that is the subject of a valid authorisation issued under section 35C. As I have noted above in relation to conduct constituting torture, the Government is of the firm view that conduct constituting cruel, inhuman or degrading treatment is not capable, as a matter of law, of being authorised under section 35C. Accordingly, it is not legally necessary to exclude such conduct from new Division 4.

ASIO's actions are limited to those activities that are relevant to its performance of its statutory functions. Conduct constituting cruel, inhuman or degrading treatment is in no way necessary for, or relevant to, the performance by ASIO of its statutory functions. As such, I do not accept that there are any circumstances in which it would be open to an Attorney-General to find that the authorisation criteria in subsection 35C(2) are satisfied in respect of a special intelligence operation that would involve conduct constituting cruel, inhuman or degrading treatment. Accordingly, the limited immunity in section 35K is incapable, as a matter of law, of applying to such conduct.

Moreover, an interpretation of s 35K to the effect of that advanced by the Committee would produce a manifestly absurd result. It appears to involve an assumption that the Parliament intended (notwithstanding the absence of clear or express language on the face of the provision) to contravene the fundamental human rights obligations to which Australia is subject in respect of prohibiting cruel, inhuman or degrading treatment.

This is contradictory to fundamental and well-established principles of legality in the interpretation of legislation. Such an assumption would also lead to the impracticable outcome that it would be necessary to make express reference to conduct that contravenes all of Australia's international human rights obligations in the exclusions in subparagraph 35K(1)(e).

As such, the Government is satisfied – as was the Parliament as a whole in passing the Bill into law – that new Division 4 of Part III of the ASIO Act is consistent with Australia's international human rights obligations in respect of prohibiting torture and other cruel, inhuman or degrading treatment. The Government, therefore, has no intention to introduce or support any amendments to these provisions of the Act.

# Appendix 2

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# Practice Note 1 and
# Practice Note 2 (interim)

# PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

## PRACTICE NOTE 1

### Introduction

This practice note:

(i) sets out the underlying principles that the committee applies to the task of scrutinising bills and legislative instruments for human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*; and

(ii) gives guidance on the committee's expectations with regard to information that should be provided in statements of compatibility.

### The committee's approach to human rights scrutiny

- 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.
- Consistent with the approaches adopted by other human rights committees in other jurisdictions, the committee will test legislation for its potential to be incompatible with human rights, rather than considering whether particular legislative provisions could be open to a human rights compatible interpretation. In other words, the starting point for the committee is whether the legislation could be applied in ways which would breach human rights and not whether a consistent meaning may be found through the application of statutory interpretation principles.
- The committee considers that the inclusion of adequate human rights safeguards in the legislation will often be essential to the development of human rights compatible legislation and practice. The inclusion of safeguards is to ensure a proper guarantee of human rights in practice. The committee observes that human rights case-law has also established that the existence of adequate safeguards will often go directly to the issue of whether the legislation in question is compatible. Safeguards are therefore neither ancillary to compatibility and nor are they merely 'best practice' add-ons.
- 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 defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- The committee notes that previously settled drafting conventions and guides are not determinative of human rights compatibility and may now need to be re-assessed for the purposes of developing human rights compatible legislation and practice.

### The committee's expectations for statements of compatibility

- The committee views statements of compatibility as essential to the consideration

of human rights in the legislative process. It is also the starting point of the committee's consideration of a bill or legislative instrument.

- The committee expects statements to read as stand-alone documents. The committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights. While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee has found the templates[1] provided by the Attorney-General's Department to be useful models to follow.
- The committee expects statements to contain an assessment of whether the proposed legislation is compatible with human rights. The committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which may raise human rights concerns in the time available.
- In line with the steps set out in the assessment tool flowchart[2] (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:
  1. whether and how the limitation is aimed at achieving a legitimate objective;
  2. whether and how there is a rational connection between the limitation and the objective; and
  3. whether and how the limitation is proportionate to that objective.
- If no rights are engaged, the committee expects that reasons should be given, where possible, to support that conclusion. This is particularly important where such a conclusion may not be self-evident from the description of the objective provided in the statement of compatibility.

SEPTEMBER 2012

1 http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Statements-of-Compatibility-templates.aspx

2 http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Tool-for-assessing-human-rights-compatibility.aspx

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# PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

## Practice Note 2 (interim)

## Civil Penalties

### Introduction

1.1 This interim practice note:

- sets out the human rights compatibility issues to which the committee considers the use of civil penalty provisions gives rise; and
- provides guidance on the committee's expectations regarding the type of information that should be provided in statements of compatibility.

1.2 The committee acknowledges that civil penalty provisions raise complex human rights issues and that the implications for existing practice are potentially significant. The committee has therefore decided to provide its initial views on these matters in the form of an interim practice note and looks forward to working constructively with Ministers and departments to further refine its guidance on these issues.

### Civil penalty provisions

1.3 The committee notes that 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.[1] These penalties are pecuniary, and do not include the possibility of imprisonment. They are stated to be 'civil' in nature and do not constitute criminal offences under Australian law. Therefore, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters.

1.4 These provisions 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. The committee appreciates that these schemes are intended to provide regulators with the flexibility to use sanctions that are appropriate to and likely to be most effective in the circumstances of individual cases.

### Human rights implications

1.5 Civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).[2] These articles set out specific guarantees that apply to proceedings involving the determination of 'criminal charges' and to persons who have been convicted of a 'criminal offence', and provide protection against the imposition of retrospective criminal liability.[3]

1.6 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 if it is considered to be 'civil' under Australian domestic law. Accordingly, when a provision imposes a civil penalty, an assessment is required of whether it amounts to a 'criminal' penalty for the purposes of the ICCPR.[4]

### The definition of 'criminal' in human rights law

1.7 There are three criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law:

a) *The classification of the penalty in domestic law*: If a penalty is labelled as 'criminal' in domestic law, this classification is considered

determinative for the purposes of human rights law, irrespective of its nature or severity. However, if a penalty is classified as 'non-criminal' in domestic law, this is never determinative and requires its nature and severity to be also assessed.

b) *The nature of the penalty*: A criminal penalty is deterrent or punitive in nature. Non-criminal sanctions are generally aimed at objectives that are protective, preventive, compensatory, reparatory, disciplinary or regulatory in nature.

c) *The severity of the penalty*: The severity of the penalty involves looking at the maximum penalty provided for by the relevant legislation. The actual penalty imposed may also be relevant but does not detract from the importance of what was initially at stake. Deprivation of liberty is a typical criminal penalty; however, fines and pecuniary penalties may also be deemed 'criminal' if they involve sufficiently significant amounts but the decisive element is likely to be their purpose, ie, criterion (b), rather than the amount per se.

1.8 Where a penalty is designated as 'civil' under domestic law, it may nonetheless be classified as 'criminal' under human rights law if either the nature of the penalty or the severity of the penalty is such as to make it criminal. In cases where neither the nature of the civil penalty nor its severity are separately such as to make the penalty 'criminal', their cumulative effect may be sufficient to allow classification of the penalty as 'criminal'.

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

1.9 Many civil penalty provisions have common features. However, as each provision or set of provisions is embedded in a different statutory scheme, an individual assessment of each provision in its own legislative context is necessary.

1.10 In light of the criteria described in paragraph 1.9 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*

1.11 As noted in paragraph 1.9(a) above, the classification of a civil penalty as 'civil' under Australian domestic law will be of minimal importance in deciding whether it is criminal for the purposes of human rights law. Accordingly, the committee will in general place little weight on the fact that a penalty is described as civil, is made explicitly subject to the rules of evidence and procedure applicable to civil matters, and has none of the consequences such as conviction that are associated with conviction for a criminal offence under Australian law.

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

1.12 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 punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;[5]
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at regulating members of a specific group (the latter being more likely to be viewed as 'disciplinary' rather than as 'criminal').

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

1.13 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;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed;
- whether the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision is higher than 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.

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

1.14 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 decriminalization. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the article 14 and article 15 of the ICCPR.

1.15 If a civil penalty is characterised as not being 'criminal', the 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 committee's expectations for statements of compatibility

1.16 As set out in its *Practice Note 1*, the committee views sufficiently detailed statements of compatibility as essential for the effective consideration of the human rights compatibility of bills and legislative instruments. The committee expects statements for proposed legislation which includes civil penalty provisions, or which draws on existing legislative civil penalty regimes, to address the issues set out in this interim practice note.

1.17 In particular, 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 article 14 and article 15 of the ICCPR, including providing justifications for any limitations of these rights.[6]

1.18 The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions are set out briefly below. The committee, however, notes that the 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.

### *Right to be presumed innocent*

1.19 Article 14(2) of the ICCPR provides that a person is entitled to be presumed innocent until proved 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.**

*Right not to incriminate oneself*

1.20 Article 14(3)(g) of the ICCPR provides that a person has the right 'not to be compelled to testify against himself or to confess guilt' in criminal proceedings. **Civil penalty provisions that are considered 'criminal' and which compel a person to provide incriminating information that may be used against them in the civil penalty proceedings should be appropriately justified in the statement of compatibility.[7] If use and/or derivative use immunities are not made available, the statement of compatibility should explain why they have not been included.**

*Right not to be tried or punished twice for the same offence*

1.21 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.**

1 This approach is reflected in the Regulatory Powers (Standard Provisions) Bill 2012, which is intended to provide a standard set of regulatory powers which may be drawn on by other statutes.

2 The text of these articles is reproduced at the end of this interim practice note. See also UN Human Rights Committee, General Comment No 32 (2007) on article 14 of the ICCPR.

3 Article 14(1) of the ICCPR also guarantees the right to a fair hearing in civil proceedings.

4 This practice note is focused on civil penalty provisions that impose a pecuniary penalty only. But the question of whether a sanction or penalty amounts to a 'criminal' penalty is a more general one and other 'civil' sanctions imposed under legislation may raise this issue as well.

5 In most, if not all, cases, proceedings in relation to the civil penalty provisions under discussion will be brought by public authorities.

6 That is, any limitations of rights must be for a legitimate objective and be reasonable, necessary and proportionate to that objective – for further information see *Practice Note 1*.

7 The committee notes that a separate question also arises as to whether testimony obtained under compulsion that has already been used in civil penalty proceedings (whether or not considered 'criminal') is consistent with right not to incriminate oneself in article 14(3)(g) of the ICCPR if it is used in subsequent criminal proceedings.

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## Articles 14 and 15 of the International Covenant on Civil and Political Rights

*1. Article 14*

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal

case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

c) To be tried without undue delay;

d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

*Article 15*

1. 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.