

## 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),<sup>1</sup> which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.<sup>2</sup> The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.<sup>3</sup>

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].

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*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'.<sup>4</sup>

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.

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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'.<sup>5</sup> 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'.<sup>6</sup> 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.**

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## 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 44<sup>th</sup> 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.<sup>1</sup>

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

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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.<sup>13</sup>

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

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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.<sup>14</sup> 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.**

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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*.

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## 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.<sup>15</sup>

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.<sup>16</sup>

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).<sup>17</sup>

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.<sup>18</sup>

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

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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.<sup>19</sup>

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

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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.<sup>20</sup>

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).<sup>21</sup>

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.

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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.<sup>22</sup>

*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.

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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 EHRR 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),<sup>23</sup> which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.<sup>24</sup> The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.<sup>25</sup>

### ***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

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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,<sup>26</sup> 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

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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.<sup>27</sup> ASIS staff also have civil and criminal immunity in certain circumstances for acts done inside Australia.<sup>28</sup> 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.**

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## 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.<sup>1</sup>

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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<sup>1</sup> EM 102.



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## 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]**