

# Chapter 1

## New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 1 to 4 December 2014, legislative instruments received from 31 October 2014 to 22 January 2015, and legislation previously deferred by the committee.

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

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

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

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

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

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns.

1.7 Bills in this list may include bills that do not engage human rights, bills that contain justifiable (or marginal) limitations on human rights and bills that promote human rights and do not require additional comment.

- Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014;
- Commonwealth Electoral Amendment (Donation Reform) Bill 2014;
- Defence Amendment (Fair Pay for Members of the ADF) Bill 2014;
- Enhancing Online Safety for Children Bill 2014;
- Enhancing Online Safety for Children Bill (Consequential Amendments) 2014;
- Excess Exploration Credit Tax Bill 2014;
- Gambling Harm Reduction (Protecting Problem Gamblers and Other Measures) Bill 2014;

- Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014;
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Designated Coastal Waters) Bill 2014;
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Miscellaneous Measures) Bill 2014;
- Private Health Insurance Amendment Bill (No. 2) 2014;
- Racial Discrimination Amendment Bill 2014;
- Sex Discrimination Amendment (Boosting Superannuation for Women) Bill 2014;
- Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014;<sup>1</sup>
- Tax and Superannuation Laws Amendment (2014 Measures No .7) Bill 2014; and
- Tribunals Amalgamation Bill 2014.

### **Instruments not raising human rights concerns**

1.8 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.<sup>2</sup> Instruments raising human rights concerns are identified in this chapter.

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

1.10 The committee has also concluded its examination of the previously deferred Criminal Code (Terrorist Organisation-Islamic State) Regulation 2014 [F2014L00979] and makes no comment on the instrument.<sup>3</sup>

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1 The bill was amended by the Senate. The House of Representatives agreed to the amendments made by the Senate and the amended bill passed both houses on 3 December 2014. The committee's assessment that the bill is compatible with human rights is based on an assessment of the bill as enacted.

2 See Parliament of Australia website, 'Journals of the Senate', [http://www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/Journals\\_of\\_the\\_Senate](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate).

3 See, Parliamentary Joint Committee on Human Rights, *Eleventh Report of the 44<sup>th</sup> Parliament* (2 September 2014) 11.

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## Deferred bills and instruments

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

- Fair Work Amendment (Bargaining Processes) Bill 2014 (deferred 2 December 2014);
- Migration Amendment (Character and General Visa Cancellation) Bill 2014 (deferred 1 October 2014);
- Omnibus Repeal Day (Spring 2014) Bill 2014 (deferred 14 November 2014);
- Academic Misconduct Rules [F2014L01785];
- Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) Amendment List 2014 (No. 2) [F2014L00970] (deferred 2 September 2014);
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Ukraine) Amendment List 2014 [F2014L01184] (deferred 24 September 2014);
- Customs (Drug and Alcohol Testing) Amendment Regulation 2014 [F2014L01616];
- Extradition (Vietnam) Regulation 2013 [F2013L01473] (deferred 10 December 2013);
- Migration Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01696];
- Migration Amendment (Complementary Protection) Regulation 2014 [F2014L01617];
- Migration Amendment (Subclass 050 Visas) Regulation 2014 [F2014L01460];
- Migration Legislation Amendment (2014 Measures No. 2) Regulation 2014 [F2014L01461];
- Social Security (Administration) (Excluded circumstances – Queensland Commission) Specification 2014 [F2015L00002]; and
- Youth Allowance (Satisfactory Study Progress) Guidelines 2014 [F2014L01265] (deferred 25 November 2014)

## Australian Citizenship and Other Legislation Amendment Bill 2014

*Portfolio: Immigration and Border Protection*

*Introduced: House of Representatives, 23 October 2014*

### **Purpose**

1.12 The Australian Citizenship and Other Legislation Amendment Bill 2014 (the bill) seeks to amend the *Australian Citizenship Act 2007* (Citizenship Act) to:

- extend good character requirements;
- modify residency requirements and related matters;
- amend the circumstances in which a person's approval as an Australian citizen may or must be cancelled;
- modify the circumstances in which the minister may defer a person making the pledge of commitment to become an Australian citizen; for example, where the minister is considering cancelling the person's approval as an Australian citizen on the basis that the person would not now be approved as an Australian citizen because of identity, having been assessed as a risk to security or being subject to the bar on approval related to criminal offences;
- adjust the circumstances in which a person's Australian citizenship may be revoked; for example, if the person has been approved as an Australian citizen by descent and the minister is satisfied that the approval should not have been given (except in circumstances where the revocation decision would result in the person becoming stateless);
- provide a discretion to revoke a person's Australian citizenship in circumstances where the minister is satisfied that the person became an Australian citizen as a result of fraud or misrepresentation, perpetrated by the Australian citizen themselves or by a third party;
- amend the rules for obtaining citizenship by adoption to stipulate that the adoption process must have commenced before the person turned 18;
- limiting automatic acquisition of citizenship at 10 years of age to those persons born in Australia who have maintained lawful residence in Australia throughout the 10 years;
- require, for the purposes of the automatic acquisition of Australian citizenship, that a person is not taken to be ordinarily resident in Australia throughout the period of 10 years beginning on the day the person was born if they were born to a parent who had privileges or immunities under the *Diplomatic Privileges and Immunities Act 1967*, the *Consular Privileges and Immunities Act 1972*, the *International Organisations (Privileges and*

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*Immunities) Act 1963 and the Overseas Missions (Privileges and Immunities) Act 1995;*

- amending the provision giving citizenship to a child found abandoned in Australia; and
- enable the minister to specify certain matters in a legislative instrument.

1.13 The bill also seeks to amend the *Migration Act 1958* to enable the use and disclosure of personal information obtained under the Citizenship Act or the citizenship regulations.

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

### **Power to revoke Australian citizenship due to fraud or misrepresentation – removal of court finding**

1.15 Currently under the Citizenship Act the power to revoke citizenship on the grounds of fraud requires a conviction for a relevant offence (for example, the offence of false statements or representations), proven in court to the criminal standard of beyond reasonable doubt.<sup>1</sup>

1.16 The proposed new section 34(AA) would give the minister a discretionary power to revoke a person's Australian citizenship, up to 10 years after citizenship was first granted, where the minister is 'satisfied' that the person became an Australian citizen as a result of fraud or misrepresentation by themselves or a third party. There would be no requirement that the allegations of fraud or misrepresentation in relation to the citizenship application be proven in court or that a person be convicted.<sup>2</sup> The power to revoke citizenship is also available in relation to the citizenship of children.<sup>3</sup>

1.17 The committee notes that very serious consequences flow from loss of Australian citizenship. The enjoyment of many rights is tied to citizenship under Australian law including, for example, the right to fully participate in public affairs. The committee therefore considers that the process by which citizenship may be revoked, and the safeguards that exist in relation to this process, are of great importance to the question of compatibility with human rights. The committee considers that the proposed discretionary power to revoke a person's Australian citizenship engages and may limit the following human rights and human rights standards:

- the obligation to consider the best interests of the child;
- the right of the child to nationality;

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1 See Citizenship Act, section 34.

2 Explanatory memorandum (EM), Attachment A, 2.

3 EM, Attachment A, 3.

- the right of the child to be heard in judicial and administrative proceedings;
- quality of law;
- the right to a fair hearing;
- the right to take part in public affairs; and
- the right to freedom of movement.

1.18 The committee's assessment of the compatibility of the proposed measure for each of these rights is set out below.

***Obligation to consider the best interests of the child***

1.19 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.<sup>4</sup>

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

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

1.21 The committee considers that removing the requirement of conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, engages and limits the obligation to consider the best interests of the child. This is because the proposed discretionary power may be exercised regardless of whether or not it is in the child's best interests for such a power to be exercised. As noted above, the enjoyment of a range of rights is tied to citizenship under Australian law, such that the removal of citizenship may negatively impact upon what is in the child's best interests. The statement of compatibility acknowledges that the proposed measure engages the obligation to consider the best interest of the child but argues that the limitation is justifiable.<sup>5</sup>

1.22 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's

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4 Article 3(1).

5 EM, Attachment A, 2.

Guidance Note 1,<sup>6</sup> and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which 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>7</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. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.23 The statement of compatibility states that the objective of giving the discretionary power to the minister is to 'strengthen the integrity of the Australian citizenship programme by preventing its abuse through misrepresentation and fraud'.<sup>8</sup> However, the statement of compatibility does not provide supporting reasons or empirical data to demonstrate that this objective addresses a pressing or substantial concern, rather than merely an outcome regarded as desirable or convenient.<sup>9</sup>

1.24 Based on the information and analysis provided, the committee does not consider that the statement of compatibility adequately demonstrates that the proposed measure addresses a legitimate objective. The committee notes that, under the current law, citizenship may be revoked on the grounds of a conviction for a criminal offence involving fraud or misrepresentation in relation to the citizenship application. However, the statement of compatibility does not fully explain why the current law is insufficient for the stated objective of preventing fraud and misrepresentation. The statement of compatibility states that 'there are often limited resources to prosecute all but the most serious fraud cases in light of competing prosecutorial priorities'.<sup>10</sup> However, the committee considers that, in the absence of further information, 'limited resources' and 'prosecutorial priorities' alone are not sufficient justification, in and of themselves, for limiting the obligation to consider the best interest of the child.

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6 Appendix II; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) [http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights\\_ctte/guidance\\_notes/guidance\\_note\\_1/guidance\\_note\\_1.pdf](http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf) (accessed 21 January 2015).

7 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).

8 EM, Attachment A, 2.

9 EM, Attachment A, 2-3.

10 EM, Attachment A, 2.

1.25 As currently drafted, the proposed amendments would allow the removal of a person's citizenship (including a child's citizenship) where the person concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves. This would mean that a child's citizenship could be revoked for conduct alleged to have been committed (but not necessarily proven) by a third party in relation to the child's application, including conduct of which the child had no knowledge, or was unable to prevent.<sup>11</sup> This raises the following further specific concerns in relation to whether the proposed power is rationally connected to, and a proportionate way to achieve, its stated objective so as to be justifiable under international human rights law.

1.26 First, the committee considers that there may not be a clear link between the manner in which the proposed discretionary power could operate and the stated objective of that power. The statement of compatibility states that the measure 'has a rational connection to this objective because it prevents applicants from accessing citizenship through fraud or misrepresentation, and provides a disincentive for people to provide fraudulent or misleading information on application.'<sup>12</sup> However, there is no apparent connection between removing a person's citizenship and the occurrence of fraud or misrepresentation of which they had no knowledge or were unable to prevent and which has not been proven. That is, it is unclear how the proposed power would provide a disincentive to a person where they had no knowledge of the fraud or misrepresentation, or where the fraud or misrepresentation had not actually occurred. The committee observes that, as noted above, the proposed power would allow the removal of a child's citizenship even where the child concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves.<sup>13</sup>

1.27 Secondly, the committee considers that, in the absence of a definition of what constitutes 'fraud' or 'misrepresentation', the minister's power to revoke citizenship on the basis of, for example, minor or technical misrepresentations may not be proportionate to the stated objective of the measure.

**1.28 The committee therefore considers that the proposed discretionary power to revoke Australian citizenship without a court finding limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border protection as to:**

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11 EM, Attachment A, 2.

12 EM, Attachment A, 2.

13 EM, Attachment A, 2.



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

### ***The right to nationality***

1.29 Every child has the right to acquire a nationality under article 7 of the CRC and article 24(3) of the International Covenant on Civil and Political Rights (ICCPR).<sup>14</sup> Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. Article 8 of the CRC provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

1.30 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and to not deprive a person of their nationality if such deprivation would render the person stateless.<sup>15</sup>

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

1.31 The committee notes that the proposed power would allow for the removal of a child's Australian citizenship.<sup>16</sup> The committee considers that removing the requirement of conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, therefore engages and may limit a child's right to nationality. The statement of compatibility acknowledges the proposed measure engages the right to nationality but argues that any limitation is justifiable.<sup>17</sup>

1.32 The statement of compatibility states that the objective of giving the discretionary power to the minister is to 'strengthen the integrity of the Australian citizenship programme by preventing its abuse through misrepresentation and fraud'.<sup>18</sup> However, as noted above at [1.23] to [1.25], the statement of compatibility has not provided sufficient reasoning or evidence to demonstrate that this stated objective constitutes a pressing or substantial concern as required to permissibly limit a right under international human rights law. Further, the committee considers that the statement of compatibility has not shown that there is a rational connection

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14 Article 24(3) of the ICCPR.

15 Articles 1 and 8 of the Convention on the Reduction of Statelessness 1961.

16 See EM, Attachment A, 2.

17 See EM, Attachment A, 2.

18 EM, Attachment A, 2.

between the measure and the stated objective and that the measure is proportionate for the achievement of that objective (see also [1.25] to [1.27] above).

1.33 The committee notes that the minister's power to revoke citizenship could, as the statement of compatibility acknowledges, result in statelessness for some children.<sup>19</sup> The statement of compatibility asserts that it is 'a proportionate and reasonable measure' for a child's citizenship to be revoked even if it would make a child stateless because 'the child will only have obtained citizenship as a result of fraud or misrepresentation'.<sup>20</sup> However, the committee observes that the proposed power would allow the removal of a child's citizenship even where the child concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves.<sup>21</sup> The committee also notes that children have different capacities and levels of maturity than adults to make judgements. Given this, the committee considers that the measure may not be proportionate to its stated objective.

1.34 The committee notes that Australia has obligations under article 8 of the CRC to preserve the identity of children, including their nationality. Additionally, the committee considers that Australia's obligations under article 8 of the CRC should be read in accordance with Australia's obligations under article 3 of the CRC to consider the best interests of the child and article 8(1) of the Convention on the Reduction of Statelessness, which provides that a state shall not deprive a person of their nationality if such deprivation would render the person stateless.<sup>22</sup> The committee considers rendering a child stateless in circumstances where fraud or serious misrepresentation has not been proven does not appear to be proportionate to the stated objective of the measure.

**1.35 The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding limits the right of the child to nationality. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

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19 EM, Attachment A, 2.

20 EM, Attachment A, 2.

21 EM, Attachment A, 2.

22 See, also, Convention on the Reduction of Statelessness 1961 article 1.

- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

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

1.36 Article 12 of the CRC provides that state parties shall assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child. The views of the child must be given due weight in accordance with the age and maturity of the child.

1.37 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

***Compatibility of the measure with the right of the child to be heard***

1.38 The statement of compatibility acknowledges that the proposed measure engages the right of the child to be heard but argues that the measure does not limit the right because:

Prior to reaching a decision on whether to revoke a child's citizenship the Minister would afford the person natural justice, which would require giving the child, the child's parent or the child's representative the opportunity to be heard, thereby satisfying Article 12.<sup>23</sup>

1.39 The committee acknowledges that this commitment to provide natural justice is an important aspect of the right of the child to be heard. However, the committee considers that natural justice is not equivalent, or a sufficient alternative, to having a court make a determination as to 'fraud' or 'misrepresentation', particularly in light of the serious consequences of a decision to revoke a child's citizenship. The committee therefore considers that the measure may limit the right of the child to be heard.

1.40 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law. This requires a reasoned and evidence-based explanation of how the measure supports a legitimate objective, how the measure is rationally connected to that objective and how the measure is reasonable and proportionate for the achievement of that objective.

**1.41 The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right of the child to be heard. As set out above, the statement of compatibility does not sufficiently justify that potential limitation for the purpose of international human rights law. The**

**committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

***Right to a fair trial and fair hearing***

1.42 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals. The right is concerned with procedural fairness and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

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

***Compatibility of the measure with the right to fair hearing***

1.44 Removing the requirement of conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, engages and may limit the right to a fair trial and fair hearing. This is because, as noted at [1.15] above, the proposed amendments remove the requirement that there be a determination of guilt proven in court to the criminal standard of beyond reasonable doubt in relation to a relevant offence (for example, the offence of false statements or representations) before the minister can exercise the power to revoke citizenship. However, the removal of the requirement of a prior conviction could in effect allow for punitive action against an individual based on the minister's determination of 'fraud' or 'misrepresentation' (either by the individual or a third party such as a migration agent). Specifically, there would be no requirement that the allegations of fraud or misrepresentation in relation to the citizenship application be proven in court or that a person be convicted.<sup>24</sup> The statement of compatibility argues the proposed power would not require a conviction as 'there are often limited resources

to prosecute all but the most serious fraud cases in light of competing prosecutorial priorities.<sup>125</sup>

1.45 The committee notes that this right was not addressed in the statement of compatibility in relation to this measure.

1.46 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law.

**1.47 The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right to a fair trial and fair hearing. As noted above, the statement of compatibility does not provide an assessment of whether the right to a fair hearing is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

***Right to take part in public affairs***

1.48 Article 25 of the ICCPR protects the right to take part in public affairs. Article 25 provides the right to take part in public affairs and elections, and guarantees the right of citizens to stand for public office, to vote in elections and to have access to positions in public service.

1.49 The right to take part in public affairs applies only to citizens. In order for this right to be meaningful, other rights such as freedom of expression, association and assembly must also be respected, given the importance of free speech and protest in a free and open democracy.

1.50 The right to take part in public affairs is an essential part of a democratic government that is accountable to the people. It applies to all levels of government, including local government.

***Compatibility of the measure with the right to take part in public affairs***

1.51 As the proposed measure grants power to remove Australian citizenship the measure engages, and has a consequential impact on, the right to take part in public

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25 EM, Attachment A, 2.

affairs. The committee is concerned that the measure may limit the right to take part in public affairs by acting as a disincentive (a 'chilling effect') for full participation in public affairs such as standing for public office. Individuals may be concerned that if they draw attention to themselves through participation in public affairs then their citizenship is open to scrutiny and may be liable to be revoked.<sup>26</sup> The committee notes that the right to take part in public affairs was not addressed in the statement of compatibility.

1.52 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law.

**1.53 The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right to take part in public affairs. As noted above, the statement of compatibility does not provide an assessment of whether the right to take part in public affairs is engaged and limited. The committee therefore requests the advice of the Minister for Immigration and Border Protection as to:**

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

### ***Right to freedom of movement***

1.54 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia, either temporarily or permanently.

1.55 The right to enter one's own country includes a right to remain in the country, return to it and enter it.<sup>27</sup> There are few, if any, circumstances in which depriving a person of the right to enter their own country could be reasonable. State parties cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her own country.

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26 This may be particularly the case in circumstances where a person is unaware of any misrepresentation and fraud that led to the granting of citizenship, and/or that any misrepresentation was minor or technical.

27 Article 12 of the ICCPR.

1.56 The reference to a person's 'own country' is not necessarily restricted to the country of one's citizenship—it might also apply when a person has very strong ties to the country.<sup>28</sup>

*Compatibility of the measure with the right to freedom of movement*

1.57 The committee notes that if a person's citizenship is revoked under the proposed provisions then the person will be granted an ex-citizen visa.<sup>29</sup> The committee considers that this may limit the right to freedom of movement. This is because as noted in the statement of compatibility an ex-citizen visa ceases on a person's departure from Australia.<sup>30</sup> The committee is concerned that when a person who has an ex-citizen visa leaves Australia they may not be able to return, even in circumstances where Australia is their 'own country'. The committee notes that the concept of 'own country' encompasses not only a country where a person has citizenship but also one where a person has strong ties. The committee notes that the right to freedom of movement and the right to return to one's own country was not addressed in the statement of compatibility.

1.58 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law.

**1.59 The committee considers that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right to freedom of movement. As set out above, the statement of compatibility does not sufficiently justify that potential limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

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28 See, for example, *Nystrom v Australia* (2011), UN Human Rights Committee, CCPR/C/102/D/1557/2007.

29 EM, Attachment A, 3. See also *Migration Act 1958* section 35.

30 EM, Attachment A, 3.

### **Quality of law**

1.60 Human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

#### *Compatibility of the measure with the 'quality of law' test*

1.61 As noted above, the committee considers that the proposed discretionary power may limit a range of human rights. The proposed power must therefore comply with the 'quality of law' test in order to be a justifiable limitation. However, the committee notes that the terms 'fraud' and 'misrepresentation', the basis on which a person's citizenship may be revoked, are not defined in the proposed legislation.<sup>31</sup> The committee further notes that the proposed measure grants broad discretionary power to the minister. The committee is therefore concerned that the terms of the proposed provision may be overly broad and insufficiently certain for the purpose of the 'quality of law' test.

**1.62 As a measure that may limit human rights, the committee considers that the proposed discretionary power may be insufficiently certain and overly broad to satisfy the 'quality of law' test. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed power to revoke citizenship is compatible with the 'quality of law' test.**

### **Extending the good character requirement to include applicants for Australian citizenship under 18 years of age**

1.63 Currently the good character requirements under the Citizenship Act apply only to applicants aged 18 and over. The concept of 'good character' is undefined in the Citizenship Act but, as a matter of policy, is understood to cover the 'enduring moral qualities of a person' and 'whether they are likely to uphold and obey the laws of Australia, and other commitments they make through the Australian Citizenship Pledge'.<sup>32</sup>

1.64 The bill would extend these 'good character' requirements to applicants for Australian citizenship aged under 18 years of age.

1.65 The committee considers that the proposed extension of the good character requirement to applicants for Australian citizenship under 18 years of age engages and limits the obligation to consider the best interests of the child and the right to

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31 See Australian Citizenship and Other Legislation Amendment Bill 2014.

32 Department of Immigration and Border Protection, Good character and offences, <http://www.citizenship.gov.au/applying/files/character/> (accessed 19 November 2014).



protection of the family. The committee's assessment of the compatibility of the proposed measure for each of these rights is set out below.

***Obligation to consider the best interests of the child***

1.66 Under the CRC, Australia is required to ensure that in all actions concerning children, the best interests of the child is a primary consideration; see [1.19] to [1.20] above.<sup>33</sup>

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

1.67 The statement of compatibility acknowledges that the measure engages the obligation to consider the best interests of the child,<sup>34</sup> and argues that the measure is consistent with the best interests of the child.<sup>35</sup> However, the committee considers that the extension of the 'good character' test to child applicants would add an additional requirement for Australian citizenship which may not be compatible with the best interests of the child. This is because such a requirement may operate to deny child applicants Australian citizenship. The committee is therefore of the view that the proposed measure may limit the obligation to consider the best interests of the child.

1.68 The committee notes the policy intention that, in practice, the character requirement would be applied only to persons over the age of 16 for whom it is possible to obtain police records; and that the Australian Citizenship Instructions will instruct to decision makers to consider the best interests of the child.<sup>36</sup>

1.69 However, the committee notes that there are no such limitations in the proposed provision. Further, the statement of compatibility advises that, 'if the department becomes aware of an applicant who has character issues and is younger than 16, it would be possible to assess that applicant against the character requirement.'<sup>37</sup> Given this, an assessment of the human rights compatibility of the measure must take into account the possibility that, as currently drafted, children under 16 (including very young children) may be subject to the 'good character' test.

1.70 The statement of compatibility identifies the objective of the measure as 'upholding the value of citizenship and ensuring uniformity and integrity across the citizenship programme.'<sup>38</sup> It argues that the measure is needed for consistency with the 'good character' requirements under the Migration Act. In particular, the

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33 Article 3(1) of the CRC.

34 EM, Attachment A, 4.

35 EM, Attachment A, 4.

36 EM, Attachment A, 4.

37 EM, Attachment A, 4.

38 EM, Attachment A, 4.

statement of compatibility asserts that 'it is appropriate that the assessment of the character of applicants for citizenship is at least as thorough as the assessment of character in the migration context.'<sup>39</sup> However, in the absence of any detailed explanation for this assertion, it is not apparent to the committee whether the measure, in seeking such consistency, may be regarded as addressing a pressing or substantial concern for the purposes of international human rights law.

1.71 The statement of compatibility further notes that 'a number of citizenship applicants [have been minors with]...significant criminal histories'.<sup>40</sup> In the absence of any evidence in support of this assertion, it is not apparent to the committee that the measure is needed to achieve its stated objective or to address a substantial and pressing concern.

1.72 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.73 The committee notes the following with respect to the proportionality of the measure in relation to the stated objective.

1.74 First, the committee notes that both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.<sup>41</sup> The committee notes that, as children's psychosocial capacity is not fully developed, children may be more likely to respond to impulses, make mistakes, take risks or respond to peer pressure without full regard for the consequences or impact of their actions. This in turn means that children may be at increased risk of contact with the criminal justice system due to their level of development.

1.75 In this context, the committee is concerned that the denial of Australian citizenship to a child on the basis of such conduct is not in accordance with accepted understandings of the capacity and culpability of children under international human rights law. The committee further notes that international human rights law recognises that a child accused or convicted of a crime should be treated in a manner which takes into account the desirability of promoting his or her reintegration into society. The committee therefore considers that the denial of a child's citizenship on

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39 EM, Attachment A, 4.

40 EM, Attachment A, 3.

41 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) <http://www.un.org/documents/ga/res/40/a40r033.htm> (accessed 19 November 2014).

the basis of a 'good character' test, and its ongoing (and possibly lifelong) effect, may impose a disproportionately adverse effect on that child's best interests.

1.76 Second, as noted above at [1.60] the statement of compatibility states that the measure is necessary because a 'number' of child applicants had significant criminal histories. However, depending on the number of such applicants (minors with significant criminal histories) and the commensurate risk to society, the committee considers that the measure may not be a proportionate way to achieving its stated objective.

**1.77 The committee considers that the proposed extension of the good character requirement limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the proposed extension of the good character requirement is a reasonable and proportionate measure for the achievement of that objective having regard to the different capacities of children.**

#### ***Right to protection of the family***

1.78 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles the family is recognised as the natural and fundamental group unit of society and, as such, being entitled to protection.

1.79 An important element of protection of the family, arising from the prohibition under article 17 of the ICCPR against unlawful or arbitrary interference with family, is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents, will therefore engage this right.

#### ***Compatibility of the measure with the right to protection of the family***

1.80 The committee is concerned that the provisions may mean that, in circumstances where parents of minors successfully apply for citizenship, the citizenship of those minors may be denied on 'good character' grounds, thereby risking the permanent separation of the family. The committee therefore considers that the measure also engages and limits the right to the protection of the family.

The committee notes that the right to protection of the family was not addressed in the statement of compatibility.

**1.81 The committee considers that the proposed extension of the good character requirement may limit the right to protection of the family. As noted above, the statement of compatibility does not provide an assessment of whether the right to protection of the family is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

### **Citizenship to a child found abandoned in Australia**

1.82 Section 14 of the Citizenship Act currently provides that a person is an Australian citizen if they are found abandoned in Australia as a child unless the contrary is proved.<sup>42</sup>

1.83 Proposed section 12(8) would replace current section 14 of the Citizenship Act to provide that a person found abandoned in Australia as a child is taken to have been born in Australia and to be an Australian citizen by birth, unless it is proved that the person was outside Australia before they were found abandoned or they are not an Australian citizen by birth.<sup>43</sup>

1.84 The committee considers that the measure engages and may limit the obligation to consider the best interest of the child as discussed below.

### ***Obligation to consider the best interests of the child***

1.85 Under the CRC, Australia is required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration; see [1.19] to [1.20] above.<sup>44</sup>

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42 Citizenship Act, section 14.

43 EM, Attachment A, 12.

44 Article 3(1) of the CRC.

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

1.86 The statement of compatibility acknowledges that the measure engages the obligation to consider the best interests of the child.<sup>45</sup> The committee notes that the proposed provision creates additional qualification requirements for Australian citizenship which may not be in the best interests of the child. The committee therefore considers that the measure may limit the obligation.

1.87 The statement of compatibility states that the objective of replacing current section 14 of the Citizenship Act is to 'clarify the meaning of the abandoned child provision.'<sup>46</sup> As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective. 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. However, the statement of compatibility does not provide supporting reasons to demonstrate that this objective addresses a pressing or substantial concern.

1.88 Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law. In this regard, it is unclear whether there is a rational connection between the stated objective of the measure and the terms of the measure itself. This is because, while the stated objective of the measure is to 'clarify' a provision (with the implication that there is no substantive change to the provision), the proposed measure in fact introduces a new factor that can disqualify an abandoned child from being an Australian citizen, which is that the child was 'outside Australia at any time before the [they were] found abandoned in Australia as a child'.

**1.89 The committee considers that introduction of a new factor that can disqualify an abandoned child from being an Australian citizen may be a limitation on the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

- **whether the proposed amendments to citizenship for an abandoned child are aimed at achieving a legitimate objective; and**

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45 EM, Attachment A, 12.

46 EM, Attachment A, 12.

- **whether and on what basis the proposed amendments to citizenship for an abandoned child are rationally connected to achieving a legitimate objective; and**
- **whether the proposed amendments to citizenship for an abandoned child are a reasonable and proportionate measure for the achievement of that objective.**

### **Limiting automatic citizenship at 10 years of age**

1.90 Currently section 12 of the Citizenship Act provides that a child born in Australia will automatically be an Australian citizen if either their parent is a citizen or permanent resident when they were born or the child is 'ordinarily resident' in Australia for their first 10 years of life.<sup>47</sup> There is a limited exception in cases where the child's parent is an enemy alien.

1.91 The bill would amend section 12 to deny automatic citizenship for a child born in Australia in any of the following circumstances arising at any time during the child's first 10 years of life:

- one or both of the child's parents were foreign diplomats;
- the child did not hold a valid visa (that is, they were present in Australia as an unlawful non-citizen);
- the child travelled outside Australia and did not hold a visa permitting them to travel to, enter and remain in Australia (this will not apply to New Zealand citizens); or
- one or both of the child's parents came to Australia before the child was born, did not hold a substantive visa at the time of the child's birth and was an unlawful non-citizen at any time prior to the child's birth (a bridging visa, criminal justice visa or enforcement visa will not be considered to be a substantive visa).<sup>48</sup>

1.92 As the measure amends the circumstances in which Australian citizenship may be granted to children, ordinarily resident in Australia for the first 10 years of their life, the committee considers that it engages the obligation to consider the best interests of the child.

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47 The current definition of 'ordinarily resident' is if the child has their home in Australia or it is their permanent abode even if he or she is temporarily absent from Australia. In effect, this means that a child born and raised in Australia automatically becomes an Australian citizen on their tenth birthday, regardless of whether they or their parents hold a valid visa.

48 See item 12 of the bill.

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***Obligation to consider the best interests of the child***

1.93 Under the CRC, Australia is required to ensure that in all actions concerning children the best interests of the child is a primary consideration; see [1.19] – [1.20] above.<sup>49</sup>

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

1.94 The statement of compatibility states that the measure engages the obligation to consider the best interests of the child.<sup>50</sup> However, while article 3 of the CRC requires the child's best interest to be considered as a primary consideration, the assessment of the measure does not explicitly state that it limits the consideration of the best interests of the child as a primary consideration.<sup>51</sup> The statement of compatibility states only that in introducing the provision the department is taking into account the best interests of the child.<sup>52</sup>

1.95 However, the committee notes that it is difficult to envisage circumstances in which it would be in a child's best interest to be refused Australian citizenship, where the child was born in Australia and had spent their first 10 years in the country. Accordingly, any limitation on this right would need to be very clearly and well justified to be regarded as permissible for the purposes of international human rights law.

1.96 **The committee considers that the proposed amendment to the 10-year rule for citizenship limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

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49 Article 3(1) of the CRC.

50 EM, Attachment A, 12.

51 EM, Attachment A, 11.

52 EM, Attachment A, 10.

## **Personal ministerial decisions not subject to merits review**

1.97 Currently, a decision refusing to grant or approve citizenship, or revoke citizenship, under the Citizenship Act is subject to full merits review by the Administrative Appeals Tribunal (AAT). The AAT provides an independent review process, considering afresh the facts, law and policy relating to certain administrative decisions.

1.98 The bill proposes removing the power of the AAT to review a decision made by the minister personally under the Citizenship Act, if the minister has stated that the decision was made in the public interest.<sup>53</sup> No definition of what might constitute the public interest is included in the bill.<sup>54</sup>

1.99 The committee considers that the removal of merits review by the AAT may engage the right to a fair hearing as discussed below.

### ***Right to a fair hearing***

1.100 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals; see [1.42] – [1.43] above.

### ***Compatibility of the measure with the right to a fair hearing***

1.101 The committee notes that, as described above, the right to a fair hearing applies in both criminal and civil proceedings, including where rights and obligations are to be determined. The bill would preserve judicial review under section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*. However, judicial review cannot examine the merits of the decision, and is limited to cases where there is an identifiable error of law. The committee therefore considers that judicial review is not equivalent or a complete substitute for access to merits review by the AAT, and so does not fully mitigate the possible limitation on the right to a fair hearing.

1.102 The committee notes that administrative review may provide an important check on ministerial or government decisions with the potential to limit the rights of an individual.

1.103 Accordingly, the committee considers that the removal of merits review by the AAT may limit the right to a fair hearing. However, this issue was not identified in the statement of compatibility.

**1.104 The committee considers that the measure may limit the right to a fair hearing. As noted above, the statement of compatibility does not provide an assessment of whether the right to a fair hearing is engaged and limited. The**

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53 See item 72, proposed new subsection 52(4).

54 See item 69, proposed new subsection 47(3)(3A).



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committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:

- 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.

### **Ministerial power to set aside decisions of the AAT if in the public interest**

1.105 Currently under the Citizenship Act, a decision refusing or cancelling approval for a person to become an Australian citizen, because the person was not of good character or because of doubts as to the person's identity, is subject to review by the AAT. The AAT is empowered to make a decision setting aside that refusal or cancellation.

1.106 The bill proposes empowering the minister to set aside such a decision made by the AAT if the minister's delegate had originally decided that an applicant for citizenship was not of good character, or was not satisfied as to the person's identity, and the minister is satisfied it is in the public interest to set aside the AAT's decision.

1.107 The committee considers that the proposed power to set aside a decision of the AAT engages the right to a fair hearing.

#### ***Right to a fair hearing***

1.108 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals; see [1.42] – [1.43] above.

#### ***Compatibility of the measure with the right to a fair hearing***

1.109 The statement of compatibility notes that the measure engages the right to a fair hearing. However, the statement of compatibility concludes that the measure does not limit the right to a fair hearing as affected applicants will still be entitled to seek judicial review.<sup>55</sup> As set out at [1.101], the committee does not consider that judicial review is equivalent to, or an effective substitute for, merits review.

1.110 As the measure allows the minister to substitute and therefore effectively overrule the decision of the AAT, the committee considers that the measure may limit the right to a fair hearing by effectively removing a person's right to a hearing before an independent and impartial tribunal.

1.111 Accordingly, the committee considers that the potential limitation on the right to a fair hearing by the measure needs to be justified for the purposes of international human rights law.

**1.112 The committee considers that the proposed power to set aside AAT decisions may limit the right to a fair hearing. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to:**

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

#### **Extension of bars to citizenship where a person is subject to a court order**

1.113 Currently, section 24(6) of the Citizenship Act requires that a person not be approved for citizenship by conferral when a prescribed period of time has not passed since they were in prison for certain offences, or the person is subject to proceedings in relation to certain offences.

1.114 The proposed amendments would extend this bar on approval for citizenship to cases where a person is subject to home detention or a court order in connection with proceedings for a criminal offence, or that requires the person to participate in a residential scheme (including a residential drug rehabilitation scheme or a residential program for those experiencing mental illness).<sup>56</sup> As a result, the committee considers that the measure engages the rights to equality and non-discrimination on the grounds of mental illness or disability.

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

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

1.116 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.

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56 Proposed section 24(6); EM, Attachment A, 5.

1.117 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, on the basis of race, sex or disability),<sup>57</sup> which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.<sup>58</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>59</sup>

1.118 The Convention on the Rights of Persons with Disabilities (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.

1.119 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

1.120 Article 12 of the CRPD requires state parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

#### *Compatibility of the measure with the rights to equality and non-discrimination*

1.121 The statement of compatibility identifies that the right to equality and non-discrimination is engaged by the measure and notes that, 'on its face, [it]... discriminate against persons with a mental illness'. This is because the proposed bar on approval for citizenship 'extends to people who have a mental illness and who have been subject to an order of the court requiring them to participate in a residential program for the mentally ill'.<sup>60</sup> The committee agrees that the measure engages and limits the right to equality and non-discrimination.

1.122 The statement of compatibility states that the measure pursues the legitimate objective of 'ensuring that citizenship is only available to those people who are not subject to an obligation to the court,'<sup>61</sup> and argues that this is important as '[b]eing of good character is a fundamental tenet of the citizenship programme'.<sup>62</sup>

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57 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.

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

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

60 EM, Attachment A, 6.

61 EM, Attachment A, 6.

62 EM, Attachment A, 6.

1.123 However, based on the information and analysis provided, the committee does not consider that the statement of compatibility adequately demonstrates that the proposed measure addresses a legitimate objective. As noted at [1.23] above, to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are needed for a legitimate objective. 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.

1.124 The statement of compatibility further argues that the amendments are proportionate to the stated aim because:

...they reflect the criminal law, which imposes consequences for committing a criminal offence on all persons, including those with a mental illness. The amendments therefore do not impose an arbitrary or unreasonable limitation on the rights of persons with a mental illness to enjoy non-discriminatory treatment under the law.<sup>63</sup>

1.125 However, the committee considers that there is no clear relationship between this explanation of the measure and the terms of the measure itself. This is because, while the explanation of the measure refers to 'consequences for committing a criminal offence',<sup>64</sup> the measure is considerably broader and would affect people who have not committed a criminal offence but are merely involved in 'proceedings for an offence'. This would include people who have not been convicted and who are on bail or on remand, or who have been determined to be unfit to plead or have been found not guilty of an offence by reason of mental illness. The effect of the measures as currently drafted would bar a person who is subject to a court order from citizenship whether or not they had been convicted of a crime. The committee therefore considers that the measure may not be proportionate to its objective.

**1.126 The committee considers that the extension of bars to citizenship limits rights to equality and non-discrimination. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed extension of bars to citizenship where a person is subject to a court order is compatible with the right to equality and non-discrimination, 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**

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63 EM, Attachment A, 6.

64 EM, Attachment A, 6.

- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

### **Tabling statement**

1.127 The bill proposes inserting a new section into the Citizenship Act to require the minister to cause a statement to be tabled in each House of Parliament when the minister makes a decision that is not reviewable by the AAT, or decides to set aside a decision of the AAT.<sup>65</sup> The committee considers that this measure may engage the right to privacy.

### ***Right to privacy***

1.128 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. However, this right may be subject to permissible limitations.

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

1.129 The proposed provision provides that the tabling statement must not include the name of the person affected by the decision. However, the committee considers that there may be instances in which a person's identity could be inferred from the information in the tabling statement.

1.130 In particular, the committee notes that the tabling statement will set out the minister's decision and give the reasons for the minister's decision. The reasons will set out a person's personal circumstances or the minister's opinion of a person's character.

1.131 However, the statement of compatibility does not identify the right to privacy as being engaged, and so does not provide an assessment of the compatibility of the measure with the right to privacy.

1.132 As set out above at [1.23], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide an analysis of how the limitation is justifiable under international human rights law.

**1.133 The committee considers that the measure limits the right to privacy. As noted above, the statement of compatibility does not provide an assessment of whether the right to privacy is engaged and limited. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the tabling statement in Parliament could lead to an individual being identified either directly or indirectly and how this is compatible with the right to privacy, and particularly:**

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65 See item 73 of the bill, proposed new section 52B.

- **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.**

## **Biosecurity Bill 2014**

### **Biosecurity (Consequential Amendments and Transitional Provisions) Bill 2014**

### **Quarantine Charges (Imposition—General) Amendment Bill 2014**

### **Quarantine Charges (Imposition—Customs) Amendment Bill 2014**

### **Quarantine Charges (Imposition—Excise) Amendment Bill 2014**

*Portfolio: Agriculture*

*Introduced: House of Representatives, 27 November 2014*

#### **Purpose**

1.134 The Biosecurity Bill 2014 (the bill), Biosecurity (Consequential Amendments and Transitional Provisions) Bill 2014, Quarantine Charges (Imposition—General) Amendment Bill 2014, Quarantine Charges (Imposition—Customs) Amendment Bill 2014, and the Quarantine Charges (Imposition—Excise) Amendment Bill 2014 form a package of five bills which seek to provide for a new regulatory framework to replace the *Quarantine Act 1908* (together, the bills).

1.135 The bill would provide a regulatory framework for managing the risk of pests and diseases entering Australian territory and causing harm to animal, plant and human health; the environment; and the economy. The bill would also provide a regulatory framework to manage biosecurity risks—including the risk of listed human diseases—entering Australian territory, or emerging, establishing themselves or spreading in Australian territory or a part of Australian territory. The bill would also give effect to Australia's international obligations, including under the World Health Organization International Health Regulations 2005 (International Health Regulations), the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures 1994 (SPS Agreement) and the Convention on Biological Diversity 1992 (Biodiversity Convention).

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

#### **Background**

1.137 The bill is substantially similar to the Biosecurity Bill 2012, which the committee considered in its *First Report of 2013*.<sup>1</sup>

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1 Parliamentary Joint Committee on Human Rights, *First Report of 2013* (February 2013) 14.

1.138 The committee considers that the bills are compatible with human rights. The committee's general approach is to only provide substantive analysis on bills that raise human rights concerns. However, in light of the significant regulatory changes proposed by the bills, and the committee's previous comments on these bills, the committee provides the following brief analysis.

### **Introduction of a new regulatory framework to replace the *Quarantine Act 1908***

1.139 The committee considers that the bill, in seeking to manage a number of risks to human, animal and plant health, engages and limits a number of human rights.

#### ***Multiple rights***

1.140 As set out in the statement of compatibility, the bill engages multiple rights including:

- Right to life;<sup>2</sup>
- Right to freedom from torture and cruel, inhuman or degrading treatment;<sup>3</sup>
- Right to liberty and freedom from arbitrary detention;<sup>4</sup>
- Right to freedom of movement;<sup>5</sup>
- Right to a fair trial and fair hearing rights;<sup>6</sup>
- Right to privacy;<sup>7</sup>
- Right to freedom of association;<sup>8</sup>
- Rights of the child;<sup>9</sup>
- Right to an adequate standard of living;<sup>10</sup>
- Right to health;<sup>11</sup>
- Right to enjoy and benefit from culture;<sup>12</sup> and

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2 Article 6(1), International Covenant on Civil and Political Rights (ICCPR).

3 Article 7, ICCPR.

4 Article 10, ICCPR.

5 Article 12, ICCPR.

6 Article 14, ICCPR.

7 Article 17, ICCPR.

8 Article 22, ICCPR.

9 Article 24(1), ICCPR and Article 3, Convention on the Rights of the Child.

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

11 Article 12, ICESCR.



- Rights of persons with disabilities.<sup>13</sup>

*Compatibility with multiple rights*

1.141 The committee considers that the bills limit a number of human rights as set out above. For example, the human health provisions of the bill, such as those relating to isolation and treatment, limit the right to freedom of movement and the right to privacy.

1.142 The committee considers that the bills have been drafted in a manner which is consistent with Australia's human rights obligations and that limitations on rights have been well considered with appropriate safeguards. The committee notes that the statement of compatibility provides a comprehensive justification for provisions that limit human rights consistent with the committee's Guidance Note 1.

1.143 The committee notes that it previously raised concerns with a number of provisions in the 2012 version of the bill, primarily in relation to reverse burden offence provisions, strict liability offence provisions, and civil penalty provisions. The committee considers that these provisions have been appropriately and sufficiently justified in the statement of compatibility for the bill.

**1.144 The committee considers that, while the bills limit multiple rights, the limitation on rights imposed by the bills are justified and compatible with Australia's human rights obligations.**

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12 Article 15, ICESCR.

13 Articles 3 and 5, Convention on the Rights of Persons with Disabilities.

## **Family Tax Benefit (Tighter Income Test) Bill 2014**

*Sponsor: Senator David Leyonhjelm*

*Introduced: 27 November 2014*

### **Purpose**

1.145 The Family Tax Benefit (Tighter Income Test) Bill 2014 (the bill) proposes to amend the *A New Tax System (Family Assistance) Act 1999* to reduce the amount payable to families under Family Tax Benefit A (FTB A) from 1 July 2015.

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

### **Background**

1.147 The bill was introduced into the Senate on 27 November 2014 and negatived at the second reading stage on 4 December 2014. In light of the fact that the bill is not proceeding, the committee provides a brief analysis and advice-only comment.

### **Reduction in Family Tax Benefit A payments to families**

1.148 The bill would reduce eligibility for FTB A payments for certain families based on their income, and reduce the amount of FTB A payments to certain families based on their income. The explanatory memorandum explains that, if the bill were passed, 247 600 families would have their FTB A payments reduced, including 89 700 families who would no longer be eligible for any FTB A payment. Amongst those affected by the change would be 5530 families who have incomes between \$50 000 and \$65 000 and are in receipt of child maintenance payments.

1.149 The committee considers that FTB A is a form of social security and therefore the measure engages the right to social security. The committee is concerned that the measure may limit the right to social security by reducing access to social security, particularly for a number of families receiving less than the median household income. It may be, however, that if the right is limited the limitation can be justified.

### ***Right to social security***

1.150 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Access to social security is required when a person has no other income or has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and

- affordable (where contributions are required).

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

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

1.152 Specific situations which are recognised as engaging a person's right to social security include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

*Compatibility of the bill with the right to social security*

1.153 The statement of compatibility acknowledges that the bill may engage the right to social security, but concludes:

...there would be no incompatibility [of the bill] with properly-defined human rights. Human rights should not include a right to social security and assistance. That would imply a right to other people's money.<sup>1</sup>

1.154 The committee notes that Australia has voluntarily accepted obligations under the seven core UN human rights treaties and that the committee's role is to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations. One such obligation is the right to social security under article 9 of the ICESCR.

1.155 The committee notes that the bill would limit access to FTB A for certain families and reduce the amount of FTB A which certain families would be entitled to under current law. Accordingly, the bill would limit the right to social security.

1.156 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provides reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

1.157 The committee notes that the committee's Guidance Note 1 provides guidance to legislation proponents on when human rights may be limited, and how

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1 Explanatory memorandum 5.

any such limitation may be justified in accordance with international human rights law.

**1.158 The committee therefore considers that the proposed amendments to the FTB A limit the right to social security. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. Noting that the bill is not proceeding, the committee draws the attention of the legislation proponent to the requirements for the preparation of statements of compatibility, as set out in the committee's Guidance Note No. 1.**

## **Federal Courts Legislation Amendment Bill 2014**

*Portfolio: Attorney-General*

*Introduced: House of Representatives, 27 November 2014*

### **Purpose**

1.159 The Federal Courts Legislation Amendment Bill 2014 (the bill) seeks to amend the *Federal Court of Australia Act 1976* and the *Federal Circuit Court of Australia Act 1999* to:

- provide an arrester with the power to use reasonable force to enter premises in order to execute an arrest warrant;
- confer jurisdiction on the Federal Circuit Court of Australia (FCCA) in relation to certain tenancy disputes;
- enable additional jurisdiction in relation to tenancy disputes to which the Commonwealth is a party to be conferred on the Federal Circuit Court of Australia by delegated legislation; and
- allow for delegated legislation to be made to modify the applicable state and territory law where appropriate, and to clarify the jurisdiction and the enforcement of an exercise of that jurisdiction.

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

### **Conferral of jurisdiction on the Federal Circuit Court for tenancy disputes**

1.161 As outlined above, the bill would confer jurisdiction on the FCCA in relation to certain tenancy disputes where the Commonwealth is a lessor or lessee. The bill would also enable additional jurisdiction in relation to tenancy disputes to be conferred on the FCCA—for example, where the Commonwealth is a sublessor or sublessee.

1.162 The bill would also enable delegated legislation to modify the applicable state and territory law to confirm the jurisdiction of the FCCA.

1.163 As the bill alters the forum through which tenancy disputes involving the Commonwealth may be resolved, the committee considers that the bill engages the right to a fair hearing.

### ***Fair hearing rights***

1.164 The right to a fair hearing are protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

*Compatibility of the measure with fair hearing rights*

1.165 The statement of compatibility explains that the bill engages fair hearing rights and in relation to this measure concludes:

This amendment promotes the right to a fair hearing. Currently, in most jurisdictions, the applicable law provides for resolution of tenancy disputes in a state or territory tribunal, which can lead to inconsistency of approach. While superior courts may also be able to hear these matters, it is not considered an appropriate use of these courts' resources. Moreover, these courts are more costly than the Federal Circuit Court, meaning there is currently no suitable or affordable forum to hear these disputes. The conferral of jurisdiction on the Federal Circuit Court will provide a cost effective and efficient forum to resolve Commonwealth tenancy disputes, promoting the right to a fair hearing.<sup>1</sup>

1.166 The committee considers that, while consistency across Australia in the resolution of tenancy disputes may benefit the Commonwealth, the bill may not protect fair hearing rights for those engaged in tenancy disputes with the Commonwealth.

1.167 For example, the committee notes that residential tenancy disputes involving the Commonwealth are currently dealt with under state and territory law, which contains various procedural and substantive protections for tenants. Those safeguards include low cost dispute resolution and various protections against unlawful or unjust eviction. The bill, on the other hand, offers no such safeguards and leaves unspecified the rights of the parties, the law to be applied, and the powers of the FCCA.

1.168 The committee notes that removing the jurisdiction of state and territory tribunals and granting it to the FCCA may increase costs and reduce access to dispute resolution. Accordingly, the committee considers that this measure may limit the right to a fair hearing.

1.169 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provide reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

**1.170 The committee considers that the proposed conferral of jurisdiction on the Federal Circuit Court of Australia in relation to certain tenancy disputes where the Commonwealth is a lessor or lessee may engage fair hearing rights. The committee**

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1 Explanatory memorandum 5.

therefore seeks the advice of the Attorney-General as to whether the conferral of jurisdiction on the Federal Circuit Court of Australia for tenancy disputes is compatible with fair hearing rights, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the measure and that objective; and
- whether the measure is a reasonable and proportionate way to achieve its stated objective.

## **Freedom of Information Amendment (New Arrangements) Bill 2014**

*Portfolio: Attorney-General*

*Introduced: House of Representatives, 2 October 2014*

### **Purpose**

1.171 The Freedom of Information Amendment (New Arrangements) Bill 2014 (the bill) repeals the *Australian Information Commissioner Act 2010* and amends the *Freedom of Information Act 1982* (the FOI Act), the *Privacy Act 1988* (Privacy Act) and the *Ombudsman Act 1976* (the Ombudsman Act) and other Acts.

1.172 The bill would abolish the Office of the Australian Information Commissioner (OAIC) and amend the FOI Act and Ombudsman Act to provide for:

- the removal of specific external review of FOI decisions by the OAIC, providing instead for the Administrative Appeals Tribunal (the AAT) to have sole jurisdiction for external merits review of FOI decisions;
- compulsory internal review of FOI decisions (where available) before a matter can proceed to the AAT;
- the Attorney-General to take over responsibility from the OIAC for FOI guidelines, collection of FOI statistics and the annual report on the operation of the FOI Act; and
- the Ombudsman to have sole responsibility for the investigation of FOI complaints.<sup>1</sup>

1.173 The bill would amend the *Australian Human Rights Commission Act 1986* and the Privacy Act to provide for there to be an Australian Privacy Commissioner, who would be an independent statutory office holder within the Australian Human Rights Commission. The Australian Privacy Commissioner would be responsible for the exercise of privacy functions under the Privacy Act and related legislation.

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

### **Removal of review by the OAIC**

1.175 As set out above, the bill would abolish the OAIC leaving the AAT as the sole forum for external review of FOI decisions.

1.176 The committee notes that, currently, review of FOI decisions by the OAIC may commence before an internal review process has been completed. If an applicant does not agree with the OAIC's review, they may then seek review of the decision with the AAT.

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1 Revised Explanatory Memorandum (REM) 2.



1.177 In addition, individuals who are denied a FOI request may seek external review from the OAIC. The OAIC does not charge any fee to conduct its reviews. In contrast, there are generally fees payable for access to AAT review.

1.178 The committee therefore considers that the abolition of the OAIC may engage the right to an effective remedy as individuals would only be able to have a FOI decision reviewed if they can afford the AAT fees.

***Right to an effective remedy***

1.179 Article 2 of the International Covenant on Civil and Political Rights (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.

1.180 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.

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

***Compatibility of the measure with the right to an effective remedy***

1.182 The statement of compatibility identifies the right to an effective remedy as being engaged by the measure. In concluding that the measure is compatible with the right to an effective remedy, the statement of compatibility states:

The remedies available in privacy matters will be substantially the same...

The availability of internal review, external merits review by the AAT, further appeals to the courts on a question of law, access to judicial review and a right to complain to the Ombudsman ensure that there is comprehensive access to an effective remedy for FOI matters.<sup>2</sup>

1.183 However, the committee notes that currently individuals may access both the OAIC and the AAT for merits review of FOI decisions. That is, individuals are able to access two forums of merits review before needing to access the courts. The bill would therefore reduce access to review by removing one forum of review.

1.184 Further, the committee notes that there is generally an \$861 fee to access AAT review (which can be reduced to \$100 in certain circumstances). By abolishing

the OAIC and leaving the AAT as the sole avenue for external merits review of FOI decisions, the bill would remove access to free external merits review of most FOI decisions.

1.185 In light of these considerations, the committee considers that the bill may limit the right to an effective remedy. This is because the current arrangements for FOI requests facilitates individuals determining whether there has been a breach of human rights.

1.186 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provide reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

**1.187 The committee considers that the proposed removal of specific external review of FOI decisions by the OAIC may limit the right to an effective remedy. As set out above, the statement of compatibility does not sufficiently justify that potential limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Attorney-General as to whether the removal of access to free external merits review of FOI decisions is compatible with the right to an effective remedy, 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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## Higher Education and Research Reform Amendment Bill 2014

*Portfolio: Education*

*Introduced: House of Representatives, 4 September 2014*

## Higher Education and Research Reform Bill 2014

*Portfolio: Education*

*Introduced: House of Representatives, 3 December 2014*

### Purpose

1.188 The Higher Education and Research Reform Amendment Bill 2014 (the original bill) sought to amend the *Higher Education Support Act 2003* (HESA). The original bill was rejected by the Senate on 2 December 2014.

1.189 Schedule 1 of the original bill would:

- remove the cap on the number of Commonwealth funded places in sub-bachelor degree courses, such as diplomas, advanced diplomas and associate degrees;
- introduce Government subsidies to bachelor and sub-bachelor courses at private universities and non-university higher education providers;
- reduce subsidies for new Commonwealth supported students at universities by an average of 20 per cent;
- remove the current maximum student contribution amounts;
- provide for the merging of the FEE-HELP and HECS-HELP loan schemes for all higher education students;
- remove the up-front payment discount for HECS-HELP loans and the voluntary repayment bonus for HELP loans; and
- remove the FEE-HELP lifetime limit and loan fee.

1.190 Schedule 2 of the original bill would require higher education providers with 500 or more equivalent full-time Commonwealth supported students to direct up to 20 per cent of additional revenue received from the deregulation of student contributions to a new Commonwealth Scholarship Scheme.

1.191 Schedule 3 of the original bill would change the indexation rate of HELP debts from the current Consumer Price Index (CPI) to the Treasury 10-year bond rate, up to a maximum of six per cent per annum.

1.192 Schedule 4 of the original bill would reduce the minimum repayment income threshold for HELP debts to \$50 638 in 2016-17 and introduce a new repayment rate of two per cent.

1.193 Schedule 5 of the original bill would:

- allow universities to charge Research Training Scheme students a capped tuition fee which will be deferrable through HELP; and

- amend the *Australian Research Council Act 2001* to allow additional investment in research through the Future Fellowships scheme, apply indexation and add an additional forward estimate amount.
- 1.194 Schedule 6 of the original bill would remove the current lifetime limits on VET FEE-HELP loans and the VET FEE-HELP loan fee.
- 1.195 Schedule 7 of the original bill would discontinue the HECS-HELP benefit from 2015.
- 1.196 Schedule 8 of the original bill would replace the current Higher Education Grants Index (HEGI) with the CPI from 1 January 2016.
- 1.197 Schedule 9 of the original bill would change the name of the University of Ballarat to Federation University Australia.
- 1.198 Schedule 10 of the original bill would allow New Zealand citizens who are Special Category Visa holders to be eligible for HELP assistance from 1 January 2015.
- 1.199 The Higher Education and Research Reform Bill 2014 (the new bill) was introduced into the House of Representatives on 3 December 2014. The new bill is substantially similar to the original bill, but with the following changes:
- amendments to legislative guidelines to clarify that overseas and other non-Commonwealth supported students should not be charged less than the level of tuition fees and subsidies available for Commonwealth supported students;
  - maintenance of the CPI as the HELP indexation rate, and provisions for HELP indexation relief for primary carers of children up to five years of age; and
  - amendment of the Other Grants Guidelines (Education) 2012 to restructure the Higher Education Participation Programme requirements and introduce three programs targeted to increasing access and participation in higher education by students from disadvantaged backgrounds.
- 1.200 Measures raising human rights concerns or issues are set out below.

## **Background**

1.201 The committee reported on the original bill in its *Twelfth Report of the 44<sup>th</sup> Parliament*.<sup>1</sup> The original bill was rejected by the Senate on 2 December 2014 and the new bill was introduced into the House of Representatives the next day.

1.202 Due to the similarity of the bills, the committee has decided to report on both bills together.

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1 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 8-13.

## **Committee view on compatibility**

1.203 The committee notes that the response states that many of the measures do not limit rights. However, many of the measures in the bill clearly do limit rights.

1.204 The minister's response could instead have acknowledged when a measure limits a human right, directly or indirectly, and then set out the minister's justification of that limitation in accordance with international human rights law. The committee draws the minister's attention to the committee's Guidance Note 1 on how and when limitations of rights may be justified. In its analysis of the measures and the minister's response, when the committee is of the view that a measure limits a right, the committee has reached its views on compatibility having regard to the justifiability of that limitation.

### ***Right to education***

#### ***Adequacy of statement of compatibility***

1.205 The statement of compatibility provides a brief description of a number of measures said to engage the right to education. However, the committee considered that the general descriptions of the effect of the measures were insufficient for the committee to conduct assessments of the human rights compatibility of the legislation.

1.206 The committee sought the advice of the Minister for Education on whether each of the measures in schedules 1, 2, 3, 4, 5, 6, 7 and 8 of the original bill are compatible with Australia's international human rights obligations and for each individual measure:

- whether the measure achieves 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.

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

#### ***Disproportionate impact of measures on women***

1.207 The committee noted that the measures in schedules 1, 3 and 4 of the original bill, while neutral on their face, may have a disproportionate impact on women. According to the Australian Bureau of Statistics (ABS), women are more likely to be out of the workforce caring for children; and women with children are more likely to be in part-time work than men with children. Accordingly, women are more likely to take longer to pay off their HELP debts and, consequently, to pay more for their education than men.

1.208 The committee requested the advice of the Minister for Education as to whether the measures in schedules 1, 3 and 4 are compatible with the rights to equality and non-discrimination on the grounds of gender.

### **Minister's response on Schedule 1—expansion of the demand driven system to include sub-bachelor courses**

Schedule 1 includes the following measures:

- the removal of the cap on the number of Commonwealth funded places in sub-bachelor degree courses, such as diplomas, advanced diplomas and associate degrees
- the introduction of Government subsidies to bachelor and sub-bachelor courses at private universities and non-university higher education providers the reduction of subsidies for new Commonwealth supported students at universities by an average of 20 per cent
- the removal of the current maximum student contribution amounts
- the merging of the FEE-HELP and HECS-HELP loan schemes for all higher education students
- the removal of the up-front payment discount for HECS-HELP loans and the voluntary repayment bonus for HELP loans
- the removal of the FEE-HELP lifetime limit and loan fee.

The impact of these measures on the right to education, and the right to equality and non-discrimination, are analysed separately below. The reforms will affect the full range of sub-groups with the student population, including women who make up the majority of the students. In 2013, there were almost a million domestic higher education students, with women comprising around 56 per cent of all students enrolled, as well as of all students commencing in that year. As such, the reforms to higher education clearly have important implications for women, as they do for men, both in terms of their impact on fees and subsidies, and on access and quality.

#### **Does this schedule limit human rights?**

##### **Expansion of the demand driven system to include sub-bachelor courses**

###### **Right to education**

The Government believes that this measure provides for more opportunity and choice in the higher education system, supporting the right to education for around 48 000 additional students each year by 2018. This measure removes the discriminatory treatment of students who wish to enrol in sub-bachelor courses, including those at private and non-university higher education providers. These sub-bachelor courses provide vocational qualifications as well as effective pathways to further education for disadvantaged students. Expanding Government subsidies to these places will mean that they are more affordable for students, which will in turn increase access to higher education.

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

This measure is fully compatible with the right to equality and non-discrimination. The extension of subsidies to include sub-bachelor courses will provide more opportunities for all people to access higher education suitable to their needs and capabilities. In particular, people who take time out of the workforce will have

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access to more Government support for retraining or updating their qualifications as a result of the extension of subsidies to sub-bachelor courses.

Proportionality to policy objectives

The investment in this measure is proportionate to the need to improve access to sub-bachelor courses at higher education providers, to provide opportunities for vocational training and pathways to higher education, particularly for disadvantaged students.

## **Committee response**

**1.209 The committee thanks the minister for his response on this aspect of the measure. The committee considers that the expansion of the demand driven system to include sub-bachelor course does not limit the right to education and the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

## **Minister's response on schedule 1—extension of subsidies to private and non-university higher education providers**

Right to education

The Government believes that this measure is fully compatible with the right to education, providing for an expansion in access to include students undertaking courses at private universities and at non-university higher education providers. The extension of subsidies will create greater competition in the higher education market, expanding the choices and opportunities for students, and creating a downward pressure on course costs.

Private providers have indicated that, as a result of the subsidy, they will be able to decrease their course costs. This will increase the choices available to students and will remove a significant financial barrier to higher education facing many students. As a result of this measure, the Government expects that by 2018 around 35 000 additional students each year will gain access to Government subsidies for their education.

Right to equality and non-discrimination

This measure will not infringe on the right to equality and non-discrimination. It will remove the discriminatory treatment against students attending private and non-university providers. Currently, students who wish to undertake their undergraduate study at these providers are not eligible to receive any Government subsidy for their education and must pay a loan fee. Private universities and non-university higher education providers may be able to deliver courses more suited to a student's needs and, under this measure, will be eligible to receive Government support, removing this element of discrimination against students attending private and non-university providers. This measure will enable students to have equal access to Government subsidies for higher education, regardless of their choice of provider.

Additionally, more women than men are enrolled in courses at private providers. This means that women are more likely to benefit from the extension of the demand driven system to include private providers. As private providers have indicated they will be able to lower course costs, women will benefit from the reduced financial burden of undertaking study at the provider of their choice, and

will be able to access Government subsidies.

Proportionality to policy objectives

The investment in this measure is proportionate to the need to improve access to higher education, and reduce costs for students wishing to study at private and non-university providers. As well as improving access, this measure will drive greater competition and quality across the sector.

To manage the costs, non-university providers will be funded at a lower rate (70 per cent) which recognises the unique, and often legislated, demands on universities, including those relating to research and community outreach, while still providing a level of funding that will encourage competition.

### **Committee response**

**1.210 The committee thanks the minister for his response on this aspect of the bill. The committee considers that the measure does not limit the right to education and non-discrimination and has concluded its examination of this aspect of the original bill.**

### **Minister's response on schedule 1—reduction of subsidies for new Commonwealth supported students at universities**

Right to education

This measure will reduce subsidies for new Commonwealth supported students at universities by an average of 20 per cent. Commonwealth Grant Scheme funding tiers will also be simplified and restructured from eight to five funding tiers, providing a more coherent basis for funding different units of study with regard to teaching methods and the infrastructure required to support delivery.

This measure will not of itself increase course costs for students. Private providers receiving Government subsidies for the first time will have the ability to reduce course costs, which will provide benefits for those who choose to enrol at these providers.

There will be no negative impact on the right to education. This right will continue to be assured by the HELP scheme which will ensure that all higher education students at registered providers will be able to defer the full cost of their study. There will not be any requirement to repay any HELP debt until a person's income reaches the minimum repayment threshold of more than \$50 000 per year, and any repayments will continue to be within moderate and reasonable limits, based on income.

Right to equality and non-discrimination

This measure will not limit the right to equality and non-discrimination. The reduction of subsidies applies to all new Commonwealth supported students equally, regardless of their course. There is no reason to expect any disproportionate impact on women. In fact the new cluster rates are specifically designed to moderate the impact on important disciplines such as teaching and nursing, in which women are more represented.

Proportionality to policy objectives

This measure will save \$1.95 billion over four years. Given it can be achieved without compromising access, it is proportionate to the objective of contributing to



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the repair of the Budget, so as to ensure the ongoing sustainability and excellence of Australia's higher education system.

## **Committee response**

### *Right to education*

#### **1.211 The committee thanks the minister for his response**

1.212 However, the committee notes that article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires Australia to recognise that, with a view to achieving the full realisation of the right to education:

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

1.213 The committee considers that the proposed 20 per cent reduction in the subsidy for Commonwealth-supported students at university may be considered a retrogressive measure for human rights purposes. It will reduce the current level of government support for higher education students and in this respect represents a limitation on the progressive introduction of free education.

1.214 The committee notes that a retrogressive measure may nevertheless be permissible for the purposes of international human rights law if it is in pursuit of a legitimate objective and is rationally connected to, and a proportionate way to achieve, that objective. The committee notes that the minister's response identifies the objective of the measure as:

...contributing to the repair of the Budget, so as to ensure the ongoing sustainability and excellence of Australia's higher education system.<sup>2</sup>

1.215 The minister's response assesses the measure as not limiting the right to education as it will not result in the introduction of upfront payments.

1.216 However, the committee notes that, while students will not have to pay fees upfront as a result of this measure, the total cost of their education would rise directly as a result of this reduction in Commonwealth subsidy. Accordingly, the committee considers that the measure does limit the right to education by increasing the total cost of education for students. As this limitation is not acknowledged by the minister, his response provides no evidence to support a conclusion that the measure is a justifiable limitation on the right to education.

1.217 The committee notes that budgetary constraints have been recognised as a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights. However, the committee notes that a 20 per cent reduction in support for each Commonwealth-funded student is a significant reduction, and accordingly evidence explaining why such a cut is

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2 Explanatory memorandum (EM) 2.

nevertheless a proportionate reduction in terms of the right to education is required. Such information was not provided in the statement of compatibility or the minister's response.

**1.218 On the basis of the information available, the committee therefore considers that the reduction in subsidies for new Commonwealth supported students at universities may be incompatible with the right to education. The committee has concluded its examination of this aspect of the original bill.**

*Right to equality and non-discrimination*

**1.219 The committee thanks the minister for his response on this aspect of the measure. The committee is of the view that the measure limits the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

**Minister's response on Schedule 1—removal of the cap on student contribution amounts**

Right to education

The introduction of greater competition into the higher education market, in the form of fee deregulation, will result in greater price differentiation among providers. Higher education providers will be able to set their own course fees, and to compete on price and quality to attract students.

Competition between providers will create downward pressure on fees. As indicated above the right to education will continue to be protected by the HELP scheme which will ensure that all eligible higher education students will be able to defer the full cost of their study and will not be required to make any repayments until they are earning sufficient income.

Right to equality and non-discrimination

The Government does not believe that this will limit the right to equality and non-discrimination in any way. It is an explicit aim of these reforms to improve choice and ensure that all people, regardless of gender, will have the opportunity to choose the course that best suits their needs.

Proportionality to policy objectives

This policy is critical to achieve the long-term objective of improving Australia's higher education sector to compete in a global market. It will enable higher education providers to improve the quality and diversity of course offerings, in order to stand out in the higher education market, which will help to promote greater quality and choice across the system.

**Committee response**

*Right to education*

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

1.221 However, the committee notes that, if fees were to rise as a result of the removal of the statutory cap on student contributions, the measure may be

incompatible with the right to education to the extent that it reduces the affordability (and thus accessibility) of higher education and, more generally, on the basis that the ICESCR requires the progressive realisation of free tertiary education.

1.222 In this respect, while the minister states that increased competition in the higher education market will 'create downward pressure on fees', the committee considers that evidence is required to show that increased competition will result in downward pressure on fees across all disciplines of study. In the absence of further information, the committee considers that the measure may be an unjustifiable limitation on the obligation to make education equally accessible to all as required by article 13 of the ICESCR.

**1.223 The committee therefore seeks further information from the minister, including any relevant modelling, case studies or analysis, in support of the assessment that removing the cap on student contributions will not reduce access to education.**

*Right to equality and non-discrimination*

**1.224 The committee thanks the minister for his response on this aspect of the measure. The committee is of the view that the measure limits the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

**Minister's response on schedule 1—merging of the FEE-HELP and HECS-HELP loan schemes**

Right to education

This measure will have no impact on the right to education. As the major differences between the HECS-HELP and FEE-HELP loan schemes will be removed in this package of reforms, the two loan schemes will be merged to simplify arrangements for students and providers. The removal of these anomalies for students will support and expand the right to education, as detailed below in the discussion of 'Removal of the loan fee and lifetime limit on FEE-HELP loans'. The eligibility criteria for accessing a HELP loan have not been altered, ensuring ongoing access to higher education for all student groups that previously had access to the HECS-HELP and FEE-HELP schemes.

Right to equality and non-discrimination

This measure will not impact on the right to equality and non-discrimination.

Proportionality to policy objectives

This measure is a logical extension of other measures, providing for a simplification of existing programme arrangements without any impact on access.

**Committee response**

**1.225 The committee thanks the minister for his response on this aspect of the bill. The committee considers that the measure does not limit the right to**

**education or the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

### **Minister's response on removal of the up-front payment discount and the voluntary repayment bonus for HELP loans**

#### Right to education

This measure is fully compatible with the right to education. It would not prevent a person from accessing higher education. HELP will continue to be available to allow students to defer their tuition costs if they choose not to pay these up-front.

#### Right to equality and non-discrimination

The removal of the voluntary repayment bonus and the up-front payment discount restores the right of all students to be treated equally. Currently some students obtain a financial benefit because they may have sufficient income to make voluntary repayments, or can afford to pay up-front for their courses.

#### Proportionality to policy objectives

This measure will contribute to sustainability of the HELP system and repair of the Budget without any negative impact on access.

### **Committee response**

**1.226 The committee thanks the minister for his response on this aspect of the bill. The committee considers that the measure does not limit the right to education or the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

### **Minister's response on schedule 1—removal of the loan fee and lifetime limit on FEE-HELP loans**

#### Right to education

The removal of the lifetime loan limit and the loan fee for FEE-HELP under this schedule also removes barriers to higher education. Under the current HELP scheme, the lifetime limit that a person may borrow is \$96 000, or \$120 002 for medicine, dentistry and veterinary science courses.

The HELP loan fee and limit can create barriers to access for people who are unable to afford upfront contributions, particularly when they have incurred HELP debts for previous study. If a student's FEE-HELP balance is such that the fees charged by the provider would cause them to go over the limit, and they do not have private resources, the system effectively denies them the opportunity to study at a private provider or in an unfunded sub-bachelor or postgraduate course. In contrast, undergraduate students at public universities are not subject to any limit and can undertake as many courses at this level at public universities as they choose.

This represents a major inequity in the system, discriminating against students attending private providers and undertaking unsubsidised sub-bachelor courses. The lifetime limit is also a potential barrier to access for students in unfunded postgraduate courses. The removal of the loan fee and lifetime limit is critical to addressing the inequities for these various categories of students.

Given the phase out of undergraduate fee-paying places in public universities, the FEE-HELP loan fee now only applies to students at private universities and non-

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university higher education providers. In addition, FEE-HELP loans tend to be larger on average than those incurred by students in Commonwealth supported places. The limit on loans mean that there may be significant limitations to access to retraining or to further study for an individual who already has a HELP loan, particularly when the burden of the loan fee is added to the existing cost of the course. Abolition of the loan fee and the lifetime limit will increase accessibility to higher education.

#### Right to equality and non-discrimination

The removal of the loan fee and the loan limit ensures equitable access for students, regardless of the type of course or the provider the student has chosen. Removing the loan fee will reduce costs for students currently studying without any Commonwealth subsidy and it will also remove pricing inequity between public and private providers, discussed above. Based on 2013 data, it is estimated that removing the loan fee will benefit more than 50 000 higher education students per year. The average loan fee in 2013 for such students was around \$2600 per year. Additionally, the removal of the lifetime HELP loan limit and the loan fee will provide more pathway options and opportunities to retrain or to update qualifications if they have taken time out of the workforce. This can be particularly important for women given their tendency to have greater caring responsibilities. Additionally, there are more women in fee-paying places than men. This indicates that the FEE-HELP loan fee has a greater financial impact on women than men. By removing the punitive FEE-HELP loan fee and lifetime limit there will be fewer financial barriers to access to higher education for women. More women are likely to benefit from these changes than are men.

#### Proportionality to policy objectives

This measure will ensure that students are not denied access to higher education because they cannot meet the upfront costs, and will ensure the costs of higher education are manageable for all students. It is also a critical element in ensuring consistent treatment of students and providers across the higher education system.<sup>3</sup>

### **Committee response**

**1.227 The committee thanks the minister for his response on this aspect of the bill. The committee considers that the measure does not limit the right to education and the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

### **Minister's response on schedule 2—creation of Commonwealth scholarships scheme**

Schedule 2 of the Bill provides for the creation of a Commonwealth Scholarship scheme. This would require providers with 500 or more equivalent full time Commonwealth supported students to set aside 20

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3 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 1-6.

per cent of additional revenue raised from the deregulation of student contributions to a scholarship fund to support disadvantaged students.

**Does this schedule limit human rights?**

The measure will help support an individual's right to education by creating a Commonwealth Scholarship scheme to expand access to higher education for disadvantaged students. This scholarship scheme will be run by providers to provide tailored, individualised support for disadvantaged students enrolled in higher education at that provider. This could take the form of help with costs of living while they study, fee exemptions, relocation expenses, or tutorial and other academic support.

This measure will support the right to education for disadvantaged students by removing barriers to further study. The Commonwealth Scholarship scheme may also promote the right to an adequate standard of living, depending on what type of support a higher education provider offers for its students.

This measure also guards against the possibility of a two-tiered system emerging by ensuring that all providers receiving significant additional revenue, including the largest and most prestigious universities, will need to meet access and equity objectives.

There are more women from disadvantaged backgrounds who study in higher education than disadvantaged men, and as such women are more likely than men to gain the benefits of the new Commonwealth Scholarship scheme.

**Are the actions taken proportionate to the policy objective?**

This measure promotes equity and access to higher education. Requiring providers to set aside one dollar in every five of additional revenue to support disadvantaged students is reasonable. This will create many thousands of scholarship opportunities for disadvantaged students, and it is proportionate to the policy objective of promoting equity and access to higher education for disadvantaged students.<sup>4</sup>

**Committee response**

**1.228 The committee thanks the minister for his response on this aspect of the measure. The committee considers that the measure does not limit the right to education and the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

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4 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 7.

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## Minister's response on schedule 3—change to indexation of HELP loans

Schedule 3 changes the indexation of HELP loans from the Consumer Price Index (CPI) to the 10 year Government bond rate, capped at 6 per cent per annum.

### Does this schedule limit human rights?

#### Right to an adequate standard of living

This measure will not limit the right to an adequate standard of living. Replacing CPI indexation with bond rate indexation will not create increased costs for students while they study, and they will still be able to defer the entire cost of their tuition through the HELP scheme. As is currently the case, they will not be required to make any repayments until they are earning a good income. This measure will not lead to any change to the rate of annual repayments or the proportion of annual household income directed towards repaying their HELP debt. Therefore, while graduates may take longer to repay their HELP loans, there will be no reduction in their annual disposable income as a result and no impact on their capacity to maintain an adequate standard of living.

#### Right to education

This measure will not limit the right of a person to access higher education. It is possible that the application of the bond rate of indexation to HELP debts may create an incentive for some students to pay back their debts earlier or pay their costs upfront, however there will be no requirement for students to pay more before or during their study as a result of this measure. HELP will continue to provide the opportunity for all Australian students to defer their tuition costs.

Furthermore, the measure will ensure the sustainability of HELP for the long term, meaning that future generations of students will also be able to borrow their share of the cost of their tuition.

#### Right to equality and non-discrimination

Under the current system, the population that tend to earn lower incomes or spend time out of the workforce take longer to repay their debts. On average, women tend to repay their student loans over a longer period of time than men. This is in a large part due to the greater likelihood that women will elect to work part time or exit the workforce, and the greater likelihood of being in lower paid professions. This results in the Government on average providing women with a higher deferral subsidy as a percentage of outstanding debt (refer Table 1 below).

The Government also provides an effective subsidy to students who will never repay some or all of their debt, Debt Not Expected to be Repaid (DNER). On average women benefit more from this subsidy than men, and this will not change under the reforms (refer Table 1).

The reforms may increase the time it will take for part time workers, or those who elected to leave the workforce, to repay their HELP debt. However, this would apply to all such groups, regard less of gender.

Women will not face any limitations to their right to access a HELP loan, and therefore higher education courses, as a result of the change in indexation. They will not have to pay any of their tuition costs upfront, and will have access to Government subsidies for more courses, including sub-bachelor courses, and courses at private providers, that may be more suitable to their needs.

**Are the actions taken proportionate to the policy objective?**

This measure will more accurately reflect the cost of borrowing to the Government, recognising the rapidly increasing cost to the Government of borrowing money in order to provide HELP loans. This measure will also effectively remove the indirect subsidy that all taxpayers contribute to higher education students.

The Government 10 year bond rate, with a cap of 6 per cent per annum, is much lower than the rate of a commercial loan. This means that a student would still pay very little interest on their HELP loan compared to an equivalent loan with a bank or a financial institution. This measure will provide certainty for students through the creation of the interest rate 'safety cap', ensuring that HELP loans will not be indexed at a rate higher than 6 per cent per annum.

The proposed change to the bond rate is proportionate to the policy objectives of repairing the Budget, and ensuring that the HELP scheme remains sustainable into the future.<sup>5</sup>

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5 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 8-9.



Table 1: Outstanding HELP debt by gender and age as at 30 June 2013

Age on completion	Outstanding debt (\$m)	Deferral subsidy as a percentage of debt	DNER as a percentage of debt
<b>Males</b>			
- less than 30	9,778	17.0%	19.5%
- 30 to 55	2,161	11.9%	29.1%
- over 55	114	5.0%	66.1%
<b>All Males</b>	<b>12,053</b>	<b>15.9%</b>	<b>21.7%</b>
<b>Females</b>			
- less than 30	12,503	18.2%	20.7%
- 30 to 55	3,212	13.2%	26.4%
- over 55	174	5.1%	65.7%
<b>All Females</b>	<b>15,889</b>	<b>17.0%</b>	<b>22.4%</b>
<b>All groups</b>	<b>27,942</b>	<b>16.6%</b>	<b>22.1%</b>

Source: Australian Government Actuary

Note: deferral subsidy is the cost to the Government of providing students with concessional loans which have no real interest rate. That is the difference between the Government's cost of borrowing and the Consumer Price Index.

## Committee response

### *Right to an adequate standard of living*

1.229 The committee thanks the minister for his response on this aspect of the measure. The committee considers that the measure is compatible with the right to an adequate standard of living and has concluded its examination of this aspect of the original bill.

### *Right to education*

1.230 The committee thanks the minister for his response on this aspect of the measure.

1.231 However, the committee notes that increases in the cost of higher education may reduce access to education for students who are, or consider themselves to be or likely to be, unable to afford those costs.

1.232 The committee notes that a central pillar of the Australian system of higher education is the ability of students to defer the costs of their education until they start earning a salary above a certain threshold. While this aspect of the system remains essentially unchanged, the committee notes that the proposed change to indexation may operate as a disincentive to certain students (such as those unable to pay upfront). Any such disincentive would be inconsistent with the obligation under the ICESCR to ensure that higher education is equally accessible and progressively free.

1.233 In addition, while the minister states that the measure will ensure the sustainability of HELP for the long term, no evidence has been provided to support this claim.

1.234 The committee notes, however, that the new bill would maintain CPI as the HELP indexation rate and accordingly there would be no change to the current arrangements for indexation of HELP loans.

**1.235 The committee therefore concludes its examination of this measure.**

*Right to equality and non-discrimination*

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

1.237 The committee considers that the measure in the original bill may indirectly discriminate against women due to its disproportionate impact on women with children. As previously noted, this is because such women are more likely than men to be out of the workforce caring for children; and more likely to be in part-time work.<sup>6</sup> Where these women are earning below the repayment threshold for HELP, their higher education debts are likely to grow faster than inflation if indexed at the bond rate as a result of the change in schedule 3. This would result in a longer period of paying off their debts and, consequently, to higher education costs than men.

1.238 The committee notes that the minister's response does not address the issue of indirect discrimination, and does acknowledge that the measure may increase the time it takes for part-time workers, or those who have chosen to leave the workforce, to repay their HELP debts, and will increase the total cost of their education.

1.239 However, the committee notes that the new bill would maintain CPI indexation of HELP debts. In addition, the new bill would provide indexation relief for primary carers of children up to five years of age. The committee considers that, compared to existing arrangements for HELP debts, the measures in the new bill would substantially address gender inequality in the cost of education. As women are predominantly the primary care giver of young children, the new bill would effectively freeze the HELP debts of women while they take time off work to raise their children (up until the age of five).

**1.240 The committee therefore concludes its examination of this measure on the basis that the revised bill is compatible with the right to equality and non-discrimination.**

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6 Australian Bureau of Statistics website, '4102.0 - Australian Social Trends, Nov 2013: Employed Mothers(a), Selected Main Reason Returned To Work, November 2011', <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0Main+Features10Nov+2013> (accessed 8 September 2014).

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## Minister's response on schedule 4—new repayment threshold for HELP loans

Schedule 4 of the Bill creates a new repayment threshold for HELP loans. When a person's annual income reaches \$50 638 they would be required to repay the HELP debt at a rate of 2 per cent per annum.

### **Does this schedule limit human rights?**

#### **Right to an adequate standard of living**

This schedule does not impact on the right to an adequate standard of living. The \$50 638 minimum repayment threshold is well above the minimum liveable wage, and will be annually adjusted to take inflation into account.

Additionally, to minimise the impact of the introduction of a lower minimum repayment threshold, graduates who earn more than \$50 637 but less than the previous minimum repayment threshold (estimated to be \$56 264 in 2016-17) would only be required to pay 2 per cent of their annual income towards the HELP scheme. Taxpayers with incomes in this range would be required to pay back around \$1013-\$1125 in 2016-17.

Those who have accessed a HELP loan and believe that they are experiencing serious financial hardship will be able to apply to the Australian Taxation Office to defer their payments, or to the Department of Finance to have their debt waived, further safeguarding the right to an adequate standard of living.

For the above reasons, there is no risk that this measure will limit the right to an adequate standard of living.

#### **Right to education**

This measure does not limit the right to access higher education. Annual payments will remain within the current reasonable limits, and will continue to be income-contingent, which will ensure this measure does not impact on the right to an adequate standard of living or create a significant deterrent to accessing higher education.

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

This measure is fully compatible with the right to equality and non-discrimination on the grounds of gender. The new repayment threshold applies to everyone, regardless of gender and still represents an income substantially above the minimum liveable wage.

Women are more likely than men to work part-time, and to remain under the minimum repayment threshold. This means that women are less likely to be required to make any repayments at all on their HELP loans. Furthermore, when a person's income, regardless of gender, falls below the repayment threshold for any financial year, they would not be required to direct any proportion of their income towards repayments.

### **Are the actions taken proportionate to the policy objective?**

This measure is proportionate to the policy objective of ensuring the long-term sustainability of HELP, while not adversely impacting on the lives of graduates by requiring repayments on a low income level. By reducing the minimum income repayment threshold, the Government will ensure that individuals who have the financial means will begin to repay their HELP debts earlier and will reduce the level of doubtful debt incurred through HELP loans.<sup>7</sup>

### **Committee response**

**1.241 The committee thanks the minister for his response on this aspect of the bill. The committee is of the view that the measure limits the right to education and the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee also considers that the measure does not limit the right to an adequate standard of living and is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

### **Minister's response on schedule 5—funding for future fellowships scheme**

Schedule 5 of the Bill will provide funding for the Future Fellowships scheme, and amend the Australian Research Council Act (ARC Act) to apply an efficiency dividend for 2014-15, before applying indexation to existing amounts and adding an additional forward estimate for funding into the 2017-18 financial year.

This schedule will allow Research Training Scheme (RTS) students to be charged a capped student contribution amount, which will allow providers to offset the 10 per cent reduction in funding for the RTS announced in the Budget.

#### **Does this schedule limit human rights?**

This measure will not limit the right to education. RTS students that are charged a tuition fee amount will be able to defer the fee through the HELP scheme in the same manner as tuition fees for undergraduate places subject to meeting the eligibility criteria for the HELP scheme. This will ensure that eligible RTS students will not have to pay this contribution amount upfront.

Additionally, the low cap of \$3900 per EFTSL for high-cost courses and \$1700 per EFTSL for low-cost courses will ensure that this price signal is not a deterrent for students to commence higher degrees by research. This is a small proportion of the total cost of the RTS course, and will not restrict access to tertiary education or higher degrees by research.

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7 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 10-11.

Additionally, the amount provided over the forward estimates to the ARC is a substantial increase in funding. This will allow the ARC to fund high-quality research to address the challenges Australia will face in the future, and to improve the quality of people's lives, as well as support the development of new industries to remain competitive in the global knowledge market. The overall increase in funding will expand the capacity of the ARC to support higher degrees by research, and graduate research capabilities.

**Are the actions taken proportionate to the policy objective?**

The RTS measure will save approximately \$174 million over three years, and will help to create a sustainable funding model for research students into the future. Given the significantly better employment and wage outcomes that postgraduates have when compared to bachelor level graduates, it is reasonable to ask RTS students to contribute a small proportion of the total cost of their course.

The application of a one-off efficiency dividend is proportionate to the policy objective of repairing the Budget, while the continuation of funding is reasonable given the importance of research to Australia's continued economic growth into the future.<sup>8</sup>

### **Committee response**

**1.242 The committee thanks the minister for his response on this aspect of the bill. The committee is of the view that the measure limits the right to education and the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

### **Minister's response on schedule 6—removal of the VET FEE-HELP loan fee and the lifetime loan limit**

Schedule 6 provides for the removal of the VET FEE-HELP loan fee and the lifetime loan limit.

**Does this schedule limit human rights?**

As discussed under Schedule 1, the removal of the loan fee and the lifetime loan limit will remove barriers to higher education and improve access for students. This is fully compatible with the right to education.

Restricting the amount that a student may borrow for their education impedes the ability of people to retrain, change careers or update their qualifications after a period out of the workforce. This measure will create more pathways for students and workers who need to access additional

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8 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 12.

study or training over their lifetimes, without the barrier of a punitive loan fee or up-front costs for their course.

It is estimated that over 80 000 students undertaking vocational education and training will benefit each year from the removal of the loan fee. In 2013, the average VET FEE-HELP loan fee was around \$1600 per student.

Most VET FEE-HELP students are women. In 2013, two-thirds of students accessing VET FEE-HELP loans were women (67 100 out of 100 000). Eligible female students were slightly more likely to access a loan (83 per cent) than eligible male students (79 per cent). As a result, removal of the VET FEE-HELP and loan-fee limits will be of significant benefit to women, and can be expected to further improve their access to vocational education and training and therefore opportunities for labour force participation.

**Are the actions taken proportionate to the policy objective?**

This measure is proportionate to the objective of ensuring equitable treatment and removing elements of discrimination against students studying VET courses in unsubsidised places. This will protect their right to access relevant VET courses regardless of their capacity to pay. The cost of these measures is manageable in the context of the overall balanced package of reforms.<sup>9</sup>

**Committee response**

**1.243 The committee thanks the minister for his response on this aspect of the bill. The committee considers that the measure does not limit the right to education or the right to equality and non-discrimination and has concluded its examination of this aspect of the original bill.**

**Minister's response on schedule 7—discontinuation of the HECS-HELP benefit**

Schedule 7 discontinues the HECS-HELP benefit.

**Does this schedule limit human rights?**

This will not have adverse effects on higher education access. The Kemp-Norton Review of the Demand Driven System found that the HECS-HELP Benefit has not created any significant incentive for students to choose courses in the targeted areas of maths, science, education or nursing since its inception in 2008 and recommended that it be removed.

Furthermore, the uptake of the programme was low and did not justify the costs of administering the scheme. In 2011-12 only 2500 benefits were granted to graduates, and in 2012-13 only 7220 benefits were granted.

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9 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 13.

In light of this, the Government has decided to remove this ineffective programme. It will not impede access to higher education, or affect eligibility for HELP loans in any way.

**Are the actions taken proportionate to the policy objective?**

The removal of the HECS-HELP benefit is reasonable given that it was not successful in creating behavioural change, or providing an incentive for students to choose courses in the targeted areas.

The removal of this programme is expected to save \$87 million over three years from 2015-16. The discontinuation of inefficient schemes such as the HECS-HELP benefit will contribute to the repair of the Budget.<sup>10</sup>

**Committee response**

**1.244 The committee thanks the minister for his response on this aspect of the bill. The committee is of the view that the measure limits the right to education and the right to equality and non-discrimination but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

**Minister's response on schedule 8—Higher Education Grants Index calculation**

Schedule 8 replaces the Higher Education Grants Index calculation with CPI.

**Does this schedule limit human rights?**

This schedule is fully compatible with the right to education. The calculation of all higher education grants under the Higher Education Support Act 2003 at CPI will ensure the continued and sustainable growth of funding.

**Are the actions taken proportionate to the policy objective?**

It is reasonable to simplify the indexation arrangements for higher education grants. This measure is part of a government-wide initiative to streamline and reduce the complexity of Government programmes.

This measure will also ensure the sustainable growth of Government funding to the higher education sector, including research grants and Australian Postgraduate Awards. It is proportionate to the policy objective of ensuring the continued excellence of Australia's higher education

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10 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 14.

providers, as well as the objective of creating sustainable funding arrangements into the future.<sup>11</sup>

### **Committee response**

**1.245 The committee thanks the minister for his response on this aspect of the bill. The committee is of the view that the measure limits the right to education but, for the reasons given by the minister, the limitation is justified and the measure is therefore compatible with human rights. The committee has concluded its examination of this aspect of the original bill.**

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11 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 31 October 2014) 15.



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

*Portfolio: Prime Minister and Cabinet*

*Authorising legislation: Public Service Act 1999*

*Last day to disallow: 2 March 2015*

### **Purpose**

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

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

### **Background**

1.248 The committee reported on the directions when they were introduced in its *Sixth Report of 2013*.<sup>1</sup>

1.249 The directions prescribe the minimum standards with which agency heads and Australian Public Service (APS) employees must comply in order to meet their obligations under the *Public Service Act 1999*, and support agency heads to fulfil their responsibilities in respect of their employer powers.

1.250 The committee raised concerns in relation to Chapter 2 of the directions, and specifically the requirement for notification of certain employment decisions in the *Gazette*. This included the employee's name (unless the relevant agency head decides the name should not be included), and information about that person's appointment, promotion and termination, including the grounds for termination. The grounds for termination included that the employee:

- lacked essential qualifications;
- had non-performance or unsatisfactory performance of duties;
- was unable to perform duties due to physical or mental incapacity;
- failed to satisfactorily complete an entry level training course; and
- breached the Code of Conduct.

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

1.251 The committee noted that the publishing of employment decisions, particularly in relation to the termination of a person's employment, limited the right to privacy.

1.252 The committee also noted that public notification that a person's employment was terminated because they were unable to perform duties due to physical or mental incapacity also engaged rights under the Convention on the Rights of Persons with Disabilities (CRPD).

1.253 In response to the committee's concerns, the Australian Public Service Commissioner (the Commissioner) conducted a review of the gazettal requirements. The current direction amends the directions to remove most of the requirements to notify of termination decisions. However, termination on the grounds of breach of the Code of Conduct will continue to be notified in the *Gazette*.

### **Notification of termination decisions in the Gazette**

1.254 The committee thanks the Commissioner for reviewing the directions in response to the committee's concerns, and notes that the amendments to the directions address the committee's concerns in relation to the compatibility of the directions with the CRPD.

1.255 However, while the amendments largely address the committee's concerns in relation to the compatibility of the measure with the right to privacy, the committee remains concerned that the requirement to notify termination on the grounds of breach of the Code of Conduct in the *Gazette* remains in the directions. The committee considers that the retention of this requirement engages the right to privacy.

### ***Right to privacy***

1.256 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. 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.

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

1.257 The statement of compatibility concludes that the direction generally advances human rights. While it identifies the continued notification of decisions relating to termination on misconduct grounds as a limitation on the right to privacy, it concludes that the measure 'is considered reasonable, necessary and proportionate'.<sup>2</sup>

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2 Statement of compatibility 6.

1.258 However, it is unclear to the committee whether the continuing publishing of termination decisions may be regarded as a justifiable limit on the right to privacy. Any such limitation must be shown to be aimed at achieving a legitimate objective, being one that is necessary and addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right.

1.259 In this regard, the statement of compatibility identifies the objectives of the measure as being 'public interest grounds' and because such information 'may be useful to prospective APS employers'.<sup>3</sup> The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1, and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which 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'.

1.260 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 useful. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

**1.261 The committee considers that the publishing of termination decisions for breach of the Code of Conduct limits the right to privacy. As set out above, the statement of compatibility has not clearly established that the limitation is in pursuit of a legitimate objective. The committee therefore seeks the advice of the Minister Assisting the Prime Minister for the Public Service as to:**

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

## **Competition and Consumer (Industry Codes—Franchising) Regulation 2014 [F2014L01472]**

*Portfolio: Treasury*

*Authorising legislation: Competition and Consumer Act 2010*

*Last day to disallow: 2 March 2015*

### **Purpose**

1.262 The Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (the regulation) regulates the conduct of participants in franchising relationships.

1.263 The regulation replaces the Trade Practices (Industry Codes—Franchising) Regulations 1998 (the Franchising Code). It requires franchisors to disclose certain information to franchisees, prescribes minimum standards in franchise agreements, and provides dispute resolution processes.

1.264 The regulation creates civil penalties of 300 units for the breach of certain provisions in the Franchising Code.

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

### **Civil penalties provisions**

1.266 The regulation creates civil penalties of 300 units for the breach of certain provisions in the Franchising Code. As set out in the committee's Guidance Note 2, civil penalty provisions engage fair trial rights and rights to a fair hearing. They may also engage criminal process rights such as the presumption of innocence.

### ***Right to a fair trial and fair hearing rights***

1.267 The right to a fair trial and fair hearing are protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

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

procedures that apply in relation to civil matters; that is, proof is on the balance of probabilities.

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

*Compatibility of the measure with the right to a fair trial and fair hearing rights*

1.270 The statement of compatibility states that 'the Regulation does not engage any of the applicable rights or freedoms'.<sup>1</sup>

1.271 However, the committee notes that as the regulation includes civil penalty provisions it engages the right to a fair trial and fair hearing rights.

1.272 The committee notes most of the civil penalty provisions apply only to breaches of the Franchising Code by the franchisor (such as in relation to a franchisor's disclosure obligations). In those cases, given the regulatory context, the committee does not consider those provisions constitute a limitation on human rights.

1.273 However, other civil penalty provisions (such as the obligation to act in good faith (clause 6) and attendance at mediation (clauses 39 and 41) apply to both franchisor and franchisee. The committee's Guidance Note 2 sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties, including the committee's expectations in relation to assessing the human rights compatibility of such provisions.<sup>2</sup>

1.274 In general, it will not be necessary to provide an assessment of human rights compatibility where the civil penalty provision is in a corporate context and the penalties are small.<sup>3</sup> In this case, however, given that franchisees may be individuals or small business and that the civil penalties may be quite large (300 penalty units), the committee considers that an assessment of whether the civil penalty provisions may be criminal for international human rights law is required.

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1 Explanatory memorandum (EM) 5.

2 Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014)  
[http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights\\_ctte/guidance\\_notes/guidance\\_note\\_2/guidance\\_note\\_2.pdf](http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf) (accessed 15 January 2015).

3 The committee also notes that the civil penalty provisions allow for a penalty of up to 300 penalty units. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) states that Regulations should not be authorised to impose fines exceeding 250 penalty units for a body corporate.<sup>3</sup>

**1.275 On this basis, the committee considers that the criminal process rights in article 14 of the ICCPR may be engaged. The committee therefore seeks the advice of the Minister for Small Business as to whether the civil penalty provisions in the regulation are compatible with the right to a fair trial and fair hearing rights.**

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## **Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria [F2014L01634]**

*Portfolio: Foreign Affairs and Trade*

*Authorising legislation: Criminal Code Act 1995*

*Last day to disallow: 26 March 2015*

### **Purpose**

1.276 The Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria [F2014L01634] (the regulation) makes it an offence under section 119.2 of the *Criminal Code Act 1995* (the Criminal Code) to enter, or remain in, the al-Raqqa Province in Syria.

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

### **Background**

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

1.279 The committee considered these provisions as part of its assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the bill) in its *Fourteenth Report of the 44<sup>th</sup> Parliament*.<sup>1</sup> The bill was passed by both Houses of Parliament and received Royal Assent on 2 November 2014.

1.280 The committee considered that the declared area offence provisions introduced by the bill were likely to be incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.

1.281 Subsequent to the committee's analysis of the bill, the bill was amended to remove the ability of the minister to declare whole countries or neighbouring countries as declared areas (see section 119.3(2A) of the Criminal Code).

### **Determination of al-Raqqa Province as a declared area**

1.282 As a result of the regulation, it is a criminal offence under section 119.2 of the Criminal Code for a person to enter, or remain in, al-Raqqa province. The committee notes that the al-Raqqa province covers an area of approximately 19 000

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

square kilometres and, prior to the civil war in Syria, was home to over 1 000 000 residents.<sup>2</sup>

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

### ***Multiple rights***

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

- the right to a fair trial and the presumption of innocence;
- the prohibition against arbitrary detention;
- the right to freedom of movement; and
- the right to equality and non-discrimination.<sup>3</sup>

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

1.285 In light of the committee's previous conclusion that the declared area offence provisions in the Criminal Code are incompatible with human rights, it follows as a matter of law that the declaration of al-Raqqa province in Syria for the purposes of the declared area offence provision is also likely to be incompatible with human rights.

1.286 Further, the committee considers that the statement of compatibility for the regulation does not meet the requirements set out in the committee's Guidance Note 1 or the Attorney-General's Department's guidance on the preparation of statements of compatibility.

1.287 While the committee acknowledges that deterring Australians from travelling to areas where terrorist organisations are engaged in a hostile activity may be regarded as a legitimate objective for the purposes of international human rights law, the committee considers that the statement of compatibility does not provide a

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2 Syrian Arab Republic Central Bureau of Statistics, *Syrian Population By Sex And Governorate According To Civil Affairs Records On 1 / 1 / 2011 ( 000 )*, available at <http://www.cbssyr.sy/yearbook/2011/Data-Chapter2/TAB-1-2-2011.htm> (accessed 6 January 2015).

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



sufficiently detailed or evidence-based analysis to establish that the regulation pursues a legitimate objective. For example, the statement of compatibility simply states:

The Declaration is compatible with these human rights because it is a lawful, necessary and proportionate response to protect Australia's national security.

...The risk of a successful terrorist attack occurring in Australia is high and the limitation imposed by the Declaration is necessary to assist in the prevention of an attack on Australian soil. This is particularly so given that ISIL is using al-Raqqa province as a base of operations and Australians have travelled to Iraq and Syria to participate in the foreign conflict.<sup>4</sup>

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

**1.289 As the committee has already concluded that the declared area offence provisions are incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement, and the rights to equality and non-discrimination, it follows that the declaration of the Al-Raqqa Province under that offence provision is also incompatible with those human rights.**

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4 Explanatory statement 2.

## **Dental Benefits Rules 2014 [F2014L01748]**

*Portfolio: Health*

*Authorising legislation: Dental Benefits Act 2008*

*Last day to disallow: 26 March 2015*

### **Purpose**

1.290 The Dental Benefits Rules 2014 (the 2014 rules) repeal and replace the Dental Benefits Rules 2013, and set out who is eligible to provide services for which dental benefits will be paid and who is eligible for dental benefits.

1.291 The 2014 rules make a number of changes to the previous rules, including:

- changing the date for which a state or territory is eligible for dental benefits to 30 June 2015 to continue to allow patients to access public sector dental treatment under the program;
- introducing a requirement that a patient be eligible for Medicare at the time the dental service is provided;
- establishing the 2015-2016 cap on the amount of benefits payable over a two consecutive calendar year period and setting it at \$1000 (in line with the 2014-2015 cap);
- requiring dentists to give their Medicare provider number on invoices and claim forms to aid in claim processing by the Department of Human Services;
- introducing a number of changes to dental benefits vouchers;
- renumbering of groups in the Dental Benefits Schedule; and
- a number of technical amendments.

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

### **Cap on benefits**

1.293 The committee considers that the 2014 rules engage the right to health and the right to social security.

1.294 The committee considers that the capping of the amount of dental benefits payable over a two consecutive calendar year period at \$1000 may limit the right to health and the right to social security. The committee therefore provides the following analysis of whether this limitation may be regarded as justifiable for the purposes of international human rights law.

### **Right to health**

1.295 The right to health is guaranteed by article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy

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the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life.

***Right to social security***

1.296 The right to social security is protected by article 9 of ICESCR. This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

1.297 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care; and
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

1.298 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to health and social security. These include:

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

1.299 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.<sup>1</sup>

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1 Further information on the content of this right can be found in the Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, March 2014, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources).

*Compatibility of the measure with the right social security and the right to health*

1.300 The statement of compatibility identifies the 2014 rules as engaging the right to health and the right to social security. It concludes that the instrument 'protects and advances' these rights and is 'therefore compatible with Australia's human rights obligations'.<sup>2</sup>

1.301 However, in relation to the introduction of a cap on benefits (limited to a benefit of \$1000 over two consecutive years), the committee notes that the measure may limit the right to health. This is because a person who needs to have extensive dental work may reach the \$1000 cap before all necessary dental work is completed, and may therefore not have the means to access all necessary dental care.

1.302 The committee further notes that the contributions to the cost of dental services through the Medicare system is a form of social security. Noting the potential for the measures to result in reduced access to dental services, the committee considers that any such result would amount to a reduction in the current level of social security available through Medicare, and therefore represent a limitation on the right to social security.

1.303 The statement of compatibility provides no assessment of the measure or of its potential limitation on the right to health. The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. To be capable of justifying a 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. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective.

**1.304 The committee considers that the cap of \$1000 for dental services over a two year consecutive calendar period may limit the right to social security and the right to health. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Health as to:**

- **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 a reasonable and proportionate way to achieve that objective.**

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2 Explanatory statement (ES) 10.

## Eligibility for dental benefits

1.305 The 2014 rules introduce a change to the benefits scheme, and therefore engage the right to social security and the right to health. The committee considers that requiring that a patient be eligible for Medicare at the time the dental service is provided may reduce current levels of access to dental benefits. The committee therefore provides the following assessment of whether any such limitation may be regarded as justifiable for the purposes of international human rights law.

### ***Right to social security and right to health***

1.306 The content of these rights described above at [1.295] to [1.299].

### *Compatibility of the measure with the right to social security and the right to health*

1.307 The statement of compatibility states that the purpose of this measure is to align the 2014 rules with 'other Commonwealth health programmes'.<sup>3</sup> In support of the conclusion that the measure protects and advances the right to health it states:

The change requiring a patient to be eligible for Medicare at the time the dental service is rendered will have a negligible impact on human rights because to be determined eligible for the Child Dental Benefits Schedule the person is required to be eligible for Medicare.<sup>4</sup>

1.308 However, it is unclear to the committee on the basis of the information provided, whether requiring a person to be eligible for Medicare at the time a service is provided may, in practice, result in a reduction to current levels of access to dental benefits. Any such reduction in access may be a retrogressive measure for human rights purposes. A retrogressive measure is any measure that directly or indirectly leads to a backwards step being taken in the level of rights protection. A retrogressive measure is not prohibited so long as it can be demonstrated that the measure is justified and has been introduced after careful consideration of all alternatives.

**1.309 The committee therefore seeks the advice of the Minister for Health as to whether the requirement that patients be eligible for Medicare at the time a dental service is provided is likely to lead to some people no longer being eligible for dental benefits.**

**1.310 If the changes will result in existing patients losing eligibility for dental benefits, the committee considers that this may limit the right to social security and the right to health. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Health as to:**

- **whether the measure is aimed at achieving a legitimate objective;**

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3 ES 10.

4 ES 11.

- **whether there is a rational connection between the measure and that objective; and**
- **whether the measure is a reasonable and proportionate way to achieve that objective.**

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## **Health Insurance (General Medical Services Table) Amendment (Duration of Attendance) Regulation 2014 [F2014L01714]**

## **Health Insurance (General Medical Services Table) Amendment (Duration of Attendance) Regulation 2014 (No. 2) [F2015L00029]**

*Portfolio: Health*

*Authorising legislation: Health Insurance Act 1973*

*Last day to disallow: N/A (due to repeal)*

### **Purpose**

1.311 The Health Insurance (General Medical Services Table) Amendment (Duration of Attendance) Regulation 2014 (the regulation) amends the Health Insurance (General Medical Services Table) Regulation 2014 to set a time limitation on specific general practice attendances funded through the Medicare Benefits Schedule (MBS).

1.312 The Health Insurance (General Medical Services Table) Amendment (Duration of Attendance) Regulation 2014 (No. 2) (the regulation two) amends the Health Insurance (General Medical Services Table) Regulation 2014 to extend the same amendment as provided in the regulation to consultations by certain Non-Vocationally Registered General Practice items. As the effect of the regulation two is the same as the regulation the analysis provided in respect of the regulation applies equally to regulation two.

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

### **Background**

1.314 The regulation was registered with the Federal Register of Legislative Instruments (FRLI) on 16 December 2014 and was due to commence on 19 January 2015.

1.315 However, on 16 January 2015 the regulation was repealed by the Health Insurance (General Medical Services Table) Repeal (Duration of Attendance) Regulation 2015 [F2015L00049], meaning that the amendments contained in the regulation will not come into effect. Given this, the committee provides the following brief analysis and advice-only comment.

### **Time limitation on specific general practice attendances**

1.316 Medicare is a universal health care system that provides financial support for medical services, including GP services.

1.317 Currently (and prior to the making of the regulation), Medicare provides a rebate for GP consultations of less than 20 minutes. Such consultations are either Level A or Level B consultations for the purposes of Medicare billing, based on the complexity of the consultation as determined by the consulting doctor using their professional expertise. The rebate for Level A consultations is \$16.95 and the rebate for Level B consultations is \$37.05.

1.318 The regulation was intended to introduce time limitations for Level A and Level B consultations. The amended Level A rebate was to apply to consultations lasting less than 10 minutes, and the amended Level B rebate to apply to consultations lasting at least 10 but less than 20 minutes.

1.319 The effect of the intended change was to be that, whereas previously relatively complex consultations lasting less than 10 minutes would attract the larger Level B Medicare rebate, such consultations would attract only the lesser Level A Medicare rebate.

1.320 By effectively increasing the cost of such consultations, the committee considers that the intended change to the government rebate for GP services engages both the right to health and the right to social security.

### ***Right to health***

1.321 The right to health is guaranteed by article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life.

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

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

1.323 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.



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*Compatibility of the measure with the right to health*

1.324 In concluding that the instrument is compatible with human rights the statement of compatibility states:

The amendments will improve Medicare by ensuring that Medicare services billed by practitioners are more reflective of the actual time spent with patients. It will advance rights to health and social security by ensuring access to publicly subsidised health services which are clinically effective and cost-effective.<sup>1</sup>

1.325 However, the committee considers that the measures may increase costs for patients and restrict access to medical services for those with limited financial means. For example, doctors may elect to increase their fees in order to compensate for lower rebates, thereby passing higher costs onto patients. Additionally, the measures may result in doctors performing longer consultations in order to claim the higher Level B rebate, leading to longer waiting lists for GP services. Accordingly, the committee considers that the regulation may limit the right to health.

1.326 The committee's usual expectation where a measure limits a human right is that the statement of compatibility provides reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

*Right to social security*

1.327 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

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

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

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1 Explanatory statement (ES) 5.

1.329 Specific situations which are recognised as engaging a person's right to social security include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

*Compatibility of the measure with the right to social security*

1.330 The committee notes that the contributions to the cost of GP services through the Medicare system is a form of social security.

1.331 As noted above, in concluding that the instrument is compatible with human rights the statement of compatibility states that the intended amendments 'advance rights to health and social security'.<sup>2</sup>

1.332 However, noting the potential for the measures to result in increased costs to patients for GP services, the committee considers that any such increase would amount to a reduction in the current level of social security available through Medicare, and therefore represent a limitation on the right to social security. Accordingly, the committee reiterates its usual expectation that statements of compatibility provide an assessment of the human rights compatibility of measures limiting human rights.

**1.333 The committee therefore considers that the introduction of time limitations on specific general practice attendances limits the right to health and the right to social security. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. Noting that the regulations have been repealed by the Health Insurance (General Medical Services Table) Repeal (Duration of Attendance) Regulation 2015 [F2015L00049], the committee draws to the attention of the Minister for Health the requirements for the preparation of statements of compatibility, as set out in the committee's Guidance Note 1.**

## **Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014 [F2014L01715]**

*Portfolio: Health*

*Authorising legislation: Health Insurance Act 1973*

*Last day to disallow: 26 March 2015*

### **Purpose**

1.334 The Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014 (the regulation) amends the Health Insurance (General Medical Services Table) Regulation 2014, the Health Insurance (Diagnostic Imaging Services Table) Regulation 2014 and the Health Insurance Regulations 1975 to implement 2014-15 Budget measures.

1.335 The regulation includes the following changes to the Health Insurance (General Medical Services Table) Regulation 2014 (GMST):

- the Medicare Benefits Schedule (MBS) fees for optometry services is reduced by 5.88 per cent;
- the charging cap that currently applies to optometrists accessing the MBS is removed, enabling them to set their own fees in a similar manner to other health providers;
- the period between being able to claim Medicare rebateable comprehensive eye examinations is extended from two years to three years for asymptomatic people aged under 65 years; and
- the period between claiming Medicare rebateable comprehensive eye examinations is reduced from two years to one year for asymptomatic patients aged 65 years and over.

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

### **Reduction in MBS fees for optometry services and removal of charging cap**

1.337 The committee considers that the regulation engages the right to health and the right to social security.

1.338 The committee notes that the changes introduced by the regulation will impact on the cost to patients of optometry services. The reduction of the MBS fees for optometry services (and associated Medicare rebate) and removal of the cap on fees charged by optometrists appear likely to lead to an increase in patient fees for optometry services. The committee therefore considers that these measures limit the right to health. The committee therefore provides the following analysis of whether this limitation may be regarded as justifiable for the purposes of international human rights law.

### **Right to health**

1.339 The right to health is guaranteed by article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life.

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

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

1.341 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

#### *Compatibility of measures with the right to health*

1.342 While the statement of compatibility identifies the measures as engaging the right to health, it concludes:

...the reduction in the Medicare fees for optometric services will...improve the effectiveness of Medicare. While it will reduce the Medicare rebate received by patients for these services, this is a reasonable and proportionate amendment to ensure that Medicare remains financially sustainable;

[The]...removal of the charging cap that currently applies to optometrist[s] accessing the Medicare Benefits Schedule (MBS) will enable these optometrists to set their own fees in a similar manner to other health providers accessing the MBS. This amendment does not affect the right to health or the right to social security[.]<sup>1</sup>

1.343 However, as noted above, the committee considers that the two measures individually and together are likely to increase the cost of optometry services. To the extent that any such increases may reduce access to those services for persons with

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1 Explanatory statement 9.

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limited financial means, the committee considers that the measures may limit the right to health.

1.344 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide reasoned and evidence-based explanations of how the measure supports a legitimate objective for the purposes of international human rights law. To be capable of justifying a 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.

1.345 In this respect, the committee considers that the statement of compatibility for the regulation does not meet the requirements set out in the committee's Guidance Note 1 or the Attorney-General's Department's guidance on the preparation of statements of compatibility. The statement of compatibility states that the reduction in the medicare rebate will ensure that Medicare remains financially sustainable, but provides no supporting evidence or analysis to show that that is a pressing or substantial concern, and not merely desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

**1.346 The committee considers that the reduction in MBS fees for optometry services and the removal of the charging cap for optometry services limits the right to health and social security. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Health as to whether the reduction in the MBS fees for optometry services and removal of the charging cap on optometrists is compatible with the right to health, and particularly:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measure and that objective; and**
- **whether the measure is a reasonable and proportionate way to achieve that objective.**

## **Migration Amendment (Partner Visas) Regulation 2014 [F2014L01747]**

*Portfolio: Immigration and Border Protection*

*Authorising legislation: Migration Act 1958*

*Last day to disallow: 26 March 2015*

### **Purpose**

1.347 The Migration Amendment (Partner Visas) Regulation 2014 (the regulation) amends the *Migration Regulations 1994* to increase visa application charges by 50 per cent for the subclasses 100 (Partner (Permanent)), 300 (Prospective Marriage (Temporary)) and 801 (Partner (Permanent)).

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

### **Increase to visa application charges**

1.349 The committee considers that the regulation engages the right to the protection of the family.

1.350 The committee considers that the increases to visa application charges (VACs) may limit the right to protection of the family of Australian citizens and residents who wish to live permanently in Australia with their partner. The committee therefore provides the following analysis of whether this limitation may be regarded as justifiable for the purposes of international human rights law.

#### ***Right to protection of the family***

1.351 The right to respect for the family is protected by articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, being entitled to protection.

1.352 An important element of protection of the family, arising from the prohibition under article 17 of the ICCPR against unlawful or arbitrary interference with family, is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation, or forcibly remove children from their parents, will therefore limit this right.

#### ***Compatibility of the measure with the right to protection of the family***

1.353 The statement of compatibility for the bill states that no human rights are engaged by the regulation.

1.354 However, the committee notes that the fees for the affected visa classes were, prior to the making of the regulation, already considerable. Given this, the 50 per cent increase to the VACs could make it less affordable and therefore more difficult for an Australian citizen or resident to bring their partner to Australia. For

example, spouses may be separated for a prolonged period of time as they save for the VACs. Accordingly, the committee considers that the regulation may limit the right to the protection of the family.

1.355 The committee notes that, from an international human rights law perspective, it is legitimate for the Australian government to charge visa processing fees and to ensure that visa applicants are suitably vetted. However, the committee's usual expectation where a measure limits a human right is that the statement of compatibility provides reasoned and evidence-based explanations of how a measure supports a legitimate objective for human rights law purposes. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights.

**1.356 The committee considers that the increase to visa application charges limits the right to protection of the family. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the increases to certain visa application charges are compatible with the right to protection of the family, and particularly:**

- **whether the 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.**

