
Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

Commonwealth Cleaning Services Guidelines Repeal Instrument 2014 [F2014L00861]

Portfolio: Employment

Authorising legislation: Financial Management and Accountability Regulations 2007

Purpose

2.3 The Commonwealth Cleaning Services Guidelines Repeal Instrument 2014 [F2014L00861] (the instrument) repeals the Commonwealth Cleaning Services Guidelines 2012 [F2013L00435] (the guidelines).

2.4 The guidelines required that Australian Government agencies only enter into a contract for cleaning services in defined locations, where a tenderer has agreed to certain mandatory requirements relating to the pay and working conditions of their employees.

Background

2.5 The committee first reported on the instrument in its *Tenth Report of the 44th Parliament*.¹ While a statement of compatibility was not required for the guidelines, the committee requested the Minister for Employment provide an assessment of the compatibility of the guidelines with human rights in order to assist the committee to complete its examination. In particular, the committee requested the advice of the minister as to the compatibility of the guidelines with the right to an adequate standard of living, the right to just and favourable conditions of work and the right to equality and non-discrimination (indirect discrimination).

2.6 The committee considered the minister's response in its *Fourteenth Report of the 44th Parliament*.² Based on the information provided, the committee considered that the repeal of the guidelines was a retrogressive measure and was therefore likely to be incompatible with the right to an adequate standard of living

1 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 104-109.

2 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 101-104.

and the right to just and favourable conditions of work. As the minister in his response did not address the committee's concerns in regard to the rights to equality and non-discrimination on the basis of race (indirect discrimination), the committee sought further advice from the minister in order to complete its consideration of this matter.

Committee view on compatibility

Repeal of Commonwealth Cleaning Services Guidelines

Right to equality and non-discrimination

2.7 The committee sought the further advice of the minister as to whether the repeal of the guidelines is compatible with the rights to equality and non-discrimination on the basis of race (indirect discrimination).

Minister's response

I refer to your further letter of 28 October 2014, concerning the Parliamentary Joint Committee on Human Rights' review of the Commonwealth Cleaning Services Repeal Instrument 2014.

The Committee's assertion that the repeal of the Commonwealth Cleaning Services Guidelines may breach Australia's Human Rights obligations is unfounded as is the assertion that revoking the Guidelines disproportionately impacts workers based on their racial background. The latter allegation is, to be frank, repugnant. I firmly repudiate any such claims. Not even the unions make such a bizarre and offensive assertion.

I again re-iterate that the Cleaning Services Guidelines were a small scale Government procurement policy that would have applied to less than one per cent of the cleaning workforce. It is not the role of the Australian Government to impose policies over and above the safety net provided through the established workplace relations framework. In particular, it is not this Government's policy to permit special wage fixing deals for highly unionised industries, to misuse the Government's procurement rules to serve union interests, or to circumvent the role of the Fair Work Commission.

The Guidelines were flawed and applied to less than one percent of the entire cleaning industry. The Guidelines mandated that employers hand out union membership material and forced them to pay their workers well above award wages, without any requirement to demonstrate genuine productivity gains. The Committee's repeated views avoid engaging with and appears difficult to reconcile with my earlier advice that the Guidelines had no impact whatsoever on the more than 99 percent of workers in the industry that don't work in Government offices located in central business district locations. These matters do not give rise to human rights issues. Wage setting in Australia, is and has been for many years, the responsibility of the Fair Work Commission and not the Government of the day. The previous government's decision to issue the Guidelines, to give

special arrangements to a tiny subset of workers in the industry, in cooperation with a particular union, undermined that role. The Cleaning Services Award 2010 sets minimum wages and conditions for all cleaners in Australia and, beyond this, higher wages and conditions should rightly be negotiated via enterprise bargaining. To assert otherwise and then suggest racial discrimination has the logical (but I am sure unintended) consequence of accusing the Fair Work Commission of such behaviour.

The existing enterprise bargaining system meant that many cleaners (through at least 65 Government cleaning contracts) were remunerated at the higher levels before the Guidelines commenced in 2012. Agencies continue to have the flexibility to engage cleaning companies that pay above award wage and conditions. Since the revocation of the Guidelines, that is still occurring.

This exercise would indicate the Committee has seriously lost its way by attempting to conflate matters of government procurement, and the payment of wages above relevant minimum standards, with issues of human rights. Such an approach, if I may say, does not appear to be the most effective use of the Committee's time and serves only to discredit the more serious and worthy issues of human rights.³

Committee response

2.8 The committee thanks the Minister for Employment for his response.

2.9 The committee raised the issue of the right to equality and non-discrimination because there is Australian government data to suggest that people from non-English speaking or racially diverse backgrounds are overrepresented in the commercial contract cleaning industry.⁴ It follows that such overrepresentation of people from racially diverse backgrounds could also be found in the subsection of the cleaning industry covered by the guidelines. If this were the case, the repeal of the guidelines could have had a disproportionate impact on that group.

2.10 Such an analysis is unremarkable in the context of international human rights law, which recognises that a measure may be neutral on its face but in practice have a disproportionate impact on groups of people with a particular attribute such as race, colour, sex, language, religion, political or other status. Where this occurs without justification it is called indirect discrimination.⁵

3 See Appendix 1, Letter from Senator the Hon Eric Abetz, Minister for Employment, to Senator Dean Smith (dated 19 November 2014) 1-2.

4 See Australian Bureau of Statistics *Migrant Data Matrices: Glossary of Migrant Related Terms* ABS cat. no. 3415.0 (2010), Australian Bureau of Statistics, *Australian Census and Migrants Integrated Dataset 2011* ABS cat. no. 3417.0.55.001 (2011) Department of Immigration and Border Protection, *The Place of Migrants in Contemporary Australia* (July 2014).

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

2.11 The committee notes that indirect discrimination does not necessarily import any intention to discriminate and can be an unintended consequence of a measure implemented for a legitimate purpose. The concept of indirect discrimination in international human rights law therefore looks beyond the form of a measure and focuses instead on whether the measure could have a disproportionately negative effect on particular groups in practice. The Attorney-General's Department guidance explains indirect discrimination as follows:

Discrimination may be either direct...or indirect. Indirect discrimination could occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups. For example, a requirement for all employees to be over six feet tall before being employed in a particular industry, where there is no cogent evidence that a minimum height requirement is justified by the conditions in the industry, is not discriminatory on its face, but it would have a disproportionate impact on women, who are less likely to meet the height requirement than men, and may therefore constitute discrimination on the basis of sex.⁶

2.12 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. However, under international human rights law such a disproportionate effect may be justifiable. In this context, the request from the committee was not an 'unfounded assertion' but rather a request for further information founded on government statistics.

2.13 Applying the test of indirect discrimination to the present case, there is government data to suggest that people from racially diverse backgrounds are overrepresented in the contract cleaning industry. However, the committee does not possess data as to whether this overrepresentation is also present in the subsection of the cleaning industry covered by the guidelines. In the absence of further specific statistics or other information, the committee is unable to determine whether or not this overrepresentation is in fact present in the subsection of the cleaning industry covered by the guidelines.

2.14 Further, the minister's response states that only one percent of the cleaning industry was covered by the guidelines. Based on this information, it may be that only a limited number of people are affected by the instrument, and that any overrepresentation of a specific group may not be statistically significant. That is, the measure may not in practice impact disproportionately on people from racially diverse backgrounds.

2.15 The committee notes that, even if people from racially diverse backgrounds were overrepresented in the subsection of the cleaning industry covered by the

6 Attorney-General's Department, *Rights of equality and non-discrimination*, <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Rightsofequalityandnondiscrimination.aspx> (accessed 27 February 2015).

guidelines, so as to have a disproportionately negative effect on that group, the repeal may still be justifiable. A measure that limits human rights will be justifiable where it is needed to address a legitimate objective, the measure is rationally connected to that objective and the measure was a proportionate means of achieving that objective.

2.16 While the minister's response has not approached its analysis in these terms, it may be possible in substance to characterise the repeal of the guidelines as having the legitimate objective of enabling the Fair Work Commission to primarily set wages in the cleaning industry. Some of the information provided by the minister also indicates that the repeal may be rationally connected to and proportionate to that objective. The committee's general expectations regarding assessments provided by legislation proponents and the committee's approach are set out in Guidance Note 1.⁷ The committee notes that, had the minister provided an analysis in accordance with the approach set out in Guidance Note 1, the committee may have been able to conclude with a higher degree of certainty that the repeal is likely to be compatible with the right to equality and non-discrimination.

2.17 The committee therefore considers that the repeal of the guidelines is likely to be compatible with the right to equality and non-discrimination on the basis of race. The committee has concluded its examination of this aspect of the instrument.

2.18 The committee further notes that much of the minister's response is directed to matters in relation to which the committee had concluded its examination; namely, the committee's assessment of the repeal of the guidelines on the right to an adequate standard of living and the right to just and favourable conditions of work.

2.19 The committee notes that these rights, which Australia has voluntarily agreed to respect, protect and fulfil, entail an obligation not to unjustifiably take any backward step or implement retrogressive measures in the progressive realisation of those rights. The committee's previous analysis was approached on this basis, noting that the committee is required to examine each bill and legislative instrument for human rights compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

7 Appendix 2; 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 (accessed 21 January 2015).

Migration Amendment (Protection and Other Measures) Bill 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 25 June 2014

Purpose

2.20 The Migration Amendment (Protection and Other Measures) Bill 2014 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to:

- establish a requirement that asylum seekers specify the particulars of their claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish their claim;
- require the Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to the credibility of claims or evidence raised by a protection visa applicant at the review stage for the first time, if the applicant has no reasonable explanation why those claims and evidence were not raised before a primary decision was made;
- permit the refusal of a protection visa application when an applicant refuses or fails to establish their identity, nationality or citizenship, and does not have a reasonable explanation for doing so;
- limit the opportunity to apply for a protection visa on the grounds of family status to circumstances where the primary applicant has not yet received a protection visa;
- redefine the risk threshold for assessing Australia's protection obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- amend the legal framework relating to unauthorised maritime arrivals and transitory persons who can make a valid application for a visa; and
- amend the processing and administrative duties of the Migration Review Tribunal (MRT).

Background

2.21 The committee first reported on the bill in its *Ninth Report of the 44th Parliament*.¹ The committee sought further information in relation to a number of sections of the bill which engaged Australia's non-refoulement obligations, and concluded that the proposed amendments in Schedule 2 of the bill, proposed

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 35-55.

section 423A, proposed amendments to section 91W and new section 91WA are incompatible with Australia's obligations of non-refoulement.

2.22 The committee also sought further information on a number of aspects of the bill that engage the obligation to consider the best interests of the child, the rights to equality and non-discrimination and the right to a fair trial and fair hearing rights.

2.23 The committee considered the Minister for Immigration and Border Protection's response in its *Twelfth Report of the 44th Parliament*.² In light of the information provided, the committee concluded that a number of sections of the bill were likely to be incompatible with Australia's obligations of non-refoulement, the right to freedom from arbitrary detention, the obligation to consider the best interests of the child, and the obligation to treat the best interests of the child as the primary consideration.

2.24 The committee requested further information from the Minister for Immigration and Border Protection on two sections of the bill which engage the right to equality and non-discrimination.

Committee view on compatibility

Responsibility of asylum seeker to provide evidence of claims

Right to equality and non-discrimination

2.25 The committee requested the further advice of the minister as to the particulars of any safeguards or policies in place to ensure women and persons with disabilities are not disadvantaged by proposed section 5AAA.

Minister's response

I note that the committee 'remains concerned, based on the information provided, that proposed section 5AAA of the *Migration Act 1958* (the Act) may lead to indirect discrimination against women and persons with a disability'.

As previously discussed, proposed section 5AAA explicitly states an existing responsibility of people who seek protection in Australia, consistent with the UNHCR Handbook. It does not introduce a new responsibility.

Section 5AAA does not change the decision-maker's obligations regarding the assessment of claims for protection. The duty to evaluate and ascertain all relevant facts is shared between the applicant and the decision-maker, consistent with UNHCR guidelines. Decision-makers may continue to ask questions, seek clarification and check that a person's claims are consistent with generally known facts and the specific country situation in question. Decision-makers must act in good faith to fully assess

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 24-45.

Protection visa applications and afford procedural fairness to asylum seekers in accordance with the Codes of Procedure in the Act.

Current policy guidance already provides safeguards from indirect discrimination to applicants who are women or people with a disability. This policy guidance is publicly available, will continue to apply, and will be updated to appropriately reflect the new section 5AAA.

The departmental "Gender Guidelines" comprehensively detail particular considerations to address potential barriers affecting female applicants. The guidelines recognise women and girls may experience particular acts of persecution and discrimination, and they address how gender related persecution can affect an applicant's ability to present their claims, lodgement of an application, interview management and confidentiality. The "Gender Guidelines" are consistent with and make direct reference to gender guidelines provided by the UNHCR, including the 2008 UNHCR "Handbook for the Protection of Women and Girls".

Detailed policy guidelines are provided in the "Protection Visa Procedures Advice Manual", the "Refugee Law Guidelines" and the "Complementary Protection Guidelines" regarding claims on behalf of survivors of torture and trauma. These guidelines comprehensively address the needs of applicants with disabilities that have resulted from torture or trauma, and include advice regarding the conduct of interviews and the assessment of credibility.

In addition to departmental policy guidelines, the Refugee Review Tribunal (RRT) provides policy guidance to its members that safeguards applicants who are women or people with a disability from indirect discrimination, namely the RRT "Gender Guidelines" and "Guidance on Vulnerable Persons". Both documents are publicly available on the RRT website: <http://www.mrt-rrt.gov.au/Conduct-of-reviews/Legislation-policies-and-guidelines.aspx>

Furthermore, primary application assistance is available to protection visa applicants who have arrived lawfully and are disadvantaged or face financial hardship (through the Immigration Advice and Application Assistance Scheme (IAAAS)), and a new Primary Application Information Service (PAIS) will provide application assistance from registered migration agents during primary processing for a small number of illegal maritime arrivals (IMAs) and unauthorised air arrivals (UAAs), who are considered to be the most vulnerable. The departmental tender for PAIS closed on 23 September 2014.

The combination of training, departmental and RRT guidelines and application assistance in certain circumstances mitigates any risk that the

proposed section 5AAA will lead to discrimination against women or people with a disability.³

Committee response

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

2.27 Under international human rights law, a measure that is neutral on its face but has a disproportionate impact, in practice, on people with a particular attribute such as race, colour, sex, language, religion, political or other opinion is called indirect discrimination.⁴

2.28 As noted previously,⁵ the committee was concerned that section 5AAA may have the potential to have a disproportionately negative impact on women and persons with a disability in practice or effect (indirect discrimination). This was because women may be more likely than their male counterparts to have claims based on persecution which has been suffered in the home or private sphere. Further, due to their activities and status in society, it may be more difficult for women to obtain documentary evidence of the harm they have experienced.⁶

2.29 The committee also noted that a person with particular disabilities may be less able to comply with the requirement to 'specify all particulars or his or her claim' and 'to provide sufficient evidence to establish the claim' under section 5AAA.⁷

2.30 The committee considers that, in this particular case, the policy safeguards that the minister points to are relatively substantial and are likely to provide some level of protection against the risk that section 5AAA would operate so as to disproportionately affect women or persons with a disability in practice (indirect discrimination). So, to the extent that these policy safeguards can ensure that the measure does not have a disproportionate effect in practice, there will be no indirect discrimination and therefore no limit on the right to non-discrimination.

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

4 *Althammer v Austria* HRC 998/01, [10.2]. See also, Attorney-General's Department, *Rights of equality and non-discrimination*, <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Rightsofequalityandnondiscrimination.aspx> (accessed 27 February 2015).

5 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 35-55.

6 See D Singer, 'Falling at each hurdle: assessing the credibility of women's asylum claims in Europe' in J Millbank, C Dauvergne and E Erbel (eds) *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014) 100.

7 See Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (June 2014) 34 - 38, paras 1.136-1.163 (committee comments on Migration Legislation Amendment Bill (No. 2) 2014 and the rights of persons with disabilities).

2.31 However, the committee notes that legislative safeguards provide a stronger level of protection than that provided by guidance material or policy safeguards and, in this case, would provide a stronger level of protection against the risk of indirect discrimination occurring.

2.32 The committee's longstanding view has been that, where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation under international human rights law.⁸ This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or disapplied at any time.

2.33 Further, in the event that the guidelines pointed to by the minister did, in practice, fail to protect against indirect discrimination, a potential consequence would be the denial of a protection visa and, ultimately, the risk of refoulement in contravention of Australia's obligations. That is, there is potential for irreversible harm to occur to a person from a breach of these obligations.

The committee notes that it has previously determined that section 5AAA is likely to be incompatible with Australia's non-refoulement obligations.⁹

2.34 The committee welcomes current policy guidance which it considers is likely to provide some level of protection against the risk that section 5AAA might operate so as to disproportionately affect women or persons with a disability in practice (indirect discrimination). That is, section 5AAA may not limit the right to equality and non-discrimination in practice and, accordingly, may be compatible with this right.

2.35 However, the committee notes that administrative and discretionary safeguards are likely to be less stringent than the protection of statutory processes in guarding against discrimination in practice; and recommends generally that safeguards be included in primary legislation. Given the potential for policy guidance to be changed or not followed, there remains a risk that the measure may disproportionately impact on women and persons with disabilities. For this reason, the committee considers that discretionary or administrative safeguards alone are generally insufficient for the purpose of justifying a limitation of human rights under international law. The committee has concluded its examination of this aspect of the bill.

8 See, for example, Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

9 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 24-45.

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage***Right to equality and non-discrimination***

2.36 The committee requested the Minister for Immigration and Border Protection's advice as to whether there are measures or safeguards in place to ensure that section 423A does not have a disproportionate or negative impact on persons with a disability.

Minister's response

As discussed above, decision-makers are obliged to act in good faith to fully assess Protection visa applications and afford procedural fairness to asylum seekers in accordance with the Codes of Procedure in the Act. RRT decision-makers must not act in a manner which is inconsistent with departmental policy guidelines for decision-makers and comprehensive policy guidelines are available regarding protection visa applications from survivors of torture and trauma, who may be living with a disability.

The RRT provides specific policy guidance to its decision-makers regarding persons with a disability, namely "Guidance on Vulnerable Persons". The RRT also explicitly advises Tribunal members to be mindful of whether an applicant is living with an illness or disorder that may affect the applicant's ability to give evidence and recall specific events or details in the policy document "Guidance on the Assessment of Credibility".

Under the proposed section 423A, the Tribunal member will draw an inference unfavourable to new claims or evidence if the member is satisfied the applicant does not have a reasonable explanation for not providing the information at the primary stage. A "reasonable explanation" is not defined in the provision as the general principles of administrative law and reasonable decision-making apply. A "reasonable explanation" is one that satisfies a Tribunal member that the new claims and evidence could not be presented earlier because the applicant was unable to do so. A "reasonable explanation" may therefore include a situation where the applicant has a restricted ability to effectively participate in the protection process due to a disability.

The proposed 423AA will be inserted into the Part 7, Division 3 of the Act which deals with 'Exercise of the Refugee Review Tribunal's powers'. The RRT is a statutory body and exists to provide an independent and final merits review of decisions that is fair, just, economical, informal and quick. Tribunal members and staff are aware of the importance of treating those with whom they deal with courtesy, respect and dignity.

These important safeguards of fairness and justice are enshrined in legislation. Section 420 of the Act details the RRT's way of operating when it states:

(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case

I am of the view that such a way of operating is appropriate and conducive to section 423AA not having a disproportionate or negative impact on persons with a disability. Further to this, the Tribunal's procedures are relatively informal, I am not represented and the member will guide the proceedings to suit the circumstances of the case. These procedures are also legislated in Part 7, Division 4 of the Act which I consider to be an important safeguard.

I also refer you to the following webpage which details support organisations - <http://www.mrt-rrt.gov.au/Apply-for-review/Support-and-advice/Support-organisations.aspx>. Many of these services are funded by the Australian Government.¹⁰

Committee response

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

2.38 The committee considers that, in this particular case, the policy safeguards that the minister points to are relatively substantial and are likely to provide some level of protection against the risk that section 423A would operate so as to disproportionately affect women or persons with a disability in practice (indirect discrimination). So, to the extent that these policy safeguards can ensure that the measure does not have a disproportionate effect in practice, there will be no indirect discrimination and therefore no limit on the right to non-discrimination.

2.39 However, the committee notes that legislative safeguards provide a stronger level of protection than that provided by guidance material or policy safeguards and, in this case, would provide a stronger level of protection against the risk of indirect discrimination occurring.

2.40 The committee's longstanding view has been that, where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation under international human

10 See Appendix 1, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith (dated 21 October 2014) 2-3.

rights law.¹¹ This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or disapplied at any time.

2.41 Further, in the event that the guidelines pointed to by the minister did, in practice, fail to protect against indirect discrimination, a potential consequence would be the denial of a protection visa and, ultimately, the risk of refoulement in contravention of Australia's obligations. That is, there is potential for irreversible harm to occur to a person from a breach of these obligations. The committee notes that it has previously determined that section 423A is incompatible with Australia's non-refoulement obligations.¹²

2.42 The committee welcomes current policy guidance which it considers is likely to provide some level of protection against the risk that section 423A would operate so as to disproportionately affect women or persons with a disability in practice (indirect discrimination). On this basis, section 432A may not limit the right to equality and non-discrimination in practice and, accordingly, may be compatible with this right.

2.43 However, the committee notes that administrative and discretionary safeguards are likely to be less stringent than the protection of statutory processes in guarding against discrimination in practice; and recommends generally that safeguards be included in primary legislation. Given the potential for the policy guidance to be changed or not followed, there remains a risk that the measure may disproportionately impact on women and persons with disabilities. For this reason, the committee considers that discretionary or administrative safeguards alone are generally insufficient for the purpose of justifying a limitation of human rights under international law. The committee has concluded its examination of this aspect of the bill.

The Hon Philip Ruddock MP

Chair

11 See, for example, Human Rights Committee, General Comment 27 , Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

12 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 24-45.

