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.

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

Portfolio: Attorney-General
Introduced: Senate, 29 October 2014; passed both Houses 2 December 2014

Purpose

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

- expand the objects of the control order regime to include prevention of the provision of support for, or the facilitation of, a terrorist act or engagement in a hostile activity in a foreign country;
- replace the current requirement for the Australian Federal Police (AFP) to provide all documents to the Attorney-General that will subsequently be provided to the issuing court, with a requirement that the AFP provide the Attorney-General with a draft of the interim control order, information about the person's age and the grounds for the request, when seeking the Attorney-General's consent to apply for a control order;
- permit a senior AFP member to seek the Attorney-General's consent to an interim control order where the order would substantially assist in preventing the provision of support for, or the facilitation of, a terrorist act or the engagement in a hostile activity in a foreign country;
- expand the grounds on which an issuing court can make a control order to include circumstances where the court is satisfied on the balance of probabilities that making the order would substantially assist in preventing the provision of, support for, or the facilitation of, a terrorist act or the engagement in a hostile activity in a foreign country;
- replace the existing requirement for the AFP member to provide an explanation as to why 'each' obligation, prohibition and restriction should be imposed with a requirement to provide an explanation as to why 'the control order' should be made or varied;

- replace the existing requirement for the issuing court to be satisfied on the balance of probabilities that 'each' obligation, prohibition and restriction 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of the objects in section 104.1 of the Criminal Code with a requirement to be satisfied on the balance of probabilities that 'the control order' (as a whole) to be made or varied 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of those objects; and
- extend the time before the material provided to an issuing court must subsequently be provided to the Attorney-General from 4 hours to 12 hours where a request for an urgent interim control order has been made to an issuing court.

2.4 Schedule 2 of the bill sought to make a number of amendments to the *Intelligence Security Act 2001* (ISA) including:

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

Background

2.5 The committee previously considered the bill in its *Sixteenth Report of the 44th Parliament*.[1] The bill passed both Houses of Parliament on 2 December 2014 and received Royal Assent on 12 December 2014.

2.6 The bill proposed to further amend the control order regime under Division 104 of the Criminal Code. This is in addition to the recent extension and amendment of control orders that was part of the Counter-Terrorism Legislation Amendment

1 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 7-21.

(Foreign Fighters) Bill 2014 (Foreign Fighters bill). The committee considered the human rights compatibility of the Foreign Fighters bill in its *Fourteenth Report of the 44th Parliament*.[2] In that report, the committee noted that the control order regime involves very significant limitations on human rights. Notably, it allows the imposition of a control order on an individual without needing to follow the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt. The Foreign Fighters bill passed both Houses of Parliament and received Royal Assent on 3 November 2014.

2.7 Essentially, the control order regime under the Criminal Code is coercive in nature. The control order regime grants the Federal Court the power to impose a control order on a person at the request of the AFP with the Attorney-General's consent. The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person the subject of the order.[3]

Committee view on compatibility

Schedule 1

Multiple rights

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

- right to equality and non-discrimination;[4]
- right to security of the person and freedom from arbitrary detention;[5]
- right to freedom of movement;[6]

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2 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3-69.

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

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

5 Article 9, ICCPR.

- right to a fair trial and the presumption of innocence;[7]
- right to privacy;[8]
- right to freedom of expression;[9]
- right to freedom of association;[10]
- right to the protection of family;[11]
- prohibition on torture and cruel, inhuman or degrading treatment;[12]
- right to work;[13] and
- right to social security and an adequate standard of living.[14]

Amendments to the control order regime

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

2.10 As the committee previously noted, these amendments would significantly expand the circumstances in which control orders could be sought against individuals, and significantly alter the purpose of control orders. As a result, control orders are likely to be used more widely and, as such, circumvent ordinary criminal proceedings as set out in paragraph [2.6] above.

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6 Article 12, ICCPR.

7 Article 14, ICCPR.

8 Article 17, ICCPR.

9 Article 19, ICCPR.

10 Article 22, ICCPR.

11 Article 23 and 24, ICCPR.

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

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

14 Article 9 and 11, ICESCR.

2.11 The current grounds for seeking and issuing a control order, including those introduced by the Foreign Fighters bill, are directed at serious criminal activity (namely, participation in terrorism, terrorist training or hostile activities). The amendments in Schedule 1 of the bill are not attached to any particular criminal offence. By extending the grounds to acts that 'support' or 'facilitate' terrorism, the bill allows a control order to be sought in circumstances where there is not necessarily an imminent threat to personal safety.[15] The protection from imminent threats has been a critical rationale relied on by the government for the need to use control orders rather than ordinary criminal processes. Further, there are a range of offences that cover preparatory acts to terrorism offences currently prescribed by the Criminal Code, which allow police to detect and prosecute terrorist activities at early stages. Accordingly, the committee considered that the amendments to control orders impose limits on the human rights (set out above at [2.8]) that are neither necessary nor reasonable.

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

2.13 The committee therefore considered that these amendments would result in control orders not being proportionate because they are not appropriately targeted to the specific obligation, prohibition or restriction imposed on a person. As a control order is imposed in the absence of a criminal conviction, it is critical that the individual measures comprising the control order are demonstrated in each individual instance to be proportionate (that is, only as restrictive as is strictly necessary to achieve the stated objective of the measure with respect to imminent threats). As a result, the committee considered that these amendments were not proportionate to the stated legitimate objective.

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

2.14 The committee considered that the amendments in Schedule 1 to the control order regime were likely to be incompatible with the rights set out in paragraph [2.8], and sought the Attorney-General's advice on how the limits it imposes on human rights are reasonable, necessary or proportionate to achieving the legitimate aim of responding to threats of terrorism.

Attorney-General's response

The committee has requested my advice on how the limits imposed on human rights by the amendments to the control order regime in Schedule 1 of the Counter-Terrorism Legislation Amendment Bill (No. 1) (CTLA Bill) are reasonable, necessary and proportionate to achieving the legitimate aim of responding to threats of terrorism. The Australian Federal Police (AFP), in their submission to the inquiry of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) into the CTLA Bill, note that 'individuals engaging in behaviours that support or facilitate terrorism or foreign incursions pose as great a risk as those directly engaging in terrorist acts or foreign incursions'. As such, the legitimate aim of the control order regime, responding to threats of terrorism, must include preventing or disrupting persons who provide critical support to those activities (without whom the terrorist act or hostile activity could not occur). The amendments to the purposes of the control order regime and the grounds for seeking and issuing a control order reflect this assessment.

The amendments do not, however, change the threshold for issuing a control order. A court cannot issue a control order unless satisfied that the obligations, prohibitions and restrictions proposed to be imposed on the person, and which may impose limits on their human rights, are 'reasonably necessary, and reasonably appropriate and adapted' for one of the purposes of the regime. In response to the PJCIS report on the CTLA Bill, the Government amended the CTLA Bill in the Senate to retain the existing requirement in the Criminal Code that the AFP provide an explanation as to why *each* of the proposed obligations, prohibitions and restrictions should be imposed on the person and that the court should be satisfied that *each* obligation, prohibition and restriction is 'reasonably necessary, and reasonably appropriate and adapted' for one of the purposes of the regime. This amendment, in addition to responding to the recommendation of the PJCIS, also addresses issues raised by the Committee in paragraphs 1.37 and 1.38 about the proportionality of the limits imposed on a person's human rights.

I note the Committee's assessment of the control order amendments in Schedule 1 of the Bill also raises issues from the Committee's Fourteenth Report of the 44th Parliament in relation to the control order amendments made by the Counter-Terrorism Legislation Amendment (Foreign Fighters)

Bill 2014 (Foreign Fighters Bill). Contrary to the Committee's statement at paragraph 1.28, I would like to reassure the Committee that the PJCIS completed its inquiry into the Foreign Fighters Bill before passage of that Bill.

The Foreign Fighters Bill was referred to the PJCIS on 24 September 2014, the day it was introduced into the Senate. The PJCIS made 37 recommendations in its Advisory Report on the Foreign Fighters Bill tabled in Parliament on 17 October 2014. The Government supported all 37 and introduced amendments in the Senate, as necessary, to implement these recommendations. Specifically, and as noted in my response to the Committee's Fourteenth Report, in implementing the recommendations of the PJCIS, the Foreign Fighters Bill was amended to require the Independent National Security Legislation Monitor (INSLM) to review the entire control order regime by 7 September 2017, and to require the PJCIS to undertake a further review by 7 March 2018. Given the urgent requirement to ensure the control order regime can respond to the current threat environment, the Parliament's decision to pass the control order amendments in the Foreign Fighters Bill but also require a comprehensive review of the whole control order regime by both the INSLM and PJCIS, is a responsible balance of protecting both Australia's national security and its human rights obligations. The timing specified for these further reviews will allow for both the INSLM and the PJCIS to consider the operation of the control order regime as amended and to ensure that information is available to the Parliament to inform any proposal to further extend the regime beyond 2018.

The heightened security environment, noted in the decision to raise the National Terrorism Public Alert System to 'high-terrorist attack is likely' in September 2014, and the operational activity undertaken by police following passage of both the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* and the *Counter Terrorism Legislation Amendment Act (No. 1) 2014* has demonstrated the need for law enforcement agencies to have the tools necessary to disrupt terrorist activities and planning.[16]

Committee response

2.15 **The committee thanks the Attorney-General for his response.** The committee welcomes the Attorney-General's advice that amendments were made to the bill following a recommendation of the PJCIS to retain the existing requirement in the Criminal Code that the AFP provide an explanation as to why *each* of the

16 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 11 February 2015) 3-4.

proposed obligations, prohibitions and restrictions of the proposed control order should be imposed and that the court should be satisfied that *each* obligation, prohibition and restriction is 'reasonably necessary, and reasonably appropriate and adapted' for one of the purposes of the regime.

2.16 The committee's central concern with the amendments in Schedule 1 was that the amendments would allow control orders to be imposed on individuals in circumstances that extend to allegations that an individual may 'support' or 'facilitate' terrorism. The committee accepted the legitimate objective of the measures was protecting national security, and further noted the recent raising by ASIO of the current threat level to 'High'.

2.17 The committee nevertheless did not consider that the amendments were likely to be proportionate. As a result of the amendments in this bill, a control order can be sought in circumstances where there is not necessarily an imminent threat to personal safety, as it covers acts that 'support' or 'facilitate' terrorism. Protection from imminent threats of harm has been a critical rationale relied on by the government for the need to use control orders rather than ordinary criminal justice processes.

2.18 In the Attorney-General's response, reference is made to an AFP submission to the inquiry of the PJCIS into this bill, that 'individuals engaging in behaviours that support or facilitate terrorism or foreign incursions pose as great a risk as those directly engaging in terrorist acts or foreign incursions'. The committee accepts that the support or facilitation of terrorism or foreign incursion is a serious offence. However, the Attorney-General's response provides no analysis or evidence as to why control orders, rather than the ordinary criminal law, is necessary to address this threat. Australian law has previously sought to address threats to national security and law and order through the criminal justice system which provides for arrest and charging of individuals planning illegal acts. The committee notes there are a range of offences that cover preparatory acts to terrorism offences currently prescribed by the Criminal Code, which allow police to detect and prosecute terrorist activities at early stages. The Attorney-General's advice provides no additional information or evidence as to why the current approach is not sufficient to deal with these situations.

2.19 **In relation to the preceding legal analysis, some members of the committee considered that the changes to the control order regime in Schedule 1 are necessary and proportionate and are therefore compatible with the human rights identified above.**

2.20 **In relation to the preceding legal analysis, other members of the committee considered that the limits control orders impose on human rights have not been justified, in that there would appear to be other, less rights restrictive, ways to**

achieve the same aim available through the ordinary criminal law (e.g. arrest, charge and remand). Accordingly, those committee members considered that the changes to the control order regime in Schedule 1 are not proportionate and are therefore incompatible with the human rights identified above.

Schedule 2

Right to life

2.21 The right to life is protected by article 6(1) of the ICCPR and article 1 of the Second Optional Protocol to the ICCPR. The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or by identified risks; and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

Providing for ASIS to support the Australian Defence Force (ADF)

2.22 The bill provided that ASIS may 'provide assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters'.

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

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

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

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

Attorney-General's response

The Committee has suggested (at paragraph 1.67 of its report) that the ISA may authorise the 'targeted killing' of Australian persons overseas and thereby engage and limit the right to life. It has also asserted that the Statement of Compatibility does not explain the necessity or proportionality of any such limitations. The Government does not accept any suggestion that the ISA engages and limits the right to life. This issue was examined in detail by the PJCIS in its inquiry into the (then) Bill. Consistent with the evidence of AGD [Attorney-General's Department] and agencies to that inquiry, the PJCIS rejected the suggestion that the ISA authorises any agency to engage in, or provide support for, the targeted killing of Australian citizens. The PJCIS stated (at p. 47 of its report):

> *The Committee acknowledges the concerns raised by some submitters that the proposed amendments will facilitate so-called 'targeted killings'. The Committee does not accept this evidence, noting that the proposed amendments do not change the role of ASIS in any way that would enable ASIS to kill, use violence against people, or participate in so-called 'targeted killings'. The Committee also notes that the ADF must abide by its Rules of Engagement at all times during its overseas engagements*.[17]

Subsection 6(4) of the ISA prohibits ASIS staff members or agents from planning for, or undertaking, activities that involve violence against the person. The ordinary meaning of the term 'violence' clearly extends to any targeted killing of an individual.[18] While the note to subsection 6(4) clarifies that this provision does not prevent ASIS from being involved with the planning or undertaking of such activities by other organisations, it is important to note that ASIS's cooperation with other organisations is subject to the limitations in sections 13 and 13A of the ISA, as well as the limitations on the functions and activities of ASIS in sections 11 and 12.

These limitations are additional to the authorisation criteria in section 9 of the ISA, particularly those in subsection 9(1), which require the Minister to be satisfied that the activity or activities will be necessary for the proper performance of the agency's functions, and that there are satisfactory

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17 See also the PJCIS's summary of AGD's and ASIS's evidence at pp. 44-46 of its report (and AGD's and ASIS's submissions to that inquiry-submissions 5, 5.1 and 5.2, and submission 17). The Committee also implied (at paragraph 1.67 of its report) that ASIS could use 'targeted killings' as an alternative to arrest or trial. The Government does not accept this view, as the ADF remains bound by its Rules of Engagement and there is no support for the practice of 'targeted killing' within the ISA.

18 For example, the term 'violence' is defined by the Macquarie Dictionary to cover 'rough or injurious action or treatment': Macquarie Dictionary (Sixth Edition, October 2013).

> arrangements in place to ensure that any activities will not exceed those which are necessary, and the nature and consequences of any such activities will be reasonable.
>
> In addition, in the specific context of ASIS providing support to the ADF in accordance with authorised activities for the proper performance of ASIS's functions under paragraph 6(1)(ba) of the ISA, any use that the ADF may make of intelligence provided by ASIS are governed by the ADF's rules of engagement. These rules are developed in consultation with the Office of International Law within AGD to ensure their consistency with international law, including international humanitarian law.
>
> The amendments enacted by Schedule 2 do not expand the functions of ASIS or any other ISA agency, nor do they change the longstanding prohibition on ASIS participating in violence under subsection 6(4). All that is changed is the method by which the Minister is able to authorise ASIS to undertake activities which relate to their functions.[19]

Committee response

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

Engagement of the right to life

2.28 The committee notes the Attorney-General is of the view that the ISA does not engage or limit the right to life. The committee notes that the ISA provides the legal basis for intelligence sharing between Australian intelligence agencies, the ADF and certain foreign agencies. That information may be used by the ADF and other military agencies in the context of armed conflict or other military activities. Accordingly, the committee is of the view that the ISA does engage and limit the right to life. As noted above, the committee's initial analysis agreed that ASIS itself is prohibited by the ISA from engaging in violence causing death but may nevertheless provide information and intelligence to agencies such as the ADF, that do have the power to use force against the person, including force that may result in the death of an individual. It is on that basis that the committee was of the view that the right to life was engaged and limited.

2.29 This analysis is consistent with analysis prepared by the Attorney-General's Department in analogous situations. The guidance material prepared by the Attorney-General's Department on international human rights law suggests that the right to life may be engaged by mutual assistance in criminal matters legislation:

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19 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 5-6.

if the provision of the assistance may have implications for the imposition of the death penalty in the foreign country.[20]

2.30 In the case of mutual assistance in criminal matters there is no suggestion that Australia would directly be involved in the imposition of the death penalty. Instead the engagement of the right to life is assessed as arising because the information shared by Australia may lead to an individual in another country being tried and convicted of a criminal offence that carries the death penalty. Similarly, in this case the committee considers that the right to life is engaged as information and intelligence shared by ASIS with other agencies may lead to military operations that could lead to a loss of life.

2.31 The committee also notes that its initial analysis was not solely focused on targeted killings, but on the use of information and intelligence provided by ASIS to the ADF and other foreign agencies in the course of military activities. Accordingly, the committee considers that the bill's engagement with the right to life goes beyond the issue of targeted killings and includes the consequences of all military activities that may be undertaken based on intelligence provided by ASIS.

2.32 The committee notes that these issues raised in the initial analysis and the Attorney-General's response engage more broadly with the ISA and not just the specific amendments in Schedule 2 of the bill. In this respect, the committee agrees with the Attorney-General's analysis that amendments enacted by Schedule 2 do not expand the functions of ASIS or any other ISA agency. Instead the bill changed the method by which the minister is able to authorise ASIS to undertake activities which relate to their functions. Nevertheless, noting that the ISA has never been subject to a human rights assessment,[21] the committee considers that an examination of ISA provisions is necessary in so far as they relate to the amendments in the bill that need to be examined by this committee.

Information shared by ASIS to the ADF

2.33 In relation to information shared by ASIS to the ADF, the response notes that the ADF must abide by its rules of engagement. The response states that the rules of engagement are 'developed in consultation with the Office of International Law within AGD to ensure their consistency with international law, including international humanitarian law'. The committee notes that international humanitarian law (IHL) only applies in the context of armed conflict and that Australia's military

20 Attorney-General's Department, List Of Guidance Sheets And Policy Triggers available at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Documents/PolicyTriggers.pdf.

21 ISA predates the establishment of this committee.

engagements overseas are broad and not confined exclusively to situations of active armed conflict. In addition, IHL does not contain the same level of human rights protections as that contained in international human rights treaties, as detailed below. It is unclear from the response how information and intelligence on Australian's activities overseas is managed and shared in a manner consistent with Australia's international human rights obligations.

2.34 As set out above, the right to life is protected by international human rights law which prohibits arbitrary killing and requires that force be used as a matter of last resort.[22] The use of deadly force can be lawful only if it is strictly necessary and proportionate, aimed at preventing an immediate threat to life and there is no other means of preventing the threat from materialising.[23]

2.35 In contrast, IHL is structured to serve as a floor, delineating a minimum standard of conduct. IHL does not, however, impose many of the positive human rights obligations guaranteed by the international human rights law. For example, the positive duty to investigate, as an aspect of the right to life under international human rights law, applies to all deaths where the state is involved. By contrast IHL is more circumscribed and requires only that governments investigate alleged or suspected war crimes.

2.36 In a situation of armed conflict, the prohibition on arbitrary killing continues to apply, but the question whether a killing is arbitrary is generally determined by applying the rules of IHL. Adopting a list of pre-identified individual military targets is not necessarily unlawful under IHL, provided it is based upon reliable intelligence and the targets selected are members of a State's armed forces, have a continuous combat function or directly participate in hostilities. The principle of proportionality applies, prohibiting 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. Avoiding excessive losses requires taking 'all feasible precautions to prevent or minimize incidental loss of civilian lives and information-gathering relating to possible civilian casualties and military gains'.[24]

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22 See, for example, Christ of Heyns, Extrajudicial, summary or arbitrary executions, UN GAOR, 69th sess, Agenda Item 69(b) of the provisional agenda, UN Doc A/69/265 (6 August 2014) [24].

23 Ben Emmerson, *Promotion and protection of human rights and fundamental freedoms while countering terrorism,* UN GAOR, 68th sess, Agenda Item 69(b) of the provisional agenda, UN Doc A/68/389 (18 September 2013) [60].

24 ICRC, Customary International Humanitarian Law, available from www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14.

2.37 The committee acknowledges that the extent to which international human rights law fully applies in the context of armed conflict is not settled as a matter of international law. The committee also notes that it is no longer accepted that human rights obligations do not apply to an army acting in an overseas operations. Rather, an army acting overseas will have obligations under international human rights law where they are exercising jurisdiction or 'effective control'. What constitutes 'jurisdiction' or 'effective control' has been the subject of continuing development through international jurisprudence. Jurisdiction is important as it determines the extent to which soldiers 'take with them' the obligations of international human rights law that apply in their country to country of the operation.

2.38 In the case of *Al-Saadoon & Ors v Secretary of State for Defence* [2015] EWHC 715, the English High Court found that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) applies to situations where Iraqi civilians were shot during security operations conducted by British soldiers. This follows the earlier case of *Al - Skeini v United Kingdom* in which the European Court of Human Rights issued a landmark judgment on the extraterritorial application of the ECHR and the duty to investigate deaths caused by British soldiers in Iraq as an aspect of the right to life.

2.39 The committee notes that these cases are not binding on Australia. Nevertheless the committee notes that international jurisprudence is developing in a manner which is increasing the application of international human rights law to overseas military operations. The development of this jurisprudence is relevant to considerations of Australia's military actions overseas and Australia's obligations under international human rights law.

Information shared by ASIS to overseas agencies

2.40 The committee notes that the response does not explain how Australia ensures that intelligence shared by ASIS will only be used by third parties in a manner that is consistent with Australia's human rights obligations. Whilst this issue is not specifically addressed in the Attorney-General's response it is relevant in analysing the conclusion in that response that the ISA does not engage the right to life.

2.41 Under section 13 of the ISA a security agency, including ASIS may cooperate with:

> ….(c) authorities of other countries approved by the Minister as being capable of assisting the agency in the performance of its functions;
>
> so far as is necessary for the agency to perform its functions, or so far as facilitates the performance by the agency of its functions.

2.42 In addition, under section 11 (2AA):

> An agency may communicate incidentally obtained intelligence to appropriate …. authorities of other countries approved under paragraph 13(1)(c) if the intelligence relates to the involvement, or likely involvement, by a person in one or more of the following activities:
>
> (a) activities that present a significant risk to a person's safety;
>
> (b) acting for, or on behalf of, a foreign power;
>
> (c) activities that are a threat to security;
>
> (d) activities related to the proliferation of weapons of mass destruction…..;
>
> (e) committing a serious crime.

2.43 The committee notes that the activities and functions of ASIS are subject to a number of safeguards including ministerial oversight and authorisation. However, there is no information in the statement of compatibility or the Attorney-General's response to support a conclusion that the ISA does not engage the right to life. The committee considers that sharing information with foreign governments who could potentially then act on this information, including through the use of lethal force, clearly engages the right to life.

2.44 The committee considers that the ISA engages and limits the right to life. This is because the ISA provides the legal basis for intelligence sharing between Australian intelligence agencies, the Australian Defence Force and certain foreign agencies. That information may be used by the Australian Defence Force and other military agencies in the context of armed conflict or other military activities. As the Attorney-General is of the view that the ISA does not engage and limit the right to life, no analysis is provided as to how the limitation on the right to life is nevertheless necessary and proportionate.

2.45 **In relation to the preceding legal analysis, some members of the committee considered that the ISA is a necessary and proportionate measure and is therefore compatible with the right to life.**

2.46 **In relation to the preceding legal analysis, other members of the committee considered that the ISA may be incompatible with the right to life.**

Right to privacy

2.47 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

2.48 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary,

they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Providing for ASIS to support the Australian Defence Force (ADF)

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

2.50 The committee noted that the statement of compatibility asserted, without explaining, the necessity of these amendments.

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

Attorney-General's response

> The amendments in Schedule 2 to the *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (CTLA Act) concerning the *Intelligence Services Act 2001* (ISA) relate to the gathering of intelligence in relation to Australian persons overseas. To the extent that such activities could limit the right to privacy, the amendments are permissible limitations because they are necessary and proportionate to addressing the national security concerns and pressing operational requirements faced by the Australian Secret Intelligence Service (ASIS) and the Australian Defence Force (ADF).
>
> In particular, new paragraph 6(1)(ba) of the ISA makes explicit that it is a function of ASIS to provide assistance to the ADF in support of military operations. The express recognition of this function will ensure appropriate transparency and will facilitate the authorisation process for ASIS to provide such support in time critical circumstances.
>
> As noted at paragraph 9 of the Explanatory Memorandum, ASIS intelligence has proved invaluable to ADF operations in the past, pursuant to its general statutory functions under paragraphs 6(1)(a), 6(1)(b) and 6(1)(e) of the ISA:
>
> > *ASIS provided essential support to the ADF in Afghanistan. The support ranged from force protection reporting at the tactical level, through to strategic level reporting on the Taliban leadership. ASIS reporting was instrumental in saving the lives of Australian soldiers and civilians (including victims of kidnapping incidents), and in enabling operations conducted by Australian Special Forces.*
>
> The necessity of the measures in Schedule 2 to the CTLA Act, to deal with the nature of current ADF operations in Iraq (and potential future

operations of similar character), was considered in detail by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its advisory report on the (then) Bill, tabled on 20 November 2014.

In its submission to the PJCIS, ASIS indicated (at p. 7):

> *In light of the rapidly changing and dangerous environment faced by the ADF in undertaking operations against the ISIL terrorist organisation in Iraq, as well as the wider threat posed by organisations such as ISIL*[Islamic State of Iraq and the Levant terrorist organisation]*, the proposed changes would position ASIS well to provide timely assistance to the ADF, minimise loss of life and to assist others in responding to the threat.*

It also noted (at p. 4):

> *Unlike the ADF's and ASIS's operations for almost 10 years in Afghanistan, in Iraq it is known that a large number of Australian persons are actively engaged with terrorist groups, including ISIL.*.

The PJCIS accepted the evidence of ASIS, Attorney-General's Department (AGD) and the Australian Security Intelligence Organisation (ASIO) that new paragraph 6(1)(ba) – together with the ability of the Foreign Minister to issue class authorisations in relation to such activities under paragraphs 8(1)(a)(ia) and (ib) and subsection 9(1A) - is necessary to ensure that ASIS can provide support to the ADF in such operations in a timely way. The PJCIS concluded, at p. 47 of its report:

> *The Committee supports the proposed amendments to the IS Act to explicitly provide for ASIS support to ADF military operations and to enable ASIS to support these operations with greater agility. The Committee recognises that the situation in Iraq, where it is known that there are a large number of Australians either fighting for or providing support to terrorist organisations, has significant implications for the ADF*.[25]

Any engagement of the right to privacy is proportionate to the legitimate security objective to which the measures are directed. AGD and agencies gave evidence of the extensive, applicable safeguards to the PJCIS, which concluded that these measures are appropriate. In particular, before authorising ASIS support for ADF operations, the Minister must be satisfied under subsection 9(1) that there are satisfactory arrangements in place to

25 Further analysis of the need for a class authorisation power in relation to ASIS's activities in support of the ADF is documented extensively in the PJCIS's advisory report at pp. 30-32 and pp. 47-48. The PJCIS accepted the evidence of ASIS (submission 17), AGD (submissions 5, 5.1 and 5.2) and ASIO (submission 10) on this issue. The Committee may wish to consult this evidence.

ensure that ASIS only engages in activities relating to its statutory functions and that the nature and consequences of those activities are reasonable. The PJCIS acknowledged (at pp. 41-42) the evidence of AGD and agencies that the consideration of privacy impacts of a proposed activity or activities forms part of the authorisation criteria under this provision.

In addition, under subsection 9(1A), the Minister can only issue an authorisation if satisfied that the Australian person or class of Australian persons is, or is likely to be, involved in one or more of the activities set out in paragraph 9(1A)(a), which includes activities that are or, are likely to be, a threat to security, per subparagraph 9(1A)(a)(iii). The term 'security' is defined in subsection 9(7) by reference to the meaning of that term under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). These requirements ensure that Ministerial authorisations are limited to the collection of intelligence in relation to activities that are of a serious nature.

Further, ASIS is subject to privacy rules made by the Foreign Minister under section 15 of the ISA, which regulate the communication and retention of intelligence information concerning Australian persons.[26] ASIS's activities in requesting and undertaking activities in accordance with a Ministerial authorisation issued under section 9 of the ISA are also subject to the independent oversight of the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Subsection 10A of the ISA further requires ASIS to provide reports to the Minister on activities undertaken in accordance with an authorisation issued under section 9 within three months of the authorisation ceasing to have effect or being renewed. The PJCIS concluded that these measures are appropriate.

The conclusions of the PJCIS support the Government's view that these measures are necessary and proportionate.[27]

Committee response

2.52 **The committee thanks the Attorney-General for his response. On the basis of the information provided, and having regard to the terms of the ISA and the Australian Secret Intelligence Service Privacy Rules, the committee has concluded**

26 These rules are publicly available on ASIS's website: http://www.asis.gov.au/Privacy-rules.html.

27 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 1-3.

its examination of this aspect of the bill and concludes it is likely to be compatible with the right to privacy.

Right to an effective remedy

2.53 Article 2 of the ICCPR requires state parties to ensure access to an effective remedy for violations of human rights. State parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, state parties may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

2.54 State parties are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations.

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

Legal immunities provided to ASIS

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

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

2.58 For the reasons set out above at [2.28]-[2.39] in relation to the right to life, the committee did not consider that the analysis provided in the statement of compatibility and EM has demonstrated that the amendments are necessary.

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

Attorney-General's response

Section 14 of the ISA may impact upon the right to an effective remedy to the extent that it provides members or agents of an ISA agency with an immunity from civil or criminal liability in relation to activities undertaken in the proper performance of their agency's functions. Such activities cannot be the subject of prosecution or civil action in Australia.

The amendments made by Schedule 2 to the CTLA Act do not change the application of section 14 to activities carried out by ASIS, in accordance with a Ministerial authorisation, to support the ADF in a military operation. Contrary to the Committee's suggestion (at pp. 15-16 of its report), the amendments do not confer upon ASIS a "new" statutory function, but rather make explicit that the functions of ASIS include the provision of assistance to the ADF in support of a military operation. As such, the immunity under section 14 has always applied to ASIS's activities in support of the ADF under its functions in paragraphs 6(1)(a), 6(1)(b) and 6(1)(e) of the ISA. The enactment of an explicit statutory function in paragraph 6(1)(ba) does not change the activities which attract immunity under section 14.

Nonetheless, the Committee has asked why an immunity from legal liability is necessary for staff members and agents of ASIS when undertaking authorised activities for the purpose of providing assistance to the ADF in support of a military operation (at p. 16). Without such an immunity, ASIS could not gain close access to relevant targets, as such access could itself constitute an offence. (For example, associating with a member of a terrorist organisation, or participating in training with a terrorist organisation are offences against Part 5.3 of the *Criminal Code 1995*. Security offences such as the terrorism-specific offences in Part 5.3 of the Criminal Code are of particular relevance in the context of the ADF's current operations against the ISIL terrorist organisation in Iraq, given that this organisation is a listed terrorist organisation under Division 102 of the Criminal Code.) The protection from legal liability conferred by section 14 is therefore essential to ensure that ASIS can provide assistance to the ADF without being exposed to legal liability that would otherwise preclude it from collecting critical intelligence (notwithstanding the existence of a Ministerial authorisation to do so, following receipt of a written request for ASIS's support from the Defence Minister under paragraph 9(1)(d), as well as the agreement of the Attorney-General in accordance with paragraph 9(1A)(b)).

There are also extensive legislative safeguards to ensure that the scope of the legal protection conferred by section 14 is proportionate to the nature of the activities carried out by the relevant staff member or agent of the agency. Section 14 applies only to the actions of an ISA employee or agent

undertaken in the course of the proper performance of their agency's functions.

Activities to produce intelligence on, or which will, or are likely to, have a direct effect on an Australian person undertaken in support of the ADF must be specifically authorised under section 9. In order to issue an authorisation, the Minister must be satisfied that the activity is necessary for the proper performance by ASIS of its functions. The Minister must be further satisfied that satisfactory arrangements are in place to ensure that the activity does not extend beyond what is necessary for the proper performance by the agency of its functions, and that satisfactory arrangements are in place to ensure that the consequences of the proposed activities are reasonable.

The actions of a staff member or an agent of an ISA agency are also subject to independent oversight by the Inspector-General of Intelligence and Security under the IGIS Act. Under subsection 14(2B) of the ISA, the IGIS may give a written certificate, certifying any fact relevant to the question of whether an act was done in the proper performance of a function of an agency. Subsection 14(2C) provides that such a certificate is prima facie evidence of the relevant facts in any proceeding.[28]

Committee response

2.60 **The committee thanks the Attorney-General for his response.** The committee agrees that the immunities from criminal and civil prosecution have the legitimate objective of enabling ASIS to undertake activities in the furtherance of Australia's national security. The committee agrees that the immunities are rationally connected to that objective as the immunities enable ASIS officers and contractors to legitimately engage with terrorist organisations in circumstances where such engagement may otherwise be an offence under Australian law.

2.61 However, the committee remains of the view that the immunities may not be proportionate to the right to an effective remedy. The response suggests that the immunities are 'essential to ensure that ASIS can provide assistance to the ADF.' The committee notes, however, that the immunities in section 14 of the ISA extend to any act done outside Australia if the act is done in the proper performance of a function of the agency. In contrast, activities conducted by ASIO and the AFP within Australia are covered by immunities if those activities are covered by a special intelligence operation (SIO) or a controlled operations scheme (COS).[29] There is no

28 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 3-4.

29 See Report 16 for more information.

blanket immunity provided to officers of those agencies in the course of the proper performance of their duties. The process of authorising a SIO or COS requires the authorising officer (including the minister as appropriate) to turn their minds not just to the necessity of the particular covert operation but the necessity for the immunities that will apply as a result of the authorisation of that operation. That process does not occur with respect to ASIS operations as all activities are covered by immunities.

2.62 Whilst the response does set out the importance of ministerial authorisation as a safeguard and the role of the IGIS in reviewing ASIS actions after the event, the response does not explain why a blanket immunity should be provided for all actions of ASIS properly performed and not just when specific operations require that immunity. In the absence of this information the committee is unable to conclude that the immunities in section 14 of the ISA are proportionate to the right to an effective remedy.

2.63 The committee considers that the immunities engage and limit the right to an effective remedy. The information provided in the statement of compatibility and the Attorney-General's response has demonstrated that the immunities pursue the legitimate objective of national security and are rationally connected to that objective. However, insufficient information has been provided to conclude that the immunities are nevertheless proportionate.

2.64 **In relation to the preceding legal analysis, some members of the committee considered that the immunities in section 14 of the ISA are necessary and proportionate and are therefore compatible with the right to an effective remedy.**

2.65 **In relation to the preceding legal analysis, other members of the committee considered that the immunities in section 14 of the ISA may be incompatible with the right to an effective remedy.**

Right to equality and non-discrimination

2.66 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the ICCPR.

2.67 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides 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.

2.68 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[30] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[31] 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.[32]

Authorising ASIS to provide information on a 'class of Australians'

2.69 Schedule 2 of the bill would amend the ISA to enable the Minister for Foreign Affairs to give an authorisation to ASIS to undertake activities for a purpose which includes producing intelligence on a specified class of Australian persons or to undertake activities that will, or is likely to, have a direct effect on a specified class of Australian persons. This class authorisation would only apply in relation to ASIS support to the ADF following a request from the Minister for Defence.

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

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

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

30 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.

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

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

2.72 While the committee acknowledged that there are a number of safeguards in the ISA,[33] the committee considered that a class authorisation power has the potential to apply intrusive interrogation powers to a group, which do not apply to the broader community and as such could be indirectly discriminatory because, although neutral on its face, it disproportionately affects people with a particular personal attribute such as religious or political belief, or ethnic background.

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

Attorney-General's response

> The amendments in Schedule 2 to the ISA allow the Foreign Minister to authorise ASIS to undertake activities in relation to, or which directly affect, a class of Australian persons, for the purpose of providing assistance to the ADF in support of a military operation. The Committee has suggested (at paragraph 1.75 of its report) that these amendments may allow the Foreign Minister to authorise ASIS to undertake activities in relation to, or directly affecting, a class of persons in a way that is directly or indirectly discriminatory. This suggestion is incorrect.
>
> I refer the Committee to the PJCIS's Advisory Report on the Bill (now Act) as tabled on 20 November 2014. The PJCIS accepted the evidence of AGD and agencies that the amendments will not permit direct or indirect discrimination against classes of persons. (For example, the amendments will not permit authorisations to be issued for ASIS to undertake activities in support of the ADF in relation to a class of Australian persons, where that class is defined by reference to persons' racial or religious affiliation). As the PJCIS acknowledged, there are four main limitations which prevent the class authorisation power from being exercised in a discriminatory fashion (at pp. 36-37 of that Committee's report):
>
> > *First, the Defence Minister must request the authorisation in writing and will set out in this request the class of Australian persons for whom ASIS's assistance is sought in relation to a specified ADF military operation.*

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

> *Secondly, the Foreign Minister must be satisfied that the other authorisation criteria in subsections 9(1) and 9(1A) are satisfied... Further, the Minister must be satisfied that the particular activities of a class of person in relation to whom the authorisation is sought fall within one or more of the activities prescribed in paragraph 9(1A)(a).*
>
> *Thirdly, the agreement of the Attorney-General is required in relation to a class of Australian persons before an authorisation is issued... The Attorney-General's Department noted that at this point, the proposed class of Australian persons will have been scrutinised by three Ministers.*
>
> *Fourthly, a class cannot include anyone who is not engaged in the specified activity or activities.*[34]

These limitations illustrate that classes of Australian persons who are the subject of an authorisation must be defined by reference to the action they have engaged in as prescribed in paragraph 9(1A)(a). The actions in that paragraph do not, in any way, relate to a person's religious, ethnic or ideological status or persuasion. Hence, there is no permissible means by which subsection 9(1A) could enable direct or indirect discrimination because its sole focus is on a person's engagement, or likely engagement, in the activities specified in paragraph 9(1A)(a). As the PJCIS acknowledged, when ASIS assistance is provided to the ADF in support of military operations, the relevant limb of the activity test in paragraph 9(1A)(a) will invariably be that in subparagraph 9(1A)(a)(iii), which prescribes activities that are or are likely to be a threat to security. There is no reasonable basis upon which to draw or infer a connection between a person's racial, religious or ideological status or persuasion and their engagement or likely engagement in activities that are, or are likely to be, a threat to security.

Further, ASIS's actions in requesting a Ministerial authorisation in relation to a class of Australian persons pursuant to its functions under paragraph 6(1)(ba), and in undertaking activities in reliance on that authorisation (including the identification of individual Australian persons within the relevant class), are subject to the independent oversight of the IGIS under the IGIS Act. ASIS must also provide reports to the Minister under section IOA within three months of the authorisation ceasing to have effect or being renewed.[35]

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34 See further: Attorney General's Department, Supplementary Submission 5.1 to the PJCIS at 4-5.

35 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 6-7.

Committee response

2.74 **The committee thanks the Attorney-General for his response.** The committee considers that the response demonstrates clearly that the amendments to the ISA to allow the Foreign Minister to authorise ASIS to undertake activities in relation to, or which directly affect, a class of Australian persons, for the purpose of providing assistance to the ADF in support of a military operation are not directly discriminatory.

2.75 The committee notes that discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups. Where a measure impacts on particular groups disproportionality, it establishes prima facie that there may be indirect discrimination.

2.76 The Attorney-General's response states that when ASIS assistance is provided to the ADF in support of military operations, the relevant limb of the activity test in paragraph 9(1A)(a) will invariably be that in subparagraph 9(1A)(a)(iii), which prescribes activities that are or are likely to be a threat to security. Accordingly, the test for a class of individuals is not confined to those who are '*engaged in the specified activity or activities*.' It may include individuals, who on the subjective assessment of ASIS, are likely to be involved in the specified activity or activities. This includes assessments of likely associations and connections.

2.77 If a provision has a disproportionate negative effect or is indirectly discriminatory it may nevertheless be justified if it pursues a legitimate objective, the measure is rationally connect to that objective and the limitation on the right to equality and non-discrimination is a proportionate means of achieving that objective. The Attorney-General's response does not acknowledge the potential for the provisions to be indirectly discriminatory and accordingly does not seek to justify the limitation on the right to equality and non-discrimination. However, the committee nevertheless considers that the potential disproportionate impact on particular groups may have been capable of justification as compatible with the right to equality and non-discrimination. Of particular relevance is that the criteria for the determination of a class of Australians under the provisions are based on objective grounds.

2.78 **The committee considers that the response demonstrates clearly that the amendments to the ISA to allow the Minister for Foreign Affairs to authorise ASIS to undertake activities in relation to, or which directly affect, a class of Australian persons, for the purpose of providing assistance to the ADF in support of a military operation, are not directly discriminatory. In terms of indirect discrimination, the provisions may have a disproportionate impact on certain groups of individuals. Where a measure impacts on particular groups disproportionately, it establishes**

prima facie that there may be indirect discrimination. However, as noted above, even where provisions impact on particular groups disproportionately, this may be justifiable under international human rights law. The committee notes that the determination of a class of Australians is based on objective grounds and, accordingly, the provisions are capable of being justified as compatible with the right to equality and non-discrimination.

Prohibition against torture, cruel, inhuman or degrading treatment

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

2.80 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely;
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

Providing for ASIS to support the ADF

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

2.82 Under the ISA, ASIS staff are not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency.[36] ASIS staff also have civil and criminal immunity in certain circumstances for acts done inside Australia.[37] ASIS staff may be involved in a range

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

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

of intelligence gathering activities so long as they do not involve planning for, or undertaking paramilitary activities; violence against the person; or the use of weapons (other than the provision and use of weapons or self-defence techniques). However, torture or cruel, inhuman or degrading practices, is not specifically mentioned. A range of techniques may constitute torture or cruel, inhuman or degrading practices, that do not fall within the prohibition of violence against the person. This may include, for example, death threats, hooding, stress positions or deprivation or food or water.

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

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

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

Attorney-General's response

> Consistent with the conclusions of the PJCIS on this matter in its advisory report on the (then) Bill,[38] there is no intention to amend the ISA in the manner recommended by the Committee.
>
> The Committee appears to assume that the limited protection from legal liability in section 14 of the ISA must expressly exclude conduct constituting torture, or cruel, inhuman or degrading treatment or punishment in order to be compatible with Australia's obligations under the Convention Against Torture. Any express exclusion is, however, not required. The ISA does not, under any circumstances, authorise an agency to engage in such conduct, nor provide any immunity for such conduct. Accordingly, any activities undertaken by a staff member or an agent of an ISA agency that constitute torture or cruel, inhuman or degrading

38 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (November 2014) 47 at [3.67]. See also Attorney-General's Department, Supplementary Submission 5.2 to the PJCIS inquiry 3-4.

treatment or punishment are subject to criminal liability, including under the torture offences in Division 274 of the *Criminal Code 1995*.

The ISA expressly provides that agencies can only undertake activities for the purpose of the proper performance of their statutory functions, and cannot undertake activities that are not necessary for that purpose (per section 12). The relevant responsible Minister can only provide authorisations for agencies to engage in relevant activities where he or she is satisfied of the following requirements under subsection 9(1):

- the activities are necessary for the proper performance of a function of the agency;
- there are satisfactory arrangements in place to ensure that nothing will be done beyond what is necessary for the proper performance of a function of the agency; and
- there are satisfactory arrangements in place to ensure that the nature and consequences of the acts undertaken in reliance on the authorisation will be reasonable, having regard to the purpose for which they are carried out.

Further, the protection from legal liability in section 14 is expressly confined to staff members or agents of an agency who undertake acts in the proper performance of the agency's functions.

As the PJCIS acknowledged in its advisory report on the (then) Bill (at p. 47) and as expressly identified in the Explanatory Memorandum (at p. 29), there can be no sensible suggestion that conduct constituting torture or cruel, inhuman or degrading treatment or punishment is necessary for - or even relevant to - the proper performance of the relevant agencies' functions under the ISA. Such an interpretation is plainly contradicted by the ordinary meaning of the term 'proper' in relation to the performance

of agencies' functions,[39] and the text and wider context of the ISA-having particular regard to the nature of agencies' functions under sections 6, 6B and 7.[40]

Rather, by limiting the scope of agencies' functions and activities (and the attendant protection from legal liability) to acts that are necessary for the proper performance of an agency's functions, the ISA evinces a clear intention that conduct constituting torture or cruel, inhuman or degrading treatment is subject to criminal and civil liability. This includes liability under the specific offences in relation to torture in Division 274 of the

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39 For example, the Macquarie Dictionary (Sixth Edition, October 2013) defines the term 'proper' as meaning "conforming to established standards of behaviour or manners; correct or decorous". In addition, in the unlikely event that the meaning of the phrase 'proper performance of the agency's functions' was considered to be ambiguous *vis a vis* torture, this would engage the presumption that legislation is to be interpreted consistently with Australia's human rights obligations: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 1983 CLR 273 at p. 287 (per Mason CJ and Deane J). There is nothing in the text of the provisions of the ISA concerning the functions of agencies, nor evident in the wider context of the ISA, to suggest that Parliament intended the ISA should be read inconsistently with Australia's international obligations to prohibit torture, including those under the Convention Against Torture. (Such a presumption is additional to the ability to consult extrinsic materials to the legislation in accordance with section 15AB of the *Acts Interpretation Act*. Relevant extrinsic materials include the Explanatory Memorandum to the Bill, which makes specific reference to this matter at p. 29.)

40 Further, the ISA is, like all Australian legislation, subject to the presumption of statutory interpretation that the Parliament did not intend to abrogate fundamental common law rights - including the fundamental and long-established rights to personal inviolability and personal liberty - in the absence of a clear intention on the face of the relevant legislation to displace this presumption. (See, for example: *'Marion's Case'* (1992) 175 CLR 218 at 253 per Mason CJ, Dawson, Toohey and Gaudron JJ concerning personal inviolability; and *R v Bolton; Ex Parte Bean* (1987) 162 CLR 514 at 523 per Brennan CJ concerning personal liberty.) The content of such fundamental rights includes conduct of the kind constituting torture and cruel, inhuman or degrading treatment or punishment, recognising that it is a significant incursion into the integrity and autonomy of a person's physical and mental state. In order for the ISA to be interpreted as abrogating these rights, it would be necessary to identify unambiguous and unmistakable language giving effect to this intention - noting that the more serious the interference, the clearer the requisite expression of intention must be: *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 at 263 (per Black CJ, Sundberg and Weinberg JJ). There is no evidence of such a clear intention on the face of the ISA. There is no inconsistency between these fundamental common law rights (to the extent that they cover conduct constituting torture or cruel, inhuman or degrading treatment or punishment) and the statutory functions or activities of agencies prescribed under the ISA; nor the limited immunity in section 14 for actions done in the proper performance of an agency's functions.

Criminal Code, which give domestic legal effect to Australia's international obligations under the Convention Against Torture. The amendments to the ISA, enacted by Schedule 2 to the CTLA Act, do not change this position in any way.

Secondly, as the PJCIS further observed, paragraph 6(4)(b) of the ISA confers an additional safeguard in relation to the conduct of activities by ASIS in recognition of its role as a human intelligence collection agency. This provision prohibits ASIS from planning for, or undertaking, activities that involve violence against the person. The Committee has asserted (at p. 20 of its report) that the term 'violence' has a narrower meaning than conduct constituting torture, or cruel, inhuman or degrading treatment or punishment. This is contradicted by the ordinary meaning of the term 'violence'. For example, the Macquarie Dictionary defines the term as encompassing "rough or injurious action or treatment",[41] which would clearly extend to the conduct identified by the Committee at page 20 of its report. This ordinary meaning is also confirmed by the Explanatory Memorandum (at p. 29). As conduct constituting torture or other cruel, inhuman or degrading treatment or punishment is outside the proper performance of all ISA agencies' functions, it necessarily falls outside the scope of the limited protection from legal liability in section 14. Accordingly, such conduct is already subject to criminal offences under Australian law, including specific offences in respect of torture in Division 274 of the Criminal Code. An express exclusion of such conduct under section 14 is, therefore, not necessary to give substantive effect to Australia's obligations under the Convention Against Torture. Further, as the PJCIS recognised, the insertion in section 14 of an express statutory exclusion of conduct that is not, in any case, within the scope of the immunity may also have unintended, adverse consequences for the interpretation of that provision (and potentially for the interpretation of agencies' functions). Accordingly, the Government has no intention to implement this recommendation.[42]

Committee response

2.86 **The committee thanks the Attorney-General for his response.** The committee notes that the Attorney-General relies in part on the principle of legality in support of an argument that acts constituting torture, cruel, inhuman or degrading treatment could not be authorised as a matter of law. As set out in the committee's *Sixteenth Report of the 44th Parliament* in relation to the *National Security Legislation*

41 Macquarie Dictionary (Sixth Edition, October 2013).

42 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 8-10.

Amendment No 1 Bill 2014 the committee disagrees with this analysis for the reasons set out in that report.

2.87 The committee further notes that the response explains that there can be no suggestion 'that conduct constituting torture or cruel, inhuman or degrading treatment or punishment is necessary for - or even relevant to - the proper performance of the relevant agencies' functions under the ISA.' The committee does not suggest that a minister would directly authorise an action by an ASIS officer or agent that would constitute torture or cruel, inhuman or degrading treatment.

2.88 However, the committee notes that ASIS officers are required to undertake a broad range of intelligence activities including counter-intelligence activities. The committee notes that Australia's obligations under the CAT are not limited to prohibiting acts of torture. Australia also has responsibility where persons acting in an official capacity acquiesce while others commit acts constituting torture under the CAT. It is not beyond imagination that during a counter-intelligence operation an official may have to turn a blind eye to acts of violence, and cruel, unusual and degrading treatment committed by others.

2.89 The committee further notes that under article 14 of the CAT Australia must ensure that victims of torture (or their dependents) have the ability to obtain civil redress. The response does not suggest how the immunities are consistent with this obligation. The response asserts that the committee's recommendation would have 'unintended adverse consequences' but does not explain those consequences.

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

Prohibition against torture, cruel, inhuman or degrading treatment

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

Attorney-General's response

> The Committee has correctly identified that the prohibitions and limitations in subsection 6(4) of the ISA do not prohibit ASIS from being involved with the planning or undertaking of activities of the kind specified in paragraphs 6(4)(a)-(c) by other organisations. This is expressly confirmed in the note to subsection 6(4). However, any such involvement is subject to the requirements of sections 13 and 13A of the ISA. These provisions state that ASIS may only cooperate with another organisation if this cooperation is in connection with the functions of ASIS (section 13), or the functions of the cooperating (Australian) organisation (section 13A).
>
> As mentioned above, the functions of ASIS are not capable of extending to conduct constituting torture, or cruel, inhuman or degrading treatment or punishment. In addition, the functions of the Australian agencies with whom ASIS may cooperate under section 13A are similarly incapable of extending to conduct constituting torture or cruel, inhuman or degrading treatment or punishment. The amendments to the ISA do not, in any way, change this position. For these reasons, the Government will not be amending the ISA to implement this recommendation. To the extent that the Committee appears to have suggested that such amendments are necessary in order for the ISA to be compatible with the Convention Against Torture, the Government does not accept that position.[43]

Committee response

2.92 **The committee thanks the Attorney-General for his response**. The committee however, reconfirms its recommendation that the ISA be amended to explicitly provided that ASIS must not provide any planning, support or intelligence where it may result in another organisation engaging in acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the CAT. The committee notes that the response states categorically that the functions of the Australian agencies with whom ASIS may cooperate under section 13A are similarly incapable of extending to conduct constituting torture or cruel, inhuman or degrading treatment or punishment. The committee notes that under section 13 ASIS may cooperate with authorities of other countries approved by the Minister. It is entirely within the proper purpose of ASIS to share relevant intelligence with countries approve by the Minister. What those agencies in other countries is a matter subject to their laws. In this respect, the committee notes the Committee

43 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to Senator Dean Smith (dated 5 March 2015) 10-11.

against Torture's recent conclusions regarding the USA's compliance with the CAT particularly in relation to activities conducted by US agencies extraterritorially.[44]

2.93 **Accordingly, given the range of agencies with which Australia engages and shares information, the committee considers that it is necessary for compliance with the Convention Against Torture that the Australian Secret Intelligence Service must not provide any planning, support or intelligence where it could foreseeably result in another organisation engaging in acts that could constitute torture or cruel, inhuman or degrading treatment or punishment as defined by the Convention Against Torture.**

44 Committee Against Torture, *Concluding observations on the combined third to fifth periodic reports of the United States of America*, UN Doc CAT/C/USA/CO/3-5, 18 Dec 2014.

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

2.94 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.

2.95 The measures in the bill which are the subject of this entry are measures that would:

- reduce subsidies for new Commonwealth supported students at universities by an average of 20 per cent; and
- remove the current maximum student contribution amounts.

2.96 A fuller description of the bills is provided in the committee's previous analysis.[1] Measures raising human rights concerns or issues are set out below.

Background

2.97 The committee reported on the original bill in its *Twelfth Report of the 44th Parliament*,[2] and sought further information from the Minister for Education in relation to a number of measures. 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.

2.98 The committee then considered the Minister for Education's response to the committee's analysis of the original bill in its *Eighteenth Report of the 44th Parliament*.[3] Due to the similarity of the bills, the committee decided to report on both bills together. The committee sought further information on the removal of the cap on student contribution amounts, and concluded its examination of all other

1 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 8-13; Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 43-64.

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

3 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 43-64.

measures in light of the minister's response. The new bill was negatived by the Senate on 17 March 2015.

Reduction of subsidies for new Commonwealth supported students at universities

Right to progressively free higher education

2.99 The committee considered that, on the basis of the information available, the reduction in subsidies for new Commonwealth supported students at universities may be incompatible with the right to education. The committee concluded its examination of this aspect of the original bill.

Removal of the cap on student contribution amounts

Right to progressively free higher education

2.100 The committee sought 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.

Minister's response on both issues

> **HECS loans will protect the right to higher education by ensuring access and affordability**
>
> The right to education will not be negatively affected by the proposed 20 per cent reduction in the subsidy for new Commonwealth supported students or the removal of the cap on student contribution amounts. The Reform Bill does not restrict accessibility and affordability of higher education. The Higher Education Contribution Scheme (HECS) will continue to ensure that Australian students are able to fully defer the cost of their higher education through income-contingent loans. Eligible students will not need to pay a cent up front for the cost of their tuition, and need not commence repayments until they earn over an estimated $50,638 (in 2016-17). In this way, HECS effectively operates as an insurance mechanism to protect borrowers who participate in higher education but do not subsequently earn sufficient income to repay their debt without hardship.
>
> International evidence suggests that the availability of a strong student loan scheme reduces or eliminates any effects of price increases on accessibility. A 2014 report prepared for the European Commission (the Usher report) explored the impacts of changes to cost-sharing arrangements on higher education students and institutions across nine countries.[4] The Usher report found that there was no trend of declining enrolments after a fee increase, and that in cases where students were

4 Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014.

able to access financial support, in the form of loans or scholarships, the impact of a fee increase on university applications was negligible.

Previous changes to tuition fee charges in Australia have also not deterred students from lower socio-economic status (SES) backgrounds from undertaking higher education. A 2008 report by Access Economics found that 'the introduction of HECS and subsequent changes in the level of charges have had minimal impact, both in terms of overall applications and on enrolments by students from lower socio-economic status backgrounds.'[5]

Similar observations were made in relation to the recent experience in England. Many institutions elected to raise their tuition fees to the new maximum amount however this did not affect the proportion of low SES students enrolling in higher education courses, and the participation rates for disadvantaged students in England is higher than ever according to a 2014 report by the UK Independent Commission on Fees.[6]

The reforms will reduce fees for some students

The removal of the cap on student contributions will not result in price increases for all students. In fact, the costs of some courses are likely to decrease, as non-university higher education providers gain access to subsidies for the first time. The Council of Private Higher Education Providers (COPHE) stated in its submission to the Senate Education and Employment Legislation Committee which was conducting an inquiry into the Higher Education and Research Reform Amendment Bill (2014) that the benefits of Commonwealth subsidies would be passed on to students through a reduction in their fees.

The Reform Bill's measures include specific benefits targeted at students facing disadvantage

The Usher report also noted that the increase in funding available to universities allowed them to open up more places, and provide more student support such as academic support or cost of living allowances or bursaries. The combined effect is that the proportion of students from low socio-economic backgrounds undertaking higher education has been observed to increase after a rise in the 'sticker price' of the course. According to information gathered, greater access to scholarships, student loans and other financial support may result in students from disadvantaged backgrounds actually paying less, due to the ability of universities to increase their outreach efforts.

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5 Access Economics Pty Limited, 'Future Demand for Higher Education', Report for Department of Education, Employment and Workplace Relations, Australia, November 2008.

6 Independent Commission on Fees, 'Analysis of trends in higher education applications, admissions, and enrolments', United Kingdom, August 2014.

The availability of new scholarships through the proposed new Commonwealth Scholarship Scheme and a new dedicated scholarships fund within the Higher Education Participation Programme (HEPP) is expected to assist many disadvantaged higher education students with the cost of undertaking study. Institutions will be able to provide tailored, individualised support to help disadvantaged students, including help with costs of attending, participating in or succeeding in higher education. These will be allocated to students either as direct scholarship payments or as individualised support, such as assistance with the cost of living, additional tutoring, mentoring or outreach.

Together, the scholarships stream under HEPP and the new Commonwealth Scholarship Scheme are expected to result in additional support, particularly for regional students because all universities will be able to provide support for access and participation through scholarships.

Greater access and success for students through the extension of Government subsidies to sub-bachelor courses

The Review of the Demand Driven Funding System[7] argued that expansion of subsidised places to sub bachelor courses and non-university higher education providers would improve the efficiency of the higher education system by better matching students with courses that suit them and give them the highest chance of success.

The measures in the Reform Bill aim to expand opportunity and choice for students through extension of the demand driven funding system to sub bachelor places at all institutions and bachelor level places at private universities and non-university higher education providers registered by TEQSA. For the first time ever, Commonwealth subsidies will be provided on a demand driven basis for eligible students enrolling in accredited higher education diplomas, advanced diplomas and associate degrees. These qualifications provide effective pathways for disadvantaged students and in many cases are qualifications in their own right (such as engineering technologists, construction managers, and paralegals).

The Review of the Demand Driven Funding System found that the capping of sub-bachelor places, as well as the general restriction on providers that are able to offer sub-bachelor Commonwealth supported places, created incentives for students to enrol in a bachelor degree. This was primarily due to the relative price differential between a (subsidised) bachelor place through a public university and a (non-subsidised) sub-bachelor place through a non-university higher education provider. This occurred even though a sub-bachelor course would better suit their needs and abilities.

Evidence to the review suggested that students who entered via a pathway course often did better than might have been expected, given their original level of academic preparation. At the University of Western

7 Kemp and Norton, 'Review of the Demand Driven Funding System', Australia, April 2014.

> Sydney's UWS College more than 70 per cent of students progress straight into the second year of a bachelor program, often with retention and success results equivalent to their peers who enrol directly into bachelor courses.
>
> In addition, as discussed above, the Council of Private Higher Education (COPHE) has confirmed that their members intend to reduce their tuition fees as a result of access to Government subsidies. An article in The Australian on 24 September 2014 stated that fees for private higher education may halve in some cases as COPHE members pass Government subsidies directly on to students as savings.[8]
>
> Based on the evidence provided, neither measure noted by the Committee can be considered to limit the right to education. The right to access higher education will be preserved by the HECS system, as all available evidence suggests that the presence of an adequate loan scheme preserves the accessibility of higher education. Additionally, the affordability of higher education will be maintained by the downward pressure on fees provided by the introduction of subsidies to sub-bachelor courses and private providers. Costs associated with higher education will also be reduced for many students as a result of the targeted scholarship programmes. The measures in the Reform Bill ensure that the right to education, including its accessibility and affordability, will not be limited.[9]

Committee response

2.101 **The committee thanks the minister for his response.** The committee notes that it had previously concluded its examination of the measure, which would implement a 20 per cent reduction in subsidies for new Commonwealth supported students at universities. The committee had concluded that the measure may be incompatible with the right to progressively free higher education.

2.102 The committee notes that the minister has provided further information on this measure as well as responding to the committee's request for further information regarding the proposed removal of the cap on student contribution amounts. The committee will consider these two measures together in light of the minister's further response.

2.103 The minister's response, which is consistent with the statement of compatibility and the minister's earlier response to the committee, reiterates a view that neither the 20 per cent reduction of subsidies for new Commonwealth supported students at universities nor removal of the cap on student contribution amounts would limit the right to education. The minister argues that this is because

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8 B Lane, The Australian, 'Fees for private college courses could halve', 24 September 2014.

9 See Appendix 1, Letter from the Hon Christopher Pyne MP, Minister for Education, to Senator Dean Smith (dated 6 March 2015) 1-4.

the continued availability of HECS will protect access and affordability by ensuring that no upfront fees are payable by students.

2.104 The committee notes at the outset that it has previously concluded that a number of the measures in the bills are compatible with the right to education. The committee further notes that it is required to assess these measures against article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In undertaking that assessment, it provides a technical analysis and does not consider the policy merits of the measure.

2.105 The committee notes that, under article 13 of ICESCR, Australia recognises 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* (emphasis added).

2.106 The committee considers that, with reference to article 13, 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. 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.

2.107 The 20 per cent subsidy reduction 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.

2.108 Similarly, the committee considers that the removal of the cap may be considered a retrogressive measure for human rights purposes as it may increase the total cost of education, and therefore reduce the affordability (and thus accessibility) of higher education, and in this respect represents a limitation on the progressive introduction of free education.

2.109 The Committee on Economic, Social and Cultural Rights (CESCR) has stated that the introduction of fees and increases in existing fees is a deliberate

retrogressive step.[10] The CESCR has made similar conclusions with respect to countries that have deferred payment schemes similar to Australia's HECS arrangements in circumstances where there has been an increase in the fee cap.[11]

2.110 The committee notes that the minister has not provided any information to the committee as to why these conclusions should not be accepted. In the absence of such information, the committee considers that the CESCR conclusions provide useful guidance in interpreting Australia's obligations under article 13 of the ICESCR.

2.111 The committee notes that the minister's response draws on international comparisons to support a view that the measures will not reduce access to university as the HECS system will ensure that any increase in fees does not act as a deterrent to accessing higher education.

2.112 However, the committee considers that a close reading of the sources quoted in the response is more equivocal as to the impact of fee increases on the accessibility of education.

2.113 In particular, the response states that the Usher report 'found no trend of declining enrolments after a fee increase'. However, that report in fact did note a dramatic decline in enrolments in England following fee increases.[12] The report also noted that 'most countries' national statistical systems are weak when it comes to measuring participation by sub-groups such as family background, social class or

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10 Concluding observations of the Committee on Economic, Social and Cultural Rights: Spain. (6 June 2012) UN Doc E/C.12/ESP/CO/5, 6. Concluding observations of the Committee on Economic, Social and Cultural Rights: Germany. (12 July 2011) UN Doc E/C.12/DEU/CO/5, 7. Concluding observations of the Committee on Economic, Social and Cultural Rights: Poland. (2 December 2009) UN Doc E/C.12/POL/CO/5, 7. Concluding observations of the Committee on Economic, Social and Cultural Rights: Luxembourg. (26 June 2003) UN Doc E/C.12/1/Add. 86, 5.Concluding Observations of the CESCR: Germany. UN DOC. E/2002/22 paras 671 and 689, Concluding Observations of the CESCR: Luxembourg. UN DOC. E/2004/22 para 103, Concluding Observations of the CESCR: Bulgaria. UN DOC. E/C.12/1/Add.37, 3, Concluding Observations of the CESCR: Canada UN DOC. E/C.12/1/Add.31, 7.

11 Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories. (12 June 2009) UN Doc E/C.12/GBR/CO/5, 6.

Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories. (5 June 2002) UN Doc E/C.12/1/Add.79, 11.

12 Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014, 12.

ethnicity' making it difficult to draw conclusions with respect to the impact of fee increases on students from disadvantaged backgrounds.[13]

2.114 The response also states that despite a significant increase in the maximum tuition fee that may be charged by English higher education institutions:

> …participation rates for disadvantaged students in England is higher than ever according to a 2014 report by the UK Independent Commission on Fees.

2.115 However, the committee notes that the report by the UK Independent Commission on Fees, referred to in the minister's response, made a number of conclusions which suggest that the impacts of increased fees, while subject to a level of uncertainty, have been followed by identifiable trends of reduced access. In relation to the uncertainty of impacts, it stated:

> …that average graduates would continue to be indebted for far longer under the new system, with many repaying into their late 40s and early 50s.
>
> …it may [therefore] take many years for the impacts of higher education funding reforms, particularly of these large changes to personal debt, to become fully apparent.

2.116 In relation to entry rates of disadvantaged students it noted:

> The gap in application and entry rates between advantaged and disadvantaged students has narrowed only slightly and remains unacceptably large, particularly for the most selective institutions. Students who are not eligible for Free School Meals remain more than twice as likely as those eligible to apply for university. Students from the least disadvantaged areas are also around 3 times more likely to enter university than those from the most disadvantaged areas.
>
> This gap is particularly large for the most selective universities and has not substantially narrowed.
>
> …[O]f particular concern are the sharp declines in the numbers of mature students applying to and entering higher education…Take-up for applicants aged 20-24 and 25+ was down 9% and 18% in 2013 (relative to 2010).
>
> …[F]igures show a particularly severe decline in the numbers of mature students starting part-time courses in the 2012/13 academic year (the year

13 Usher, Orr and Wespel, 'Do changes in cost-sharing have an impact on the behaviour of students and higher education institutions?', Report for European Union, United Kingdom, May 2014, 12.

> of fees increase.) 43% fewer mature students started part-time courses in this year than did in 2009/10.[14]

2.117 The minister's response also quotes a 2008 Access Economics study to support the position that changes to the HECS system do not discourage students, particularly students from disadvantaged backgrounds from pursuing higher education studies.

2.118 However, the committee notes that the changes which were the subject of the 2008 Access Economics study have been characterised by Professor Bruce Chapman, the architect of the HECS scheme, as insubstantial, whereas the measures in the bills propose fundamental changes to HECS.[15] Accordingly, the committee considers that it is unclear whether accurate and reliable predictions as to the impact of the current measures on the cost of education can be drawn in reliance on the evidence from the 2008 Access Economics study.

2.119 The minister's response also quotes a submission from the Private Higher Education Providers (COPHE) to a recent Senate committee inquiry which states that COPHE members will pass on the new Commonwealth subsidy to students in the form of lower fees. The response argues that this will put downward pressure on fees across the higher education sector. However, the committee notes that the UK study quoted in the minister's response suggests that universities may in fact compete on prestige rather than price. It noted that, following a decision by the UK government to increase the maximum a university could charge in annual tuition fees in 2012-13 from £3375 to £9000:

> Contrary to the government's hopes that universities would compete on price, the vast majority of universities and courses charge the £9,000 maximum, with the current average fee being £8,507.20.[16]

2.120 The committee notes that a specific measure in the bill would see the cap on fees removed in Australia and, in the absence of a cap, the increase in fees could be greater in Australia than in the UK example referred to by the minister. However, no evidence has been provided to suggest that Australian universities (particularly the

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14 Independent Commission on Fees, 'Analysis of trends in higher education applications, admissions, and enrolments', United Kingdom, August 2014, 31.

15 Julie Hare and Andrew Trounson, 'HECS designer Bruce Chapman class for action to limit fee rises', *The Australian* 3 September 2014 (available from http://www.theaustralian.com.au/higher-education/hecs-designer-bruce-chapman-calls-for-action-to-limit-fee-rises/story-e6frgcjx-1227045452598). See also Matthew Knott, Heath Gilmore, 'Graduates could pay up to $120,000 in debt, HECS architect warns', *Sydney Morning Herald* May 14, 2014 (available at http://www.smh.com.au/federal-politics/political-news/graduates-could-pay-up-to-120000-in-debt-hecs-architect-warns-20140514-zrctv.html).

16 Independent Commission on Fees, 'Analysis of trends in higher education applications, admissions, and enrolments', United Kingdom, August 2014, 5.

elite or 'sandstone' universities) will respond differently in Australia than the 'vast majority' of UK universities as described in the UK study cited by the minister.

2.121 Finally, the minister's response asserts that the proposed changes will not disadvantage students and that, if they were introduced, the continuation of HECS would mean that students (including students from disadvantaged backgrounds) will not be dissuaded from accessing higher education. However, as set out above, the committee considers that the evidence presented to support these claims is equivocal.

2.122 In light of the above, the committee considers it likely that the proposed measures would be considered to be retrogressive under international human rights law, as they appear to represent a backwards step in the level of protection for the right to access education, and in the progressive introduction of free higher education.

2.123 As noted above, 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, and the committee's analytical framework may be applied to support an analysis of a retrogressive measure as being justified or permissible for the purpose of international human rights law. In this respect, the committee considers that the minister could have advanced an argument that, notwithstanding their retrogressive nature, the proposed measures are nevertheless justified as they are reasonable, necessary and proportionate to achieve a legitimate aim.

2.124 The committee notes that the statement of compatibility identified a number of the proposed measures as a necessary part of 'contributing to the repair of the Budget, so as to ensure the ongoing sustainability and excellence of Australia's higher education system',[17] and such budgetary constraints have been recognised as being capable of providing a legitimate objective for the purpose of justifying reductions in government support that impact on economic, social and cultural rights.

2.125 Further, in justifying the proposed measures as proportionate to a legitimate aim, the minister could have advanced an argument that they are necessary to ensure the long term financial viability of the higher education sector, and in particular to provide financial stability to public universities in the context of declining budget revenue. However, the minister has not sought to advance, or to provide any evidence in support of, such arguments.

2.126 **Accordingly, the committee considers that the 20 per cent reduction in support for Commonwealth funded students and the removal of the cap on student contribution amounts are retrogressive measures with respect to the**

17 Explanatory memorandum 2.

obligation to progressively realise the right to free higher education under article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The committee considers that the measure may be incompatible with the obligation to progressively realise the right to free education as defined in article 13 of the ICESCR.

Omnibus Repeal Day (Spring 2014) Bill 2014

Portfolio: Prime Minister and Cabinet
Introduced: House of Representatives, 22 October 2014

Purpose

2.127 The Omnibus Repeal Day (Spring 2014) Bill 2014 (the bill) sought to amend or repeal legislation across nine portfolios. It included measures that repeal redundant and spent Acts and provisions in Commonwealth Acts, and complements the measures included in the Statute Law Revision Bill (No. 2) 2014 and the Amending Acts 1970-1979 Bill 2014.

2.128 The bill also abolished the following bodies:

- the Fishing Industry Policy Council;
- the Product Stewardship Advisory Group; and
- the Oil Stewardship Advisory Council.

Background

2.129 The committee first reported on the bill in its *Nineteenth Report of the 44th Parliament*.[1]

Removal of consultation requirement when changing disability standards

Right to equality and non-discrimination

2.130 The committee considered that repealing consultation requirements under the *Telecommunications Act 1997* (Telecommunications Act) relating to changes to disability standards limits the right to equality and non-discrimination and the rights of persons with disabilities. Currently under the Telecommunications Act, the Australian Communications and Media Authority (ACMA) can make a 'disability standard' in relation to equipment used in connection with a standard telephone service where features of the equipment are designed to cater for the special needs of persons with disabilities (for example, an induction loop designed to assist with a hearing aid). Before making a disability standard, ACMA must try to ensure that interested persons have an adequate opportunity (of at least 60 days) to make representations about the proposed standard, and give due consideration to any representations made.

2.131 The Convention on the Rights of Persons with Disabilities (CRPD) describes the specific elements that state parties are required to take into account to ensure the right to equality and non-discrimination including requirements to consult persons with disabilities.

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 29-41.

2.132 The statement of compatibility provided no assessment of the compatibility of the measure with these rights. The committee therefore sought the advice of the Parliamentary Secretary to the Prime Minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- 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.

Parliamentary Secretary to the Prime Minister's response

> The proposed repeal of subsections 382(1) and (5) of the *Telecommunications Act 1997* (the TC Act) forms part of a broader program of reform of statutory consultation requirements in the Communications portfolio. The reason for the removal of bespoke consultation requirements is that such requirements are unnecessarily duplicative in light of the consultation requirements in section 17 of the *Legislative Instruments Act 2003* (the LI Act) which sets the standard consultation requirements for all Commonwealth legislative instruments.
>
> The provisions proposed for repeal mandate a variety of inconsistent approaches with respect to the time and method of consultation. The various provisions proposed to be repealed are prescriptive rules. The consultation periods in question range from 14 to 60 days. Some of the consultation provisions require publication on a website; some require publication in multiple newspapers. There is no policy rationale for this inconsistency, which introduces unnecessary inflexibility and imposes costs without corresponding benefits above those supplied by the standard consultation arrangements in Part 3 of the LI Act.
>
> The standard requirements in section 17 of the LI Act apply across all legislation that does not have separate consultation provisions, not only in the Communications portfolio but across the Commonwealth. In the Communications portfolio, section 17 of the LI Act has been used to ensure that appropriate consultation has been undertaken. The proposed repeal is intended to simplify, shorten and harmonise the law, in accordance with the objectives of the Government's deregulation agenda.
>
> The Communications portfolio has taken a consistent approach to the reform of statutory consultation requirements. The provisions proposed to be amended include many that have no special relevance to persons with disabilities. This standard approach is consistent with the goal of ensuring the right to equality before the law for people with disabilities is on an equal basis with others in the community.
>
> Subsections 382(1) and (5) of the *Telecommunications Act 1997*

In determining whether any consultation is appropriate, the rule-maker would ensure that any persons likely to be affected by the proposed instrument had an adequate opportunity to comment (subsection 17(2) of the LI Act refers).

Accordingly, section 17 of the LI Act, while not identical to the provisions being repealed, provides a statutory mechanism for those with an interest in disability standards, including persons with disabilities, to comment on those standards, notwithstanding the repeal of subsections 382(1) and (5) of the TC Act. For example, the provisions being repealed require the Australian Communications and Media Authority (ACMA), before making a disability standard under 382 of the TC Act, to try to ensure that any interested person has adequate opportunity (of at least 60 days) to make representations about the proposed standard, and for ACMA to give due consideration to these representations. Section 17 of the LI Act provides a separate statutory mechanism for those with an interest in a standard to comment on those standards. Both section 382 of the TC Act and section 17 of the LI Act are framed in terms of "practicable" consultation, meaning that the differences between the two approaches are not as significant as they may appear.

It is also worth noting that Part 5 of the LI Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be set out in the associated explanatory statement and, accordingly, if the Parliament is dissatisfied with that consultation, the instrument may be disallowed. [2]

Committee response

2.133 **The committee thanks the Parliamentary Secretary to the Prime Minister for his response.**

2.134 The committee notes that the Convention on the Rights of Persons with Disabilities (CRPD) describes the specific elements that state parties are required to take into account to ensure the right to equality and non-discrimination. In particular, article 4(3) of the CRPD requires that when legislation and policies are being developed and implemented that relate to persons with disabilities, state parties must closely consult with and actively involve persons with disabilities through their representative organisations.

2.135 In addition, article 9 of the CRPD requires that state parties take appropriate measures to ensure persons with disabilities have access, on an equal basis with others, to information and communications technologies and systems. The United Nations Committee on the Rights of Persons with Disabilities has noted that access to

2 See Appendix 1, Letter from the Hon Christian Porter MP, Parliamentary Secretary to the Prime Minister, to Senator Dean Smith (dated 26/03/2015) 1-2.

information and communications technology (including telephones) is a requirement of the obligation to adopt and monitor national accessibility standards, and has noted that it 'is important that the review and adoption of these laws and regulations are carried out in close consultation with persons with disabilities and their representative organizations (art. 4, para. 3), as well as all other relevant stakeholders'.[3]

2.136 The committee therefore emphasises that the obligation to respect the right to equality and non-discrimination in relation to persons with disabilities includes an obligation to closely consult when reviewing any regulations that affect accessibility, such as national disability standards administered by the Australian Communications and Media Authority (ACMA) under the *Telecommunications Act 1997* (Telecommunications Act). As the bill seeks to repeal consultation requirements under the Telecommunications Act, it is necessary to demonstrate that existing legislation provides for as much, if not more, requirements to consult when any changes are made to disability standards.

2.137 The committee acknowledges the Parliamentary Secretary's advice that the existing provisions of the *Legislative Instruments Act 2003* (LI Act) provides a statutory mechanism for people to comment on those standards, and that the differences between the standards in the LI Act and those repealed by this bill are not as significant as they may appear as they are both framed in terms of 'practicable' consultation.

2.138 However, as the committee noted in its initial consideration of this matter, the LI Act does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, there are no equivalent process requirements to those contained in the Telecommunications Act, which provides for at least 60 days for people to make comments on a proposed standard. In addition, the LI Act provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.

2.139 The committee therefore considers that the consultation requirements under the LI Act are not equivalent to the current consultation requirements in the Telecommunications Act. Therefore, the repeal of the consultation requirements in relation to disability standards limits the right to equality and non-discrimination, in particular, the obligation to consult under the CRPD.

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3 Committee on the Rights of Persons with Disabilities, *General Comment No. 2: Article 9: Accessibility* (2014) para 28.

2.140 A limitation on a right can be justified if the measure seeks to achieve a legitimate objective and the limitation is rationally connected to, and is a proportionate way to achieve, its legitimate objective.

2.141 The committee notes the Parliamentary Secretary's advice that the purpose of the amendment is to take a consistent approach to the reform of statutory consultation requirements, is intended to 'simplify, shorten and harmonise the law, in accordance with the objectives of the deregulation agenda' and removes unnecessarily duplicative consultation requirements.

2.142 The committee notes that to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. The committee considers that the simplification of the law in order to achieve the objective of deregulation may not be considered to meet a pressing or substantial concern, such that it would warrant limiting the obligation to closely consult with, and actively involve, persons with disabilities when adopting and monitoring national accessibility standards.

2.143 The committee also notes the Parliamentary Secretary's advice that the reform of statutory consultation requirements is a standard approach, including provisions that have no special relevance to persons with disabilities. This standard approach, the Parliamentary Secretary advised, 'is consistent with the goal of ensuring the right to equality before the law for people with disabilities is on an equal basis with others in the community'. The committee notes that treating persons with a disability exactly the same as others in the community, without taking into account their special needs, does not advance the right to equality before the law under international human rights law. Rather international human rights law recognises that laws and policies may need to take into account the special needs of particular groups in order to comply with the right to equality and non-discrimination. The committee has no comment to make in relation to the broader reform of the statutory consultation requirement—its concern relates solely to the consultation requirements in relation to standards that relate to the accessibility of telephones for persons with a disability and the human rights implications of that requirement.

2.144 **The committee therefore considers that the repeal of the consultation requirements under the Telecommunications Act relating to disability standards limits the right to equality and non-discrimination and the rights of persons with disabilities. In light of the information provided by the Parliamentary Secretary and the fact that there is no legislative requirement that consultation be undertaken before a disability standard is made, the committee considers that this measure may be incompatible with these rights.**

Removal of requirement for independent reviews of Stronger Futures measures

Right to equality and non-discrimination

2.145 The committee was concerned that removing legislated requirements for independent review under the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act) and the *Stronger Futures in the Northern Territory Act 2012* (SF Act) may mean certain measures may not be appropriately evaluated. The relevant provisions of these Acts relate to the 'Stronger Futures' measures that were introduced to 'support Aboriginal people in the Northern Territory'. The committee noted that the statement of compatibility relied on these measures being considered 'special measures' under international law. Special measures involve the granting of a benefit or preference to members of a disadvantaged group on the basis of membership of that group, where differential treatment on that ground would generally prohibited as discrimination.[4] Such measures cannot be continued after the objectives for which they were taken have been achieved.[5] The committee does not consider these measures are properly characterised as 'special measures', however, if they are considered to be 'special measures', there must be a process for a full evaluation of whether the measures continue to be necessary to meet the objective of reducing Indigenous disadvantage.

2.146 The committee therefore sought the advice of the Parliamentary Secretary to the Prime Minister as to how the repeal of the review requirements, if these measures are characterised as 'special measures', is consistent with the obligation to monitor whether the objectives of the special measures have been achieved. The committee also sought advice as to whether repealing the requirement for review of the Stronger Futures measures is compatible with multiple human rights, given the importance of independent review and evaluation of the Stronger Futures measures to questions about justifying limitations on rights.

Multiple rights

2.147 The committee considered that repealing the legislated requirement for an independent review of the Stronger Futures measures may affect whether the Stronger Futures measures can be considered to justifiably limit human rights. The statement of compatibility provided no assessment of the compatibility of the measure with human rights. The committee therefore sought the advice of the Parliamentary Secretary to the Prime Minister as to whether repealing the

4 See, for example, UN Committee on the Elimination of Racial Discrimination General Recommendation No. 32, *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (August 2009).

5 See article 1(4) of the Convention on the Elimination of Racial Discrimination.

requirement for review of the Stronger Futures measures is compatible with human rights.

Parliamentary Secretary to the Prime Minister's response

> The policy objective of these elements of the legislation is to support Indigenous people in the Northern Territory to live strong, independent lives, where communities, families and children are safe and healthy, including reducing alcohol-related harm.
>
> The repeal of review requirements in both the SFNT Act and Part 10 of the Classifications Act is machinery in nature - as such, it does not engage any applicable human rights, including those identified by the Committee at paragraph 1.153 of the Nineteenth Report of the 44th Parliament. The amendment relating to the assessment of licensed premises also does not engage any rights or freedoms, as any changes to licensing arrangements remain a matter for the Northern Territory Government and the Northern Territory Licensing Commission.
>
> The repeal of the legislated review requirements does not mean that Stronger Futures measures will not be closely monitored and assessed. The operation of individual elements, which form part of the Stronger Futures package, is regularly monitored in conjunction with the Northern Territory Government. As the Committee is aware, the Commonwealth is also undertaking a revision of the Stronger Futures National Partnership Agreement in collaboration with the Northern Territory Government. This is currently underway.
>
> The revision process includes a critical assessment of the effectiveness of the Stronger Futures National Partnership Agreement and overtakes the need for the review requirement provisions to remain in legislation.
>
> Further to this, I understand that an inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities is being conducted by the House of Representatives Standing Committee on Indigenous Affairs. Submissions on Northern Territory alcohol laws were provided for the inquiry's consideration, from the Northern Territory Government, private individuals and a range of stakeholder groups. [6]

Committee response

2.148 **The committee thanks the Parliamentary Secretary to the Prime Minister for his response.**

2.149 The committee notes that the advice provided by the Parliamentary Secretary does not address any of the specific questions raised by the committee. Rather, it repeats information that was contained in the statement of compatibility,

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6 See Appendix 1, Letter from the Hon Christian Porter MP, Parliamentary Secretary to the Prime Minister, to Senator Dean Smith (dated 26/03/2015) 2-3.

including the assertion that the repeal of the review requirements 'is machinery in nature' and does not engage any applicable human rights.

2.150 As the committee set out in its initial examination of the bill, the committee raised two concerns in relation to the bill. First, it noted that as the statement of compatibility relied on these measures being considered 'special measures' under international law, there must be a process for a full evaluation of whether the measures continue to be necessary to meet the objective of reducing Indigenous disadvantage. The Parliamentary Secretary's advice did not provide any information in relation to how repealing a requirement for independent review is consistent with continuing to evaluate whether the Stronger Futures measures remain necessary.

2.151 In addition, the committee considers that the repeal of these review requirements may affect whether the Stronger Futures measures can be considered to justifiably limit human rights. As the committee previously noted, the existence of a legislative requirement for independent review and evaluation of the Stronger Futures measures is important to questions about justifying limitations on rights, particularly considering the proportionality of any such limitations. As the committee has concluded that the SF Act introduces a number of measures that limit multiple human rights, the committee considers that removing the requirement for independent review of these measures may affect the proportionality of the Stronger Futures measures.

2.152 The committee notes that the review provisions in the Classification Act and the SF Act specify that the reviews must be independent, provide timeframes in which the reviews must be completed, provide frameworks for what must be reviewed and require reports of the reviews be tabled in Parliament. In contrast, the reviews set out in the Parliamentary Secretary's response do not have such features, and particularly lack any requirement that the review actually take place or that it be independent and transparent.

2.153 **On the basis of the information provided, the committee considers that the removal of a legislated requirement for independent review of the Stronger Futures measures may mean these measures may not be appropriately evaluated. The committee notes that the government claims that these measures are 'special measures' designed to meet the objective of reducing Indigenous disadvantage which may otherwise be prohibited as discrimination. However, the committee notes that under international human rights law such 'special measures' cannot be continued after the objectives for which they were taken have been achieved. The committee therefore considers that repealing the legislated requirement for an independent review of the Stronger Futures measures may affect the ability to evaluate whether the measures continue to be necessary to meet the objective of reducing Indigenous disadvantage or could constitute special measures.**

2.154 **Further, repealing the legislated requirement for an independent review of the Stronger Futures measures may also affect the ability of whether the Stronger Futures measures can be considered to justifiably limit human rights.**

2.155 **The committee notes that it intends to report on its *Review of Stronger Futures in the Northern Territory Act 2012* and related legislation in mid-2015.**

Academic Misconduct Rules 2014 [F2014L01785]

Portfolio: Education
Authorising legislation: Academic Misconduct Statute 2014

Purpose

2.156 The Academic Misconduct Rules 2014 (the rules) govern the academic conduct of all students at the Australian National University (ANU). The rules set out what constitutes academic misconduct and the consequences that flow from an allegation of misconduct.

Background

2.157 The committee first reported on the instrument in its *Nineteenth Report of the 44th Parliament*.[1]

Interim denial of access to university following allegation of misconduct

Right to education

2.158 The committee considered that the power to make an interim exclusion order in relation to a student against whom an allegation of academic misconduct has been made engages and may limit the right to education. The committee sought the advice of the Vice-Chancellor of the Australian National University as to whether the measure is compatible with the right to education, and particularly:

- whether there is a rational connection between the limitation and the stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Vice-Chancellor's response

> The report of the Joint Committee queries whether an interim exclusion of a student from some or all of the University's facilities, pending the conclusion of an inquiry into serious academic misconduct derogates from the "right to (higher) education", as outlined in Article 13 of the International Covenant on Economic, Social and Cultural Rights:
>
> > *13(c) 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;*
>
> Following on the reference in Article 26 of the Universal Declaration:
>
> > *26(1)…… and higher education shall be equally accessible to all on the **basis of merit**.*

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 39-41.

I have included a reference to these Articles due to the inclusion of the highlighted phrase – not contained in descriptions of the right to education at non-tertiary levels. Merit, or "capacity" as it is used in the ICESCR, is the antithesis of cheating and is an important focus of the Rules under question.

The complete text of Rule 10 is:

> **10 Interim exclusion by the Deputy Vice-Chancellor**
>
> 10.1 Subject to sub-rule 10.2, the Deputy Vice-Chancellor may, by written notice, deny a student in relation to whom an allegation of academic misconduct has been made access to all or any of the facilities of the University, or to any part of the University premises or to any activities conducted by or on behalf of the University.
>
> 10.2 The Deputy Vice-Chancellor must not deny a student access under subrule 10.1 unless he or she considers that the alleged academic misconduct is of a serious nature.
>
> 10.3 A denial of access under this rule is in force for the period specified in the notice, or until the conclusion of the inquiry process, whichever first occurs.
>
> 10.4 If the Deputy Vice-Chancellor exercises his or her powers under this rule, he or she must, as soon as is practicable, give to the student:
>
> (a) a copy of the notice; and
>
> (b) a written statement setting out the reasons for the action and advising the student that he or she has a right to apply for review of the decision under the Appeals Rules.

I have highlighted "serious" in the above extract because it seems to have been overlooked by the Joint Committee in its reasons. It is mentioned only once – at paragraph 1.166 and not again, including in paragraph 1.177 when the Joint Committee raises the matter upon which they have sought advice from the University. As an example, at paragraph 1.173 in the Joint Committee states:

> *"The committee is concerned that rule 10, by allowing for the exclusion of a student from the University facilities following an allegation of academic misconduct, without an enquiry have taken place, may limit the rights of all persons to access education"*

With respect to the Joint Committee, the right to access higher education is limited to those who demonstrate merit (not all persons) and the operation of the interim suspension can only occur if the allegations of academic misconduct fall into the category of "serious".

In addition, and before considering the reasons why such a power to suspend is required, the Committee did not address the rights of a student

to appeal any interim restrictions that have been applied, before the finalisation of the inquiry. Again, this element of the Rules only received a brief mention in paragraph 1.167 of the Committee's reasons. The appeal right is to provide procedural assurance that the exercise of the power to suspend a student on an interim basis is a proportionate response to the circumstances that have arisen. There is also provision for an appeal to be conducted "on the papers" to allow for the efficient consideration of an appeal that might involve an interim suspension (Appeals Rules 2014, see for eg rules 15 and 18).

The University faces many challenges when dealing with allegations of academic misconduct. For example, the use by a student of IT systems to "hack" into the systems of the University that may contain examination papers or other confidential material that would enable a student to cheat on assessment. Where allegations of that kind are made, suspending the access of the student from the electronic systems of the University is important to preserve the integrity of those systems as well as to gather appropriate evidence.

There are times when students unfortunately become aggressive and threaten witnesses (staff or students) who may be relevant to the inquiry – a student may be excluded entirely from their program or indeed have their academic record at the University completely expunged in certain cases of academic misconduct. Students facing these potential sanctions can seek to influence and harass potential witnesses both "online" and physically, and hence may need to have access to IT facilities suspended or be removed from campus during the inquiry process.

There have also been instances where students have created false identification documents to enable them to enter examination rooms or to inappropriately gain access to parts of the University campus – while allegations of that kind are resolved, it is important for safety and protection of property to remove the student from campus.

These Rules also deal with allegations of research misconduct in doctoral and other programs of higher degree by research. Allegations of research misconduct are quite serious and have the potential to prevent a student from continuing an academic research career. In these cases, evidence needs to be gathered before it is destroyed, removed or disturbed in some way so that the sanctity of the investigation and inquiry process is protected. In some cases this requires the removal of the student alleged to have engaged in misconduct from campus. Such removal can also serve to protect the interests of the student – if there is interference with evidence and they can demonstrate that they were not on campus as a result of obeying the interim suspension thus removing that student from suspicion in relation to the disturbed evidence.

These examples are not exhaustive with experience suggesting that the range of behaviours alters as the circumstances of the study environment change over time. Hence the wide discretion available to the Deputy Vice

Chancellor to preserve the integrity of the inquiry processes in matters of serious academic misconduct

The exercise by the University of the power to suspend a student on an interim basis is also subject to external review by bodies like the Federal Court or the Ombudsman.

For all of the above reasons, the University is satisfied that the measure in the Rules is reasonable and proportionate in relation to its objectives and there is a rational connection between the interim power to suspend and the objectives.[2]

Committee response

2.159 **The committee thanks the Australian National University for its response.**

2.160 The committee notes, in particular, the advice that sets out the challenges the university faces when dealing with allegations of academic misconduct and the potential need to suspend a student from accessing the university while the allegation is investigated.

2.161 **On the basis of the information provided, and given the right for an affected student to appeal the interim suspension, the committee concludes that the measure is likely to be compatible with human rights.**

2 See Appendix 1, Letter from Ken Grime, University Counsel, to the Hon Philip Ruddock MP (dated 24/03/2015) 1-3.

Customs Act 1901 - CEO Directions No. 1 of 2015 [F2015L00099]

Customs Act 1901 - CEO Directions No. 2 of 2015 [F2015L00101]

Portfolio: Immigration and Border Protection
Authorising legislation: Customs Act 1901
Last day to disallow: 26 March 2015

Purpose

2.162 The Customs Act 1901 — CEO Directions No. 1 of 2015 [F2015L00099] and the Customs Act 1901 — CEO Directions No. 2 of 2015 [F2015L00101] (the 2015 directions) give directions, respectively, to mainland officers of the Australian Customs and Border Protection Service (ACBPS) and Customs officers of the Indian Ocean Territories Customs Service (IOTCS) regarding the deployment of approved firearms and other approved items of personal defence equipment in accordance with Use of Force Order (2015).

2.163 An ACBPS or IOTCS officer may only use force in accordance with the procedures set out in Use of Force Order (2015), including where a Customs officer is exercising powers to:

- restrain;
- detain;
- physically restrain;
- arrest;
- enter or remain on coasts, airports, ports, bays, harbours, lakes and rivers;
- execute a seizure or search warrant;
- remove persons from a restricted area; or
- board, detain vessels or require assistance.

Background

2.164 The committee first reported on the 2015 directions in its *Nineteenth Report of the 44th Parliament*.[1]

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 45-50.

Use of lethal force

Right to life

2.165 The 2015 directions permit the use of lethal force 'when reasonably necessary to protect life, in accordance with the Use of Force Order (2015) (the Order)'. The committee considered that the use of lethal force engages and may limit the right to life. The committee considered that the limitation on the right to life may be justifiable but as the 2015 directions rely on the Order, it was unable to complete its assessment of the instrument with the right to life without first having reviewed the Order.

2.166 The committee therefore requested a copy of the Order to enable it to complete its assessment, and noted it was willing to receive a copy of the order on an in-confidence basis.

2.167 The committee recommended the Order be published on the ACBPS's website (and redacted if necessary).

Use of handcuffs on children

Rights of the child

2.168 The committee was concerned that the use of handcuffs on children may limit the rights of the child. The committee considered that the statement of compatibility did not provide sufficient justification of the compatibility of the measure with this right. The committee therefore sought 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.

2.169 The committee also requested a copy of the Order to enable it to complete its assessment of the instrument with the rights of the child.

2.170 The Chief Executive Officer provided an 'in confidence' response to the committee which included a copy of the Use of Force Order (2015). On the committee's request, the Chief Executive Officer provided the committee with a revised version of the initial letter for publishing with this report, as set out below.

Customs Chief Executive Officer's response

I refer to the Parliamentary Joint Committee on Human Rights *Nineteenth Report of the 44th Parliamen*t and the committee's request for a response.

The Committee specifically expressed concerns that the use of handcuffs on children may limit the rights of a child, and that the statement of compatibility does not provide sufficient justification of the compatibility of the measure with this right. Accordingly, the Committee requested advice on:

- 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.

In response to the Committee's concerns, I wish to assure the Committee that any situation that would necessitate the handcuffing of a child or young person, would only ever be done so in order to achieve a legitimate objective, and only when reasonable and proportionate to the achievement of that objective, and in accordance with the exercise of statutory powers.

Restraints would only ever be considered in accordance with the Operational Safety Principles and Use of Force Model that states officers will only use the minimum amount of force reasonable and appropriate for the effective exercise of their statutory powers. At its core, the Model requires the use of communications (including negotiation and conflict de-escalation) as the primary consideration in interactions between ACBPS officers and members of the public.

ACBPS has a stringent program of training and annual recertification where it appropriately trains all officers who are required to hold a Use of Force permit.

Operational safety training and competency assessment are conducted in accordance with the Use of Force Order (2015) and delivered only by qualified Operational Safety Trainers. Restraints may only be applied by officers who hold a current Use of Force permit and only in the exercise of statutory powers.[2]

2 See Appendix 1, Letter from Michael Outram, Acting Chief Executive Officer, Australian Customs and Border Protection Service, to the Hon Philip Ruddock MP (dated 17 April 2015) 1-2.

Committee response

2.171 **The committee thanks the Chief Executive Officer of the Australian Customs and Border Protection Service for his detailed response and for providing a copy of the Order to the committee on an 'in confidence' basis.**

2.172 The committee thanks the CEO for his advice that the ACBPS will publish an edited version of the Order on its website following the committee's consideration of this advice.

2.173 Having reviewed the Order, the committee considers that the Order contains sufficient safeguards as it constrains the use of force by customs officers to situations where it is strictly necessary and reasonable.

2.174 **On the basis of the information provided, and having reviewed the Order, the committee concludes that the Order and the 2015 directions are likely to be compatible with human rights.**

Dental Benefits Rules 2014 [F2014L01748]

Portfolio: Health
Authorising legislation: Dental Benefits Act 2008
Last day to disallow: 26 March 2015

Purpose

2.175 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.

2.176 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.

Background

2.177 The committee first reported on the instrument in its *Eighteenth Report of the 44th Parliament*.[1]

Cap on benefits

Right to health and the right to social security

2.178 The committee considered 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. The committee considered that the statement of compatibility did not sufficiently justify that limitation for the purpose of international human rights law, so sought the advice of the Minister for Health as to:

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

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 74-78.

- 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.

Minister's response

The Child Dental Benefits Schedule (CDBS) commenced on January 2014, and provides up to $1,000 in benefits, capped over two calendar years, for basic dental services for eligible children 2-17 years of age who satisfy a means test. The CDBS is administered under the *Dental Benefits Act 2008*. Dental Benefits Rules provide for the operational aspects of the programme.

The Dental Benefits Rules 2014 (the 2014 Rules) repeal and replace the Dental Benefits Rules 2013 (the 2013 Rules). Compared with the 2013 Rules, the 2014 Rules make a number of minor amendments to improve the operation of the CDBS.

Cap on Benefits

At paragraph 1.304 of the Report, the Committee notes that it considers the cap on benefits of $1,000 over two consecutive calendar years may limit the rights to social security and health. The Committee asks for further justification of this limitation.

I would like to clarify for the Committee that the cap on dental benefits of $1,000 for the 2015 and 2016 two calendar year period specified in the 2014 Rules does not represent any change from the cap that would have applied for this period had the 2013 Rules remained in force. The 2013 Rules placed a maximum cap on benefits of $1,000 for the 2014 and 2015 two calendar year period and provided for that amount to continue to apply for each two year period into the future unless a new amount was specified (subrule 14 (9)). The 2014 Rules maintain the existing level of access to dental services subsidised through the CDBS; the cap on benefits does not impose any new limitation on human rights.

I note the Committee's comments that the benefits cap could mean that people who need extensive dental work above the $1,000 limit may not have the means to access all necessary dental care. While the cap limits the benefits available under the CDBS, it is not the only means of financial support for dental services. State and territory governments provide free or low cost dental care to people with pensioner concession cards or health care cards. This provides a safety net for people who have limited means to meet the full cost of dental treatment themselves. Additionally, many states provide dental services to all children, regardless of means.

The objective of the limit on benefits is to balance the need for support for the dental treatment needs of children with maintaining the sustainability of government funding. It is my view that the provision for a benefit limit of $1,000 over two consecutive calendar years is a reasonable and

proportionate way to provide sustainable access to an appropriate level of government funding in the context of the broader dental system.[2]

Committee response

2.179 **The committee thanks the Minister for Health for her response**, and in particular her advice that the Child Dental Benefits Schedule is not the only means of financial support for dental services for people on low income.

2.180 **On the basis of the information provided, the committee concludes that this aspect of the measure is likely to be compatible with human rights.**

Eligibility for dental benefits

Right to social security and right to health

2.181 The committee sought 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.

2.182 The committee noted that if the changes would result in existing patients losing eligibility for dental benefits, this may limit the right to social security and the right to health, which had not been justified in the statement of compatibility. The committee therefore sought 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.

Minister's response

Eligibility for dental services

At paragraph 1.309 of the Report, the Committee seeks advice as to whether the requirement that patients are 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.

In accordance with section 23 of the *Dental Benefits Act 2008*, to be eligible for a voucher for CDBS services in a calendar year a person must, on at least one day of the year:

- be aged at least two years but younger than 18 years;
- meet the means test; and
- be eligible for Medicare.

2 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to Senator Dean Smith (dated 19/03/2015) 1-2.

A person cannot be identified as eligible for a voucher for the CDBS for a particular calendar year until after they have met the means test and have become eligible for Medicare. CDBS vouchers apply in respect of a full calendar year (1 January to 31 December) regardless of the date on which they are issued.

The 2014 Rules introduce a requirement that, for a CDBS benefit to be payable, a patient must be eligible for Medicare at the time a dental service is provided. This means that, for a person who became eligible for Medicare part way through the calendar year, they would not be entitled to receive CDBS benefits for any dental services provided before they became eligible for Medicare.

The Committee notes that it considers changes to the eligibility for CDBS benefits engage the right to health and the right to social security. As this amendment only impacts on dental services that have already been provided and paid for without any anticipation of access to dental benefits, it is my view that, in practice, it does not affect the right to health.

The amendment does engage the right to social security because it removes an entitlement to receive a benefit for that dental service; however, the number of people likely to be affected by this amendment, if any, would be negligible. To be affected, a person would have had to receive a dental service in Australia while visiting and then, later that same year, become Medicare eligible, for example, by becoming an Australian resident.

The objective of this amendment is to create consistency with other Commonwealth programmes (such as the Medicare Benefits Schedule (MBS)) in that a person must be eligible for Medicare on the day of service for which a benefit applies. It is my view that this amendment is the most reasonable way to achieve a consistent application of health benefits to support effective administration of government funding and is compatible with Australia's human rights obligations.[3]

Committee response

2.183 **The committee thanks the Minister for Health for her response.**

2.184 The committee appreciates the minister's explanation that this amendment only impacts on dental services that have already been provided and that the number of people likely to be affected by the amendment would be negligible. It considers that the objective of creating consistency with other Commonwealth programs is a legitimate objective.

3 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to Senator Dean Smith (dated 19/03/2015) 2-3.

2.185 **On the basis of the information provided, the committee concludes that this aspect of the measure is likely to be compatible with human rights.**

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

2.186 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.

2.187 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 examination is reduced from two years to one year for asymptomatic patients aged 65 years and over.

Background

2.188 The committee first reported on the instrument in its *Eighteenth Report of the 44th Parliament*.[1]

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

Right to health

2.189 The committee considered 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 previously, the statement of compatibility

1 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 83-85.

does not sufficiently justify that limitation for the purpose of international human rights law. The committee therefore sought 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.

Minister's response

> At paragraph 1.346 of the Report, the Committee notes that it 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. The Committee seeks further justification for these limitations.
>
> In the last decade, spending on Medicare has more than doubled from $8 billion in 2004 to around $20 billion today, yet the Australian Government raised only around $10 billion from the Medicare levy in 2013-14. Ten years ago, the Medicare levy covered 67 per cent of the cost of Medicare, but it now covers only 54 per cent. Medicare spending is projected to climb to $34 billion in the next decade to 2024. I consider that this projected increase in spending represents a pressing concern for Australia and the Australian Government is working to make Medicare sustainable for the future and responsibly managing Australia's Budget is a legitimate objective for the Australian Government. The reduction in Medicare fees for optometric services and the removal of the cap will achieve a savings of $89.6 million over four years. These savings will contribute to an overall reduction in Medicare spending into the future.
>
> The reduction in the rebate reflects efficiencies gained within the optometry profession over the years due to new technologies and techniques which support more cost-effective services. The reduction in the Medicare fees result in a decrease of only a few dollars per service. For the most common service, a comprehensive eye examination which is claimed when clinically necessary, this means a reduction in the rebate of about $3.55 for the service. I consider that reducing the Medicare fees for optometric services is a reasonable and proportionate way to assist in achieving an overall reduction in Medicare expenditure into the future.
>
> Removing the charging cap for optometrists also means that individual optometrists can make their own business decisions according to their own and their patients' circumstances, including whether to continue bulk-billing patients. This will align the rules governing charging by optometrists with those applying for other health professions in the Medicare scheme. The Government believes that it is not unreasonable for patients who can afford it to contribute a modest amount to their service.

The optometry sector is highly commercialised and competitive. In 2013-14, 97 per cent of Medicare rebateable optometric services were bulk-billed and this rate has been relatively stable over the years. To identify whether these measures would significantly increase out-of-pocket costs for optometry services, my Department commissioned ACIL Allen Consulting to undertake an analysis of optometry services in Australia. The report *Optometry Market Analysis* found that the market is extremely competitive even in regional areas, with 75 per cent of all practices having at least one competitor within 500 metres and 95 per cent having competitors within 10 kilometres.

The strong competitive market means that the reduction in the fees and the removal of the cap is unlikely to increase patient contributions significantly or reduce access to Medicare rebateable optometric services. It is expected that the majority of optometry services will continue to be bulk-billed, including in regional areas. A full copy of the report is available at www.acilallen.com.au/projects/14/health-care/124/optometry-market-analysis.

The MBS also provides additional benefits for people with high out-of-pocket costs for out-of-hospital services through the Medicare safety nets. Services provided by optometrists are eligible for Medicare safety net benefits.[2]

Committee response

2.190 **The committee thanks the Minister for Health for her response. On the basis of the information provided, the committee concludes that the measure is likely to be compatible with human rights.**

The Hon Philip Ruddock MP

Chair

2 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to Senator Dean Smith (dated 19/03/2015) 3-4.