

Chapter 1 - New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 10 to 13 August 2015 and legislative instruments received from 12 June to 6 August 2015.

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

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

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

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

Bills not raising human rights concerns

1.6 The committee has examined the following bills and concluded that they do not raise human rights concerns. The following categorisation is indicative of the committee's consideration of these bills.

1.7 The committee considers that the following bills do not require additional comment as they either do not engage human rights or engage rights (but do not promote or limit rights):

- Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015; and
- Maritime Transport and Offshore Facilities Security Amendment (Inter-State Voyages) Bill 2015.

1.8 The committee considers that the following bills do not require additional comment as they promote human rights or contain justifiable limitations on human rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Aged Care Amendment (Independent Complaints Arrangements) Bill 2015;
- Asian Infrastructure Investment Bank Bill 2015;
- Banking Laws Amendment (Unclaimed Money) Bill 2015; and

- Parliamentary Expenses Amendment (Transparency and Accountability) Bill 2015.

Instruments not raising human rights concerns

1.9 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.¹ Instruments raising human rights concerns are identified in this chapter.

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

Deferred bills and instruments

1.11 The committee has deferred its consideration of the following legislation:

- Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015;
- Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 [F2015L00877];
- Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 [F2015L00878];
- Federal Financial Relations (National Partnership payments) Determination No. 87 (December 2014) [F2015L01093];
- Federal Financial Relations (National Partnership payments) Determination No. 88 (January 2015) [F2015L01094];
- Federal Financial Relations (National Partnership payments) Determination No. 89 (February 2015) [F2015L01095];
- Federal Financial Relations (National Partnership payments) Determination No. 90 (March 2015) [F2015L01096];
- Federal Financial Relations (National Partnership payments) Determination No. 91 (April 2015) [F2015L01097];
- Federal Financial Relations (National Partnership payments) Determination No. 92 (May 2015) [F2015L01098]; and
- Federal Financial Relations (National Partnership payments) Determination No. 93 (June 2015) [F2015L01099].

1 See Parliament of Australia website, 'Journals of the Senate', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

1.12 The committee also continues to defer its consideration of the Shipping Legislation Amendment Bill 2015 (deferred 11 August 2015) and the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).

1.13 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.²

1.14 The committee also continues to defer a number of instruments in connection with its ongoing examination of the autonomous sanctions regime and the Charter of the United Nations sanctions regime.³

2 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-fifth Report of the 44th Parliament* (11 August 2015).

3 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015).

Response required

1.15 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Comptroller-General of Customs (Use of Force) Directions 2015 [F2015L01044]

Comptroller Directions (Use of Force) 2015 [F2015L01085]

Portfolio: Immigration and Border Protection

Authorising legislation: Customs Act 1901

Last day to disallow: 17 September 2015 (Senate)

Purpose

1.16 The Comptroller-General of Customs (Use of Force) Directions 2015 and the Comptroller Directions (Use of Force) 2015 (the new directions) give directions, respectively, to mainland customs officers and customs officers of the Indian Ocean Territories Customs Service regarding the deployment of approved firearms and other approved items of personal defence equipment in accordance with Operational Safety Order (2015).

1.17 A customs officer may only use force in accordance with the procedures set out in Operational Safety Order (2015), including where a customs officer is exercising powers to:

- direct;
- 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.

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

Background

1.19 The committee commented on the Customs Act 1901 - CEO Directions No. 1 of 2015 and Customs Act 1901 - CEO Directions No. 2 of 2015 (the previous

directions) in its *Nineteenth Report of the 44th Parliament*.⁴ A response was received and commented on in the committee's *Twenty-second Report of the 44th Parliament*.⁵

Use of lethal force

1.20 The previous directions were, in the main, in the same form as the new directions. It has been necessary to remake the directions to reflect the introduction of the Australian Border Force and the integration of the Australian Customs and Border Protection Service within the Department of Immigration and Border Protection.

1.21 The new directions permit the use of force in accordance with procedures set out in the Operational Safety Order (2015).

1.22 The committee considers that the use of force engages and may limit the right to life.

Right to life

1.23 The right to life is protected by article 6(1) of the International Covenant on Civil and Political Rights (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 identified risks; and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

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

1.25 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.

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

5 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 187-190.

Compatibility of the measures with the right to life

1.26 The statement of compatibility for each instrument states that the directions promote the right to life:

...as they only direct officers of Customs to use lethal force when reasonably necessary (noting that they must act appropriately and in proportion to the seriousness of the circumstances), when other options are insufficient and only in self-defence from the immediate threat of death or serious injury or in defence of others against who there is an immediate threat of death or serious injury. The Order specifically states that lethal force is an option of last resort, and that an officer of Customs who considers using lethal force must do so with a view to preserving human life.⁶

1.27 The committee considers that the limitation on the right to life may be justifiable. However, given the directions rely on the Operational Safety Order (2015), which has not been provided to the committee, the committee is unable to complete its assessment of the compatibility of the measures with the right to life.

1.28 The committee notes that the Chief Executive Officer of the Australian Customs and Border Protection Service made a copy of the previous Use of Force Order (2015) available to the committee and undertook to make an edited version of the document available through the website.

1.29 The committee notes that the statement of compatibility for both instruments states that the Operational Safety Order (2015) supersedes the Use of Force Order (2015) and makes minor amendments to the order. As such, the committee needs to review the new order in order to properly assess its compatibility with human rights.

1.30 The committee therefore requests a copy of Operational Safety Order (2015) to enable a complete assessment of the instrument with the right to life. Noting the likely considerations around the exemption of the document from publication, the committee is willing to receive a copy of the order on an in-confidence basis.

1.31 Additionally, the committee notes that a commitment was made to the committee to make an edited version of the previous Use of Force Order available on a public website. The committee therefore recommends that the Operational Safety Order (2015) be similarly published (and redacted if necessary).

6 Explanatory Statement (ES), Statement of Compatibility (SoC) 3.

Crimes Legislation (Consequential Amendments) Regulation 2015 [F2015L00787]

Portfolio: Justice

Authorising legislation: Australian Crime Commission Act 2002; Crimes Act 1914; Crimes Legislation (Serious and Organised Crime) Act 2010; Financial Transaction Reports Act 1988; Law Enforcement Integrity Commissioner Act 2006; and Proceeds of Crime Act 2002

Last day to disallow: 8 September 2015 (Senate)

Purpose

1.32 The Crimes Legislation (Consequential Amendments) Regulation 2015 (the regulation) makes amendments to a range of Commonwealth instruments that support Australian criminal justice arrangements. In particular, the regulation:

- makes amendments to a number of instruments to reflect the new name of the Queensland Crime and Misconduct Commission;
- amends the Proceeds of Crime Regulations 2002 to update references to state and territory proceeds of crime laws and update the list of offences that are considered 'serious offences' for the purposes of the *Proceeds of Crime Act 2002* (POC Act); and
- makes technical amendments to remove redundant references.

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

List of 'serious offences' under the Proceeds of Crime Act

1.34 Under the POC Act various actions can be taken in relation to the restraint, freezing or forfeiture of property which may have been obtained as a result, or used in the commission, of specified offences, including a 'serious offence'. The term 'serious offence' is defined in the Act as including 'an indictable offence specified in the regulations'.

1.35 The regulation amends regulation 9 of the Proceeds of Crime Regulations 2002 to expand the type of indictable offences that will be considered as a 'serious offence' under the POC Act. This will include:

- new offences under the *Criminal Code Act 1995* relating to slavery-like practices, trafficking in persons and child sexual abuse material; and
- offences under the *Copyright Act 1968* (Copyright Act), relating to infringement of copyright.

1.36 The measures, in expanding the application of the POC Act to apply to a new range of offences, engage and may limit the right to a fair trial and fair hearing.

Right to a fair trial and a fair hearing

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

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

Compatibility of the measure with the right to a fair trial

1.39 The statement of compatibility for the regulation states that proceedings under the POC Act do not engage the fair trial rights in article 14 of the ICCPR as '[t]hese proceedings are civil, not criminal, and do not involve the determination of a person's guilt or innocence with respect to a criminal offence'.¹

1.40 However, as set out in the committee's Guidance Note 2, even if a penalty is classified as civil or administrative under domestic law it may nevertheless be considered 'criminal' under international human rights law. A provision that is considered 'criminal' under international human rights law will engage criminal process rights under articles 14 and 15 of the ICCPR, such as the right to be presumed innocent.

1.41 The committee has previously raised concerns that parts of the POC Act may involve the determination of a criminal charge.² The POC Act enables a person's property to be frozen, restrained or forfeited either where a person has been convicted or where there are reasonable grounds to suspect a person has committed a serious offence. As assets may be frozen, restrained or forfeited without a finding of criminal guilt beyond reasonable doubt, the POC Act limits the right to be presumed innocent, which is guaranteed by article 14(2) of the ICCPR.

1.42 The forfeiture of property of a person who has already been sentenced for an offence may also raise concerns regarding the imposition of double punishment, contrary to article 14(7) of the ICCPR.

1.43 As the statement of compatibility does not acknowledge that the right to a fair trial is engaged and limited, no justification is provided for this limitation.

1 Explanatory Statement (ES), Statement of Compatibility (SoC) 3.

2 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (May 2013) 189-191.

Compatibility of the measure with the right to a fair hearing

1.44 The statement of compatibility acknowledges that the right to a fair hearing may be engaged but states that the impact of the regulation is limited:

This Regulation will mean that a proceeds of crime authority will be able to obtain a greater range of orders with respect to offences in the Criminal Code and the Copyright Act. However this regulation does not vary the requirements that a proceeds of crime authority is required to meet in order to obtain a proceeds of crime order, where a person has been convicted, or is reasonably suspected of committing a 'serious offence', and does not diminish the fair hearing rights of a person against whom the order is sought.³

1.45 However, while the regulation does not vary any of the POC Act requirements for obtaining a proceeds of crime order against a person, it does broaden the application of the POC Act by expanding the range of offences to which it applies. Because the POC Act engages and may limit the right to a fair trial and right to a fair hearing (see above), it is therefore necessary to assess whether expanding its application to the new offences is justifiable under international human rights law.

1.46 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,⁴ and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁵ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

3 ES, SoC 3.

4 Appendix II; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

5 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>.

1.47 The statement of compatibility states in general terms the objective of the expansion of the POC Act to new offences in the Criminal Code relating to slavery-like practices, trafficking in persons and child sexual abuse material. It states that including these offences 'provides proceeds of crime authorities with more tools to target the profit incentives behind this exploitative conduct'.⁶

1.48 Providing more tools for crime authorities to target the incentives behind such serious offences as slavery, trafficking and child abuse material is likely to be considered a legitimate objective for the purposes of international human rights law.

1.49 However, in relation to including offences relating to copyright infringement, the statement of compatibility states that the objective is to 'strengthen Australia's copyright enforcement regime and assist in minimising lost revenue to the Government through the detection of other economic-related crime such as tax evasion and money laundering'.⁷ In this regard, it is not clear that including such offences necessarily supports a legitimate objective for the purposes of international human rights law. No evidence has been provided as to why it is necessary to strengthen the copyright enforcement regime, including why existing offence provisions are not sufficient to regulate this area.

1.50 In addition, it is not clear what is meant by the statement that including copyright offences as serious offences for the POC Act will assist in the 'detection of other economic related crime'; and how the ability to investigate unrelated offences is relevant and appropriate when considering whether any limitation on the right to a fair trial or fair hearing is justifiable in relation to the inclusion of copyright offences for the purposes of the POC Act.

1.51 In assessing the proportionality of the regulation against the right to a fair trial and fair hearing, it is also relevant as to whether the POC Act itself sets out sufficient safeguards to protect this right. As noted above, the committee has previously raised concerns that parts of the POC Act may involve the determination of a criminal charge and the process rights in the POC Act may not satisfy the requirements of a fair trial. It would therefore assist the committee if further information were provided setting out the basis on which orders are made under the POC Act and whether this process is compatible with both the right to a fair trial and the right to a fair hearing.

1.52 The committee's assessment against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial and fair hearing) of the inclusion of copyright offences as 'serious offences' for the purposes of the *Proceeds of Crime Act 2002* raises questions as to whether expanding the application of this Act is a justifiable limit on the right to a fair trial and fair hearing.

6 ES, SoC 3.

7 ES, SoC 3.

1.53 The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Justice 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.**

Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015 [F2015L01027]

Portfolio: Trade and Investment

Authorising legislation: Export Market Development Grants Act 1997

Last day to disallow: 17 September 2015 (Senate)

Purpose

1.54 The Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015 (the 2015 Guidelines) are being made to replace the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2004. The 2015 Guidelines set out what the Chief Executive Officer (CEO) of Austrade is to comply with in:

- making decisions regarding 'excluded consultants' under the *Export Market Development Grants Act 1997* (the EMDG Act);
- determining who is an 'associate' of a person for the purposes of the EMDG Act; and
- forming an opinion whether a person, or any associate, is a fit and proper person to receive a grant.

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

Criteria for establishing a person is a 'fit and proper' person

1.56 Under the EMDG Act grants can be made to specified Australian businesses which have incurred expenses promoting the export of their Australian goods, services, intellectual property rights and know-how. The EMDG Act sets out that the CEO can form the opinion, in accordance with the guidelines, that a person, or associate of a person, is not a 'fit and proper' person for the purposes of a grant.

1.57 The 2015 Guidelines set out a very broad basis on which the CEO of Austrade can determine whether a person, or associate of a person, is not to be considered to be a 'fit and proper person', including whether:

- the person or associate has been convicted of an offence under Australian law or a law of a foreign country, other than a spent conviction;
- a civil penalty or an administrative sanction has been imposed on the person or associate under Australian law or a law of a foreign country;
- the person or associate is involved in proceedings which may result in a civil penalty or administrative sanction being imposed;
- the person or associate has been the subject of a comment or assessment by a court, tribunal or regulator that the CEO is satisfied is critical of the person or associate;

- the person or associate is the subject of any other proceedings before a court, tribunal or regulator in which a comment or assessment critical of the person or associate may be made;
- the person or associate has been under insolvency administration or has been an officer of, or otherwise in control of, a business that has failed; or
- there are any other matters that the CEO considers relevant 'to the personal, commercial, financial or professional status or reputation of the person or associate'.¹

1.58 The committee considers that the broad basis on which the CEO can declare that a person is ineligible for a grant on the basis that they are not a 'fit and proper' person engages and may limit the right to privacy (right to reputation).

Right to privacy (right to reputation)

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

1.60 This right includes protection of the professional and business reputation of a person. The article is understood as meaning that the law must provide protection against attacks on a person's reputation (for example, through the law of defamation), as well as requiring that any law which affects a person's reputation must not be arbitrary.

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

Compatibility of the measure with the right to privacy (right to reputation)

1.62 The statement of compatibility merely states that the determination is compatible with human rights.

1.63 The committee notes that it previously examined this same issue when it considered legislation relating to the fit and proper person test in respect of the EMDG Act.² In its earlier assessment, the committee noted that a finding that a person is not a 'fit and proper' person to be involved in the process of preparing an application for a government grant is a finding that is likely to have an adverse

1 See sections 3.2 to 3.6 of the 2015 Guidelines.

2 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (March 2013) 12-15 and Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (May 2013) 205-211.

impact on a person's business reputation. This is the case even if the number of people who are aware of the finding is relatively small.

1.64 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,³ and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁴ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.65 The committee notes that the committee's previous assessment noted that any guidelines setting out the fit and proper person test should be accompanied by a full statement of compatibility addressing the human rights compatibility of the guidelines, including whether there are any procedural safeguards in making such a determination. However, the 2015 Guidelines contain no information about the effect of the instrument, nor an assessment of the compatibility of the 2015 Guidelines with the right to reputation.

1.66 The committee's assessment against article 17 of the International Covenant on Civil and Political Rights (right to privacy and reputation) of the fit and proper person test raises questions as to whether the criteria for determining whether a person is a 'fit and proper person' are proportionate to any limitation on a person's right to reputation.

1.67 As set out above, the condition engages and limits the right to privacy and reputation. The statement of compatibility does not provide any justification for that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Trade and Investment as to:

3 Appendix II; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) [http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_note_1/guidance_note_1.pdf](http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf).

4 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>.

- **whether the proposed measure is 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.**

Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 [F2015L00876]

Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 [F2015L01114]

Portfolio: Communications

Authorising legislation: Radiocommunications Act 1992

Last day to disallow: 16 September 2015 (Senate)

Purpose

1.68 The Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 (CB Class Licence) revokes and replaces the Radiocommunications (Citizen Band Radio Stations) Class Licence 2002.

1.69 The Citizen Band (CB) radio service is a two-way communications service that may be used by any person in Australia. The operation of a CB radio station is subject to the regulatory arrangements set out in the CB Class Licence. The CB Class Licence sets out the conditions for operating CB stations.

1.70 The Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 revokes and replaces the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2008 (Overseas Amateurs Class Licence).

1.71 The Overseas Amateurs Class Licence authorises visiting overseas qualified persons to operate amateur stations in Australia and applies conditions to the operation of these stations.

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

Condition of Class Licences not to seriously alarm or affront a person

1.73 Both the CB Class Licence and the Overseas Amateurs Class Licence sets out the general conditions which apply to a person operating a CB radio or amateur stations, including that a person must not operate the station:

- in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or
- for the purpose of harassing a person.¹

1.74 Section 46 of the *Radiocommunications Act 1992* provides that a person must not operate a radiocommunications device other than as authorised by a class licence. There are penalties for breach of the class licence, including, if the device is a

1 Paragraph 6(f) of the Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 and subsection 8(4) of the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015.

radiocommunications transmitter, imprisonment for up to two years or 1500 penalty units, and if it is not a transmitter, 20 penalty units.

1.75 It appears that communication over a CB radio or amateur station may be considered to be over a radiocommunications transmitter,² rendering a person who operates the station liable to imprisonment for up to two years if they operate the station in a way that causes a reasonable person to be 'seriously alarmed or seriously affronted'.

1.76 The committee considers that making it an offence to breach a condition of a class licence that is to not seriously alarm or affront a person engages and limits the right to freedom of expression.

Right to freedom of expression

1.77 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.78 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.³

Compatibility of the measure with the right to freedom of expression

1.79 The statement of compatibility for both instruments acknowledge that the relevant condition of the class licences engage and may limit the right to freedom of expression. However, both conclude that any such limitation is reasonable, necessary and proportionate. The statement of compatibility for the CB Class Licence provides more information, explaining:

The condition at paragraph 6(f) of the Class Licence has been in force for the past 13 years (by virtue of its inclusion in the Radiocommunications (Citizen Band Radio Stations) Class Licence 2002, which the Class Licence

2 See subsection 7(2) of the *Radiocommunications Act 1992* which defines a 'radiocommunications transmitter' as a transmitter designed or intended for the purpose of radiocommunication. Section 6 defines 'radiocommunication' as radio emission or reception of radio emission for the purpose of communicating information. Subsection 8(2) defines a transmitter as anything designed, intended or capable of radio emission.

3 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

replaces) and provides a useful tool for managing the appropriate operation of citizen band radio stations. Over that period, the ACMA (and its predecessor agencies) have received and investigated complaints concerning behaviour relevant [sic] to the condition at paragraph 6(f) of the Class Licence and in some cases individuals have been successfully prosecuted for breaching the condition. Accordingly, it is considered that any limitation on the right to freedom of expression established by the operation of paragraph 6(f) of the Class Licence is a reasonable, necessary and proportionate for the purpose of protecting the rights of others and for the protection of public order (paragraphs 19.3(a) and (b) of the ICCPR).⁴

1.80 The committee notes that the sole reason given in the statement of compatibility for the CB Class Licence as to why the condition is justifiable is that it has been in force for 13 years and has been previously used to investigate complaints and prosecute operators of CB stations. The existence of the condition under Australian domestic law is not relevant to an assessment of whether such a condition is justified under international human rights law. The statement of compatibility for the Overseas Amateur Class Licence provides no justification for why the limitation on the right to freedom of expression is justifiable.

1.81 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,⁵ and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁶ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law. Simply stating that the provision has been in force

4 Explanatory Statement (ES), Statement of Compatibility (SoC) 6.

5 Appendix II; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

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

for some time and has been used to prosecute persons in the past does not justify the limitation on the right to freedom of expression.

1.82 The right to freedom of expression includes a right to use expression 'that may be regarded as deeply offensive'.⁷ The right to freedom of expression protects not only favourable information and ideas but also those that offend, shock or disturb because 'such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'.⁸

1.83 If the government wishes to limit the right to freedom of expression it must demonstrate there is a specific threat that requires action which limits freedom of speech, and it must be demonstrated there is a direct and immediate connection between the expression and the threat.⁹

1.84 Maintaining public order is a basis on which it may be permissible to regulate speech in public places. Common 'public order' limitations include prohibiting speech which may incite crime, violence or mass panic. However, speech that merely alarms or affronts (even if it 'seriously' alarms or affronts a person) would not generally be sufficient to justify limiting freedom of expression.

1.85 The committee's assessment against article 19 of the International Covenant on Civil and Political Rights (right to freedom of expression) of the condition in both class licences not to seriously alarm or affront a person raises questions as to whether the condition is compatible with the right to freedom of speech.

1.86 As set out above, the conditions engage and limit the right to freedom of expression. The statements of compatibility for both instruments do not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Communications as to:

- **whether the proposed measure is 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.**

7 See UN Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 11.

8 *Handyside v United Kingdom* (1976) 1 EHRR 737.

9 See UN Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 35.

Social Security (Parenting payment participation requirements—classes of persons) Amendment Specification 2015 (No. 1) [F2015L00938]

Portfolio: Employment

Authorising legislation: Social Security Act 1991

Last day to disallow: 17 September 2015 (Senate)

Purpose

1.87 The Social Security (Parenting payment participation requirements—classes of persons) Amendment Specification 2015 (No. 1) (the 2015 Specification) amends the Social Security (Parenting payment participation requirements—classes of persons) (DEEWR) Specification 2011 (No. 1), with the effect that individuals will continue, from 30 June 2015 to 31 March 2016, to be considered to fall within the 'teenage parent' or 'jobless families' class of persons. These individuals will be subject to the Helping Young Parents (HYP) and Supporting Jobless Families (SJF) measures. These measures provide select recipients of Parenting Payments with additional support and additional responsibilities.

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

Extension of measures requiring certain classes of persons to participate in compulsory activities

1.89 Under the HYP and SJF measures, parents in receipt of Parenting Payments are required to attend appointments with the Department of Human Service and sign a Parenting Payment Employment Pathway Plan ('Parenting Plan'). Failure to attend appointments without a reasonable excuse, or sign their Parenting Plan, may result in the person's income support payments being suspended.

1.90 In addition, parents who fall within the 'teenage parent' class of persons are required to have a minimum of two compulsory activities in their Parenting Plan, including study or training and an activity focused on the health and development of their child. Failure to attend their two compulsory activities without a reasonable excuse may result in a person's social security benefits being suspended.

1.91 A 'teenage parent' is defined as a person who is aged 19 or under who receives Parenting Payment, has a child aged five or under, has not completed their final year of secondary school or equivalent and lives in one of 10 trial locations.¹

1.92 A 'jobless family' is defined as a person who is either aged 22 or under or has been receiving income support for at least two years and who receives Parenting

1 See section 4 of the Social Security (Parenting payment participation requirements—classes of persons) (DEEWR) Specification 2011 (No. 1).

Payment, has a child aged five or under, has not engaged in work or study in the last four weeks and lives in one of 10 trial locations.²

1.93 The committee considers that the measure engages and may limit the right to social security, the right to an adequate standard of living and the right to equality and non-discrimination.

Right to social security

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

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

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

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

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

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

2 See section 4 of the Social Security (Parenting payment participation requirements—classes of persons) (DEEWR) Specification 2011 (No. 1).

Right to an adequate standard of living

1.98 The right to an adequate standard is guaranteed by article 11(1) of the ICESCR, and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.99 In respect of the right to an adequate standard of living, article 2(1) of the ICESCR also imposes on Australia the obligations listed above in relation to the right to social security.

Compatibility of the measure with the right to social security and an adequate standard of living

1.100 The statement of compatibility recognises that the 2015 Specification engages and limits the right to social security and an adequate standard of living and sets out why this limitation is justifiable. In particular, it sets out that the objective of the measures that are being extended by the 2015 Specification, is:

to provide services, opportunities and responsibilities to boost the educational attainment, job readiness, child wellbeing and functioning of young parents and jobless families with young children in highly disadvantaged locations in Australia.³

1.101 The committee considers that helping young parents and jobless families in this way seeks to achieve a legitimate objective for the purposes of international human rights law.

1.102 However, it is unclear whether the limitation on the right to social security and an adequate standard of living (in suspending a person's social security payments), is rationally connected to the objective being sought. In other words, it is unclear if the measures are likely to be effective in achieving the objective of boosting educational attainment, job readiness, child wellbeing and functioning of young parents and jobless families with young children. The committee understands that the HYP and SJF measures were initially intended to be undertaken for a trial period to determine whether they were effective in achieving the stated outcomes. No information is provided in the statement of compatibility or the explanatory statement as to whether the effectiveness of the measures has been evaluated. In addition, no information is provided as to why it is necessary to extend the measures by a further nine months. Without understanding whether the measures are likely to be effective in achieving the stated aim, or why the measures are being extended for a nine month period, it is difficult to assess whether the limitation is justifiable.

1.103 The committee's assessment against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) of the extension of the Helping Young Parents and Supporting Jobless Families measures raises questions as to whether the

3 Explanatory Statement, Statement of Compatibility, 1.

limitation on these rights is rationally connected to the objective sought to be achieved.

1.104 As set out above, the condition engages and limits the right to social security and right to an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Employment as to whether there is a rational connection between the limitation and the legitimate objective of helping teenage parents and jobless families, and in particular, is there evidence that demonstrates that the measures are likely to be effective in achieving the stated objective.

Right to equality and non-discrimination

1.105 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

1.106 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.

1.107 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),⁴ which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.⁵ 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.⁶

1.108 Articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the rights to equality for women.

Compatibility of the measure with the right to equality and non-discrimination

1.109 The statement of compatibility does not consider whether the measures engage and limit the right to equality and non-discrimination. Both measures

4 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.

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

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

distinguish between Parenting Payment recipients based on their age. The HYP measure only applies to parents who are 19 or under at the relevant time and the SJF measure applies to parents who are 22 or under at the relevant time (as well as to persons who have been on income support for two years or more).

1.110 The distinction between recipients based on age constitutes direct discrimination on the basis of a personal attribute, and therefore limits the right to equality and non-discrimination. This limitation requires justification.

1.111 The measures may also be indirectly discriminatory on the basis of sex, as the vast majority of those affected by the measures (Parenting Payment recipients) are likely to be female. No information is provided in the statement of compatibility as to the gender make-up of the people affected by the measure, however, ABS data indicates that women are more likely than men to be recipients of social welfare and are more likely to be the primary care giver of children (and in fact the statement of compatibility refers to 'teenage *mothers*' when explaining the measures). Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.

1.112 Indirect discrimination does not necessarily import any intention to discriminate and can be an unintended consequence of a measure implemented for a legitimate purpose. The concept of indirect discrimination in international human rights law therefore looks beyond the form of a measure and focuses instead on whether the measure could have a disproportionately negative effect on particular groups in practice. Nevertheless, under international human rights law such a disproportionate effect may be justifiable. More information is required to establish if the measure does impact disproportionately on females, and if so, if such a disproportionate effect is justifiable.

1.113 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's Guidance Note 1,⁷ and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁸ To be capable of

7 Appendix II; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

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

justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.114 The committee's assessment against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) of the extension of the Helping Young Parents and Supporting Jobless Families measures raises questions as to whether the limitation on these rights is justifiable.

1.115 As set out above, the extension of the measures engages and limits the right to equality and non-discrimination on the basis of age and gender. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Employment 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.**

Further response required

1.116 The committee seeks a further response from the relevant minister or legislation proponent with respect to the following bills and instruments.

Defence Legislation (Enhancement of Military Justice) Bill 2015

Portfolio: Defence

Introduced: House of Representatives, 26 March 2015

Purpose

1.117 The Defence Legislation (Enhancement of Military Justice) Bill 2015 (the bill) seeks to make a number of amendments to the *Defence Force Discipline Act 1982* (Defence Force Discipline Act) and the *Defence Act 1903*.

1.118 The bill also seeks to amend the *Military Justice (Interim Measures) Act (No. 1) 2009* to extend the period of appointment of the Chief Judge Advocate and full-time Judge Advocates by a further two years, making the period of appointment up to eight years instead of six years.

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

Background

1.120 In 2005, the Senate Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry into the effectiveness of Australia's military justice system (the 2005 report).¹ Following the 2005 report, legislation² was introduced to create a permanent military court (the Australian Military Court) which was intended to satisfy the principles of impartiality, judicial independence and independence from the chain of command.³

1.121 In 2009 the High Court struck down this legislation as being unconstitutional.⁴ In response, Parliament put in place a series of temporary measures pending the introduction of legislation to establish a constitutional court. The *Military Justice (Interim Measures) Act (No. 1) 2009* (Interim Act) largely returned the service tribunal system to that which existed before the creation of the Australian Military Court.⁵

1 See Senate Standing Committee on Foreign Affairs, Defence and Trade, *The effectiveness of Australia's military justice system*, June 2005.

2 *Defence Legislation Amendment Act 2006*.

3 See Explanatory Memorandum (EM) to the Defence Legislation Amendment Bill 2006, notes on clauses 3(b).

4 *Lane v Morrison* [2009] HCA 29.

5 See EM to the Military Justice (Interim Measures) Bill (No. 1) 2009, 1.

1.122 In 2013 the Military Justice (Interim Measures) Amendment Bill 2013 amended the Interim Act to extend the appointment, remuneration, and entitlement arrangements of the Chief Judge Advocate and judge advocates by an additional two years. The committee reported on this bill in its *Sixth Report of 2013*.⁶

1.123 The committee then reported on the current bill in its *Twenty-second Report of the 44th Parliament*, and requested further information from the Minister for Defence as to whether the bill was compatible with the right to a fair trial.⁷ The bill passed both Houses of Parliament on 25 June 2015 and received Royal Assent on 30 June 2015.

Extension of the appointments of Chief Judge Advocate and judge advocates

1.124 Initially, the Interim Act provided a fixed tenure of up to two years for both the Chief Judge Advocate and full-time judge advocates who were appointed pursuant to the provisions of the Interim Act. This was extended in 2011 and 2013.⁸ That tenure is due to expire in September 2015. The bill amends Schedule 3 of the Interim Act to extend the appointment, remuneration, and entitlement arrangements provided for in that Act for an additional two years. The bill therefore provides a fixed tenure for the Chief Judge Advocate and current full-time judge advocates of up to eight years, or until the Minister for Defence declares, by legislative instrument,⁹ a specified day to be a termination day, whichever is sooner.

1.125 The committee previously considered that extending the operation of the existing military justice system through extending the appointment period for the Chief Judge Advocate and judge advocates engages and may limit the right to a fair hearing and fair trial.

Right to a fair hearing and fair trial

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

1.127 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These

6 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 40.

7 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 42-46.

8 See the *Military Justice (Interim Measures) Amendment Act 2011* (extended the period of appointment to four years) and *Military Justice (Interim Measures) Amendment Act 2013* (extended the period of appointment to six years).

9 The legislative instrument would not be subject to disallowance.

include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right to not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

Compatibility of the measure with the right to fair hearing and fair trial

1.128 The trial of members of the armed services for serious service offences by service tribunals (including courts-martial) has been identified as giving rise to issues of compatibility with the right to a fair hearing in the determination of a criminal charge. The question is whether a person who is a member of a military with a hierarchical chain of command and who serves as a judge or member of a military tribunal, can be said to constitute an independent tribunal in light of the person's position as part of a military hierarchy.

1.129 The UN Human Rights Committee has stated that 'the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception' and that 'the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military'.¹⁰

1.130 The question of whether a tribunal enjoys the institutional independence guaranteed by article 14(1) requires consideration of a number of factors, including whether the members of the court or tribunal are independent of the executive and the term of appointment of members. The fact that the term of appointment of a member of a court or tribunal is terminable at the discretion of a member of the executive, would appear to be incompatible with the requirement that tribunals be independent.¹¹

1.131 The statement of compatibility states that it is necessary to further extend the statutory period of appointment, but does not assess whether this extension is compatible with the right to a fair trial. Rather, it has an overview statement of the human rights implications of the bill as a whole.¹²

1.132 The stated objective of maintaining and enforcing discipline within the Defence Force, including supporting the authority of commanders, is an important objective under international human rights law. However, the requirement under article 14 of the ICCPR for the independence and impartiality of a tribunal is an absolute right and not subject to any exceptions.

1.133 As set out above, the bill extends an interim arrangement. No information was provided in the statement of compatibility as to what steps are being taken to establish a permanent system of military justice.

10 UN Human Rights Committee, General Comment No. 32 (2007) para [22].

11 UN Human Rights Committee, General Comment No. 32 (2007) paras [19]-[20].

12 EM 3.

1.134 The committee therefore considered that extending the appointments of the Chief Judge Advocate and full-time judge advocates, and thereby extending the current system of military justice, may limit the right to a fair hearing. The statement of compatibility does not address this issue. The committee therefore sought the advice of the Minister for Defence as to whether extending the operation of the existing system of military justice is compatible with the right to a fair trial.

Minister's response

The purpose of the proposed amendments to the *Military Justice (Interim Measures) Amendment Act (No. 1) 2009* (Interim Measures Act) by the Bill is to continue the appointment arrangements made in the Interim Measures Act, by extending the appointment of the current Chief Judge Advocate (CJA) and full-time Judge Advocate (JA) for a further two year period and, as such, the Bill does not have an adverse impact on human rights.

The Committee is concerned that the effect of the proposed amendments to the Interim Measures Act will be to limit the right to a fair hearing and fair trial and that the Statement of Compatibility in the Explanatory Memorandum does not address this issue. In fact, the Statement of Compatibility states that 'The Bill operates ... to extend the appointments of the current CJA and full-time Judge Advocate who contribute to the effective operation of the military justice system and the dispensation of military discipline...' (emphasis added). As discussed below, this statement reflects a commitment to the consistent conduct of fair trials and hearings.

As you point out, the Interim Measures Act reinstated the service tribunal system that existed before the creation of the Australian Military Court to sustain that system until such time as the Parliament decided how to permanently address the issue of the trial of serious service offences in the Australian Defence Force. The current arrangements provided for in the *Defence Force Discipline Act 1982* (DFDA) have enabled the continuation of the delivery of military discipline via a system of trials by service tribunal (post the High Court decision in *Lane v Morrison* [2009] HCA 29), which operates in an independent and impartial manner. The amendments in the Bill, which extend the appointments of the CJA and JA, are required to continue to support that system.

The Judge Advocate General, who must be a serving or former superior court judge, together with other Offices and appointments under the DFDA, combine to support the independence of the military justice system and the conduct of fair trials. For example, the establishment of the statutorily independent positions of the Director of Military Prosecutions, the Inspector General of the Australian Defence Force and the Registrar of Military Justice, together with the creation of (and statutory recognition that the Bill will give to) the position of the Director Defence Counsel Services and the abolition of convening authorities, have all ensured that

military discipline is dispensed in a manner separate to, and independent of, the military chain of command.

Of note, in 2003 and 2005, legislative amendments were made to the procedure for the Judge Advocate General to appoint officers to act as JAs for courts martial and for nominating officers as DFMs, as opposed to these members being appointed by the chain of command. These amendments removed the involvement of convening authorities and substituted the Registrar of Military Justice in the appointment of JAs. This was to ensure that any actual or perceived influence by the chain of command in the appointment process was avoided and to facilitate fair and independent service tribunal trials. JAs are, therefore, appointed by the Chief of the Defence Force or a Service Chief on the nomination of the Judge Advocate General. Defence Force magistrates are also appointed on the nomination of the Judge Advocate General (currently Rear Admiral, the Honourable Justice Michael Slattery QC, RANR of the Supreme Court of New South Wales).

Importantly, all courts martial and Defence Force magistrates trials are conducted in accordance with rules of evidence, accused members are provided with independent legal representation at Commonwealth expense and convicted members have their convictions and punishments automatically reviewed to ensure they are in accordance with the law. A convicted person may also lodge a petition against their conviction or punishment and, in addition, can appeal their conviction to the Defence Force Discipline Appeal Tribunal (consisting of a panel of superior court judges), the Federal Court of Australia and, if leave is granted, to the High Court of Australia.

The presence and application of all these elements in the military justice system is an indication of the delivery of fair trials and hearings.

Moreover, the High Court of Australia has consistently found the system of trials by Service tribunal to be constitutionally sound.

As noted in the 2009 Report on the *Independent Review on the Health of the Reformed Military Justice System* (Sir Laurence Street AC, KCMG, QC and Air Marshal Les Fisher (Rtd)):

'The military justice system is delivering and should continue to deliver impartial, rigorous and fair outcomes; has a greater transparency and enhanced oversight; is substantially more independent from the chain of command; and is effective in maintaining a high standard of discipline both domestically and in the operational theatre' (emphasis added).

These findings reinforce Defence's ongoing commitment to delivering impartial, rigorous and fair military justice outcomes and it is continuing its commitment in this regard.

The proposed amendments to the Interim Measures Act are consistent with, and ensure the right to a fair hearing and fair trial (supporting the

military justice system). They are also consistent with the criteria of an independent and impartial tribunal as required by article 14(1) of the International Covenant on Civil and Political Rights (competence, independence and impartiality of a tribunal).¹³

Committee response

1.135 **The committee thanks the Minister for Defence for his response.** In particular, the committee thanks the minister for his additional advice as to how the current system of military justice operates in practice and how this delivers a fair trial and fair hearing. In particular, the committee notes the minister's advice:

- regarding the establishment of the statutorily independent positions of the Director of Military Prosecutions, the Inspector General of the Australian Defence Force, the Registrar of Military Justice and the proposed Director Defence Counsel Services;
- that convening authorities have been abolished;
- that the Judge Advocate General appoints officers to act as judge advocates for courts martial and for nominating officers as Defence Force Magistrates, as opposed to these members being appointed by the chain of command;
- that judge advocates are no longer appointed by the chain of command but by the Chief of the Defence Force or a Service Chief on the nomination of the judge advocate; and
- that convicted members can appeal their conviction to the Defence Force Discipline Appeal Tribunal.

1.136 Having regard to this advice and relevant comparative human rights law jurisprudence,¹⁴ the committee considers that the current structure for conducting military justice would appear to meet the requirement that hearings are conducted by an independent and impartial body.

1.137 However, in determining whether a tribunal can be considered 'independent', regard must also be had to the term of office for those who conduct military justice hearings. The committee notes that under the transitional provisions of the Interim Act, which the bill extends, the Chief Judge Advocate and judge advocates are appointed for eight years from the date of the Interim Act.¹⁵ However,

13 See Appendix 1, Letter from the Hon Kevin Andrews MP, Minister for Defence, to the Hon Philip Ruddock MP (dated 10 June 2015) 1-3.

14 See, for example, *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005 (cf the earlier system of military justice which raised concerns regarding the perception of independence and impartiality: *Findlay v United Kingdom* European Court of Human Rights, (1997) 24 EHRR 221).

15 See items 2 and 4 of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

the Interim Act also provides that the minister may declare in writing any day to be the 'termination day' so the appointment of the Chief Judge Advocate or judge advocates will end on this earlier date.¹⁶ There is no guidance as to when the minister may make such a declaration and this declaration, while a legislative instrument, is specifically excluded from being subject to disallowance.¹⁷

1.138 The European Court of Human Rights has said that the 'irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence' and this forms part of the requirement of a fair trial.¹⁸ It is recognised that this irremovability does not always have to be recognised in law, if it is recognised in fact and other necessary guarantees are present. However, in this case, the opposite is true—the Interim Act expressly gives the executive the power to remove the Judge Advocate General and judge advocates simply by declaring a 'termination day'.

1.139 The committee notes that the requirements of independence and impartiality are not just that the tribunal must be independent, but it must also present an appearance of independence: it 'must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect'.¹⁹ The minister's power to terminate the appointment of the Judge Advocate General and the judge advocates, at any time, raises concerns that the military courts could be perceived as not being independent or impartial. The minister's response did not address this aspect of the committee's concerns.

1.140 The requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception, and this applies to both civilian and military courts.²⁰ It is therefore not possible to justify any limitation on this right.

1.141 Accordingly, the committee considers that enabling the executive to terminate the appointments of the Chief Judge Advocate and judge advocates at any time gives rise to a perception that the system of military justice is not objectively independent. Therefore, the committee seeks the Minister for Defence's advice as to whether extending the appointments of the Chief Judge

16 See item 8 of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

17 See item 8(2) of Schedule 3 of the *Military Justice (Interim Measures) Act (No. 1) 2009*.

18 *Campbell and Fell v United Kingdom*, European Court of Human Rights, Application No. 7819/77 and 7878/77, 28 June 1984, para 80. See also *Morris v the United Kingdom*, European Court of Human Rights, Application No. 38784/97, 26 May 2002, para 68 and *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005, para 118.

19 *Cooper v United Kingdom*, European Court of Human Rights, Application No. 48843/99, 26 January 2005, para 104.

20 See UN Human Rights Committee, General Comment No. 32 (2007) para [22].

Advocate and judge advocates, and thereby extending the current system of military justice, limits the right to a fair hearing.

1.142 Further, the committee seeks the Minister for Defence's advice as to whether the Interim Act should be amended to remove the power of the minister to unilaterally revoke the appointments of the Chief Judge Advocate and judge advocates.

Advice only

1.143 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138]

Portfolio: Attorney-General

Authorising legislation: Family Law Act 1975 and Federal Circuit Court of Australia Act 1999

Last day to disallow: Disallowed on 11 August 2015, Senate

Purpose

1.144 The Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 (the regulation) makes amendments to the Family Law (Fees) Regulation 2012 to:

- increase the fee for certain divorce applications, consent orders and issuing subpoenas by a prescribed amount;
- increase all other existing family law fee categories (by an average of 11 per cent) except for the reduced divorce fee in the Federal Circuit Court and divorce fees in the Family Court of Australia; and
- establish a new fee category for the filing of an amended application.

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

Background

1.146 The regulation was disallowed in the Senate on 11 August 2015.¹

Increased fees for family court proceedings

1.147 Schedule 1 of the regulation increased the costs in all fee categories by 11 per cent for all family law matters in the Family Court and the Federal Circuit Court. This includes the costs of commencing an application for a divorce and for appeals and the costs for the hearing of the application or appeal.

1.148 The committee considers that this engages and limits the right to a fair hearing (access to justice).

1 See Senate Standing Committee on Regulations and Ordinances website, 'Disallowance Alert 2015', http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Right to a fair hearing

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

1.150 The right also includes the right to have equal access to the courts, regardless of citizenship or other status. This requires that no one is to be barred from accessing courts or tribunals (although there are limited exceptions if these are based on objective and reasonable grounds, for example vexatious litigants). To be real and effective this may require access to legal aid and the regulation of fees or costs that could indiscriminately prevent access to justice.

Compatibility of the measure with the right to a fair hearing

1.151 The statement of compatibility states that the regulation does not engage any of the applicable rights or freedoms and does not raise any human rights issues.

1.152 However, the right to a fair hearing includes a right to access to justice. A substantial increase in the cost of making an application to the Family Court or Federal Circuit Court, and in conducting a case before the courts, engages the right to a fair hearing, as this right includes a right to access to justice. The UN Human Rights Committee has said that the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under the right to a fair hearing.² Family law decisions have been held to be included in the concept of when a person's 'rights and obligations' are being determined.

1.153 Whether the right is limited will depend on whether the increase in fees to access the courts would indiscriminately prevent access to justice. No information is provided in the statement of compatibility as to whether there is any ability for an applicant to seek to have the fees waived if the fees would effectively prevent them from accessing the courts.

1.154 The committee's assessment of the 11 per cent increase for all family law matters in the Family Court and the Federal Circuit Court against article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing) raises

2 See UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007). See also *Lindon v Australia*, Communication No. 646/1995 (25 November 1998), para. 6.4.

questions as to whether the increase in court fees is a limitation on the right to access to justice.

1.155 As set out above, the increase in fees engages and limits the right to a fair hearing. The statement of compatibility does not explore whether the measure limits the right to a fair hearing and does not justify any limitation for the purposes of international human rights law.

1.156 However, as the regulation has been disallowed by the Senate the committee draws the preceding analysis to the attention of the Attorney-General and makes no further comment.