



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Functions of the committee

The committee has the following functions under the *Human Rights (Parliamentary Scrutiny) Act 2011*:

- to examine bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue; and
- to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as those contained in following seven human rights treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

The establishment of the committee builds on the Parliament's established traditions of legislative scrutiny. Accordingly, the committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations. The committee does not consider the broader policy merits of legislation.

The committee's purpose is to enhance understanding of and respect for human rights in Australia and to ensure appropriate recognition of human rights issues in legislative and policy development.

The committee's engagement with proponents of legislation emphasises the importance of maintaining an effective dialogue that contributes to this broader respect for and recognition of human rights in Australia.

Committee's analytical framework

Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

International human rights law recognises that reasonable limits may be placed on most rights and freedoms—there are very few absolute rights which can never be legitimately limited.¹ All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

More information on the limitation criteria and the committee's approach to its scrutiny of legislation task is set out in Guidance Note 1, which is included in this report at Appendix 2.

1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

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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 17 to 20 August 2015, legislative instruments received from 7 to 13 August 2015, and legislation previously deferred by the committee.

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

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

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

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

Bills not raising human rights concerns

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

- Tax and Superannuation Laws Amendment (2015 Measures No.4) Bill 2015; and
- Tax and Superannuation Laws Amendment (Better Targeting the Income Tax Transparency Laws) 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):

- Broadcasting Legislation Amendment (Primary Television Broadcasting Service) Bill 2015;

- Foreign Acquisitions and Takeovers Fees Impositions Bill 2015;
- Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015;
- Marriage Equality Plebiscite Bill 2015; and
- Register of Foreign Ownership of Agricultural Land 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 Marriage Legislation Amendment Bill 2015.

1.12 The committee continues to defer its consideration of the following legislation:

- Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 [F2015L00877] (deferred 18 August 2015);
- Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 [F2015L00878] (deferred 18 August 2015);
- Federal Financial Relations (National Partnership payments) Determination No. 87 (December 2014) [F2015L01093] (deferred 18 August 2015);
- Federal Financial Relations (National Partnership payments) Determination No. 88 (January 2015) [F2015L01094] (deferred 18 August 2015);
- Federal Financial Relations (National Partnership payments) Determination No. 89 (February 2015) [F2015L01095] (deferred 18 August 2015);
- Federal Financial Relations (National Partnership payments) Determination No. 90 (March 2015) [F2015L01096] (deferred 18 August 2015);
- Federal Financial Relations (National Partnership payments) Determination No. 91 (April 2015) [F2015L01097] (deferred 18 August 2015);
- Federal Financial Relations (National Partnership payments) Determination No. 92 (May 2015) [F2015L01098] (deferred 18 August 2015);

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.

- Federal Financial Relations (National Partnership payments) Determination No. 93 (June 2015) [F2015L01099] (deferred 18 August 2015); and
- 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); and Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015).

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

Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015

Portfolio: Environment

Introduced: House of Representatives, 20 August 2015

Purpose

1.15 The Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (the bill) seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the Environment Act) to remove section 487 of the Environment Act. Currently, section 487 expands the meaning of 'person aggrieved' in the *Administrative Decisions (Judicial Review) Act 1977*.

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

Removal of extended standing to seek judicial review of decisions or conduct under the Environment Act

1.17 Currently, section 487 of the Environment Act gives standing rights (the right to bring an action before the courts) to individuals and organisations who, at any time in the preceding two years, have engaged in a series of activities for the protection or conservation of, or research into, the Australian environment. This means that currently those individuals and organisations can bring an action to seek judicial review of actions taken, or not taken, under the Environment Act. The bill would remove the right of these individuals and organisations to bring judicial review in relation to decisions made (or failed to be made) under the Environment Act or conduct engaged under that Act (or regulations).

1.18 The objectives of the Environment Act include protecting the environment and ecosystems and promoting ecologically sustainable development, which includes principles of inter-generational equity; that the present generation should ensure the health, diversity and productivity of the environment for the benefit of future generations.¹

1.19 The removal of the existing right of a person who, or organisation which, is dedicated to protecting the environment from applying for judicial review of decisions taken (or not taken) or conduct engaged in under the Environment Act, could result in a failure to properly enforce the protections under the Environment Act, and as a result may engage and limit the right to health and a healthy environment.

1 See section 3 of the *Environment Protection and Biodiversity Conservation Act 1999*.

Right to health and a healthy environment

1.20 The right to health is guaranteed by article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).

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

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

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

Compatibility of the measure with the right to health and a healthy environment

1.23 The statement of compatibility does not explore whether the right to health and a healthy environment is engaged by this measure.

1.24 While the text of the ICESCR does not explicitly recognise a human right to a healthy environment, the UN Committee on Economic, Social and Cultural Rights has recognised that the enjoyment of a broad range of economic, social and cultural rights depends on a healthy environment.² As the UN Committee emphasized in its recent statement in the context of the Rio+20 Conference, 'the Committee in its dialogue with States parties has regularly stressed the inter-linkages of specific economic, social and cultural rights, as well as the right to development, with the

2 See, e.g., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Uzbekistan*, 24 January 2006, U.N. Doc. E/C.12/UZB/CO/1, paragraph [9] ("the effects of the Aral Sea ecological catastrophe in the State party have posed obstacles to the enjoyment of economic, social and cultural rights by the population in the State party")

sustainability of environmental protection and development efforts.³ The UN Committee has recognised that environmental degradation and resource depletion can impede the full enjoyment of the right to health.⁴

1.25 The UN Committee has also drawn a direct connection between the pollution of the environment and the resulting negative effects on the right to health, explaining that the right to health is violated by 'the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.'⁵

1.26 As such, the removal of a right of a person or bodies who are committed to environmental protection from seeking to enforce the protections in the Environment Act, may engage and limit the right to a healthy environment. This was not addressed in the statement of compatibility.

1.27 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 1,⁶ 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'.⁷ 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,

3 See *Statement in the context of the Rio+20 Conference on "the green economy in the context of sustainable development and poverty eradication"*, adopted by the Committee at its forty-eighth session, 30 April–18 May 2012, 4 June 2012, U.N. Doc. E/C.12/2012/1, paragraph [5].

4 See Office of the United Nations High Commissioner for Human Rights, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Individual Report on the International Covenant on Economic, Social and Cultural Rights, Report No. 1*, December 2013, 17.

5 Statement of the Committee on Economic, Social and Cultural Rights to the Commission on Sustainable Development as the Preparatory Committee for the World Summit on Sustainable Development (Bali, Indonesia, 27 May-7 June 2002), 30 April 2003, U.N. Doc. E/C.12/2002/13, Annex VI, paragraph 3.

6 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014)
http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

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

and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.28 The committee's assessment of the removal of extended standing for judicial review of decisions or conduct under the *Environment Protection and Biodiversity Conservation Act 1999* against article 12 of the International Covenant on Economic, Social and Cultural Rights (right to health and a healthy environment) raises questions as to whether the measure limits the right, and if so, whether that limitation is justifiable.

1.29 As set out above, the measure may engage and limit the right to health and a healthy environment as the bill removes extended standing for judicial review of decisions or conduct under the Environment Act. The statement of compatibility does not justify that possible limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for the Environment as to whether the bill limits the right to a healthy environment and, if so:

- 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.

Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015

Sponsors: Senators Leyonhjelm and Day

Introduced: Senate, 13 August 2015

Purpose

1.30 The Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015 (the bill) seeks to amend the *Fair Work Act 2009* to exclude employers in the restaurant and catering, hotel, and retail industries which employ fewer than 20 employees from being required to pay penalty rates under an existing or future modern award unless:

- the work is in addition to ten hours of work in a 24 hour period; or
- the work is on a public holiday; or
- the work is on a weekend and in addition to 38 hours of work over the relevant week.

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

Removal of penalty rates in certain circumstances

1.32 Most employees in Australia have their minimum wages and conditions set by awards, though other instruments such as individual contracts or enterprise agreements often provide additional wages and conditions above the minimum conditions established in awards. Penalty rates generally apply to non-standard hours of work (such as weekend and night work), overtime and work on public holidays.

1.33 As set out above, this bill would exempt small business employers (with fewer than 20 employees) in the restaurant and catering, hotel, and retail industries from being required to pay penalty rates under an existing or future modern award unless certain conditions are met. Awards will be allowed to include penalty rates provisions for work: in addition to ten hours of work (in a 24 hour period); on a weekend but only if the work is in addition to 38 hours in the week; and on a public holiday.

1.34 The bill engages and may limit the right to just and favourable conditions of work, as the changes to penalty rates for non-standard work hours (such as weekend and night work) may reduce the take home pay of individuals in those industries.

1.35 In reducing the income of some of the lowest paid employees in Australia, the measure also engages and may limit the right to an adequate standard of living.

1.36 In addition, the measure engages and may limit the right to equality and non-discrimination. In particular, the measure may constitute indirect discrimination on the basis of gender and age, as women and young people are disproportionately represented in the affected industries.

Right to just and favourable conditions of work

1.37 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹

1.38 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) 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.

1.40 The right to work may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Compatibility of the measure with the right to just and favourable conditions of work

1.41 The statement of compatibility for the bill acknowledges that the measure engages the right to work and rights in work but states that the bill does not limit the right of employees to earn either fair wages or equal remuneration as the bill 'only affects the circumstances in which certain employers will be required to pay penalties above the base wage'.² The statement of compatibility further states that the bill does not affect remuneration for public holidays and 'maintains the payment of penalty rates to financially recognise work performed above and beyond the usual

1 Related provisions relating to such rights for specific groups 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).

2 Explanatory Memorandum (EM), Statement of Compatibility (SOC) 5.

hours of employment'.³ However, the statement of compatibility does not directly address the limitation on the right to just and favourable conditions of work.

1.42 First, the statement of compatibility states that the bill is 'intended to support and encourage greater employment within small businesses'. The statement of compatibility does not outline how this measure pursues a legitimate objective for the purposes of international human rights law. In particular, the statement of compatibility does not provide evidence as to why the employment outcomes of small businesses (with fewer than 20 employees) in the restaurant and catering, hotel and retail industries are at particular risk such that the stated objective addresses a pressing or substantial concern.

1.43 Second, the statement of compatibility has not demonstrated that the measure is rationally connected to that objective. In particular, the statement of compatibility has not addressed the likelihood of small businesses using the savings made from not having to pay penalty rates in certain circumstances to hire new employees, rather than for other purposes. Evidence of the impact of changing penalty rates on employment outcomes is not discussed in the statement of compatibility.

1.44 Third, the statement of compatibility has not demonstrated that the measure is proportionate to its stated objective (that is, that it is the least rights restrictive means of achieving that objective). In particular, the statement of compatibility has not provided a reasoned and evidence-based explanation of why the measure is necessary for the attainment of a legitimate objective. The committee considers that there is likely to be a less rights restrictive alternative to achieving the stated objective of the bill, such as wage subsidies or incentive payments for hiring eligible job seekers. The statement of compatibility does not assess the likely effect of the proposed measures on workers and what effect this may have to the rates of pay of affected workers, and how this is proportionate to the stated objective.

1.45 The committee's assessment of the changes to penalty rate provisions for certain restaurant and catering, hotel and retail employees against article 7 of the International Covenant on Economic, Social and Cultural Rights (right to just and favourable conditions of work) raises questions as to whether the changes to penalty rates for the affected employees is justifiable.

1.46 As set out above, the bill engages and limits the right to just and favourable conditions of work. 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 legislation proponents 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;**

3 EM, SOC 5.

- **there is a rational connection between the limitation and that objective; and**
- **the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Right to an adequate standard of living

1.47 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.48 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living.

Compatibility of the measure with the right to an adequate standard of living

1.49 Employees in the restaurant and catering, hotel and retail industries have the lowest average full time weekly earnings in Australia, and employees in these industries are likely to be reliant on the conditions in awards.⁴ In addition, most employees in these industries are part time or casual employees.⁵ Employees in these industries often have little bargaining power over the conditions of their employment.

1.50 The changes in the payment of penalty rates proposed by the bill has the potential to have a sizeable impact on the wages earned by the affected low paid employees, particularly existing employees who may have structured their work patterns according to the available wages and penalty rates. It is also possible that penalty rates have been part of the overall wage packages in such industries, and average wage rates would have been higher if penalty rates were lower (or zero).

1.51 As the statement of compatibility does not identify the measure as limiting the right to an adequate standard of living in this way, no justification for the limitation is provided.

1.52 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

4 Australian Bureau of Statistics 2015, *Average Weekly Earnings, Australia, May 2015*, Cat. No. 6302.0, released 13 August 2015.

5 Australian Bureau of Statistics 2014, *Forms of Employment, Australia, November 2013*, Cat. No. 6359.0, released 7 May 2014; Australian Bureau of Statistics 2013, *Labour Mobility, Australia, February 2013*, Cat. No. 6209.0, released 21 August 2013.

Guidance Note 1,⁶ 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'.⁷ 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.

1.53 The committee's assessment of the changes to penalty rate provisions in existing and future modern awards against article 11 of the International Covenant on Economic, Social and Cultural Rights (right to an adequate standard of living) raises questions as to whether the changes to penalty rates for the low paid affected employees is justifiable.

1.54 As set out above, the changes to penalty rates engages and limits the right to an adequate standard of living. The statement of compatibility does not provide an assessment as to the compatibility of the measure with this right. The committee therefore seeks the advice of the legislation proponent 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;**
- **there is a rational connection between the limitation and that objective; and**
- **the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Right to equality and non-discrimination

1.55 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).

1.56 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

6 Appendix 2; See Parliamentary Joint Committee on Human Rights, Guidance Note 1 - Drafting Statements of Compatibility (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

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

entitled without discrimination to the equal and non-discriminatory protection of the law.

1.57 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),⁸ which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.⁹ 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.¹⁰

1.58 In addition to the articles on non-discrimination in the ICCPR and CEDAW, article 2(2) of the ICESCR guarantees the right to equality and non-discrimination in the exercise of economic, social and cultural rights, including the right to earn fair wages or equal remuneration sufficient to earn a decent living in article 7 of the ICESCR.

1.59 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

1.60 The measure engages and may limit the right to equality and non-discrimination because of the possibility of indirect discrimination on the basis of gender or age.

1.61 International human rights law recognises that a measure may be neutral on its face but in practice have a disproportionate impact on groups of people with a particular attribute such as race, colour, sex, language, religion, political or other status. Where this occurs without justification it is called indirect discrimination.¹¹ 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.

8 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.

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

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

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

1.62 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. However, under international human rights law such a disproportionate effect may be justifiable.

1.63 The majority of employees in the restaurant and catering, hotel and retail industries are female, and more women in these industries work part-time than full-time.¹² Given the low base wage for these industries, women who work part-time are possibly more reliant on penalty rates to supplement their base wage. Some women may organise their work schedule around family responsibilities, and work non-standard hours where childcare can be supplied by their partner or family. The changes to penalty rates may possibly have a disproportionate impact on women.

1.64 Employees in the restaurant and catering, hotel and retail industries are also likely to be younger on average and award reliant.¹³ Minimum wage jobs are often entry level, with a much higher reliance on minimum wage jobs observed among employees aged less than 20 years (25 per cent of employees) and between 21 to 24 years (14 per cent of employees) compared with those aged 25 to 54 (roughly 5 per cent).¹⁴ Therefore the changes to penalty rates may possibly have a disproportionate impact on young people.

1.65 As the statement of compatibility does not identify the measure as limiting the right to equality and non-discrimination in this way, no justification for the limitation is provided.

1.66 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, as outlined at paragraph [1.52] above.

1.67 The committee's assessment of the changes to penalty rate provisions in existing and future modern awards against article 2(2) of the International Covenant on Economic, Social and Cultural Rights, articles 2, 16 and 26 of the International Covenant on Civil and Political Rights and articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (right to equality and non-discrimination) raises questions as to whether the indirect discrimination against women and young people is justifiable.

12 Australian Bureau of Statistics 2015, *Labour Force, Australia, Detailed, Quarterly, May 2015*, Cat. No. 6291.0.55.003, released 18 June 2015.

13 Australian Bureau of Statistics 2014, *Employee Earnings and Hours, Australia, May 2014*, Cat. No. 6306.0, released 22 January 2015.

14 Productivity Commission, *Workplace Relations Framework*, Draft Report, August 2015, p. 315 based on Australian Bureau of Statistics 2014, *Microdata: Employee Earnings and Hours, Australia, May 2014*, Cat. No. 6306/0/55/001, released 11 June 2015.

1.68 As set out above, the changes to penalty rates engages and limits the right to equality and non-discrimination. The statement of compatibility does not provide an assessment as to the compatibility of the measure with this right. The committee therefore seeks the advice of the legislation proponent 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;
- there is a rational connection between the limitation and that objective; and
- the limitation is a reasonable and proportionate measure for the achievement of that objective.

Shipping Legislation Amendment Bill 2015

Portfolio: Infrastructure and Regional Development

Introduced: House of Representatives, 25 June 2015

Purpose

1.69 The Shipping Legislation Amendment Bill 2015 (the bill) provides a new framework for the regulation of coastal shipping in Australia, including:

- replacing the existing three tiered licensing system with a single permit system available to Australian and foreign vessels, which will provide access to the Australian coast for a period of 12 months;
- establishing a framework of entitlements for seafarers on foreign vessels engaging or intending to engage in coastal shipping for more than 183 days;
- allowing for vessels to be registered on the Australian International Register if they engage in international shipping for a period of 90 days or more; and
- making consequential amendments and repealing the *Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Act 2012*.

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

12 month permit system for access to Australian coastal shipping

1.71 As set out above, the bill would replace the current three tiered licensing system with a single permit system which will provide access to Australian coastal shipping for 12 months. The permit system will be open to applications from both Australian and foreign registered vessels.

1.72 Under the bill, vessels registered under the laws of a foreign country will not be subject to Australian crew requirements unless they declare on their permit that they intend to engage in coastal shipping for more than 183 days during the permit period, or if the vessel actually engages in coastal shipping for more than 183 days during the permit period. Accordingly, under the proposed permit system, foreign vessels will be able to operate in Australian coastal waters and not pay their workers in accordance with Australian laws provided that the vessel spends less than six months in Australian waters in any given 12 month period.

1.73 Accordingly, the measure engages and may limit the right to just and favourable conditions at work as the bill may permit individuals to be paid less than Australian award wages whilst working in Australian coastal waters.

Right to just and favourable conditions of work

1.74 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹

1.75 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of state parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

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

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) 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.

1.77 The right to work may be subject only to such limitations as are determined by law and are compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Compatibility of the measure with the right to just and favourable conditions of work

1.78 The statement of compatibility suggests that the measure engages the right to just and favourable conditions of work but does not explicitly consider whether the measure limits the right. The statement of compatibility discusses the parts of the relevant award that apply to foreign vessels which currently operate in Australia under the existing licencing system. However, no information is provided as to whether the bill would expand the number of individuals who work in Australian coastal waters on below award wages or the proportion of individuals who are paid below award wages.

1.79 The statement of compatibility states that Australia is not required to set wages and conditions for seafarers on foreign vessels under the ICESCR. This appears

1 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child (CRC) and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

to misunderstand the nature of Australia's obligations under international law. Australia is obligated to apply international human rights law to everyone subject to its jurisdiction. This includes people in Australian coastal waters that form part of Australia's territory. As part of Australia's sovereignty, Australia applies a number of domestic laws to foreign flagged vessels in its coastal waters including the *Navigation Act 2012*.

1.80 Accordingly, to the extent that the bill may expand the number of individuals working in Australian coastal waters on below Australian award wages, the bill may limit the right to just and favourable conditions of work.

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 1,² 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'.³ 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.

1.82 The committee's assessment of the 12 month permit system for access to Australian coastal shipping by foreign flagged vessels against articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (right to just and favourable conditions of work) raises questions as to whether the measure limits the right, and if so, whether that limitation is justifiable.

1.83 As set out above, the measure engages and may limit the right to just and favourable conditions at work as the bill may permit individuals to be paid less than Australian award wages whilst working in Australian coastal waters. 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 Infrastructure and Regional Development as to:

2 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

3 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 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.**

Social Security Legislation Amendment (Debit Card Trial) Bill 2015

Portfolio: Social Services

Introduced: House of Representatives, 19 August 2015

Purpose

1.84 The Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (the bill) seeks to amend the *Social Security (Administration) Act 1999*, and make consequential amendments to a number of other Acts, to provide for the trial of cashless welfare arrangements.

1.85 The bill would enable a legislative instrument to be made which would prescribe locations, or locations and classes of persons, in three discrete trial areas which would trial 'cashless welfare arrangements'. This would mean that persons on working age welfare payments in the specified locations would have 80 per cent of their income support restricted, so that the restricted portion could not be used to purchase alcoholic beverages or to conduct gambling.

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

Restrictions on how social security payments are spent

1.87 As set out above, the bill provides the legislative basis on which a trial could be conducted whereby 80 per cent of a person's social security would be placed in a restricted bank account. The trial would take place between February 2016 and June 2018. A person subject to the trial would not be able to access their social security payments in cash; rather their social security payments would be provided on a debit card that could not be used to purchase alcoholic beverages or gambling. This would be achieved by ensuring the debit card could not be used at excluded businesses.

1.88 It is not clear what businesses will be excluded businesses, for which any money linked to a welfare restricted bank account will not be able to be spent. This is because the bill leaves much of the detail as to how the trial will work to be dealt with in a future legislative instrument.¹ Little detail is provided in the explanatory memorandum or the statement of compatibility.

1.89 The statement of compatibility does explain that the trial is in response to a recommendation from Mr Andrew Forrest's Review of Indigenous Jobs and Training.² In this review, Mr Forrest recommended that specific retailers would be excluded, such as bottle shops. As for retailers that sell both alcohol and other goods (such as Woolworths or Coles) the review states:

1 See proposed new subsection 124PQ(2) of the bill.

2 Andrew Forrest, *Creating Parity – the Forrest Review*, 2014.

We will need to explore if the retailers who sell a mixed range of goods (like vegetables and alcohol) can also classify and prohibit certain purchases at point of sale.³

1.90 The bill also leaves to a legislative instrument the locations that will be the subject of the trial and the class of person who would be subject to the trial. For example, proposed section 124PG states that the trial could apply to all persons who receive a trigger payment whose usual place of residence is in a trial location; or it could apply in respect of a particular class of persons whose usual place of residence is in a trial location. Neither the explanatory memorandum nor the statement of compatibility explain the likely approach that will be taken. A 'trigger payment' is defined as including all social security benefits and most social security pensions (including Newstart Allowance, Youth Allowance, disability pensions and carers' payments).

1.91 The restriction on how a person can spend their social security payments engages and limits the right to a private life. It may also engage and limit the right to equality and non-discrimination, as the measures may impact disproportionately on particular persons. In relation to these two rights, it also engages and may limit the right to social security.

Right to a private life

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

1.93 Privacy is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

1.94 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 a private life

1.95 The statement of compatibility does not acknowledge that the bill engages the right to a private life and therefore provides no justification as to any limit on this right.

1.96 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

3 Andrew Forrest, *Creating Parity – the Forrest Review*, 2014, 106.

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.

1.97 Restricting how a person can access, and where they can spend, their social security benefits, interferes with the person's right to personal autonomy and therefore their right to a private life. In addition, being able to only access 20 per cent of welfare payments in cash could have serious restrictions on what a person is able to do in their private life. There are many instances where a person would only be able to use cash to purchase goods or services, such as at markets, for public transport, to give to family members, services which require cash payments, buying second-hand goods and at stores that have minimum purchase requirements. For those on the single rate of Newstart, restricting the cash availability of the allowance to 20 per cent would mean that just over \$50 is available per week to be spent in cash.⁶ This restriction undoubtedly impacts on how a person is able to conduct their private life and represents the extension of government regulation into the private and family lives of the persons affected by these trials.

1.98 As the UN Special Rapporteurs on Extreme Poverty and Human Rights and Rights of Indigenous Peoples have said in relation to the provision of social security benefits:

When States impose excessive requirements and conditions on access to public services and social benefits, and severe sanctions for non-compliance, such measures threaten welfare beneficiaries' enjoyment of a number of human rights, including the right to...be free from arbitrary or

4 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

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>.

6 The current maximum Newstart Allowance for a single person without dependents is \$519.20 per fortnight; 20 per cent of this is \$51.92 per week. See <http://www.humanservices.gov.au/customer/enablers/centrelink/newstart-allowance/payment-rates-for-newstart-allowance>.

unlawful State interference in their privacy, family, home or correspondence.⁷

1.99 In this case, while not acknowledging that the right to a private life is engaged, the statement of compatibility states that the objective of the bill is to:

[achieve] the legitimate objective of reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare recipients will be subject to harassment and abuse in relation to their welfare payments.⁸

1.100 The committee considers that this is likely to be a legitimate objective for the purposes of human rights law. However, in addition to a measure having a legitimate objective, it is necessary to demonstrate that the measure is rationally connected to that objective. That is, that the measure is likely to be effective in achieving the objective being sought. It is noted that the measure, in quarantining a person's welfare payments and restricting where that quarantined payment can be spent, is very similar to the existing program of income management.

1.101 As the committee has previously noted in relation to income management, the government has not clearly demonstrated that the measure has had the beneficial effects that were hoped for.⁹ Indeed, the most recent government-commissioned evaluation of income management in the Northern Territory has concluded that income management has been of mixed success. In particular, it found no evidence income management has achieved its intended outcomes. Rather than promoting independence and building skills and capabilities, it appears to have 'encouraged increasing dependence upon the welfare system', and there is no evidence to indicate its effectiveness at the community level or that it facilitates long-term behaviour change.¹⁰

1.102 Given the similarities between income management and this proposed trial of cashless welfare arrangements, it is incumbent on the legislation proponent to explain how the measures are likely to be effective (that is, rationally connected) to the stated objective.

1.103 In addition, it is necessary for the legislation proponent to explain how the measure is proportionate to its stated objective. This includes explaining whether there are effective safeguards or controls over the measure, including the possibility of monitoring and access to review. There is nothing in the statement of

7 Letter from the UN Special Rapporteurs on Extreme Poverty and Human Rights and Rights of Indigenous Peoples to the Permanent Representative of Australia to the United Nations, 9 March 2012.

8 Explanatory Memorandum (EM), Statement of Compatibility (SOC) 4.

9 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013* (26 June 2013).

10 The committee is currently undertaking a review of the income management measures as part of its review into Stronger Futures, which it intends to report on by late 2015.

compatibility that explores whether there are any such safeguards in place and whether the measures are proportionate to the stated objective.

1.104 The committee's assessment of the restrictions on welfare payments against article 17 of the International Covenant on Civil and Political Rights (right to a private life) raises questions as to whether this measure is justifiable.

1.105 As set out above, the restrictions on welfare payments engage and limit the right to a private life. 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 Social Services as to:

- **whether there is a rational connection between the limitation and that objective, in particular, whether there is evidence to indicate that restricting welfare payments in this way is likely to be effective in achieving the stated aims of reducing hardship, deprivation, violence and harm, encouraging socially responsible behaviour and reducing the likelihood of harassment and abuse; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, including that there are appropriate safeguards in place, including monitoring and access to review.**

1.106 The committee also seeks the minister's advice on these questions regarding the right to social security and the right to equality and non-discrimination set out below (articles 2 and 9 of the International Covenant on Economic, Social and Cultural Rights and articles 2 and 26 of the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities).

Right to equality and non-discrimination

1.107 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the ICCPR and article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

1.108 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.

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

1.110 Articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) further describes the content of these rights and the specific elements that state parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.

1.111 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.

1.112 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that state parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

Right to social security

1.113 The right to social security is protected by article 9 of the 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.

1.114 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).

1.115 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.

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

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

1.117 The statement of compatibility states that the cashless welfare arrangements trial will not be applied on the basis of race or cultural factors. Rather, trial locations 'will be chosen based on objective criteria, such as high levels of welfare dependence and community harm, as well as the outcomes of comprehensive consultation with prospective communities.'¹¹ As such, the statement of compatibility says that the trial is not targeted at people of a particular race. It also states that the trial will not detract from the eligibility of a person to receive welfare, nor will it reduce the amount of a person's social security entitlement.¹² The statement of compatibility makes no reference to whether the measure may impact disproportionately on women or people with a disability.

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

1.119 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. However, under international human rights law such a disproportionate effect may be justifiable.

1.120 It is difficult to say whether this measure will have a disproportionate impact on people of a particular race as the locations for the trial are not set out in the bill but are to be established by a legislative instrument. However, as the statement of compatibility acknowledges, these amendments are in response to a key recommendation made by Mr Andrew Forrest's Review of Indigenous Jobs and

11 EM, SOC 3.

12 EM, SOC 2.

Training. This review examined options to help 'end the disparity between Indigenous Australians and other Australians'.¹³

1.121 In addition, the Parliamentary Secretary to the Prime Minister's Second Reading speech stated that Ceduna in South Australia will be the first site under the trial to commence, and that advanced discussions were under way with leaders in the East Kimberly region to trial the arrangement.¹⁴ A high proportion of the population of Ceduna and the East Kimberley region are Indigenous, many of whom are receiving social security benefits. It therefore appears likely that the measures may disproportionately impact on Indigenous persons, and as such may be indirectly discriminatory unless this disproportionate effect is demonstrated to be justifiable. This has not been explored in the statement of compatibility.

1.122 It is also difficult to know whether the measure will disproportionately impact on women and people with a disability, though statistically overall, women and persons with a disability are more likely to be receiving social security payments.

1.123 In addition, the right to social security must be able to be enjoyed without discrimination.¹⁵ The UN Committee on Economic, Social and Cultural Rights has stated that states should take particular care that Indigenous peoples are not excluded from social security systems through direct or indirect discrimination.¹⁶

1.124 Accordingly, the restrictions on welfare payments engage and may limit the right to social security and the right to equality and non-discrimination, and as such this limitation needs to be justified. The analysis at [1.100] to [1.103] in relation to the rational connection and proportionality of the measures applies equally in relation to the limitations on the right to social security and the right to equality and non-discrimination.

Disclosure of information

1.125 The bill also seeks to introduce two new provisions which would allow the disclosure of information about a person involved in the trial if the information is relevant to the operation of the trial.

1.126 Proposed new sections 124PN and 124PO would allow an officer or employee of a financial institution, and a member, officer or employee of a community body (as specified in a legislative instrument), to disclose such

13 Andrew Forrest, *Creating Parity – the Forrest Review*, 2014, 1.

14 Mr Tudge MP, Parliamentary Secretary to the Prime Minister, Second Reading Speech, House of Representatives, *Hansard*, 19 August 2015.

15 UN Committee on Economic, Social and Cultural Rights, General Comment No. 19, paragraph 29.

16 UN Committee on Economic, Social and Cultural Rights, General Comment No. 19, paragraph 35.

information about a person to the Secretary of the relevant Commonwealth department. This is stated to operate despite any law in force in a State or Territory.

1.127 In addition, if such information is disclosed, the bill would also enable the Secretary to disclose any information about the person to a member, officer or employee of a financial institution or community body for the purposes of the performance of their functions or duties or the exercise of their powers.

1.128 Disclosing personal information engages and limits the right to privacy.

Right to privacy

1.129 As noted above at paragraph [1.92] to [1.94], article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. This includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

Compatibility of the measure with the right to privacy

1.130 The statement of compatibility does not acknowledge that the bill engages the right to privacy and therefore provides no justification as to any limit on this right. However, disclosing personal information clearly engages and limits the right to privacy. Any such limitation must be justified in order to be compatible with human rights.

1.131 Of particular concern is that these disclosure powers apply despite any law in force in a State or Territory, which would include laws regulating privacy. There is also no limit on the type of personal information that may be disclosed, other than that the information 'is relevant to the operation of this Part'.

1.132 As noted above at paragraph [1.95], the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility explain how the measure supports a legitimate objective and how it is rationally connected to, and a proportionate way to achieve, its legitimate objective.

1.133 The committee's assessment of the disclosure of information provisions against article 17 of the International Covenant on Civil and Political Rights (right to privacy) raises questions as to whether this measure is justifiable.

1.134 As set out above, the disclosure of information engages and limits the right to privacy. 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 Social Services 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.**

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.

Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015 [F2015L00336]

Portfolio: Employment

Authorising legislation: Seafarers Rehabilitation and Compensation Act 1992

Last day to disallow: 13 August 2015

Purpose

2.3 The Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015 (the instrument) declares that a certain type of ship which is only engaged in intra-state trade is not a prescribed ship for the purposes of the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act).

2.4 Originally, the Seafarers Act provided workers compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry. The effect of the instrument is that workers on ships engaged in intra-state voyages are no longer covered by the Seafarers Act and so will no longer be entitled to compensation under that Act.

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

Background

2.6 In February 2015 the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the bill) was introduced into the House of Representatives. The bill amended the Seafarers Act to ensure workers on ships engaged in intra-state voyages between 1993 and May 2015 are not covered by the Seafarers Act (or by specific maritime occupational health and safety legislation).¹ The bill passed the House of Representatives in February 2015 and passed the Senate with amendments on 13 May 2015.

1 Namely the *Occupational Health and Safety (Maritime Industry) Act 1993*. See also the *Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit—Intra-State Trade) Declaration 2015 [F2015L00335]* which prescribed ships or vessels only engaged in intra-state trade as non-prescribed ships or units for the purposes of that Act.

2.7 Both the bill and the instrument were introduced following a decision of the Full Court of the Federal Court² which held that the coverage provisions in the Seafarers Act apply to all seafarers employed by a trading, financial or foreign corporation, including ships engaged in purely intra-state trade.

2.8 The committee commented on this bill in its *Twentieth Report of the 44th Parliament* and *Twenty-fifth Report of the 44th Parliament*.³ The committee commented on the instrument in its *Twenty-second Report of the 44th Parliament*, and requested further information from the Minister for Employment as to whether the instrument was compatible with human rights.⁴ The committee notes that this instrument has since been repealed and replaced by the Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra State Trade) Declaration 2015 (No. 2) [F2015L00858].

Alteration of coverage of persons eligible for workers' compensation

2.9 The committee considered in its previous analysis that the instrument, in removing ships engaged in intra-state voyages from the coverage of the Seafarers Act and thereby removing an entitlement to compensation for workers injured on such ships, engages and may limit the right to social security.

Right to social security

2.10 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.

2.11 Specific situations and statuses 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. It also includes the protection of workers injured in the course of employment.

Compatibility of the measure with the right to social security

2.12 The statement of compatibility states that the instrument may limit the right to social security, but that such a limitation is reasonable and proportionate as affected employees will retain entitlements to compensation under state legislation.

2 *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182.

3 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 36 and Parliamentary Joint Committee on Human Rights, *Twenty-fifth Report of the 44th Parliament* (11 August 2015) 157.

4 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 125-127.

2.13 As the committee noted in its consideration of the bill, to the extent that the state schemes are less generous than the scheme under the Seafarers Act, the measure in the instrument may be regarded as a retrogressive measure. Under article 2(1) of the ICESCR, Australia has certain obligations in relation to economic and social rights. These include an obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right to social security. A reduction in compensation available to an injured worker may be a retrogressive measure for human rights purposes. A retrogressive measure is not prohibited so long as it can be demonstrated that the measure is justified. That is, it addresses a legitimate objective, it is rationally connected to that objective and it is a proportionate means of achieving that objective.

2.14 The statement of compatibility states that the objective of the instrument is to ensure the long-term viability of maritime industry employers and the sustainability of the scheme. While the committee notes that this is likely to be a legitimate objective for the purposes of international human rights law, it is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective.

2.15 The statement of compatibility characterises the measure as proportionate.⁵ However, it also states that workers' compensation premiums under the federal scheme are, on average, significantly more expensive than those of the state and territory schemes, which could suggest that those schemes provide for lesser coverage or entitlements.

2.16 The committee therefore sought the advice of the Minister for Employment as to the extent of differences in levels of coverage and compensation between the scheme under the Seafarers Act and state and territory workers' compensation schemes.

Minister's response

This Declaration is a short-term measure, supported by the industry and unions to address a recent Federal Court decision. The declaration seeks to maintain the long standing status quo until such a time as the Government brings forward broader reform to the scheme.

The Seacare scheme is unlike state and territory workers compensation schemes in that it is industry-specific. It covers a small number of employers in a defined part of the maritime industry, compared to state and territory workers compensation schemes that cover most employers operating within the states and territories across a large number of industries and occupations.

Workers compensation schemes across Australia vary substantially, making it difficult to assess whether an individual would be better off in

one scheme or another. To determine if an injured seafarer would be better off under the Seacare scheme compared to a state or territory scheme, a number of factors need to be considered including the injured seafarer's:

- wages
- level of impairment
- subjective preferences for weekly compensation payments or a lump sum payment
- access to common law damages
- ability to return to work.

For example, when comparing the Seacare scheme to Western Australia's workers compensation scheme, as was done by the Maritime Union of Australia in its submission to the Senate Education and Employment Legislation Committee Inquiry into the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015. It could be said that in some respects the Seacare scheme is more generous as:

- the Seacare scheme provides weekly compensation until an injured employee fully returns to work or reaches 65 years of age, while Western Australia's scheme caps weekly compensation payments at a total monetary value (currently \$212,980.00)
- the Seacare scheme has no monetary limit on the amount of compensation for medical expenses; while Western Australia's scheme has an initial cap of \$63,894, with the potential for an additional \$50,000 where this amount is insufficient and a further \$250,000 in exceptional circumstances.

Focusing narrowly on monetary elements of workers compensation also does not provide the complete picture of the benefits available for injured workers. The best outcome for an injured worker is a swift and durable return to work, not an extended period relying on workers compensation benefits. Claim disputation and resolution rates are also a major factor in a swift return to work.

Injured employees under Western Australia's workers compensation scheme, for example, have much better rehabilitation and return to work prospects than under the Seacare scheme. The Seacare scheme's return to work rate (59 per cent in 2012-13) is substantially below both Western Australia's scheme (75 per cent) and the national average (77 per cent). The Seacare scheme's disputation rate is much higher (18.6 per cent in 2012-13) than Western Australia's scheme (2.5 per cent) and disputes generally take longer to resolve. The poorer rehabilitation and return to work performance of the Seacare scheme highlights that it would be unwise to consider an ad hoc substantial expansion of the scheme.

The comparison between Western Australia's workers compensation scheme and the Seacare scheme is broadly indicative of all comparisons between state and territory schemes in that all schemes present different advantages and disadvantages compared to others.

All seafarers will continue to have access to workers compensation following the Declaration. The effect of the Declaration is that certain seafarers will have access to workers compensation under a state workers compensation scheme rather than the Commonwealth's Seacare scheme. If the Committee is of the view that workers compensation benefits under a state workers compensation scheme insufficiently promote the right to social security, then it is ultimately a matter for the relevant state government to ensure that those rights are better promoted.

To the extent to which the human right to social security is in any way impacted, it is proportionate and appropriate in that the Declaration ensures continued workers compensation coverage of all workers, protects the viability of the Seacare scheme Safety Net Fund and maritime industry employers and provides the opportunity for detailed consideration of reforms to the Seacare scheme that will produce a scheme that better supports the rights to social security and safe, healthy working conditions for Seafarers.

During recent consultations with interested parties in the maritime industry, one party raised an issue about how the Declarations affect a 'legacy' class of ships i.e. vessels that were immediately before the repeal of the *Navigation Act 1912*, covered by a declaration in force under ss 8A(2) or 8AA(2) of that Act. This issue had not been identified in consultations during the development of the Declarations. In order to address this issue, I will be remaking the Declarations to ensure this legacy class of ships is not affected.⁶

Committee response

2.17 The committee thanks the Minister for Employment for his response. The committee notes the difficulty in comparing the federal and state workers compensation schemes and that there are both benefits to, and disadvantages with, the state and territory schemes. As there are both benefits and disadvantages with the state compensation schemes it is difficult for the committee to assess that the measure does not limit the right to social security, however, the committee considers that the minister's response has demonstrated that there are safeguards in place to ensure any such limitation may be proportionate to the legitimate objective sought to be achieved. The committee also notes that the regulation was time-limited, as it was due to sunset clause two years after the date on which it took effect.

6 See Appendix 2, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 30 June 2015) 1-2.

2.18 Accordingly, the committee considers that the measure may be compatible with the right to social security and has concluded its examination of this matter.

The Hon Philip Ruddock MP

Chair

Appendix 1

Correspondence



**SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA**

The Hon. Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
SI.111
Parliament House
CANBERRA ACT 2600

30 JUN 2015

Dear Mr Ruddock *Philip*

This letter is in response to your letter of 13 May 2015 concerning the human rights implications of the Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015.

This Declaration is a short-term measure, supported by the industry and unions, to address a recent Federal Court decision. The declaration seeks to maintain the long standing status quo until such a time as the Government brings forward broader reform to the scheme.

The Seacare scheme is unlike state and territory workers compensation schemes in that it is industry-specific. It covers a small number of employers in a defined part of the maritime industry, compared to state and territory workers compensation schemes that cover most employers operating within the states and territories across a large number of industries and occupations.

Workers compensation schemes across Australia vary substantially, making it difficult to assess whether an individual would be better off in one scheme or another. To determine if an injured seafarer would be better off under the Seacare scheme compared to a state or territory scheme, a number of factors need to be considered including the injured seafarer's:

- wages
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For example, when comparing the Seacare scheme to Western Australia's workers compensation scheme, as was done by the Maritime Union of Australia in its submission to the Senate Education and Employment Legislation Committee Inquiry into the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015, it could be said that in some respects the Seacare scheme is more generous as:

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Focusing narrowly on monetary elements of workers compensation also does not provide the complete picture of the benefits available for injured workers. The best outcome for an injured worker is a swift and durable return to work, not an extended period relying on workers compensation benefits. Claim disputation and resolution rates are also a major factor in a swift return to work.

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The comparison between Western Australia's workers compensation scheme and the Seacare scheme is broadly indicative of all comparisons between state and territory schemes in that all schemes present different advantages and disadvantages compared to others.

All seafarers will continue to have access to workers compensation following the Declaration. The effect of the Declaration is that certain seafarers will have access to workers compensation under a state workers compensation scheme rather than the Commonwealth's Seacare scheme. If the Committee is of the view that workers compensation benefits under a state workers compensation scheme insufficiently promote the right to social security, then it is ultimately a matter for the relevant state government to ensure that those rights are better promoted.

To the extent to which the human right to social security is in any way impacted, it is proportionate and appropriate in that the Declaration ensures continued workers compensation coverage of all workers, protects the viability of the Seacare scheme Safety Net Fund and maritime industry employers and provides the opportunity for detailed consideration of reforms to the Seacare scheme that will produce a scheme that better supports the rights to social security and safe, healthy working conditions for seafarers.

During recent consultations with interested parties in the maritime industry, one party raised an issue about how the Declarations affect a 'legacy' class of ships i.e. vessels that were, immediately before the repeal of the *Navigation Act 1912*, covered by a declaration in force under ss 8A(2) or 8AA(2) of that Act. This issue had not been identified in consultations during the development of the Declarations. In order to address this issue, I will be remaking the Declarations to ensure this legacy class of ships is not affected.

Yours sincerely

ERIC ABETZ

Appendix 2

Guidance Note 1 and Guidance Note 2

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.¹ For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. 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. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.²

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

¹ Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

² For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department.³

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

³ The Attorney-General's Department guidance may be found at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role>

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).¹

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.²

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.³ However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

¹ For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

² The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

³ See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).⁴ Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

⁴ See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, [522]* (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.⁵

Civil penalty provisions

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

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

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

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.⁶ This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; **and**
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

⁵ This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

⁶ The UN Human Rights Committee, while not providing further guidance, has determined that civil penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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