

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

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

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

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

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

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.**

