Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Twenty-ninth report of the 44th Parliament

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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 14 to 17 September 2015, legislative instruments received from 28 August to 17 September 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 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):

- Aviation Transport Security Amendment (Cargo) Bill 2015;
- Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015;
- Customs Amendment (Fees and Charges) Bill 2015;
- Customs Depot Licensing Charges Amendment Bill 2015;
- Customs Tariff Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015;
- Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015;

- Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015;
- Environment Protection and Biodiversity Conservation Amendment (Prohibition of Live Imports of Primates for Research) Bill 2015;
- Food Standards Australia New Zealand Amendment (Forum on Food Regulation and Other Measures) Bill 2015;
- Import Processing Charges Amendment Bill 2015; and
- Tax Laws Amendment (Combating Multinational Tax Avoidance) 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):

- Education Legislation Amendment (Overseas Debt Recovery) Bill 2015;
- Student Loans (Overseas Debtors Repayment Levy) Bill 2015;
- Fair Work Amendment (Gender Pay Gap) Bill 2015;
- Migration Amendment (Charging for a Migration Outcome) Bill 2015;
- Social Services Legislation Amendment (Cost of Living Concession) Bill 2015;
- Social Services Legislation Amendment (Low Income Supplement) Bill 2015;
- Social Services Legislation Amendment (More Generous Means Testing for Youth Payments) Bill 2015;
- Superannuation Legislation Amendment (Trustee Governance) Bill 2015; and
- Trade Marks Amendment (Iconic Symbols of National Identity) 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.

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.

Deferred bills and instruments

1.11 The committee has deferred its consideration of the following bill and instruments:

- Migration and Maritime Powers Amendment Bill (No. 1) 2015;
- Fair Work (State Declarations — employer not to be national system employer) Endorsement 2015 (No. 1) [F2015L01420]; and
- Radiocommunications (27 MHz Handphone Stations) Class Licence 2015 [F2015L01441].

1.12 The committee continues to defer its consideration of the Marriage Legislation Amendment Bill 2015 (deferred 8 September 2015) and the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).

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

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).

Response required

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

Australian Immunisation Register Bill 2015

Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015

Portfolio: Health
Introduced: House of Representatives, 10 August 2015

Purpose

1.15 The Australian Immunisation Register Bill 2015 (the bill) creates a new legislative framework for the operation of Australian immunisation registers, and repeals existing registers established under the *Health Insurance Act 1973* and the *National Health Act 1953*.

1.16 The Australian Immunisation Register (Consequential and Transitional Provisions) Bill 2015 provides for the consequential and transitional provisions required to support the operation of the *Australian Immunisation Register Act 2015*.

1.17 Together these bills provide for the expansion of immunisation registers in two stages:

- From 1 January 2016 the Australian Childhood Immunisation Register (ACIR) will be expanded, so as to collect and record all vaccinations given to young people under the age of 20 years (currently only vaccinations given to children aged under seven years are collected and recorded); and
- From late 2016 the register will be renamed the Australian Immunisation Register (AIR) and will collect and record all vaccinations given to every person in Australia from birth to death.

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

Use and disclosure of personal information from the Australian Immunisation Register

1.19 Under the bills, from late 2016 all persons in Australia enrolled in medicare and, if not eligible for medicare, anyone vaccinated in Australia, will be automatically registered on the AIR. This will include the vast majority of people in Australia, including those that choose not to receive vaccinations. The AIR can include significant personal information.[1]

1 This includes contact details, medicare number, vaccination status, general practitioner information regarding non-vaccination status and other information relevant to vaccinations.

1.20 The committee considers that the use and disclosure of personal information engages and limits the right to privacy.

Right to privacy

1.21 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. The right to privacy 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.

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

Compatibility of the measure with the right to privacy

1.23 The statement of compatibility for the bill acknowledges that the bill engages the right to privacy but states:

> The authorisations of used [sic] and disclosure of personal information are reasonable, appropriate and necessary for the objectives and purposes of the Bill and adequately describes persons who are requiring access to the immunisation Register to achieve the objectives of the Register. The provisions in the Bill also provide individuals with freedom to access their own personal information. The limiting provisions surrounding the access of personal information are well described. The limitations for purposes for which the information can be disclosed are a reasonable and proportionate use of individual's personal information.[2]

1.24 The committee notes that while the statement of compatibility does not explicitly set out the objectives of the bill, the objectives of the bill appear to include facilitating the establishment of records of vaccinations which will assist with information about vaccination coverage; monitoring the effectiveness of vaccinations; identifying areas of Australia at risk during disease outbreaks; and promoting health and well-being.[3] The committee considers that these objectives are likely to be considered legitimate objectives for the purposes of international human rights law, and the inclusion of information on the AIR is likely to be rationally connected to these objectives.

1.25 However, it is unclear whether all of the powers enabling the use, recording and disclosure of information are proportionate to achieving those objectives. In

2 Explanatory memorandum (EM), Statement of Compatibility (SoC) 6.

3 See clause 10 of the Australian Immunisation Register Bill 2015.

particular, the committee is concerned about the ability of the minister (or his or her delegate) to authorise a person to use or disclose protected personal information for a purpose that the minister (or delegate) is satisfied is in the public interest. This power is in addition to the other powers under subclause 22(2), which provides detailed authorisation for the use and disclosure of protected information to specified persons or bodies and for specified purposes.

1.26 The statement of compatibility does not explain why it is necessary to include this broadly defined power. Rather, it states:

> The Minister (or his or her delegate) may also disclose personal information if they are satisfied that it is in the public interest to do so. An example is where a child protection agency requests information when investigating the welfare of a child. Section 23 of the Bill creates an offence for making a record, using or disclosing personal information where not authorised. In the 2014-2015 financial year, more than 18,000 authorisations occurred for this purpose.[4]

1.27 Under international human rights law, when considering whether a limitation on a right is proportionate to achieve the stated objective it is necessary to consider whether there are other less restrictive ways to achieve the same aim. It is not clear why it is necessary to have such a broad power to enable disclosure to any person if it is considered to be 'in the public interest', in addition to the already expansive powers to authorise the use or disclosure of information under subclause 22(3) of the bill. If the intention is to allow child protection agencies to access the information, the provision could have been drafted more narrowly. The committee also notes that the statement of compatibility says that in one year, 18 000 authorisations for disclosure were made under the existing legislation. It would assist the committee to understand more about what type of authorisations these were, to whom and for what purpose.

1.28 It is also of note that the explanatory memorandum refers to disclosure being limited to 'a specified person or to a specified class of persons',[5] however, clause 22(3) is not limited in this way but allows the minister to authorise 'a person' to use or disclose protected information.

1.29 **The committee's assessment of the measure authorising the use or disclosure of protected information against article 17 of the International Covenant on Civil and Political Rights (right to privacy) raises questions as to whether the measure adopts the least rights restrictive approach.**

1.30 **As set out above, the measure authorising the use or disclosure of protected information engages and limits the right to privacy. The statement of compatibility does not sufficiently justify that limitation for the purposes of**

4 EM, SoC 6.

5 EM 15.

international human rights law. The committee therefore seeks the advice of the Minister for Health as to whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the measure is sufficiently circumscribed to ensure it operates in the least rights restrictive manner.

Reversal of the burden of proof

1.31 Clause 23 of the bill makes it an offence for a person to make a record of, disclose or otherwise use protected information if that record, use or disclosure is not authorised by the bill. Clauses 24 to 27 provide a number of exceptions to this offence, including if the use is in good faith, the person is unaware that information is commercial-in-confidence, that the disclosure was to the person to whom the information relates or to the person who provided the information. These exceptions reverse the burden of proof, requiring the defendant to bear an evidential burden if relying on these defences.

1.32 The committee considers that the reversal of the burden of proof engages and limits the right to a fair trial (presumption of innocence).

Right to a fair trial (presumption of innocence)

1.33 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. 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.

1.34 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.

1.35 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.

Compatibility of the measure with the right to a fair trial

1.36 The statement of compatibility for the bill does not acknowledge that the right to a fair trial is engaged by these measures. The explanatory memorandum to the bill also provides no justification for these measures.

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

1.38 **The committee's assessment of the reversal of the burden of proof against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial) raises questions as to whether the measure is justifiable.**

1.39 **As set out above, the reversal of the burden of proof engages and limits the right to a fair trial. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Health 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.**

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.

Health Legislation Amendment (eHealth) Bill 2015

Portfolio: Health
Introduced: House of Representatives, 17 September 2015

Purpose

1.40 The Health Legislation Amendment (eHealth) Bill 2015 (the bill) seeks to amend the law relating to the personally controlled electronic health record system (PCEHR). The PCEHR (to be renamed 'My Health Record') provides an electronic summary of an individual's health records. Currently, under legislation governing the PCEHR, an individual's sensitive health records are only uploaded on to the register if the individual expressly consents (or 'opts-in').

1.41 The bill will enable opt-out trials to be undertaken in defined locations, whereby an individual's health records will be automatically uploaded onto the My Health Record system unless that individual takes steps to request that their information not be uploaded. The bill would allow the opt-out process to apply nationwide following a trial.

1.42 The bill seeks to simplify the privacy framework by revising the way that permissions to collect, use and disclose information are presented, and will include new permissions to reflect how entities engage with one another. The bill also seeks to introduce new criminal and civil penalties for breaches of privacy; provide that enforceable undertakings and injunctions are available; and extend mandatory data breach notification requirements.

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

Automatic inclusion of health records on the My Health Record system: 'opt-out' process

1.44 As set out above, the bill seeks to remove the requirement for the express consent of an individual before their personal health records are uploaded onto the PCEHR. Rather, an individual will need to expressly advise that they do not wish to participate (to 'opt-out').

1.45 The committee considers that the bill, in enabling the uploading of everyone's personal health records onto a government database without their consent, engages and limits the right to privacy.

Right to privacy

1.46 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. The right to privacy 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.

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

Compatibility of the measure with the right to privacy

1.48 The statement of compatibility acknowledges that the bill limits the right to privacy, however, it concludes that the limitation on the right to privacy is reasonable, necessary and proportionate. It explains the overall objective of the My Health Record system:

> The objective of the system is to address the fragmentation of information across the Australian health system and provide healthcare providers the information they need to inform effective treatment decisions.[1]

1.49 The statement of compatibility also explains that the bill responds to recommendations made from a review of the PCEHR system and addresses issues identified in the early years of operating the system.[2] It explains that the opt-out model is intended to drive the use of My Health Records by healthcare providers as part of normal healthcare in Australia:

> Increased participation by individuals is anticipated to drive increased and meaningful use by healthcare providers. Combined with other measures to improve the usability of the system and the clinical content of My Health Records, if nearly all individuals have a My Health Record, healthcare providers will be more likely to commit to using and contributing to the My Health Record system, thereby increasing the utility of the system by increasing the amount of clinically valuable information.[3]

1.50 The committee notes that the overall objective of the My Health Record system, in seeking to provide healthcare providers with the necessary information to inform effective treatment decisions, is likely to be considered a legitimate objective for the purposes of international human rights law. However, it is questionable whether the objective behind the bill, in amending the system to an opt-out model, would be considered a legitimate objective for the purposes of international human rights law. 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. Increasing the number of people using the My Health Record system, in an attempt to drive increased use by healthcare providers, may be regarded as a desirable or convenient outcome but

1 Explanatory Memorandum (EM), Statement of Compatibility (SoC) 28.

2 EM, SoC 28.

3 EM, SoC 31-32.

may not be addressing an area of public or social concern that is pressing and substantial enough to warrant limiting the right.

1.51 Even if the opt-out model, and the corresponding limitation on the right to privacy, is considered to be seeking to achieve a legitimate objective, it must also be demonstrated that the limitation is proportionate to the objective being sought.

1.52 The statement of compatibility sets out a number of safeguards in place for the use and disclosure of healthcare information held on the database, noting:

> Individuals who have a My Health Record can control who can access their information and what information can be accessed, and can elect to be notified when someone accesses their My Health Record. Individuals can set the access controls on their My Health Record online or over the phone. They can limit which healthcare providers can access their My Health Record…They can effectively remove records that have been uploaded…Once they have a My Health Record an individual can cancel their registration.[4]

1.53 The committee accepts that the safeguards contained in the My Health Record system, as a whole, are likely to mean that the limitation on the right to privacy, for those who actively register for a My Health Record and choose to have their private health records uploaded to the database, is likely to be proportionate to the overall objective of maintaining the My Health Record system.

1.54 However, the statement of compatibility gives little information about the proportionality of the proposed opt-out process. It explains that the opt-out process will be initially trialled in specific locations, meaning 'My Health Records will be created for people living in specified locations unless they say they do not want one'.[5] Little detail is given as to how people in these specified locations will be notified that their personal health information will be automatically uploaded on a national register unless they take active steps to opt out.[6]

1.55 Further information is provided in the explanatory memorandum (EM) to the bill as to how the opt-out arrangements might work in practice. It states:

> In any opt-out arrangements, it is intended that healthcare recipients would be given a reasonable amount of notice before opt-out is implemented so they could learn about the My Health Record system, and would be given a reasonable amount of time to decide whether or not to opt-out. Various methods would be made available to healthcare recipients to opt-out, for example, online, in person or by phone.[7]

4 EM, SoC 31.

5 EM, SoC 31.

6 EM, SoC 31.

7 EM 92.

1.56 However, the bill itself does not set out any safeguards to ensure that healthcare recipients would be given reasonable notice or a reasonable amount of time to decide whether to opt-out. Rather, a person's health records would automatically be registered on the system if the System Operator 'is satisfied' that the healthcare recipient 'has been given the opportunity' not to be registered (not a 'reasonable' opportunity).[8]

1.57 When a healthcare recipient elects not to be registered they must do so in 'the approved form' and if the rules so require it, to do so 'within a period, or on the occurrence of an event' specified in the rules. There is no requirement in the bill that this period of time be within a reasonable time after an individual is notified that their personal health records are being uploaded onto the national database–nor is there any requirement in the legislation to notify individuals that their personal health records will be automatically uploaded onto the register unless they actively opt-out.

1.58 In addition, once an individual's personal details are included on the My Health Record there is no ability for the person to erase their record from the register – all they can do is ensure that the personal health information stored on the database will not be authorised for disclosure.[9]

1.59 The EM states that there will be 'various channels' available for people to opt-out, including online or as a tick-box on an application form to register newborns or immigrants with Medicare. However, these are not set out in the legislation.

1.60 The EM also states that for those without online access, with communication disabilities, or without the required identity documents, 'other channels will be available, such as phone and in person'.[10] No information is given as to how this would work in practice. There are no legislative safeguards in the bill to ensure that people will be appropriately notified.

1.61 The committee's interpretation of international human rights law is that, where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation.[11] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended at any time.

1.62 In considering whether the limitation on the right to privacy is proportionate to the stated objective it is also necessary to consider whether there are other less restrictive ways to achieve the same aim. In order to achieve the objective of having

8 See proposed clause 3 of proposed Schedule 1 to the *Personally Controlled Electronic Health Records Act 2012* as proposed to be inserted by item 106 of the bill.

9 EM 95, words underlined emphasised (words in bold in the original).

10 EM 94.

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

more people register for the My Health Record system it is not clear, on the basis of the information provided, why the current opt-in model has not succeeded. The committee notes that the Regulatory Impact Statement (RIS) attached to the EM for the bill weighed up a number of legislative options. No explicit consideration of the right to privacy is included in the RIS and there is no evidence that the option set out in the bill is in fact the least rights restrictive.

1.63 The bill also provides that once the opt-out trial has taken place the Minister for Health can, by making rules, apply the opt-out model to all healthcare recipients in Australia. In making this decision the bill provides that the minister 'may' take into account the evidence obtained in applying the opt-out model and any other matter relevant to the decision.[12] There is no requirement that the minister consider the privacy implications of this decision or whether people in the trials were given an appropriate and informed opportunity to opt-out.

1.64 **The committee's assessment of the opt-out model provided for by the bill against article 17 of the International Covenant on Civil and Political Rights (right to privacy) raises questions as to whether the opt-out model is a justifiable limitation on the right to privacy.**

1.65 **As set out above, the opt-out model 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 Health as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the opt-out model is the least rights restrictive approach and whether there are sufficient safeguards in the legislation.**

Automatic inclusion of children's health records on the My Health Record system

1.66 Currently under the *Personally Controlled Electronic Health Records Act 2012* a person under the age of 18 years is automatically assigned an 'authorised representative' who has the power to manage the child's health records.[13] The authorised representative can be any person who has parental responsibility for the

12 See proposed clause 2 of proposed Schedule 1 to the *Personally Controlled Electronic Health Records Act 2012* as proposed to be inserted by item 106 of the bill.

13 See subsection 6(1) of the *Personally Controlled Electronic Health Records Act 2012*.

child. A parent is considered to be the child's authorised representative until the child turns 18 years of age or until the child takes control of their record. A child who wishes to take control of their health record needs to satisfy the System Operator that they want to manage his or her own PCEHR and are capable of making decisions for themselves.[14]

1.67 The committee considers that automatically uploading the private health records of all children in Australia, unless their parent chooses to opt-out of the register, engages and both promotes and limits the rights of the child.

Rights of the child

1.68 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights. The rights of children include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

1.69 State parties to the CRC are required to ensure to children the enjoyment of fundamental human rights and freedoms and are required to provide for special protection for children in their laws and practices. In interpreting all rights that apply to children, the following core principles apply:

- rights are to be applied without discrimination;
- the best interests of the child are to be a primary consideration;
- there must be a focus on the child's right to life, survival and development, including their physical, mental, spiritual, moral, psychological and social development; and
- there must be respect for the child's right to express his or her views in all matters affecting them.

Compatibility of the measure with the rights of the child

1.70 The statement of compatibility for the bill recognises that the rights of the child are engaged by the bill but states:

> The existing arrangements allowing parents or other appropriate people to act on behalf of a child (section 6 of the My Health Records Act) are not affected by the Bill. … [T]he privacy of children is protected as representatives such as parents and legal guardians can set the privacy controls such as removing information or restricting access to content...

14 See subsection 6(3) of the *Personally Controlled Electronic Health Records Act 2012*.

> The My Health Records Act continues to allow a child who is capable of making decisions for themselves to take control of their My Health Record, set access controls or cancel their registration (if already registered) if they choose to do so. The Bill will enable a child who is capable of making decisions for themselves to, like other individuals, opt themselves out of registration in the My Health Record system. …
>
> [T]he Bill shifts the duty of authorised representatives for children from being required to act in the 'best interests' of an individual, to a duty to give effect to the 'will and preferences' of the individual. This change realises the principle that children with appropriate maturity have an equal right to make decisions and to have those decisions respected…[15]

1.71 As noted above at [1.50] an attempt to drive increased use by healthcare providers, may be regarded as a desirable or convenient outcome but may not address an area of public or social concern that is pressing and substantial enough to warrant limiting the rights of the child.

1.72 In addition, the committee considers that the opt-out model may not be regarded as a proportionate means of achieving that objective. As discussed above, the amendments in the bill will enable the collection of all children's personal sensitive health information to be automatically included on the My Health Record, unless their authorised representative opts-out of this process, or they can prove to the Systems Operator that they should not have an authorised representative and so can opt-out themselves. Similarly to the discussion above at paragraphs [1.48] to [1.62], this significantly limits the child's right to privacy and, in so doing, limits the rights of the child. In particular, as the UN Committee on the Rights of the Child has noted, the child has the right to the protection of their confidential health-related information:

> In order to promote the health and development of adolescents, States parties are also encouraged to respect strictly their right to privacy and confidentiality, including with respect to advice and counselling on health matters (art. 16). Health-care providers have an obligation to keep confidential medical information concerning adolescents, bearing in mind the basic principles of the Convention. Such information may only be disclosed with the consent of the adolescent, or in the same situations applying to the violation of an adult's confidentiality. Adolescents deemed mature enough to receive counselling without the presence of a parent or other person are entitled to privacy and may request confidential services, including treatment.[16]

1.73 Under the proposed opt-out arrangements in the bill a child must rely on their parent taking active steps to ensure the child's record is not automatically

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15 EM, SoC 36.

16 Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child* (2003), paragraph 11.

included on the My Health Record. As set out above at paragraphs [1.54] to [1.61] there are particular problems with the way in which the current opt-out arrangements are provided for in the bill. There is also no additional information as to how a child, who wishes to take control of their own record, is able to do so. No information is given as to what a child needs to do in order to satisfy the Systems Operator that their parent should not be considered to be their authorised representative. No information is given as to what timeframe the Systems Operator makes the decision as to whether the child is capable of managing their own affairs and whether this would occur within sufficient time to allow the child to exercise their opt-out rights.

1.74 The committee notes that the bill does impose an obligation on an authorised representative to give effect to the will and preferences of the child, unless to do so would pose a serious risk to the child's personal and social wellbeing.[17] While this is a welcome measure, there is nothing in the legislation that makes this requirement binding, as there are no consequences in the legislation if the parent does not give effect to the child's will and preferences. In addition, even if a child does manage to become responsible for their own health records, it appears that the child's parent will be notified when that occurs.[18]

1.75 **The committee's assessment of the automatic inclusion of all children's health records on the My Health Record register against the Convention on the Rights of the Child (rights of the child) raises questions as to whether the automatic inclusion of the health records of all children on the register is compatible with the rights of the child.**

1.76 **As set out above, automatic inclusion of the health records of all children on the register engages and limits the rights of the child. 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 Health as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**

17 See proposed new section 7A to the *Personally Controlled Electronic Health Records Act 2012*, item 64 of the bill.

18 See Parents FAQ, on the eHealth.gov.au website which states 'Parents or Authorised Representatives who are managing the eHealth record for a person under 18 years old will be notified when the person has taken control of their own eHealth record': see http://www.ehealth.gov.au/internet/ehealth/publishing.nsf/Content/faqs-individuals-parents (accessed 23 September 2015).

- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the opt-out model is the least rights restrictive approach and whether there are sufficient safeguards in the legislation to protect the rights of the child.**

Automatic inclusion of the health records of persons with disabilities on the My Health Record system

1.77 Currently under the *Personally Controlled Electronic Health Records Act 2012* (the PCEHR Act) a healthcare recipient can apply to the System Operator to register for the PCEHR, thereby opting-in to have their health care records included on the register. A person with disabilities can do so on an equal basis with other healthcare recipients. However, where the Systems Operator of the PCEHR is satisfied that a person aged over 18 years is not capable of making decisions for him or herself, another person will be considered to be the authorised representative of that person, and only that person will be able to manage the person's health records.[19]

1.78 The committee considers that automatically uploading the private health records of all persons with disabilities in Australia, unless they or an authorised representative choose to opt-out of the register, engages and limits the rights of persons with disabilities.

Rights of persons with disabilities

1.79 The Convention on the Rights of Persons with Disabilities (CRPD) sets out the specific rights owed to persons with disabilities. It describes 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, and to participate fully in society.

1.80 Article 4 of the CRPD states that in developing and implementing legislation and policies that concern issues relating to persons with disabilities, states must closely consult with and actively involve persons with disabilities, through their representative organisations.

1.81 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

1.82 Article 12 of the CRPD requires state parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to exercise their legal capacity.

1.83 Article 22 requires state parties to protect the privacy of the personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

19 See subsection 6(4) of the *Personally Controlled Electronic Health Records Act 2012*.

Compatibility of the measure with the rights of persons with disabilities

1.84 The statement of compatibility for the bill recognises that the rights of persons with disabilities are engaged by the bill, but states:

> Consistent with Article 12, people with a disability are provided equal opportunity to participate in the My Health Record system and make decisions about access to their personal information. Continuing current arrangements, authorised representatives can support people to interact with the My Health Record system and act on behalf of the individual if they are unable to act for themselves. These arrangements allow for people with a disability to participate in the My Health Record system, control access to their personal information and withdraw participation in the My Health Record system if they choose to do so. This functionality also supports Article 22 of the CRPD protecting the privacy of people with a disability.
>
> The Bill shifts the duty of authorised representatives from being required to act in the 'best interests' of an individual, to a duty to give effect to the 'will and preferences' of the individual. This change realises the principle that people with disability have an equal right to make decisions and to have those decisions respected…[20]

1.85 As noted above at [1.50], an attempt to drive increased use by healthcare providers, may be regarded as a desirable or convenient outcome but may not address an area of public or social concern that is pressing and substantial enough to warrant limiting the rights of persons with disabilities.

1.86 In addition, the committee considers that the opt-out model may not be regarded as a proportionate means of achieving that objective. As discussed above, the amendments in the bill will enable the collection of the personal sensitive health information of all persons with disabilities to be automatically included on the My Health Record register, unless they or their authorised representative opts-out of this process. Similar to the discussion above at paragraphs [1.48] to [1.62], this significantly limits the right to privacy of persons with disabilities. The processes proposed by the bill also do not appear to provide persons with disabilities the support necessary to enable them to exercise their legal capacity.

1.87 In particular, the current law provides that whenever the Systems Operator is satisfied that a healthcare recipient 'is not capable of making decisions for himself or herself' the Systems Operator will deem whomever they are satisfied is an appropriate person to be the healthcare recipient's authorised representative. Once an authorised representative is stated by the Systems Operator to be acting for a healthcare recipient, that authorised representative is authorised to do anything the

20 EM, SoC 35.

healthcare recipient can do and the healthcare recipient is not entitled to have any role in managing their health records.[21]

1.88 However, article 12 of the CRPD affirms that all persons with disabilities have full legal capacity. While support should be given where necessary to assist a person with disabilities to exercise their legal capacity, it cannot operate to deny the person legal capacity by substituting another person to make decisions on their behalf. The UN Committee on the Rights of Persons with Disabilities has considered the basis on which a person is often denied legal capacity, which includes where a person's decision-making skills are considered to be deficient (known as the functional approach). It has described this approach as flawed:

> The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.[22]

1.89 The current PCEHR Act, by denying a person the right to manage any of their health records as soon as the Systems Operator makes an assessment that the person lacks the capacity to make decisions for him or herself, removes the person's right to legal capacity.

1.90 The amendments in the bill, in requiring an authorised representative to make reasonable efforts to ascertain the healthcare recipient's will and preferences in relation to their My Health Record,[23] are important in respecting the rights of persons with disabilities. However, the design of the current legislation is such that the authorised representative would always be exercising substitute decision-making, rather than supported decision-making.[24] In addition, while the bill imposes an obligation on an authorised representative to give effect to the will and

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21 See subsection 6(7) of the *Personally Controlled Electronic Health Records Act 2012*.

22 UN Committee on the Rights of Persons with Disabilities, *General comment No. 1: Article 12: Equal recognition before the law* (2014), paragraph 15.

23 See proposed new section 7A to the *Personally Controlled Electronic Health Records Act 2012*, item 64 of the bill.

24 See subsection 6(7) of the *Personally Controlled Electronic Health Records Act 2012*.

preferences of the healthcare recipient, there is nothing in the legislation that makes this requirement binding, as there are no consequences in the legislation if the authorised representative does not give effect to the person's will and preferences. The statement of compatibility states that a failure of the representative to meet these duties 'may result in their appointment being suspended or cancelled, or access to the individual's My Health Record being blocked under the My Health Records Rules'.[25] However, it is not clear how this would work in practice.

1.91 The use of substitute decision-making through the authorised representative process in the bill is of particular concern from an international human rights law perspective. As the UN Committee on the Rights of Persons with Disabilities has explained:

> Substitute decision-making regimes, in addition to being incompatible with article 12 of the Convention, also potentially violate the right to privacy of persons with disabilities, as substitute decision-makers usually gain access to a wide range of personal and other information regarding the person. In establishing supported decision-making systems, States parties must ensure that those providing support in the exercise of legal capacity fully respect the right to privacy of persons with disabilities.[26]

1.92 The Australian Law Reform Commission (ALRC) has identified a number of Commonwealth laws that are not fully compliant with article 12 of the CRPD and has made recommendations to bring legislation into line with international law. The recommendations could relevantly inform the drafting of the bill in a matter consistent with international law.[27]

1.93 In addition, there is no information as to how persons with disabilities will be notified appropriately about their right to opt-out of the scheme. As the UN Committee on the Rights of Persons with Disabilities has noted:

> Lack of accessibility to information and communication and inaccessible services may constitute barriers to the realization of legal capacity for some persons with disabilities, in practice. Therefore, States parties must make all procedures for the exercise of legal capacity, and all information and communication pertaining to it, fully accessible. States parties must review their laws and practices to ensure that the right to legal capacity and accessibility are being realized.[28]

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25 EM, SoC 35.

26 UN Committee on the Rights of Persons with Disabilities, *General comment No. 1: Article 12: Equal recognition before the law* (2014), paragraph 47.

27 ARLC, *Equality, Capacity and Disability in Commonwealth Laws* (*ALRC Report 124*), 24 November 2014, see in particular Recommendations 4-1 to 4-12, available from https://www.alrc.gov.au/publications/equality-capacity-disability-report-124.

28 UN Committee on the Rights of Persons with Disabilities, *General comment No. 1: Article 12: Equal recognition before the law (2014)*, paragraph 37.

1.94 **The committee's assessment of the automatic inclusion of the health records of all persons with disabilities on the My Health Record register against the Convention on the Rights of Persons with Disabilities (rights of persons with disabilities) raises questions as to whether the automatic inclusion of the health records of all persons with disabilities on the register is compatible with the rights of persons with disabilities.**

1.95 **As set out above, automatic inclusion of the health records of all persons with disabilities on the register engages and limits the rights of persons with disabilities. 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 Health as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether the opt-out model is the least rights restrictive approach and whether there are sufficient safeguards in the legislation to protect the rights of persons with disabilities.**

Civil penalty provisions

1.96 The bill introduces a number of new civil penalty provisions to apply when a person improperly uses or discloses personal information from the My Health Record system or fails to give up-to-date and complete information for the register.

1.97 For example, proposed new section 26 makes it an offence to, unless authorised, use or disclose identifying information from the My Health Records system. The penalty for the criminal offence is two years imprisonment or 120 penalty units (or both). Proposed new subsection 26(6) also applies a civil penalty to the same conduct, on the basis of recklessness, with an applicable civil penalty of 600 penalty units.

1.98 The committee considers that this measure engages and may limit the right to a fair trial as the civil penalty provisions may be considered to be criminal in nature under international human rights law and may not be consistent with criminal process guarantees.

Right to a fair trial and fair hearing rights

1.99 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses

notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

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

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

1.101 Under international human rights law civil penalty provisions may be regarded as 'criminal' if they satisfy certain criteria. 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. If so, such provisions would engage the criminal process rights under articles 14 and 15 of the ICCPR.

1.102 There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be considered 'criminal' for the purposes of human rights law. The committee's Guidance Note 2 sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.[29]

1.103 The statement of compatibility states that the civil penalty provisions in the bill should not be classified as criminal under human rights law:

> Under the civil penalty provisions, proceedings are instituted by a public authority with statutory powers of enforcement in a court. A finding of culpability precedes the imposition of a penalty. This might make the penalties appear "criminal" however this is not determinative. While the provisions are deterrent in nature, these penalties generally do not apply to the public at large. Only a specific group of users, being healthcare providers and other participants in the My Health Record system with access to sensitive information will generally be impacted by these penalties. Further, the severity of the penalties is not too high, with the highest pecuniary penalty that can be imposed being only 600 units. This penalty is justified as the My Health Record system deals with privacy sensitive information and the misuse of this information needs to have proportionate penalties to the potential damage to healthcare recipients. In light of this analysis, the nature and application of the civil penalty provisions suggest that they should not be classed as criminal under human rights law.[30]

29 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 2 –Offence provisions, civil penalties and human rights* (December 2014); http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

30 EM, SoC 34.

1.104 The committee considers that a penalty of up to 600 penalty units is a substantial penalty that could result in an individual being fined up to $108 000.[31] This is in a context where the individual made subject to the penalty may be a healthcare provider, such as a nurse, or an administrator working for a healthcare provider. The maximum civil penalty is also substantially more than the financial penalty available under the criminal offence provision, which is restricted to a maximum of 120 penalty units (or $21 600).

1.105 When assessing the severity of a pecuniary penalty the committee has regard to the amount of the penalty, the nature of the industry or sector being regulated and the maximum amount of the civil penalty that may be imposed relative to the penalty that may be imposed for a corresponding criminal offence. Having regard to these matters the committee considers that the civil penalty provisions imposing a maximum of 600 penalty units may be considered to be 'criminal' for the purposes of international human rights law.

1.106 The consequence of this is that the civil penalty provisions in the bill must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. However, civil penalty provisions are dealt with under the civil law in Australia and a civil penalty order can be imposed on the civil standard of proof – the balance of probabilities.

1.107 In addition, the committee notes that proposed new section 31C of the bill provides that each civil penalty provision under the bill is enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014*. This Act provides that criminal proceedings may be commenced against a person for the same, or substantially the same, conduct, even if a civil penalty order has already been made against the person.[32] If the civil penalty provision is considered criminal in nature, this raises concerns under article 14(7) of the ICCPR which provides that no one is to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted (double jeopardy).

1.108 The committee also notes that the civil penalty and offence provisions in the bill also allow for a reversal of the burden of proof, requiring the defendant to bear an evidential burden in relation to the defences in the bill. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Neither the statement of compatibility nor the EM justifies the need for the reversal of the burden of proof.

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31 The current penalty unit rate is $180 per unit, see section 4AA of the *Crimes Act 1914*.

32 See section 90 (in Division 3 of Part 4) of the *Regulatory Powers (Standard Provisions) Act 2014*.

1.109 The statement of compatibility states that the objective of the penalty regime is to protect the private sensitive information held on the My Health Record system 'and the misuse of this information needs to have proportionate penalties to the potential damage to healthcare recipients'.[33] The committee considers that the protection of private sensitive information is a legitimate objective for the purposes of international human rights law. However, the objective behind including civil penalties of up to 600 penalty units (substantially more than the penalty available under the criminal offence provision) without the usual protections available to those charged with a criminal offence, and the reversal of the burden of proof, has not been explained in the statement of compatibility.

1.110 The statement of compatibility also does not explain how the civil penalty provisions, which are likely to be considered 'criminal' for the purposes of international human rights law, are proportionate to their objective. 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. 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.

1.111 **The committee's assessment of the civil penalty provisions in the bill against article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing) raises questions as to whether the provisions are criminal for the purposes of international human rights law and, if so, whether any limitation on the right to a fair hearing is justifiable.**

1.112 **As set out above, the civil penalty provisions engage and may limit the right to a fair hearing. 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 Health as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

33 EM, SoC 34.

Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015

Portfolio: Employment
Introduced: House of Representatives, 10 September 2015

Purpose

1.113 The Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 (the bill) seeks to amend the *Social Security (Administration) Act 1999* (SSA Act) to:

- withhold a job seeker's social security payment where a job seeker refuses to enter into an Employment Pathway Plan without a reasonable excuse for doing so, and impose an additional penalty to be deducted from the eventual payment;
- withhold a job seeker's social security payment where a job seeker acts in an inappropriate manner during an appointment such that the purpose of the appointment is not achieved without a reasonable excuse for doing so, and impose an additional penalty to be deducted from the eventual payment;
- amend the instalment period from which penalties are deducted in relation to job seekers' failure to participate in a specified activity (e.g. work for the dole) to effect a more immediate penalty;
- withhold a job seeker's social security payment where job search efforts have been inadequate (with possibility of receiving full back pay once adequate job search efforts can be proven to have resumed); and
- remove the ability of a job seeker who has failed to accept an offer of suitable employment without a reasonable excuse to apply to have the eight-week penalty period waived in lieu of undertaking additional activities.

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

Suspension of benefits for inappropriate behaviour

1.115 Item 18 of the bill would amend the SSA Act to provide that a penalty may be deducted from a job seeker's social security payment where a job seeker acts in an inappropriate manner, without a reasonable excuse, during an appointment such that the purpose of the appointment is not achieved.

1.116 This measure may result in individuals losing social security payments and accordingly engages and limits the right to social security and the right to an adequate standard of living.

Right to social security

1.117 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the

importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

1.118 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).

1.119 Under article 2(1) of the 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.

1.120 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.

Right to an adequate standard of living

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

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

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

1.123 The statement of compatibility acknowledges that the measure engages these rights. The statement of compatibility explains the legitimate objective of the measure as:

> …discouraging job seekers from deliberately resisting assistance provided to them to identify and find work.[1]

1.124 A legitimate objective must address a substantial and pressing concern and be based on empirical research or reasoning. No evidence is provided as to the extent to which individuals on social security are frustrating job search activities by inappropriate behaviour during appointments. On its face, the measure pursues an objective that appears to be desirable and convenient. Accordingly, it is questionable as to whether the measure pursues a legitimate objective for the purposes of international human rights law.

1.125 To the extent that the measure does pursue a legitimate objective, the measure is rationally connected to that objective as penalties for inappropriate behaviour may encourage better behaviour during appointments.

1.126 In terms of proportionality, the statement of compatibility states that:

> The measure is proportionate as protection would be added to the compliance framework to ensure that a job seeker's behaviour can be assessed in a fair and reasonable manner.[2]

1.127 However, none of those protections are included in the bill. The committee's interpretation of international human rights law is that, where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation.[3] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended at any time.

1.128 Inappropriate behaviour is not defined in the bill and it is unclear how and on what basis a person's behaviour during an interview is inappropriate. While there may be extreme cases, where it is very clear that a person is deliberately behaving in a manner designed to frustrate an appointment, there are also likely to be many cases where a person's behaviour is not so extreme and a high degree of judgement is required to determine what is appropriate behaviour and what is inappropriate behaviour. Under this bill, such judgement is to be exercised with no statutory guidance. Moreover, many of these appointments will be with private sector service

1 Explanatory Memorandum (EM) 46.

2 EM 46.

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

providers, where the person who will make the judgement as to whether inappropriate behaviour has caused an appointment to fail is not bound by the Australian Public Service code of conduct. In the absence of statutory guidance, the bill may result in individuals losing social security benefits in circumstances which are unfair or unreasonable.

1.129 **The committee's assessment of the suspension of benefits for inappropriate behaviour against article 19 and article 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) raises questions as to whether the limitation is justifiable.**

1.130 **As set out above, the removal of the suspension of benefits for inappropriate behaviour engages and limits the right to social security and right to an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Employment as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular whether there are sufficient safeguards in the legislation.**

Removal of waivers for refusing or failing to accept a suitable job

1.131 Items 12 and 13 of the bill would make amendments to the SSA Act so that when a job seeker refuses or fails to accept an offer of suitable employment and has no reasonable excuse for the failure, a job seeker's payment would not be payable for a period of eight weeks. The current ability of the department to waive that eight week non-payment penalty would be removed by the bill.

1.132 This measure may result in individuals losing social security payments and accordingly engages and limits the right to social security and the right to an adequate standard of living.

Right to social security

1.133 The right to social security is outlined above at paragraphs [1.117] to [1.120].

Right to an adequate standard of living

1.134 The right to an adequate standard of living is outlined above at paragraphs [1.121] to [1.122].

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

1.135 The statement of compatibility explains that the measure does limit the right to social security and the right to an adequate standard of living and that such limitations are justified for the purposes of international human rights law.

1.136 The statement of compatibility states that:

> …this measure has the legitimate objective of reducing the reliance on participation payments by job seekers who have successfully shown they are capable of obtaining suitable work.[4]

1.137 A legitimate objective must address a substantial and pressing concern and be based on empirical research or reasoning. In terms of empirical research, the explanatory memorandum (EM) explains that in 2009-2010, 45% of penalties for refusing a suitable job were waived and that in 2013-14, 78% of penalties for refusing a suitable job were waived.[5]

1.138 The EM argues that the waiver provisions act as an incentive for non-compliance. However, no evidence is provided that the high waiver rates are a result of the legislation requiring the waiver to be granted rather than there being a genuine reason for the department granting the waiver in each case. On its face, the measure pursues an objective that appears to be desirable and convenient. Accordingly, it is questionable as to whether the measure pursues a legitimate objective for the purposes of international human rights law.

1.139 To the extent that the measure does pursue a legitimate objective, the measure is rationally connected to that objective as the inability for penalties to be waived may encourage some job seekers to take jobs assessed as suitable where they may currently seek a waiver on the basis of hardship.

1.140 In terms of proportionality the statement of compatibility states:

> Existing protections such as the reasonable excuse provisions and safeguards for vulnerable job seekers will still apply, and the Bill will not change the process used to make decisions as to what constitutes suitable work. A job seeker cannot be penalised for failing to accept a job that they are not capable of doing (or for which the employer will not provide training), that does not meet the applicable statutory conditions, that involves unreasonable commuting or that would aggravate any pre-existing medical conditions.[6]

1.141 However, notwithstanding these protections, as set out in the EM, there is a very high waiver rate of the eight week penalty for failure to accept a suitable job

4 EM 48.

5 EM 9.

6 EM 48.

applied by the department. No evidence is provided that these waivers are applied by the department inappropriately. If the waivers are currently applied appropriately it is foreseeable that the bill, in taking away the department's discretion to apply a waiver, may result in undue hardship. This is not addressed in the statement of compatibility.

1.142 Further, in order for a measure to impose a proportionate limitation on the right to social security and right to an adequate standard of living, the measure must be the least rights restrictive method of achieving the stated objective. Given the high waiver rates by the department, it is possible that measures could be introduced to reduce the waiver rate by tightening the circumstances in which a waiver may be granted. In removing the ability of the department to provide a waiver in any circumstance, the statement of compatibility has not demonstrated that a less rights restrictive approach of changing the grounds on which a waiver may be granted is not feasible or possible. Accordingly, the statement of compatibility has not demonstrated that the measure is proportionate for the purposes of international human rights law.

1.143 **The committee's assessment of the removal of waivers for refusing or failing to accept a suitable job against article 19 and article 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) raises questions as to whether the limitation is justifiable.**

1.144 **As set out above, the removal of waivers for refusing or failing to accept a suitable job engages and limits the right to social security and right to an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Employment as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Social Services Legislation Amendment (No Jab, No Pay) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 16 September 2015

Purpose

1.145 The Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (the bill) seeks to amend the *A New Tax System (Family Assistance) Act 1999* to provide that child care benefit, child care rebate and the Family Tax Benefit Part A supplement will only be payable where a child fully meets the immunisation requirements.

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

No exception for religious or conscientious objections

1.147 Currently the *A New Tax System (Family Assistance) Act 1999* provides that certain family assistance payments are conditional on meeting the childhood immunisation requirements for children at all ages. However, there are currently exceptions where the child's parent has declared in writing that he or she has a conscientious objection to the child being immunised. A conscientious objection is defined as follows:

> An individual has a conscientious objection to a child being immunised if the individual's objection is based on a personal, philosophical, religious or medical belief involving a conviction that vaccination under the latest edition of the standard vaccination schedule should not take place.[1]

1.148 The bill would repeal this exception meaning that certain family assistance payments would only be payable in relation to a child that has been immunised (unless there is a medical contradiction to immunisation or immunisation is unnecessary as the child has developed a natural immunity). There would no longer be an exception where the parent objected to immunisation based on their religious or personal beliefs.

1.149 The committee considers that the removal of the exemption for conscientious objectors engages and may limit the right to freedom of thought, conscience and religion.

Right to freedom of thought, conscience and religion

1.150 Article 18 of the International Covenant on Civil and Political Rights (ICCPR) protects the rights of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs. Subject to certain limitations, persons also have the right to demonstrate or manifest religious or other

1 See section 5 of the *A New Tax System (Family Assistance) Act 1999*.

beliefs, by way of worship, observance, practice and teaching. The right includes the right to have no religion or to have non-religious beliefs protected.

1.151 The right to freedom of thought, conscience and religion not only requires that the state should not, through legislative or other measures, impair a person's freedom of thought, conscience and religion, but that the state should also take steps to prevent others from coercing persons into having, or changing, beliefs or religions.

1.152 The right also requires the state to respect the convictions of parents and guardians of children in the provision of education. This allows public schools to teach particular religions or beliefs, but only if it is taught in a neutral and objective way or there is a non-discriminatory alternative for those children whose parents or guardians do not wish them to be educated in that religion or belief.

1.153 The right to hold a religious or other belief or opinion is an absolute right. However, the right to exercise one's belief can be limited given its potential impact on others. The right can be limited as long as it can be demonstrated that the limitation is reasonable and proportionate and is necessary to protect public safety, order, health or morals or the rights of others. The right to non-discrimination often intersects with the right to freedom of religion and each right must be balanced against one another.

Compatibility of the measure with the right to freedom of thought, conscience and religion

1.154 The statement of compatibility acknowledges that the right to freedom of thought, conscience and religion is engaged by this measure as families will no longer be eligible to receive certain levels of family assistance where they have a conscientious or religious belief that prevents them from immunising their children. However, it notes that article 18 of the ICCPR permits limitations on the right if necessary to protect public health or the fundamental rights and freedoms of others and states:

> The objection to vaccination can limit the rights of others to physical and mental health. As the most effective method of preventing infectious diseases, vaccination provides a necessary protection of public health.
>
> Further, these families continue to have the right to uphold their conscientious or religious belief by electing not to receive child care benefit, child care rebate or the family tax benefit Part A supplement.[2]

1.155 The statement of compatibility also states that the purpose of the bill is to 'encourage parents to immunise their children' and notes that in so doing the bill promotes the right to health as vaccination is recognised to be the most effective

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

method of preventing infectious diseases and providing protection to both the vaccinated individuals and the wider community.[3]

1.156 The committee accepts that the objective of the bill, in encouraging parents to immunise their children and thereby prevent the spread of infectious diseases is a legitimate objective for the purposes of international human rights law.

1.157 However, no information is provided in the statement of compatibility as to whether the measures in the bill are rationally connected to that objective. In other words, no information is provided to explain whether the measures would be likely to be effective in achieving the objective of encouraging vaccination. It is not clear to the committee whether these particular measures which result in certain family assistance payments being withheld would be likely to encourage persons with strongly held objections to vaccinate their child.

1.158 In addition, little information is provided in the statement of compatibility as to whether the measures are proportionate to their stated objective. In determining whether a measure is proportionate regard must be had to whether there are any less rights restrictive options available to achieve that objective. No information is given as to whether other less restrictive options, such as education campaigns or support for parents to encourage them to vaccinate their child, have been explored.

1.159 **The committee's assessment of the removal of the conscientious objector exemption against article 18 of the International Covenant on Civil and Political Rights (right to freedom of thought, conscience and religion) raises questions as to whether the limitation is justifiable.**

1.160 **As set out above, the removal of the conscientious objector exemption engages and limits the right to freedom of thought, conscience and religion. 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 the stated objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, in particular that it is the least rights restrictive approach to achieving that objective.**

3 EM, SOC 1-2.

Advice only

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

Social Services Legislation Amendment (Youth Employment) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 16 September 2015

Purpose

1.162 The Social Services Legislation Amendment (Youth Employment) Bill 2015 (the bill) seeks to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to:

- amend the ordinary waiting period for working age payments;
- remove access to Newstart Allowance and Sickness Allowance to 22 to 24 year olds and replace these benefits with access to Youth Allowance (Other);
- provide for a four-week waiting period for certain persons aged under 25 years applying for Youth Allowance (Other) or Special Benefit; and
- introduce new requirements and activities for job seekers to complete during the above four-week waiting period as part of new program 'RapidConnect Plus'.

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

Background

1.164 The bill reintroduces a number of measures previously included in the Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015 (the previous bill), which itself reintroduced measures previously contained within the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014 (the No. 4 bill). The No. 4 bill reintroduced some measures previously included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the No. 1 bill) and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 (the No. 2 bill).

1.165 The committee reported on the No. 1 bill and No. 2 bill in its *Ninth Report of the 44th Parliament*,[1] and concluded its examination of the No. 2 bill in its *Twelfth*

1 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 83.

Report of the 44th Parliament.[2] In that report, the committee requested further information from the Minister for Social Services regarding measures contained within the No. 1 bill.[3]

1.166 The committee then considered the No. 4 bill in its *Fourteenth Report of the 44th Parliament*, and in the *Seventeenth Report of the 44th Parliament* concluded its consideration of the No. 1 bill and No. 4 bill.[4]

1.167 The committee considered the previous bill in its *Twenty-fourth Report of the 44th Parliament*, and requested further information from the Minister for Social Services as to whether the bill was compatible with Australia's international human rights obligations.[5]

1.168 Noting that the previous bill had been negatived in the Senate on 9 September 2015, the committee concluded its consideration in its *Twenty-eighth Report of the 44th Parliament*.[6]

Schedule 2 – Age requirements for various Commonwealth payments

1.169 Schedule 2 of the bill would provide that 22-24 year olds are no longer eligible for Newstart Allowance (or Sickness Allowance), and are instead eligible for Youth Allowance. Existing recipients of Newstart Allowance (or Sickness Allowance) would continue to receive those payments until such time as they are no longer eligible.

1.170 The committee examined this measure in its previous analysis, and considered that increasing the age of eligibility for various Commonwealth payments engages and limits the right to equality and non-discrimination.

Right to equality and non-discrimination

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

1.172 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

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 67.

3 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 55-64.

4 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 94-95, and Parliamentary Joint Committee on Human Rights, *Seventeenth Report of the 44th Parliament* (2 December 2014) 11-13.

5 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 12-19.

6 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 51-63.

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

1.173 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[7] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[8] 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.[9]

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

1.174 The changes to the threshold for Newstart eligibility in Schedule 2 of the bill reintroduce measures contained within the No. 2 bill, the No. 4 bill and the previous bill. The statement of compatibility for the bill does not identify the measures as engaging and potentially limiting the right to equality and non-discrimination.

1.175 As discussed in previous analysis in the committee's *Ninth Report of the 44th Parliament*, *Twelfth Report of the 44th Parliament*, *Twenty-fourth Report of the 44th Parliament* and *Twenty-eighth Report of the 44th Parliament*, the measure clearly engages the right to equality and non-discrimination as by reducing access to the amount of social security entitlements for persons of a particular age, the measure directly discriminates against persons of this age group.[10]

1.176 The committee notes that it has previously commented on its expectation that where a measure that it has considered is reintroduced, previous responses to the committee's requests for further information be used to inform the statement of compatibility for the reintroduced measure. It was on the basis of the further information provided by the Minister for Social Services that the committee was previously able to conclude that the measure was compatible with the right to equality and non-discrimination. This information has again not been provided in the statement of compatibility for the new bill.

1.177 As the statement of compatibility does not identify the measure as engaging and limiting the right to equality and non-discrimination despite the minister's

7 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.

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

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

10 See Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament* (15 July 2014) 94-95; *Twelfth Report of the 44th Parliament* (24 September 2014) 78-79 (where the committee concluded that the measure was incompatible with the right to equality and non-discrimination); *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 13-15; and *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 52-55.

previous dialogue with the committee on the measure, the scrutiny dialogue between the committee and proponents of legislation is less effective.

1.178 **Accordingly, the committee reiterates its above comments and concludes its consideration of the matter on the basis of the previous additional information provided by the Minister for Social Services.**

Schedule 3 – Income support waiting periods and Schedule 4 – Other amendments

1.179 Schedule 3 of the bill would introduce a requirement that individuals under the age of 25 be subject to a four-week waiting period, as well as any other waiting periods that may apply, before social security benefits become payable.

1.180 The measure would apply to applicants seeking Youth Allowance (Other) and Special Benefit. The four-week waiting period may be reduced if a person has previously been employed, and there are a range of exemptions for parents and individuals with a disability. The new bill also has an additional exemption where a person may need to be reassessed on the basis of new or additional information being provided, leading to that person being classified as requiring a certain level of employment services or disability employment services.

1.181 The committee considered previously that the income support waiting periods engage and limit the rights to social security and an adequate standard of living.

Right to social security

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

1.183 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; and
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent; and
- affordable (where contributions are required).

1.184 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.

1.185 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.

Right to an adequate standard of living

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

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

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

1.188 The introduction of the four-week waiting period in Schedule 3 of the bill reintroduces measures contained within the No. 2 bill, the No. 4 bill and the previous bill (amended in the previous bill from a 26-week waiting period).

1.189 The committee accepted in relation to the previous bill that the measure pursues a legitimate objective and that the measure is rationally connected to that objective, but sought further information from the minister in relation to the proportionality of the measure. Of particular concern to the committee was whether the measure was the least rights restrictive approach.

1.190 The minister's response to the committee's questions regarding the previous bill provided advice that the measure specifically targets those young people who are job ready and that there are important protections for parents and those assessed as unable to work who will be exempt from the measure. However, the measure will apply to all individuals assessed as job ready (in Stream A of jobactive) and there will be no individual assessment of each job seeker's engagement with seeking work, nor an individual assessment of their ability to find jobs. The committee also noted that currently, there is a youth unemployment rate of 13.4 per cent which suggests there are more job seekers than jobs available. Evidence was not provided in the minister's response to confirm that all jobseekers will be eligible and able to immediately engage with education and immediately gain income support.

1.191 Further, the measure does not allow for an individual assessment of the individual's capacity to live without social security support for four weeks and there

is no discretion that would enable Centrelink to waive the waiting period if the individual does not meet the set exemptions. In the absence of these protections, the committee previously considered that the measure cannot be said to be the least rights restrictive means of achieving a legitimate objective and therefore does not impose a proportionate limitation on the right to social security.

1.192 In relation to the right to an adequate standard of living, the minister's further information in relation to the previous bill suggested that 46% of young people do not live at home and are thus not fully supported by their parents. The majority of these would appear to be in private rental accommodation of some sort. The committee noted that it is not clear how those young people will meet the costs of housing during the waiting period and meet other basic living costs to provide an adequate standard of living.

1.193 The committee also noted that the additional funding provided to Emergency Relief providers would not be able to ensure that all individuals affected by the measure will be able to maintain an adequate standard of living.

1.194 The committee therefore considers that the measure is not proportionate as it does not include an individual assessment for each person affected by the measure nor does it provide safeguards to ensure that no individual is left unable to meet their basic needs during the waiting period.

1.195 The committee notes that Schedule 4 of the bill also introduces new measures intended to complement the income support waiting period in Schedule 3. These measures would require certain job seekers to participate in a new programme, RapidConnect Plus, during the four-week waiting period in order to receive social security payments at the end of the waiting period. RapidConnect Plus would require job seekers who have been classified as not having significant barriers to employment to participate in a number of activities during this period, including attending interviews with jobactive providers, entering into a Job Plan and undertaking job searches. If job seekers do not complete these activities without a reasonable excuse, the waiting period may be further extended beyond the four-week period.

1.196 The committee considers that as the new measures under Schedule 4 of the bill extend the obligations required of job seekers under Schedule 3 of the bill, they potentially compound the existing limitations on the right to social security and the right to an adequate standard of living. This is especially the case as the requirements in Schedule 4 would require job seekers to undertake activities that may result in the job seeker incurring costs (such as travel and clothing) while they are receiving no social security benefits.

1.197 **The committee therefore reiterates its comments in relation to these measures in the previous bill, particularly, that its assessment of the proposed income support waiting period for young people aged under 25 against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights**

(right to social security and right to an adequate standard of living) raises questions as to whether the changes are justifiable under international human rights law.

1.198 **As set out above, the proposed income support waiting periods engage and limit the right to social security and right to an adequate standard of living under articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights. Some committee members consider that the measure has not been justified as a proportionate limitation on those rights. Accordingly, those members of the committee consider that the measure is incompatible with the right to social security and the right to an adequate standard of living.**

1.199 **Other members of the committee consider that the limitation on the right to social security and right to an adequate standard of living under articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights has been justified and further consider that incentivising young people to find work is an important policy objective.**

Right to equality and non-discrimination

1.200 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. More information is provided above at paragraphs [1.171] to [1.173].

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

1.201 The committee previously concluded that the measure (in relation to the No. 2 bill) was incompatible with the right to equality and non-discrimination on the basis of age (direct discrimination).[11] In its analysis in relation to the previous bill, the committee again considered that the income support waiting periods for young people aged under 25 raise questions as to whether the measure is justifiable under international human rights law.

1.202 The statement of compatibility for the bill acknowledges that the measure engages the right to equality and non-discrimination on the basis of age, but concludes that 'those subjected to a waiting period are young enough to reasonably draw on family support to assist them during the waiting period'.[12]

1.203 As noted in its analysis on the previous bill, the committee considers that a measure that impacts differentially on or excludes individuals based on their age is likely, on its face, to be incompatible with the right to equality and non-discrimination. In this respect, by imposing a four-week waiting period based on a person's age, the measure directly discriminates against persons under 25 years of age.

11 See Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 79, para 2.25.

12 EM, SoC 12.

1.204 While the committee had accepted that the measure pursues a legitimate objective and that the measure is rationally connected to that objective, it considered that there were issues in relation to the proportionality of the measure.

1.205 The statement of compatibility states that 43 per cent of young people receiving unemployment benefits are living at home with their parents, compared with 7 per cent of those aged over 25.[13] This shows there is some evidence that the measure is targeted at young people, taking into account their ability to seek support from their parents. However, this also shows that the majority of young people on unemployment payments are not living at home (and are thus likely to have private rental costs) and are less likely to be able to rely on their parents for support during the waiting period. These figures also do not show whether a person living at home with their parents are doing so on a rent-free basis or whether such persons might be financially supporting their family members.

1.206 A human rights assessment of the measure must establish that the proposed age cut offs are necessary, reasonable and proportionate in pursuit of a legitimate objective. The statement of compatibility for the bill, along with further information provided by the minister in relation to the previous bill, do not demonstrate that nearly all, or even a majority, of individuals aged 25 or under will be able to rely on their parents for economic support. As such, the measure is not sufficiently targeted to impose a proportionate limitation on the right to equality and non-discrimination based on age.

1.207 **The committee therefore reiterates its comments in relation to these measures in the previous bill, particularly, that its assessment of the proposed income support waiting periods for young people aged under 25 against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) raises questions as to whether the changes are justifiable under international human rights law.**

1.208 **As set out above, the proposed income support waiting period engages and limits the right to equality and non-discrimination as the four-week waiting period is applied based on a person's age. Some committee members consider that the measure has not been justified as a proportionate limitation on this right. Accordingly, those committee members consider that the measure is incompatible with the right to equality and non-discrimination.**

1.209 **Other members of the committee consider that the limitation on the right to equality and non-discrimination has been justified and further consider that incentivising young people to find work is an important policy objective.**

13 EM, SoC 12.

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.

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

Comptroller Directions (Use of Force) 2015 [F2015L01085]

Portfolio: Immigration and Border Protection
Authorising legislation: Customs Act 1901
Last day to disallow: 17 September 2015 (Senate)

Purpose

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

2.4 A customs officer may only use force in accordance with the procedures set out in Operational Safety Order (2015).

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

Background

2.6 The committee commented on the Customs Act 1901 - CEO Directions No. 1 of 2015 and Customs Act 1901 - CEO Directions No. 2 of 2015 (the previous directions) in its *Nineteenth Report of the 44th Parliament*.[1] A response was received and commented on in the committee's *Twenty-second Report of the 44th Parliament*.[2]

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

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

2.7 The committee considered the new directions in its *Twenty-sixth Report of the 44th Parliament*, and requested a copy of the Operational Safety Order (2015) in order for the committee to fully assess the new directions with the right to life.[3]

Use of lethal force

2.8 The previous directions were, in the main, in the same form as the new directions. The directions were remade to reflect the introduction of the Australian Border Force and the integration of the Australian Customs and Border Protection Service within the Department of Immigration and Border Protection.

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

2.10 The committee considered in its previous report that the use of force engages and may limit the right to life.

Right to life

2.11 The right to life is protected by article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) and article 1 of the Second Optional Protocol to the ICCPR. The right to life has three core elements:

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

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

2.13 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.

3 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 4-6.

Compatibility of the measures with the right to life

2.14 The Chief Executive Officer of the Australian Customs and Border Protection Service made a copy of the previous Use of Force Order (2015) available to the committee in confidence. As the Operational Safety Order (2015) supersedes the Use of Force Order (2015), the committee requested a copy of the new order on an in-confidence basis in order to properly assess its compatibility with the right to life.

2.15 The committee also noted a commitment made to the committee to make an edited version of the previous Use of Force Order available on a public website. The committee therefore recommended that the Operational Safety Order (2015) be similarly published (and redacted if necessary).

Australian Border Force Commissioner's response

> In response to the Parliamentary Joint Committee on Human Rights *Twenty-sixth Report of the 44th Parliament*, please find attached a copy of the Operational Safety Order (2015) to assist in your assessment of the instrument's compatibility with the right to life.
>
> Note that the Order is classified as For Official Use Only and is provided on an in-confidence basis to the Committee. Consistent with past practice, the Department of Immigration and Border Protection will publish a version of the Operational Safety Order (2015), which has been edited to an Unclassified level, on its website.
>
> This Order provides a policy framework around using reasonable force by an officer in the exercise of their statutory powers and is mainly relevant to the duties of officers who are in the Australian Border Force.
>
> You would already be aware that the Operational Safety Order (2015) supersedes the Use of Force Order (2015). I note that the Committee recently reviewed the Use of Force Order (2015) and concluded in its *Twenty-second Report of the 44th Parliament* that it was 'likely compatible with human rights'.
>
> I wish to inform the Committee that some minor amendments have since been made to the Operational Safety Order (2015). These amendments were made following a review to ensure currency and consistency with other law enforcement agencies, and to ensure the order accurately reflected changes to terminology and workforce structure following integration with the Department of Immigration and Border Protection on 1 July 2015. The Operational Safety Order (2015) otherwise remains consistent with the Use of Force Order (2015), and it is the Department's view that it continues to remain compatible with human rights. [4]

4 See Appendix 1, Letter from Mr Roman Quaedvlieg APM, Australian Border Force Commissioner, to the Hon Philip Ruddock MP (dated 11 September 2015) 1.

Committee response

2.16 **The committee thanks the Australian Border Force Commissioner for his response and for providing a copy of the Operational Safety Order (2015) to the committee on an 'in confidence' basis.**

2.17 The committee also appreciates the advice that an edited version of the Operational Safety Order (2015) will be published on the Australian Border Force's website.

2.18 Having reviewed the Operational Safety Order (2015), the committee considers that it continues to contain sufficient safeguards.

2.19 **On the basis of the information provided, the committee concludes that the Operational Safety Order (2015) and the new directions are likely to be compatible with human rights.**

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

Portfolio: Trade and Investment
Authorising legislation: Export Market Development Grants Act 1997
Last day to disallow: 17 September 2015 (Senate)

Purpose

2.20 The Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015 (the 2015 Guidelines) are being made to replace the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2014. The 2015 Guidelines provides the Chief Executive Officer (CEO) of Austrade guidance in:

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

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

Background

2.22 The committee previously considered the 2015 Guidelines in its *Twenty-sixth Report of the 44th Parliament* (previous report) and requested further information from the Minister for Trade and Investment as to the compatibility of the 2015 Guidelines with the right to privacy (right to reputation).[1]

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

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

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

2.25 The committee considered in its previous report that the broad basis on which the CEO can declare that a person is ineligible for a grant on the basis that they

1 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 12-15.

are not a 'fit and proper' person engages and may limit the right to privacy (right to reputation).

Right to privacy (right to reputation)

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

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

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

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

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

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

2.31 The committee considered in its previous report that the condition engages and limits the right to privacy and reputation. The committee therefore sought the advice of the Minister for Trade and Investment as to whether the proposed measure is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

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

Minister's response

Objective of the measure

The *Export Market Development Grants Act 1997* (the EMDG Act) provides non-discretionary grants to Australian small and medium-sized businesses that have incurred specified expenses promoting the export of their goods, services, intellectual property rights and know-how. The grant is a partial reimbursement of the expenses incurred.

The *Export Market Development Grants Amendment Act 2004* (the 2004 Amendment Act) introduced a 'not fit and proper person' test, to be applied by Austrade in accordance with Ministerial guidelines when assessing entitlement to payment of an EMDG grant.

The 2004 Amendment Act provided that a grant to which an applicant is otherwise entitled is not payable if, in accordance with Ministerial guidelines, Austrade determines that the applicant or an associate of the applicant is 'not fit and proper' to receive a grant.

As required under paragraph 101(1)(bb) of the Act, the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2004 (the 2004 instrument) provide guidelines to be complied with by Austrade:

- in determining who is an associate of a person, for the purposes of the 'not fit and proper' provision; and
- in forming an opinion whether a person or any associate of the person is a fit and proper person to receive a grant.

In 2014 the Government amended the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2004 so that the instrument's 'not fit and proper person' rules also applied to consultants preparing applications on behalf of their clients.

Recently this instrument was remade as it was due to sunset. The remade instrument is unchanged from the 2014 instrument.

Connection between the limitation and the objective of the Guidelines

The probity and good public image of EMDG applicants and consultants can have a significant impact on the public perception of the EMDG scheme, and the Government's management of it. The Government, applicants and EMDG consultants all share an interest in the EMDG scheme maintaining broad public support. This support depends upon public confidence in the probity of the scheme.

The Government considers that it is therefore appropriate that applicants are required to be fit and proper to receive a grant, and that consultants should also meet a similar standard. If the scheme were to be withdrawn due to poor public perception thousands of small and medium-sized Australian exporters would be directly affected.

The public is entitled to expect that taxpayer funds are directed to businesses that operate in accordance with Australian laws and acceptable business standards, and that the Government will take all reasonable steps to be sure that this happens. The 'fit and proper person' test for applicants provides this assurance.

Export Market Development Grants (EMDG) consultants have a direct and vested interest in the outcome of their clients' EMDG assessments and have an increasingly high public profile associated with the EMDG scheme. Consultants currently prepare almost 70 per cent of EMDG claims, and earn fees from the scheme, usually on a commission basis.

A 'fit and proper person' test for consultants provides an incentive for consultants to act honestly and to prepare claims with a high attention to claim accuracy. Consultants are not subject to the disciplinary rules of any professional body. The only influence the Government has over the conduct of consultants in the preparation of claims is through the mechanism of preventing them from preparing and lodging further claims where they are found to be 'not fit and proper'.

The 'fit and proper person' test provides applicants that are using a consultant to lodge a claim on their behalf with a degree of confidence that the consultant will act in a professional manner, will have sufficient skills and experience to complete the claim.

Is the limitation reasonable and proportionate?

The Government recognises that the making of a finding that an applicant or a consultant is not a fit and proper person is significant, and therefore there are a number of procedural and other safeguards in place to ensure that an applicant's or consultant's right to reputation is not limited and that any treatment is reasonable and proportionate.

Guidelines in the legislative instrument set out criteria for the Chief Executive Officer's (CEO's) decision. The CEO's decision will be subject to the normal rules of administrative law. These include the principle of procedural fairness (natural justice). In accordance with this legal requirement, before a decision is made, Austrade must advise each applicant or consultant it considers may not be a fit and proper person of the grounds for that concern, and of any adverse material or information that may be taken into account, and give the applicant or consultant the opportunity to respond. The applicant's or consultant's response must be taken into account in making the decision.

Other applicable rules of administrative law include that the CEO must act reasonably on the basis of the evidence and must take account of relevant considerations and not take account of irrelevant considerations.

Applicants and consultants will have access to merits review by the Administrative Appeals Tribunal (AAT) of an adverse decision under section 87 AA or 79A (respectively) of the EMDG Act. This is provided for

by section 97(ca) of the EMDG Act in the case of applicants and section 97(caa) of the EMDG Act in the case of consultants.

In addition, there is an entitlement to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* as well as under the common law. Judicial review would consider the lawfulness of a decision in particular, in relation to whether the decision complied with the rules of administrative law.

However, provided the CEO acts in good faith, there would be no liability in defamation in relation to a finding that an applicant or consultant is not a fit and proper person.

It is also important to note that section 87 AA and section 79A determinations are not made for an unlimited period. Further section 79E of the EMDG Act provides that the excluded consultant may apply at any time for a revocation of the determination.

In doing so, the CEO will have to take into account any relevant submissions by the consultant and any change in the circumstances, such as a successful appeal against a conviction and the lapse of time since any adverse event. The safeguards outlined apply each time the CEO makes a decision. Thus, a decision by the CEO that an applicant or consultant is not a fit and proper person does not operate indefinitely into the future. It does not constitute a ban on the applicant or consultant in relation to all future applications.

In light of these various safeguards, the legislative instrument and its assessment criteria are considered to be a reasonable and proportionate measure to give effect to the aim being pursued by the legislative instrument. In particular, it is considered that they do not breach an applicant's or a consultant's right to be protected from unlawful attacks on his or her reputation.[3]

Committee response

2.32 **The committee thanks the Minister for Trade and Investment for his response.**

2.33 The committee notes the minister's advice regarding the objective of the measure, including that the fit and proper person test provides a means of monitoring the conduct of consultants, helping to ensure they act professionally and honestly, and accepts that this is likely to be a legitimate objective for the purposes of international human rights law.

2.34 The committee also notes the information provided regarding the proportionality of the measure, including access to merits review and judicial review of adverse decisions. However, the committee considers that for as long as the

3 See Appendix 1, Letter from the Hon Andrew Robb MP, Minister for Trade and Investment, to the Hon Philip Ruddock MP (dated 15 September 2015) 1-4.

procedural safeguards relating to a finding that a person is not a 'fit and proper' person are not specified, the broad discretion given to the CEO may unjustifiably limit the right to privacy.

2.35 **The committee therefore recommends that, in order to avoid any incompatibility with the right to privacy (right to reputation) under article 17 of the International Covenant on Civil and Political Rights, the 2015 Guidelines be amended to include procedural safeguards relating to how the Chief Executive Officer makes an assessment that a person is not a 'fit and proper' person to be involved in preparing an application for a government grant.**

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

Portfolio: Employment
Authorising legislation: Social Security Act 1991
Last day to disallow: 17 September 2015 (Senate)

Purpose

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

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

Background

2.38 The committee previously considered the 2015 Specification in its *Twenty-sixth Report of the 44th Parliament* (previous report) and requested further information from the Assistant Minister for Employment as to the compatibility of the 2015 Specification with human rights.[1]

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

2.39 Under the HYP and SJF measures, parents in receipt of Parenting Payments are required to attend appointments with the Department of Human Services and sign a Parenting Payment Employment Pathway Plan ('Parenting Plan'). In addition, parents who fall within the 'teenage parent' class of persons are required to have a minimum of two compulsory activities in their Parenting Plan. Failure to attend appointments or compulsory activities without a reasonable excuse, or sign their Parenting Plan, may result in a person's social security benefits being suspended.

2.40 The committee considered in its previous analysis that the measure engages and may limit the right to social security, the right to an adequate standard of living and the right to equality and non-discrimination.

1 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 20-25.

Right to social security

2.41 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.

2.42 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).

2.43 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.

2.44 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.

Right to an adequate standard of living

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

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

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

2.47 The statement of compatibility explains that the 2015 Specification engages and limits the right to social security and an adequate standard of living and sets out why this limitation is justifiable. It sets out the objective of the measure as providing 'opportunities… to boost the educational attainment and job readiness… of young parents and jobless families with young children in highly disadvantaged locations in Australia'.[2]

2.48 The committee previously considered that the measure seeks to achieve a legitimate objective for the purposes of international human rights law. However, the committee considered that it is unclear whether the limitation on the right to social security and an adequate standard of living (in suspending a person's social security payments), is rationally connected to the objective being sought. In other words, it is unclear if the measures are likely to be effective in achieving the objective.

2.49 The committee therefore sought the advice of the Assistant Minister for Employment as to whether there is a rational connection between the limitation and the legitimate objective of helping teenage parents and jobless families, and in particular, whether there is evidence that demonstrates that the measures are likely to be effective in achieving the stated objective.

Assistant Minister's response

Background information

The Helping Young Parents and Supporting Jobless Families measures commenced in 2012 as early intervention measures targeting vulnerable groups of parents living in 10 socio-economically disadvantaged locations. Many of these parents face a higher risk of long-term unemployment, reliance on income support and intergenerational unemployment. This early intervention contact ensures earlier identification of the parents' and families' needs and barriers to employment and provides tailored assistance through linkages to the most appropriate local services-while recognising and taking into consideration their family responsibilities.

Extension of the Helping Young Parents and Supporting Jobless Families measures

As part of the Youth Employment Strategy under the Growing Jobs and Small Business package, a new programme incorporating successful elements of the trials was introduced in the 2015-16 Federal Budget. The Supporting Parents to Plan and Prepare for Employment (Supporting Parents) programme will commence on 1 April 2016 and will continue to support eligible parents residing in the 10 disadvantaged locations to make a better transition into paid employment. The new programme

2 Explanatory Statement, Statement of Compatibility 1.

incorporates the compulsory participation model but with the requirement to participate in one activity only-instead of two compulsory activities under the Helping Young Parents measure.

Both the Helping Young Parents and Supporting Jobless Families measures have been extended until 31 March 2016 to enable eligible parents to access the local services that meet their needs and address identified vocational and non-vocational barriers to employment for as long as possible and on a continuous basis, ensuring eligible parents transition smoothly from the trials into the Supporting Parents measure from 1 April 2016.

Compliance

Under both the Helping Young Parents and Supporting Jobless Families measures, all participants are required to attend interviews and sign a Participation Plan, however, only the Helping Young Parents measure requires compulsory participation in activities.

Without regular ongoing contact with the Australian Government Department of Human Services (Human Services) and participation in the activities, parents may fail to participate actively in their community or to take up opportunities for building a more secure future for themselves and their children.

Rational connection between the limitation and legitimate objective

The rational connection between the limitation and legitimate objective is demonstrated by the range of evidence showing that the measures, in particular their compulsory elements, have been effective in achieving their stated objectives.

Increased participation in education

Departmental analysis has shown that the proportion of Helping Young Parents participants undertaking study increased by 15 percentage points to 39 per cent over their participation to 30 June 2013. By 30 June 2013, more than 250 parents in Helping Young Parents exited the measure due to having completed Year 12 or equivalent qualification and more than 40 young parents started a new job.

Helping Young Parents participants in areas of high unemployment obtained the most benefit, with almost half participating in education compared with 32 per cent of young parents not participating in the measure. Participants reported that their increased awareness and use of Jobs, Education and Training Child Care Fee Assistance had greatly helped them to participate in education.

Under the Helping Young Parents measure, the minimum education level requirement was to attain a Year 12 or equivalent qualification. However, operational data from Human Services shows some young parents have been willing to enrol in higher-level education courses, such as Certificates

III/IV, diplomas and degrees. This highlights the benefits of the measure in increasing participants' education levels.

Increased engagement

Since the implementation of the Helping Young Parents and Supporting Jobless Families measures in 2012, Human Services officers have provided regular qualitative evidence to the Department of Employment that parents participating in the trials have shown a positive increase in their engagement with Human Services and interest in engaging with local services following the development of a Participation Plan tailored to their own and their families' needs.[3]

Committee response

2.50 **The committee thanks the Assistant Minister for Employment for his response.**

2.51 The committee notes the minister's advice that the measures are being extended for nine months in order to ensure eligible parents can access local services and address barriers to employment before the transition to the new Supporting Parents to Plan and Prepare for Employment commences on 1 April 2016.

2.52 The committee further notes the detailed evidence provided regarding the effectiveness of the measures in improving participation and education rates of participants in the trials, and on the basis of this information the committee considers that they are likely to be rationally connected to their stated objective.

2.53 **Accordingly, the committee considers that the measures are likely to be compatible with the right to social security and right to an adequate standard of living.**

Right to equality and non-discrimination

2.54 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).

2.55 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.

3 See Appendix 1, Letter from the Hon Luke Hartsuyker MP, Assistant Minister for Employment, to the Hon Philip Ruddock MP (dated 11 September 2015) 2-3.

2.56 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[4] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[5] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[6]

2.57 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

2.58 The statement of compatibility does not address the right to equality and non-discrimination. Both measures distinguish between Parenting Payment recipients based on their age. The HYP measure only applies to parents who are 19 or under at the relevant time and the SJF measure applies to parents who are 22 or under at the relevant time (as well as to persons who have been on income support for two years or more).

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

2.60 The measures may also be indirectly discriminatory on the basis of sex, as the vast majority of those affected by the measures (Parenting Payment recipients) are likely to be female. Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination.

2.61 The committee therefore sought the advice of the Assistant Minister for Employment 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.

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4 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

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

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

Assistant Minister's response

Justification for targeting teenage parents

There is ample evidence that the stated objective (to assist young parents and jobless families with young children to improve their family wellbeing, educational attainment and work readiness) addresses a pressing or substantial concern.

In Australia, at any one time there are around 11,000 teenage parents on Parenting Payment. Around 80 per cent of these parents have not completed Year 12 or equivalent qualifications and over 25 per cent only have primary school as their highest level of education.

It is well documented[7] that teenage parents and jobless families are far more likely to have poor employment prospects, low educational attainment, low incomes, poor health and low educational and employment outcomes for their children-contributing to the risk of long term welfare dependency for themselves and their children.

To the extent that the measures may limit the right to equality and non-discrimination on the basis of age and gender, the measures are reasonable and proportionate to the policy objective of assisting young parents to improve their family wellbeing, education attainment and work readiness. The measures assist parents to identify their barriers to education and employment, to develop a plan to address those barriers and to participate in the agreed activities, thereby increasing their capacity to study or work. This recognises that the right to educational and the right to work are essential for realising other human rights (such as the right to an adequate standard of living) and that the workforce participation of parents creates benefits for their children. As already demonstrated, there is a range of evidence that the measures have been effective in increasing young parents' participation in education and in increasing engagement with local services.

Justification for targeting jobless families

In Australia, joblessness among families is a significant social and economic problem resulting in one of the highest proportion of children living in jobless families in the OECD.[8] Women make up the largest proportion of parents heading jobless families.

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7 See for example Whiteford, P. (2009). Family Joblessness in Australia, Paper commissioned by the Social Inclusion Unit of PM&C, Canberra.

http://apo.org.au/research/family-joblessness-australia.

8 OECD, 11/7 /2014, Children in families by employment status:

http://www.oecd.org/els/family/LMF 1 1 Children in families by employment status Jul2014.pdf.

> Evidence shows that long periods out of the workforce increase the risk of difficulties returning to paid work. There is also increased risk of experiencing disadvantage and a lower quality of life.
>
> For Australian families who become jobless, the likelihood of the family remaining jobless for a long period of time has increased in recent years. Being in a family where no adult has worked for a long time can mean higher levels of poverty, poorer health and lower levels of education for parents and their children. This can lead to the risk of long term welfare dependency and poor outcomes for the children.
>
> Children from disadvantaged families, particularly where parents have a low level of education, benefit from early childhood programmes and perform better in their early school years because they are better prepared for school, move into school more easily and are more motivated.[9]
>
> If parents on income support are assisted to gain job related skills and education earlier, as well as using the time when their children are young to stabilise their family life, they are more likely to gain ongoing employment and to move off income support.[10]

Committee response

2.62 **The committee thanks the Assistant Minister for Employment for his response.**

2.63 The committee considers that that response demonstrates that assisting young parents and jobless families with young children to improve their family wellbeing, educational attainment and work readiness is a legitimate objective for the purposes of international human rights law, and that the measures appear to be rationally connected to that objective and proportionate to achieving the stated objective.

2.64 **Accordingly, the committee considers that the measures are likely to be compatible with the right to equality and non-discrimination and has concluded its examination of the bill.**

The Hon Philip Ruddock MP

Chair

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9 For a summary of the literature on this topic, see Harrison, U et al 'Child care and early education in Australia', Social Policy Research Paper No. 40, Longitudinal Study of Australian Children: https://www.dss.gov.au/sites/default/files/documents/05 2012/sprp 40.pdf

10 See Appendix 1, Letter from the Hon Luke Hartsuyker MP, Assistant Minister for Employment, to the Hon Philip Ruddock MP (dated 11 September 2015) 4-5.

Appendix 1

Correspondence

Australian
BORDER FORCE

COMMISSIONER

The Honourable Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2601

Dear Mr Ruddock

Department of Immigration and Border Protection Operational Safety Order (2015)

In response to the Parliamentary Joint Committee on Human Rights *Twenty-sixth Report of the 44th Parliament,* please find attached a copy of the Operational Safety Order (2015) to assist in your assessment of the instrument's compatibility with the right to life.

Note that the Order is classified as For Official Use Only and is provided on an in-confidence basis to the Committee. Consistent with past practice, the Department of Immigration and Border Protection will publish a version of the Operational Safety Order (2015), which has been edited to an Unclassified level, on its website.

This Order provides a policy framework around using reasonable force by an officer in the exercise of their statutory powers and is mainly relevant to the duties of officers who are in the Australian Border Force.

You would already be aware that the Operational Safety Order (2015) supersedes the Use of Force Order (2015). I note that the Committee recently reviewed the Use of Force Order (2015) and concluded in its *Twenty-second Report of the 44th Parliament* that it was 'likely compatible with human rights'.

I wish to inform the Committee that some minor amendments have since been made to the Operational Safety Order (2015). These amendments were made following a review to ensure currency and consistency with other law enforcement agencies, and to ensure the order accurately reflected changes to terminology and workforce structure following integration with the Department of Immigration and Border Protection on 1 July 2015. The Operational Safety Order (2015) otherwise remains consistent with the Use of Force Order (2015), and it is the Department's view that it continues to remain compatible with human rights.

I trust this information is of assistance to the Committee.

Yours sincerely

Roman Quaedvlieg APM
Commissioner

11 September 2015

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THE HON ANDREW ROBB AO MP

MINISTER FOR TRADE AND INVESTMENT

C15-247

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

15 SEP 2015

Dear Mr ~~Ruddock~~ Philip

Thank you for your letter of 18 August 2015 seeking my advice about the human rights compatibility of the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2015 [F2015L01027].

I understand that the Parliamentary Joint Committee on Human Rights is seeking my advice on:

- whether the proposed measure is aimed at achieving a legitimate objective
- whether there is a rational connection between the limitation [on a person's right to reputation] and that objective
- whether the limitation [on a person's right to reputation] is a reasonable and proportionate measure for the achievement of that objective.

Objective of the measure

The *Export Market Development Grants Act 1997* (the EMDG Act) provides non-discretionary grants to Australian small and medium-sized businesses that have incurred specified expenses promoting the export of their goods, services, intellectual property rights and know-how. The grant is a partial reimbursement of the expenses incurred.

The *Export Market Development Grants Amendment Act 2004* (the 2004 Amendment Act) introduced a 'not fit and proper person' test, to be applied by Austrade in accordance with Ministerial guidelines when assessing entitlement to payment of an EMDG grant.

The 2004 Amendment Act provided that a grant to which an applicant is otherwise entitled is not payable if, in accordance with Ministerial guidelines, Austrade determines that the applicant or an associate of the applicant is 'not fit and proper' to receive a grant.

As required under paragraph 101(1)(bb) of the Act, the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2004 (the 2004 instrument) provide guidelines to be complied with by Austrade:

- in determining who is an associate of a person, for the purposes of the 'not fit and proper' provision; and
- in forming an opinion whether a person or any associate of the person is a fit and proper person to receive a grant.

In 2014 the Government amended the Export Market Development Grants (Associate and Fit and Proper Person) Guidelines 2004 so that the instrument's 'not fit and proper person' rules also applied to consultants preparing applications on behalf of their clients.

Recently this instrument was remade as it was due to sunset. The remade instrument is unchanged from the 2014 instrument.

Connection between the limitation and the objective of the Guidelines

The probity and good public image of EMDG applicants and consultants can have a significant impact on the public perception of the EMDG scheme, and the Government's management of it. The Government, applicants and EMDG consultants all share an interest in the EMDG scheme maintaining broad public support. This support depends upon public confidence in the probity of the scheme.

The Government considers that it is therefore appropriate that applicants are required to be fit and proper to receive a grant, and that consultants should also meet a similar standard. If the scheme were to be withdrawn due to poor public perception thousands of small and medium-sized Australian exporters would be directly affected.

The public is entitled to expect that taxpayer funds are directed to businesses that operate in accordance with Australian laws and acceptable business standards, and that the Government will take all reasonable steps to be sure that this happens. The 'fit and proper person' test for applicants provides this assurance.

Export Market Development Grants (EMDG) consultants have a direct and vested interest in the outcome of their clients' EMDG assessments and have an increasingly high public profile associated with the EMDG scheme. Consultants currently prepare almost 70 per cent of EMDG claims, and earn fees from the scheme, usually on a commission basis.

A 'fit and proper person' test for consultants provides an incentive for consultants to act honestly and to prepare claims with a high attention to claim accuracy. Consultants are not subject to the disciplinary rules of any professional body. The only influence the Government has over the conduct of consultants in the preparation of claims is through the mechanism of preventing them from preparing and lodging further claims where they are found to be 'not fit and proper'.

The 'fit and proper person' test provides applicants that are using a consultant to lodge a claim on their behalf with a degree of confidence that the consultant will act in a professional manner, will have sufficient skills and experience to complete the claim.

Is the limitation reasonable and proportionate?

The Government recognises that the making of a finding that an applicant or a consultant is not a fit and proper person is significant, and therefore there are a number of procedural and other safeguards in place to ensure that an applicant's or consultant's right to reputation is not limited and that any treatment is reasonable and proportionate.

Guidelines in the legislative instrument set out criteria for the Chief Executive Officer's (CEO's) decision. The CEO's decision will be subject to the normal rules of administrative law. These include the principle of procedural fairness (natural justice). In accordance with this legal requirement, before a decision is made, Austrade must advise each applicant or consultant it considers may not be a fit and proper person of the grounds for that concern, and of any adverse material or information that may be taken into account, and give the applicant or consultant the opportunity to respond. The applicant's or consultant's response must be taken into account in making the decision.

Other applicable rules of administrative law include that the CEO must act reasonably on the basis of the evidence and must take account of relevant considerations and not take account of irrelevant considerations.

Applicants and consultants will have access to merits review by the Administrative Appeals Tribunal (AAT) of an adverse decision under section 87 AA or 79A (respectively) of the EMDG Act. This is provided for by section 97(ca) of the EMDG Act in the case of applicants and section 97(caa) of the EMDG Act in the case of consultants.

In addition, there is an entitlement to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* as well as under the common law. Judicial review would consider the lawfulness of a decision in particular, in relation to whether the decision complied with the rules of administrative law.

However, provided the CEO acts in good faith, there would be no liability in defamation in relation to a finding that an applicant or consultant is not a fit and proper person.

It is also important to note that section 87 AA and section 79A determinations are not made for an unlimited period. Further section 79E of the EMDG Act provides that the excluded consultant may apply at any time for a revocation of the determination. In doing so, the CEO will have to take into account any relevant submissions by the consultant and any change in the circumstances, such as a successful appeal against a conviction and the lapse of time since any adverse event. The safeguards outlined apply each time the CEO makes a decision. Thus, a decision by the CEO that an applicant or consultant is not a fit and proper person does not operate indefinitely into the future. It does not constitute a ban on the applicant or consultant in relation to all future applications.

In light of these various safeguards, the legislative instrument and its assessment criteria are considered to be a reasonable and proportionate measure to give effect to the aim being pursued by the legislative instrument. In particular, it is considered that they do not breach an applicant's or a consultant's right to be protected from unlawful attacks on his or her reputation.

Yours sincerely

Andrew Robb

THE HON. LUKE HARTSUYKER MP
ASSISTANT MINISTER FOR EMPLOYMENT
DEPUTY LEADER OF THE HOUSE

The Hon. Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

Thank you for your letter of 18 August 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) seeking advice on the human rights compatibility of the Social Security (Parenting payment participation requirements – classes of persons) Amendment Specification 2015 (No. 1) (the 2015 Specification).

In your letter you seek advice about the human rights compatibility relating to the intent of the 2015 Specification which extends the Helping Young Parents and Supporting Jobless Families measures for a further nine months to 31 March 2016.

I enclose the advice the Committee is seeking. There is a range of evidence demonstrating that these measures are effective in achieving the stated objectives to provide services, opportunities and responsibilities to boost educational attainment, job readiness, child wellbeing and functioning of young parents and jobless families with young children in highly disadvantaged locations in Australia.

The enclosed advice also provides evidence that establishes that the measures support a legitimate objective which addresses a pressing or substantial concern, thereby justifying the limitation of the right to equality and non-discrimination on the basis of age and gender.

Thank you for bringing this matter to my attention.

Yours sincerely

LUKE HARTSUYKER

Encl

11 SEP 2015

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Advice to Joint Parliamentary Committee on Human Rights in regard to the Social Security (Parenting payment participation requirements – classes of persons) Amendment Specification 2015 (No. 1) [F2015L00938]

ITEM 1

1.103 The committee's assessment against articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (right to social security and right to an adequate standard of living) of the extension of the Helping Young Parents and Supporting Jobless Families measures raises questions as to whether the limitation on these rights is rationally connected to the objective sought to be achieved.
1.104 As set out above, the condition engages and limits the right to social security and right to an adequate standard of living. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Employment as to whether there is a rational connection between the limitation and the legitimate objective of helping teenage parents and jobless families, and in particular, is there evidence that demonstrates that the measures are likely to be effective in achieving the stated objective.

Background information

The Helping Young Parents and Supporting Jobless Families measures commenced in 2012 as early intervention measures targeting vulnerable groups of parents living in 10 socio-economically disadvantaged locations. Many of these parents face a higher risk of long-term unemployment, reliance on income support and intergenerational unemployment. This early intervention contact ensures earlier identification of the parents' and families' needs and barriers to employment and provides tailored assistance through linkages to the most appropriate local services—while recognising and taking into consideration their family responsibilities.

Extension of the Helping Young Parents and Supporting Jobless Families measures

As part of the Youth Employment Strategy under the Growing Jobs and Small Business package, a new programme incorporating successful elements of the trials was introduced in the 2015–16 Federal Budget. The *Supporting Parents to Plan and Prepare for Employment* (Supporting Parents) programme will commence on 1 April 2016 and will continue to support eligible parents residing in the 10 disadvantaged locations to make a better transition into paid employment. The new programme incorporates the compulsory participation model but with the requirement to participate in one activity only—instead of two compulsory activities under the Helping Young Parents measure.

Both the Helping Young Parents and Supporting Jobless Families measures have been extended until 31 March 2016 to enable eligible parents to access the local services that meet their needs and address identified vocational and non-vocational barriers to employment for as long as possible and on a continuous basis, ensuring eligible parents transition smoothly from the trials into the Supporting Parents measure from 1 April 2016.

Compliance

Under both the Helping Young Parents and Supporting Jobless Families measures, all participants are required to attend interviews and sign a Participation Plan, however, only the Helping Young Parents measure requires compulsory participation in activities.

Without regular ongoing contact with the Australian Government Department of Human Services (Human Services) and participation in the activities, parents may fail to participate actively in their community or to take up opportunities for building a more secure future for themselves and their children.

Rational connection between the limitation and legitimate objective

The rational connection between the limitation and legitimate objective is demonstrated by the range of evidence showing that the measures, in particular their compulsory elements, have been effective in achieving their stated objectives.

Increased participation in education

Departmental analysis has shown that the proportion of Helping Young Parents participants undertaking study increased by 15 percentage points to 39 per cent over their participation to 30 June 2013. By 30 June 2013, more than 250 parents in Helping Young Parents exited the measure due to having completed Year 12 or equivalent qualification and more than 40 young parents started a new job.

Helping Young Parents participants in areas of high unemployment obtained the most benefit, with almost half participating in education compared with 32 per cent of young parents not participating in the measure. Participants reported that their increased awareness and use of Jobs, Education and Training Child Care Fee Assistance had greatly helped them to participate in education.

Under the Helping Young Parents measure, the minimum education level requirement was to attain a Year 12 or equivalent qualification. However, operational data from Human Services shows some young parents have been willing to enrol in higher-level education courses, such as Certificates III/IV, diplomas and degrees. This highlights the benefits of the measure in increasing participants' education levels.

Increased engagement

Since the implementation of the Helping Young Parents and Supporting Jobless Families measures in 2012, Human Services officers have provided regular qualitative evidence to the Department of Employment that parents participating in the trials have shown a positive increase in their engagement with Human Services and interest in engaging with local services following the development of a Participation Plan tailored to their own and their families' needs.

ITEM 2

1.114 The committee's assessment against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) of the extension of the Helping Young Parents and Supporting Jobless Families measures raises questions as to whether the limitation on these rights is justifiable.
1.115 As set out above, the extension of the measures engages and limits the right to equality and non-discrimination on the basis of age and gender. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister for Employment as to:

- *whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;*
- *whether there is a rational connection between the limitation and that objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

Justification for targeting teenage parents

There is ample evidence that the stated objective (to assist young parents and jobless families with young children to improve their family wellbeing, educational attainment and work readiness) addresses a pressing or substantial concern.

In Australia, at any one time there are around 11,000 teenage parents on Parenting Payment. Around 80 per cent of these parents have not completed Year 12 or equivalent qualifications and over 25 per cent only have primary school as their highest level of education.

It is well documented[1] that teenage parents and jobless families are far more likely to have poor employment prospects, low educational attainment, low incomes, poor health and low educational and employment outcomes for their children—contributing to the risk of long term welfare dependency for themselves and their children.

To the extent that the measures may limit the right to equality and non-discrimination on the basis of age and gender, the measures are reasonable and proportionate to the policy objective of assisting young parents to improve their family wellbeing, education attainment and work readiness. The measures assist parents to identify their barriers to education and employment, to develop a plan to address those barriers and to participate in the agreed activities, thereby increasing their capacity to study or work. This recognises that the right to educational and the right to work are essential for realising other human rights (such as the right to an adequate standard of living) and that the workforce participation of parents creates benefits for their children. As already demonstrated, there is a range of evidence that the measures have been effective in increasing young parents' participation in education and in increasing engagement with local services.

[1] See for example Whiteford, P. (2009). Family Joblessness in Australia, Paper commissioned by the Social Inclusion Unit of PM&C, Canberra.
http://apo.org.au/research/family-joblessness-australia

Justification for targeting jobless families

In Australia, joblessness among families is a significant social and economic problem resulting in one of the highest proportion of children living in jobless families in the OECD.[2] Women make up the largest proportion of parents heading jobless families.

Evidence shows that long periods out of the workforce increase the risk of difficulties returning to paid work. There is also increased risk of experiencing disadvantage and a lower quality of life.

For Australian families who become jobless, the likelihood of the family remaining jobless for a long period of time has increased in recent years. Being in a family where no adult has worked for a long time can mean higher levels of poverty, poorer health and lower levels of education for parents and their children. This can lead to the risk of long term welfare dependency and poor outcomes for the children.

Children from disadvantaged families, particularly where parents have a low level of education, benefit from early childhood programmes and perform better in their early school years because they are better prepared for school, move into school more easily and are more motivated.[3]

If parents on income support are assisted to gain job related skills and education earlier, as well as using the time when their children are young to stabilise their family life, they are more likely to gain ongoing employment and to move off income support.

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[2] OECD, 11/7/2014, Children in families by employment status: http://www.oecd.org/els/family/LMF_1_1_Children_in_families_by_employment_status_Jul2014.pdf

[3] For a summary of the literature on this topic, see Harrison, LJ et al 'Child care and early education in Australia', Social Policy Research Paper No. 40, Longitudinal Study of Australian Children: https://www.dss.gov.au/sites/default/files/documents/05_2012/sprp_40.pdf

Appendix 2

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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;

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[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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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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.

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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.

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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 civi; 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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