Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Thirty-fourth report of the 44th Parliament

23 February 2016

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

Email: human.rights@aph.gov.au
Website: http://www.aph.gov.au/joint_humanrights/

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Members

The Hon Philip Ruddock MP, Chair	Berowra, New South Wales, LP
Mr Laurie Ferguson MP, Deputy Chair	Werriwa, New South Wales, ALP
Senator Carol Brown	Tasmania, ALP
Dr David Gillespie MP	Lyne, New South Wales, NAT
Ms Cathy McGowan AO MP	Indi, Victoria, IND
Senator Nick McKim	Tasmania, AG
Senator Claire Moore	Queensland, ALP
Senator Dean Smith	Western Australia, LP
Mr Michael Sukkar MP	Deakin, Victoria, LP

Secretariat

Mr Ivan Powell, Acting Committee Secretary
Mr Matthew Corrigan, Principal Research Officer
Mr Harry Hobbs, Principal Research Officer
Ms Jessica Strout, Principal Research Officer
Ms Eloise Menzies, Senior Research Officer
Ms Alice Petrie, Legislative Research Officer

External legal adviser

Dr Aruna Sathanapally

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.

Table of contents

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 2 to 11 February 2016, legislative instruments received from 11 December 2015 to 21 January 2016, and legislation previously deferred by the committee.

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

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

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

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

Bills not raising human rights concerns

1.6 The committee has examined the following bills and concluded that they either do not raise human rights concerns; or they do not require additional comment as they promote human rights or contain justifiable limitations on human rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Aged Care Legislation Amendment (Increasing Consumer Choice) Bill 2015;
- Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2015;
- Dairy Produce Amendment (Dairy Service Levy Poll) Bill 2015;
- Narcotic Drugs Amendment Bill 2016;
- Offshore Petroleum and Greenhouse Gas Storage Amendment Bill 2015;
- Parliamentary Entitlements Amendment (Injury Compensation Scheme) Bill 2016;
- Renewable Fuel Bill 2016;
- Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016;

- Tax Laws Amendment (Norfolk Island CGT Exemption) Bill 2015;
- Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016;
- Trade Legislation Amendment Bill (No. 1) 2016;
- Transport Security Amendment (Serious or Organised Crime) Bill 2015; and
- Veterans' Affairs Legislation Amendment (Single Appeal Path) Bill 2015.

Instruments not raising human rights concerns

1.7 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.

1.8 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.

Appropriation bills

1.9 The following appropriation bills were introduced during the relevant period:

- Appropriation Bill (No. 3) 2015-2016; and
- Appropriation Bill (No. 4) 2015-2016.

1.10 In light of the committee's previous correspondence on these matters with the Minister for Finance, the committee refers to its previous comments.[2]

Previously considered measures

1.11 The committee refers to its previous comments in relation to the following bills which reintroduce measures previously considered by the committee:

- Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2];[3]
- Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2];[4] and

---

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.

2 See *Twenty-third Report of the 44th Parliament* (18 June 2015), Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015, 13-17.

3 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 106-113.

4 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 106-113.

- Business Services Wage Assessment Tool Payment Scheme Amendment Bill 2015.[5]

Deferred bills and instruments

1.12 The committee has deferred its consideration of the following bills and instruments:

- Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016;
- Aviation Transport Security (Prohibited Cargo - Bangladesh) Instrument 2015 [F2015L02072];
- Aviation Transport Security (Prohibited Cargo - Egypt) Instrument 2015 [F2015L02058];
- Aviation Transport Security (Prohibited Cargo - Somalia) Instrument 2015 [F2015L02057];
- Aviation Transport Security (Prohibited Cargo - Syria) Instrument 2015 [F2015L02073];
- Aviation Transport Security (Prohibited Cargo - Yemen) Instrument 2015 [F2015L02056]; and
- Child Care Benefit (Vaccination Schedules) (Education) Determination 2015 [F2015L02101].

1.13 The committee continues to defer its consideration of the Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542] (deferred 23 June 2015).[6]

1.14 The committee has also deferred its consideration of the following instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation:

- Social Security (Administration) (Exempt Welfare Payment Recipients - Principal Carers of a Child) (Specified Activities) Instrument 2015 [F2015L02086];
- Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Determination 2015 [F2015L01836];[7] and

---

5 This bill extends the Business Services Wage Assessment Tool Payment Scheme, which the committee has previously commented on. See Parliamentary Joint Committee on Human Rights, *Eleventh Report of the 44th Parliament* (2 September 2014) 13-30.

6 See Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (23 June 2015) 2.

7 This instrument was received in the previous time period of the *Thirty-third Report of the 44th Parliament* (2 February 2016).

- Social Security (Administration) (Vulnerable Welfare Payment Recipient) Amendment Principles 2015 [F2015L02087].

1.15 The committee also continues to defer one bill and a number of instruments in connection with this review.[8]

1.16 The committee also defers the Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2016 (No. 1) [F2016L00047] pending a response from the Minister for Foreign Affairs in connection with its ongoing examination of the autonomous sanctions regime and the Charter of the United Nations sanctions regime.[9]

8 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).

9 See Parliamentary Joint Committee on Human Rights, *Thirty-third Report of the 44th Parliament* (2 February 2016) 17-25.

Further response required

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

Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 [F2015L01462]

Portfolio: Employment
Authorising legislation: Fair Work (Building Industry) Act 2012
Last day to disallow: 3 December 2015 (Senate)

Purpose

1.18 The Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 (the instrument) amends the Building Code 2013 (the code). The amendments require building contractors or building industry participants to show the ways in which they are managing drug and alcohol issues in the workplace in their work health safety and rehabilitation (WHS&R) management systems. For certain types of building work, to which the Commonwealth is making a significant contribution, building contractors and industry participants must also include a fitness for work policy to manage alcohol and other drugs in the workplace in their management plan for WHS&R.

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

Background

1.20 The committee first reported on the instrument in its *Thirtieth Report of the 44th Parliament* and requested further information from the Minister for Employment as to whether the instrument was compatible with Australia's human rights obligations.[1]

Alcohol and drug testing of construction workers

1.21 Schedule 3 of the instrument sets out requirements relating to drug and alcohol testing that a fitness for work policy must address.

1.22 The committee considered that establishing a policy framework for testing workers for drugs and alcohol engages and limits the right to privacy.

Right to privacy

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

1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 61-63.

correspondence or home. The right to privacy includes protection of our physical selves against invasive action, including:

- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing); and
- the prohibition on unlawful and arbitrary state surveillance.

Compatibility of the measure with the right to privacy

1.24 The statement of compatibility acknowledges that drug and alcohol testing implemented under the instrument engages the right to privacy. The statement of compatibility states in relation to the drug and alcohol testing that it is 'legitimate to seek to eliminate the risk that employees might come to work impaired by alcohol or drugs such that they could pose a risk to health and safety'[2] and that:

> To the extent that drug and alcohol testing implemented in accordance with the amending instrument may limit a person's right to privacy, the limitation is reasonable, necessary and proportionate in pursuit of the legitimate policy objective of protecting the right to safe and healthy working conditions for all workers.[3]

1.25 The committee considered that drug and alcohol-free workplaces are important in a building and construction context and the measures were likely to be considered as pursuing a legitimate objective for the purposes of international human rights law.

1.26 The committee also considered that the measures were rationally connected to that objective, in that drug and alcohol testing policies may encourage compliance with the prohibition on drugs and alcohol in the workplace.

1.27 However, it was unclear whether the policy framework for drug and alcohol policies is proportionate to achieving that objective as, under the policy, there did not appear to be any safeguards required to be put in place to protect the privacy of individuals who are subject to testing.

1.28 This issue was not addressed in the statement of compatibility. The committee therefore sought the advice of the Minister for Employment as to whether the limitation was a reasonable and proportionate measure for the achievement of the stated objective, and in particular, whether there were sufficient safeguards in place to protect the right to privacy.

2 Explanatory Statement (ES) 3.

3 ES 3.

Minister's response

> The Government's requirement that some form of drug and alcohol testing occur on Commonwealth funded construction sites does not in any way impact upon a person's 'right to respect for individual sexuality' or 'right to respect for reproductive autonomy' nor does it concern the 'prohibition on unlawful or arbitrary state surveillance'.
>
> Any impact the Government's requirements have on the right to privacy contained in article 17 is entirely reasonable, necessary and proportionate, especially when one considers more pressing interest a worker has in being able to attend Commonwealth funded construction sites confident in the knowledge that there is a system in place to ensure their colleagues are not affected by drugs or alcohol.
>
> In response to the specific questions on implementation raised by the Committee, it appears there is a misunderstanding of the nature and operation of the legislative instrument. The Building Code requires that contractors on Commonwealth funded construction projects have a drug and alcohol testing policy. The legislative instrument does not prescribe the policy that is to apply nor does it outline an exhaustive list of matters the policy must address. How the requirements of the Building Code are implemented at a certain workplace is a matter to be determined at the workplaces level, subject to existing safety, privacy and industrial laws.[4]

Committee response

1.29 **The committee thanks the Minister for Employment for her response.**

1.30 The committee reiterates its previous view that pursuing drug and alcohol-free workplaces in a building and construction context is a legitimate objective for the purposes of human rights law.

1.31 The committee understands that the instrument requires contractors on Commonwealth-funded construction projects to have a drug and alcohol testing policy. The instrument also sets out a non-exhaustive list of matters that the policy must address, which includes requirements for testing.[5] The instrument therefore requires, in effect, that workers on Commonwealth-funded construction projects are subject to drug and alcohol tests.

1.32 As outlined in the statement of compatibility for the instrument:

> …items 2 and 5 of the amending instrument insert new requirements that seek to ensure that there is an approach to managing drug and alcohol issues in the workplace that helps to ensure that no person attending the

4 See Appendix 1, Letter from Senator the Hon Michaelia Cash, Minister for Employment, to the Hon Philip Ruddock MP (received 11 January 2016) 1.

5 Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015, Schedule 3, clauses 3 and 6.

> site to perform building work does so under the influence of alcohol or other drugs…
>
> To the extent that drug and alcohol testing implemented in accordance with the amending instrument may limit a person's right to privacy, the limitation is reasonable, necessary and proportionate in pursuit of the legitimate policy objective of protecting the right to safe and healthy working conditions for all workers.[6]

1.33 However, as the statement of compatibility and the minister's answer do not provide information as to whether there are sufficient safeguards in place, in either the instrument or existing safety, privacy and industrial laws, to ensure that there is not an unjustifiable limitation on a person's right to privacy, the proportionality of the measure remains unclear.

1.34 For example, the fitness for work policy set out in the instrument does not include any requirements relating to how drug and alcohol tests are to be conducted, whether any blood, hair or saliva samples might be taken in order to conduct the test, the procedure for managing test results, and how long samples or records of the testing will be retained.

1.35 Additionally, the policy framework does not include requirements that the testing has to be done in the least personally intrusive manner or that the records be destroyed after a certain period of time.

1.36 The taking and retention of bodily samples for testing purposes can contain very personal information. The international jurisprudence has noted that genetic information contains 'much sensitive information about an individual' and given the nature and amount of personal information contained in cellular samples 'their retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned'.[7]

1.37 The instrument is silent as to whether such samples will be retained and the committee is unaware whether there is other existing legislation that would govern the retention and destruction of samples taken in accordance with drug and alcohol policies as required by the instrument. For completeness, such safeguards exist in relation to other alcohol and drug testing regimes, including for law enforcement agencies such as the AFP.

1.38 **The committee therefore requests further advice from the Minister for Employment as to the proportionality of the requirement that construction workers undergo drug and alcohol testing, in particular, whether there are sufficient safeguards in place to protect the right to privacy.**

---

6 ES, statement of compatibility (SOC) 3.

7 *S and Marper v UK*, ECtHR, 4 December 2008, paragraphs 72 and 73.

Advice only

1.39 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.

Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 [F2015L01961]

Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015 [F2015L01962]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 11 May 2016 (Senate)

Purpose

1.40 The Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Migration Outcome regulation) and the Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015 (No. 4 Measures regulation) amend the Migration Regulations 1994. The first regulation introduces measures to support new provisions introduced by the *Migration Amendment (Charging for a Migration Outcome) Act 2015* (Charging for a Migration Outcome Act), and the second regulation makes a range of amendments which include amendments which reflect changes to the *Migration Act 1958* (Migration Act) made by the *Migration Amendment (Strengthening Biometrics Integrity) Act 2015* (the Biometrics Act).

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

Adequacy of statements of compatibility

1.42 The statement of compatibility for the Migration Outcome regulation states:

> The Charging for a Migration Outcome Act was assessed against the seven core international human rights treaties. That assessment appears in the Statement of Compatibility in the Explanatory Memorandum to the Migration Amendment (Charging for a Migration Outcome) Bill 2015.
>
> The assessment completed against those seven core treaties, and the Government's claims supporting compatibility with those treaties, extends to the Regulation.

> Therefore, the Statement of Compatibility with Human Rights made in relation to the Charging for a Migration Outcome Act addresses the human rights implications of these proposed amendments to the Regulations.[1]

1.43 In relation to the measures concerning the Biometrics Act, the statement of compatibility to the No. 4 Measures regulation states:

> The amendments to the Migration Regulations in Schedule 2 are consequential to Schedule 1 to the Biometrics Act. As such the Statement of Compatibility with Human Rights made in relation to Schedule 1 of the Biometrics Act addresses any human rights implications of the amendments in Schedule 2 to the Regulation.[2]

1.44 The committee's expectations in relation to statements of compatibility for bills and disallowable legislative instruments are outlined in its Guidance Note 1, which is included in this report at Appendix 2. The guidance note provides:

> 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.[3]

1.45 The committee also highlights the Attorney-General's Department's advice on how to prepare statements of compatibility where a bill or legislative instrument is not considered to raise human rights issues:

> If it is not evident from the overview provided above of the Bill/Disallowable Legislative Instrument why it does not engage human rights, further details should be included on why it is considered that rights are not engaged. The Parliamentary Joint Committee on Human Rights requires sufficient information to form a view that no human rights are engaged.[4]

1.46 The Attorney-General's Department's advice also states that departments and agencies should, where appropriate, cite the evidence that has been taken into

---

1 Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 [F2015L01961], explanatory statement (ES), statement of compatibility (SOC) 2.

2 Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015 [F2015L01962], ES, SOC 7.

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

4 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that does not raise any human rights issues at: https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility-Templates.aspx.

account in making an assessment that the bill or legislative instrument does not engage any human rights.[5]

1.47 The committee does not consider that a statement of compatibility that relies on an assessment of measures in a related bill can be considered as a stand-alone document in line with the committee's expectations. In this respect, the committee also notes that during its assessment of the Biometrics Bill the committee sought further information from the minister as the statement of compatibility for this bill did not sufficiently justify measures that engaged and limited the right to privacy, the right to equality and non-discrimination, the right to equality before the law and rights of the child.

1.48 **The committee draws the Minister for Immigration and Border Protection's attention to its Guidance Note 1 which provides more information as to the role of the committee in scrutinising legislation for compatibility with Australia's international human rights obligations and guidance on how statements of compatibility may be prepared. The committee also draws the minister's attention to the guidance and templates provided by the Attorney-General's Department in relation to preparation of statements of compatibility.**

5 See Attorney-General's Department, Statements of Compatibility Templates at: https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility-Templates.aspx.

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.

Health Insurance Amendment (Safety Net) Bill 2015

Portfolio: Health
Introduced: House of Representatives, 21 October 2015

Purpose

2.3 The Health Insurance Amendment (Safety Net) Bill 2015 (the bill) seeks to amend the *Health Insurance Act 1973* to introduce a new Medicare safety net, replacing three existing safety nets.

2.4 The new Medicare safety net will continue to cover up to 80 per cent of out-of-pocket medical costs once an annual threshold is met, however, it will introduce a limit on the amount and type of out-of-pocket costs that can be included in the calculation for the annual safety net threshold.

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

Background

2.6 The committee first commented on the bill in its *Thirtieth Report of the 44th Parliament*, and requested further information from the Minister for Health as to whether the determinations were compatible with the right to social security and the right to health.[1]

Limitations on the amount of out-of-pocket health costs that can be claimed

2.7 There are currently three Medicare safety nets:

- the Original Medicare Safety Net—which increases the Medicare rebate payable for out-of-hospital Medicare services to 100 per cent of the scheduled fee once an annual threshold of gap costs has been met;
- the Greatest Permissible Gap (GPG)—which increases the Medicare rebate for high cost out-of-hospital services so that the difference between the Medicare Benefits Schedule (MBS) fee and the Medicare rebate is no more than $78.40; and

1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 14-18.

- the Extended Medicare Safety Net (EMSN)—which provides a rebate for out-of-pocket medical costs (for out-of-hospital care) so that Medicare pays up to 80 per cent of further out-of-pocket costs once an annual threshold has been met.

2.8 Together these three schemes reduce both the individual costs of high cost out-of-hospital services for all Medicare recipients and provide increased rebates to individuals and families who have high annual medical bills that exceed certain thresholds.

2.9 The bill would replace these three safety nets with a new Medicare safety net.

2.10 The proposed new Medicare safety net would have a lower annual threshold for most people including concession card holders, singles and families.[2] Those receiving FTB A will have to reach a slightly higher threshold than under current arrangements.[3]

2.11 Currently, all out-of-pocket costs for out-of-hospital Medicare services count towards the Medicare threshold and there are caps on benefits only for certain items.

2.12 The bill would limit the out-of-pocket costs that can accumulate per service to the threshold for all Medicare services and limit the amount of safety net benefits that are payable per service for all Medicare services. This will mean that some patients will incur out-of-pocket costs that are not included in their costs for medical expenses for the purposes of accessing the new Medicare safety net.

2.13 In addition, it would appear that the bill would remove the GPG which would result in some people incurring larger out-of-pocket expenses for individual high cost medical procedures.

2.14 The committee therefore considered in its previous analysis that the changes to Medicare engage and may limit the right to social security and the right to health.

Right to social security

2.15 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 Current thresholds for concession card holders and recipients of FTB A is $638.40 and for singles and families is $2 000.

3 The proposed new threshold for concession card holders is $400; for singles is $700; for families is $1 000 and for recipients of FTB A is $700.

2.16 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).

2.17 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.

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

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

Right to health

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

2.21 Article 2(1) of the ICESCR imposes on Australia the obligations listed above at paragraph [2.17] and article 4 of the ICESCR allows limitations on the right to health in the manner set out above at paragraph [2.19].

Compatibility of the measure with the right to social security and the right to health

2.22 The statement of compatibility for the bill acknowledges that the bill engages these rights, and explains that the objective is 'to ensure that the safety net arrangements for out-of-pocket costs for out-of-hospital Medicare services are financially sustainable'.[4]

2.23 It also notes that the bill seeks to address issues raised by two independent reviews which found that the existing safety net arrangements may have led to some people experiencing higher out-of-pocket costs. This is because there is evidence to suggest that the introduction of the EMSN led to doctors increasing their fees.[5]

2.24 The committee considered that better targeting the safety net arrangements and ensuring they are financially sustainable is a legitimate objective for the purposes of international human rights law. The committee considered that the measures are rationally connected, and likely to be effective, to achieving this objective.

2.25 Under international human rights law, one of the considerations, in determining whether a limitation on a right is proportionate, is considering whether any affected groups are particularly vulnerable.

2.26 The statement of compatibility does not explain whether the bill will result in many financially disadvantaged people being worse off as a result of the changes. The committee considered that if this is the case, it is also unclear what safeguards there are to ensure that financially disadvantaged people are not effectively barred from accessing appropriate out-of-hospital healthcare due to a reduction in the benefits payable to them.

2.27 The committee also noted that it would appear that the bill would remove the GPG, which could result in some people incurring larger individual out-of-pocket expenses for high cost medical services.

2.28 The committee therefore sought the advice of the Minister for Health as to whether the limitation is a reasonable and proportionate measure for the achievement of the objective, in particular, whether financially vulnerable patients are likely to be unreasonably affected by the changes and, if so, what safeguards are in place to protect financially vulnerable patients.

4 Explanatory memorandum (EM), statement of compatibility (SOC) 9.

5 EM, SOC 9.

Minister's response

The Committee states that the measures contained in the Bill 'engage and limit the right to social security and the right to health' under international human rights law. Specifically, the Committee seeks my advice 'as to whether the limitation is a reasonable and proportionate measure for the achievement of the objective, in particular, whether financially vulnerable patients are likely to be unreasonably affected by the changes and, if so, what safeguards are in place to protect financially vulnerable patients.' These issues are considered below.

Improved access for concessional patients and non-concessional single patients

There have been two independent reviews of the Extended Medicare Safety Net (EMSN). The *Extended Medicare Safety Net Review Report 2009* was a review of the whole EMSN. The *Extended Medicare Safety Net Review of Capping Arrangements Report 2011* evaluated the introduction of caps on benefits payable through the EMSN. These reports were prepared by the Centre for Health Economics Research and Evaluation at the University of Technology, Sydney, following open tender processes.

The 2009 and 2011 reviews found that most EMSN benefits have flowed to patients living in relatively higher income areas. Analysis of current Medicare data confirms that this distribution has persisted. This is a reflection of different patterns of service use, as well as the tendency of doctors working in higher socio-economic areas to charge high fees, particularly for people without concession cards. The 2009 review noted that the EMSN 'may be helping wealthier people to afford even more high-cost services'. The 2011 review found that after the capping of safety net benefits for selected MBS items, the reduction in EMSN expenditure was relatively greater in wealthier areas and major cities, compared to lower socioeconomic and regional areas.

The existing safety nets also provide relatively poor access for non-concessional single people on low incomes, particularly people below retirement age who do not have children. A much smaller proportion of single people without concession cards qualify for the EMSN than any other group. This is due to the ability of family members to pool out-of-pocket costs to qualify for EMSN benefits. Singles, on the other hand, can only count their own out-of-pocket costs towards the threshold. If the Bill is not passed, a non-concessional single in 2016 would need to accumulate $2,030 in out-of-pocket costs to access the EMSN.

The new Medicare safety net introduces lower thresholds for most patient groups, including a new lower threshold for singles. It places uniform caps on the amount of out-of-pocket costs which can accumulate to the eligibility threshold and the total benefits payable for all Medicare Benefits Schedule (MBS) services. The combined effect of the lower thresholds and capping arrangements will be to create a relative shift in safety net

payments to concessional patients and single people without concession cards.

Threshold changes

The 2016 thresholds for the new Medicare safety net will be:

- $400 for concessional families and singles,
- $700 for FTB (A) families and singles who do not have a concession card, and
- $1,000 for all other families.

If the Bill is not passed, the 2016 thresholds for the Extended Medicare safety will be:

- $647.90 for concession cardholders and FTB (A) families, and
- $2,030 for all other families and singles.

I expect the proportion of benefits flowing to people charged more moderate fees to increase and consequently a greater share of safety net benefits for those in lower socioeconomic areas. The Department of Health estimates an additional 53,000 people will receive a safety net benefit under the new arrangements. The number of eligible concession card holders is expected to increase by 80,500. The number of non-concession card holders is expected to decrease by 27,500, however, there will be a net increase in non-concessional single people.

Capping arrangements

Although the EMSN was intended to assist patients who have high out-of-pocket costs, it has had an inflationary impact in some areas. While the Government pays 80 per cent of the increase in fees, the patient still pays the remaining 20 per cent. In some cases, the increase in fees has been so high that Medicare data indicate that patients now face higher out-of-pocket costs than they would have if the safety net had not existed. More generally, the 2009 review estimated that the EMSN was directly responsible for a 2.9 per cent increase in provider fees per year (excluding GPs and pathology). Clearly, this has implications for patients who need services, but do not qualify for the EMSN, and the health system as a whole.

Benefit cap

Caps were introduced on safety net benefits for selected items in 2010. These caps placed an upper limit on the Commonwealth contribution for the service. This led to some moderation in the fees charged in some areas for these services. The introduction of safety net benefit caps for all MBS items is therefore expected to have a moderating effect on fee inflation.

At present, around 570 MBS items have a maximum safety net benefit or 'cap' in order to limit the incentives for providers to charge high fees for these items. However, the 2011 review into capping arrangements

concluded that numerous opportunities remain for providers to shift billing practices in order to avoid caps.

Cataract surgery provides an example of billing practice shifting around capped items. Caps were introduced for cataract surgery in 2010. The 2011 review found that the fees charged for uncapped MBS item 20142 (the initiation of management of anaesthesia for lens surgery) increased by 400 per cent at the 90th percentile provider fee, indicating the possibility of provider fee sharing between ophthalmologists and anaesthetists to avoid the cap on cataract surgery.

When EMSN benefit caps were expanded in 2012, a cap was placed on the item for the initiation of anaesthesia in association with cataract surgery. Since then, some providers have shifted fees to other items, including to a routine diagnostic test. Although most doctors charge around $40 for the test, some patients have been billed over $1,000. While safety net benefit caps could be introduced for the diagnostic test item, currently there is the possibility that the high fee would move to another uncapped item. The new Medicare safety net, by capping benefits for all MBS items, would protect patients against this type of fee inflation in the future.

Accumulation cap

The 2009 review also found that one of the main incentives for fee inflation was the ability for people to cross the threshold of the EMSN in a single high fee service. This is because when a practitioner knows a patient is likely to qualify for the EMSN, they can increase their fees with the knowledge the Government is paying the majority of the cost.

For example, the maximum fee for brain stem audiometry (a form of hearing test) - an item with an MBS Fee of around $192 - increased to more than $3,995 in 2014. The patient qualified for EMSN benefits in a single service and was rebated 80 per cent of all costs in excess of the relevant threshold. The accumulation cap will in many cases remove the incentive for providers to charge very high fees relative to the MBS Fee.

The new thresholds already take into account the effects of an accumulation cap. In addition, people who are charged up to 150 per cent of the MBS Fee will not experience more out-of-pocket costs before reaching the threshold.

The accumulation and safety net benefit caps for all MBS items will address the chief structural flaws of the EMSN. The threshold settings and capping arrangements will create a more level-playing field for patients to qualify for assistance. The accumulation cap weakens the link between the patient's ability to pay high fees and the likelihood of reaching the threshold. In combination with the lower threshold levels, the capping arrangements will facilitate access to the new Medicare safety net for an additional 80,500 concessional patients.

Removal of the Greatest Permissible Gap rule

At paragraph 1.89 of the Report, the Committee raises the potential impact of the removal of the Greatest Permissible Gap (GPG) rule on financially disadvantaged people, particularly for 'one-off' services. The removal of the GPG will have no effect on most services that are bulk billed. For those that are not bulk billed, the impact of the removal of the GPG will be largely offset by the reduced thresholds of the new Medicare safety net. The GPG does not apply to in-hospital services. A worked example, prepared by my Department, to demonstrate the interaction of the removal of the GPO rule and the new Medicare safety net for a high-priced MBS item is at Attachment A.[6]

A significant proportion of the services to which the GPG rule is applied are bulk-billed, and many of these are diagnostic imaging MBS items. There is a bulk-billing incentive for diagnostic imaging services provided to concessional people and children under 16 years of age. Diagnostic imaging providers receive 95 per cent of the MBS Fee if they bulk-bill a patient in one of these categories. This is independent of the operation of the GPG rule. This means that there is no change to the rebate paid for these services when bulk-billed. The bulk-billing rate across all diagnostic imaging services for patients in these groups is around 90 per cent.

The MBS items subject to the GPG rule are for high priced services that are often embedded in a 'cycle of care', e.g. Assisted Reproductive Technology services. The nature of many of these high priced items means that at the time a patient receives such a service, he or she will have, at the least, already seen their GP for a referral and a specialist for an initial consultation. While there is a reduction in the standard MBS benefit available, there is an increase in the amount of out-of-pocket costs that accrue to the safety net thresholds, and the patient reaches the safety net sooner. This will be of particular benefit to concessional singles and families who under the new Medicare safety net have a threshold of $400. Registered families are able to pool out-of-pocket costs to reach the safety net threshold.

Once the patient has qualified for the safety net, there is a cap on the amount of safety net benefits that will be paid (as is currently the case with many high cost out-of-hospital services), meaning that the net impact on the financial position of the patient is usually unchanged.

For the reasons outlined above, I believe these measures are not incompatible with Australia's human rights obligations and that they are reasonable and proportionate to the achievement of a legitimate objective.[7]

---

6 See Attachment A in the minister's correspondence at Appendix 1 of the report.

7 See Appendix 1, Letter from the Hon Sussan Ley MP, Minister for Health, to the Hon Philip Ruddock MP (dated 1 December 2015) 1-5.

Committee response

2.29 **The committee thanks the Minister for Health for her detailed and thorough response.**

2.30 The committee considers that the response demonstrates that the measures are well targeted and therefore proportionate to achieving the stated objective. In particular, the response sets out a number of safeguards in place to ensure that vulnerable people will not be disadvantaged by the measures and significant numbers of people will be better off as a result of the changes in the bill.

2.31 **Accordingly, the committee considers that the bill is compatible with the right to social security and the right to health and has concluded its examination of the bill.**

Omnibus Repeal Day (Spring 2015) Bill 2015

Portfolio: Prime Minister
Introduced: House of Representatives, 12 November 2015

Purpose

2.32 The Omnibus Repeal Day (Spring 2015) Bill 2015 (the bill) seeks to make a number of amendments to a variety of Acts. The bill seeks to repeal redundant or spent provisions as well as make a number of amendments designed to reduce regulation.

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

Background

2.34 The Omnibus Repeal Day (Spring 2014) Bill 2014 (the 2014 bill) sought to make a number of the amendments that are contained in this bill. The 2014 bill is currently before the House of Representatives.

2.35 The committee previously commented on the 2014 bill in its *Nineteenth Report of the 44th Parliament*,[1] and considered the Parliamentary Secretary to the Prime Minister's response in its *Twenty-second Report of the 44th Parliament*.[2]

2.36 The committee first commented on the bill in its *Thirty-first Report of the 44th Parliament*, and requested further information from the Assistant Minister for Productivity as to whether the bill was compatible with the right to equality and non-discrimination (rights of persons with disabilities).[3]

Removal of consultation requirements when changing disability standards

2.37 Part 2 of Schedule 3 of the bill seeks to repeal a number of provisions in various Acts relating to consultation requirements, including repealing subsections 382(1) and (5) of the *Telecommunication Act 1997* (Telecommunications Act).

2.38 Currently under the Telecommunications Act, the Australian Communications and Media Authority (ACMA) can make a 'disability standard' in relation to equipment used in connection with a standard telephone service where features of the equipment are designed to cater for the special needs of persons with disabilities (for example, an induction loop designed to assist with a hearing aid).[4] Before making a disability standard, ACMA must try to ensure that interested

1 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 29-38.

2 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 174-182.

3 Parliamentary Joint Committee on Human Rights, *Thirty-first Report of the 44th Parliament* (24 November 2015) 4-11.

4 Section 380 of the *Telecommunications Act 1997* (the Telecommunications Act).

persons have an adequate opportunity (of at least 60 days) to make representations about the proposed standard, and give due consideration to any representations made.[5]

2.39 In its previous report the committee considered that repealing consultation requirements under the Telecommunications Act relating to changes to disability standards engages the right to equality and non-discrimination and the rights of persons with disabilities.

Right to equality and non-discrimination (rights of persons with disabilities)

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

2.41 These are fundamental human rights that are essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.42 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[6] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[7] 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.[8]

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

2.44 Article 4 of the CRPD requires that when legislation and policies are being developed and implemented that relates to persons with disabilities, state parties must closely consult with and actively involve persons with disabilities through their representative organisations.

---

5 Section 382 of the Telecommunications Act.

6 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.

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

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

2.45 Article 9 of the CRPD requires state parties to take appropriate measures to ensure persons with disabilities have access, on an equal basis with others, to information and communications technologies and systems.

2.46 Article 21 of the CRPD requires state parties to take all appropriate measures to ensure persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others.

Compatibility of the measure with the right to equality and non-discrimination (rights of persons with disabilities)

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

2.48 In addition, article 9 of the CRPD requires that state parties take appropriate measures to ensure persons with disabilities have access, on an equal basis with others, to information and communications technologies and systems. The United Nations Committee on the Rights of Persons with Disabilities has noted that access to information and communications technology (including telephones) is a requirement of the obligation to adopt and monitor national accessibility standards, and has noted that it 'is important that the review and adoption of these laws and regulations are carried out in close consultation with persons with disabilities and their representative organizations (article 4, paragraph 3), as well as all other relevant stakeholders'.[9]

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

2.49 In its previous report, the committee considered that repealing consultation requirements under the Telecommunications Act relating to changes to disability standards limits the right to equality and non-discrimination and the rights of persons with disabilities.

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

2.50 The statement of compatibility did not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore sought the advice of the Assistant Minister for Productivity as to the legitimate objective, rational connection, and proportionality of the measure.

Assistant Minister's response

> The proposed repeal of subsections 382(1) and (5) of the *Telecommunications Act 1997* (the TC Act) forms part of a broader reform of statutory consultation requirements in the Communications and the Arts portfolio. Statutory consultation requirements have, over time, developed into a variety of inconsistent approaches with respect to the time and method of consultation. The legitimate objective of making consultation requirements consistent across portfolio legislation will reduce the complexity and inflexibility of current arrangements, providing stakeholders with certainty and consistency, and allowing rule-makers to undertake targeted, appropriate and satisfactory consultation using standardised consultation requirements already provided for in Section 17 of the *Legislative Instruments Act 2003* (the LI Act).
>
> The consultation provisions in section 382 of the TC Act do not strictly require that consultation be undertaken before an instrument is made. Rather, the provisions require the Australian Communications and Media Authority (ACMA) to 'so far as is practicable, try to ensure' that an adequate opportunity is provided for representations to be made. The 60 day period referred to in subsection 382(5), for persons to make representations, applies in the context of the ACMA's obligations to try to consult so far as is practicable.
>
> Subsection 17(1) of the LI Act on the other hand requires a rule-maker, before making a legislative instrument, to be satisfied that he or she has undertaken consultation that is appropriate and reasonably practicable. Accordingly, both section 382 of the TC Act and section 17 of the LI Act are framed in terms of 'practicable' consultation. The LI Act provides for equivalent requirements for the ACMA to consult when any changes are made to disability standards.
>
> The legislated consultation obligations in section 17 of the LI Act will ensure that persons with disabilities continue to be consulted by the ACMA in the making of disability standards, particularly as the ACMA ensures the effectiveness of any standard providing for the needs of persons with disabilities. Therefore the repeal of subsections 382(1) and (5) of the TC Act would not limit requirements for consultations with persons with disabilities, and there is no limitation on the right to equality and non-discrimination in relation to persons with disabilities.
>
> It is worth noting that Part 5 of the LI Act sets out a tabling and disallowance regime which facilitates parliamentary scrutiny of legislative instruments. The consultation undertaken in relation to any legislative instrument is required to be detailed in the associated explanatory

statement and, accordingly, if Parliament were dissatisfied with the level of consultation undertaken, the instrument may be disallowed.

In the present context of disability standards made by the ACMA, if the Parliament were dissatisfied with the ACMA's response to the requirement for appropriate and reasonably practicable consultation under section 17 of the LI Act, then Parliament could disallow the instrument.

The proposed repeal of subsections 382(1) and (5) of the TC Act therefore may engage but do not limit the right to equality and non-discrimination and the rights of persons with disabilities, due to the operation of comparable provisions in Section 17 of the LI Act.[10]

Committee response

2.51 **The committee thanks the Assistant Minister for Productivity for his response.**

2.52 The committee acknowledges the assistant minister's advice that the existing provisions of the *Legislative Instruments Act 2003* (Legislative Instruments Act) provides a statutory mechanism for people to comment on those standards, and that the consultation provisions in section 17 of the Legislative Instruments Act are 'comparable' to the consultation requirements under section 382 of the Telecommunications Act. Further, the committee accepts that, as the assistant minister notes, section 382 of the Telecommunications Act and section 17 of the Legislative Instruments Act do not strictly require that consultation be undertaken before an instrument is made.

2.53 However, as the committee noted in its initial consideration of this matter, and in relation to the 2014 bill, the consultation requirements under the Legislative Instruments Act are nevertheless not equivalent to the current consultation requirements in the Telecommunications Act. In particular, there are no equivalent process requirements to those contained in the Telecommunications Act, which provides for at least 60 days for people to make comments on a proposed standard. In addition, the Legislative Instruments Act provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument. Therefore, contrary to the assistant minister's advice, the repeal of the consultation requirements in relation to disability standards would limit the right to equality and non-discrimination, in particular, the obligation to consult under the CRPD.

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

10 See Appendix 1, Letter from the Hon Dr Peter Hendy MP, Assistant Minister for Productivity, to the Hon Philip Ruddock MP (dated 15 December 2015, received 19 January 2016) 1-2.

2.55 The committee notes the assistant minister's advice that the purpose of the amendment is to take a consistent approach to the reform of statutory consultation requirements, which will 'reduce the complexity and inflexibility of current arrangements providing stakeholders with certainty and consistency', and allow 'rule-makers to undertake targeted, appropriate and satisfactory consultation using standardised consultation requirements'.[11] The committee accepts that standardised requirements will assist rule-makers in this regard.

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

2.57 The committee notes further that while standardisation may be an appropriate aim in the abstract, international human rights law recognises that laws and policies may need to take into account the special needs of particular groups in order to comply with the right to equality and non-discrimination. Treating persons with a disability exactly the same as others in the community, without taking into account their special needs, does not advance the right to equality before the law under international human rights law.

2.58 Finally, the committee also notes the assistant minister's advice that Parliament may, under Part V of the Legislative Instruments Act, disallow any instruments made by ACMA, if it were dissatisfied with the level of consultation undertaken.[12] This is correct. However, it fails to appreciate the reduction in protection offered to persons with disabilities under sections 382(1) and 382(5) of the Telecommunications Act.

2.59 **The committee therefore considers that the repeal of the consultation requirements under the Telecommunications Act relating to disability standards limits the right to equality and non-discrimination and the rights of persons with disabilities. In light of the information provided by the Assistant Minister for Productivity, the committee considers that this measure may be incompatible with these rights.**

11 See Appendix 1, Letter from the Hon Dr Peter Hendy MP, Assistant Minister for Productivity, to the Hon Philip Ruddock MP (dated 15 December 2015, received 19 January 2016) 1.

12 See Appendix 1, Letter from the Hon Dr Peter Hendy MP, Assistant Minister for Productivity, to the Hon Philip Ruddock MP (dated 15 December 2015, received 19 January 2016) 2.

Removal of requirement for independent reviews of Stronger Futures measures

2.60 In its previous report, the committee considered that removal of a legislated requirement for independent review of the Stronger Futures measures may affect the proportionality of any limitations on rights posed by the Stronger Futures measures and impact on whether such measures can be considered to justifiably limit human rights.

2.61 The committee noted further that it is currently conducting its *Review of Stronger Futures in the Northern Territory Act 2012 and related legislation* and will consider the effect of the removal of the review requirements as part of that inquiry. That inquiry is due to be completed shortly.

Migration and Maritime Powers Amendment Bill (No. 1) 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 16 September 2015

Purpose

2.62 The Migration and Maritime Powers Amendment Bill (No. 1) 2015 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to:

- provide that when an unlawful non-citizen is in the process of being removed to another country and if, before they enter that country, the person is returned to Australia, then that person has a lawful basis to return to Australia without a visa;
- provide that when that person is returned to Australia, bars on the person making a valid visa application for certain visas will continue to apply as if they had never left Australia;
- make further amendments arising out of the enactment of the *Migration Amendment (Character and General Visa Cancellation) Act 2014*;
- confirm that a person who has previously been refused a protection visa application that was made on their behalf cannot make a further protection visa application; and
- ensure that fast track applicants can apply to the Administrative Appeals Tribunal for review of certain decisions.

2.63 The bill also seeks to amend the *Maritime Powers Act 2013* to amend the powers that are able to be exercised in the course of passage through or above waters of another country in a manner consistent with the United Nations Convention on the Law of the Sea.

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

Background

2.65 The committee first reported on the bill in its *Thirtieth Report of the 44th Parliament* (previous report), and requested further information from the Minister for Immigration and Border Protection as to the compatibility of the bill with Australia's international human rights obligations.[1]

1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 28-52.

Extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia.

2.66 The amendments in Schedule 1 of the bill provide that when an unsuccessful attempt is made to remove a non-citizen from Australia, the non-citizen can be returned to Australia without a visa and will be taken to have been continuously in the migration zone.

2.67 The effect of this amendment is that the person would be ineligible to make further applications for a protection visa because they would be characterised as being continuously in the migration zone, such that the refusal or cancellation of their visa continues to have effect despite their attempted removal.

2.68 Nevertheless, the fact that the person has been refused entry by their home country may be a relevant factor in assessing the legitimacy of their protection claim. It may also be evidence that they are effectively stateless. The inability of individuals in such circumstances to make a new protection claim means that the person may be subject to indefinite immigration detention (raising the right to liberty) or subject to further attempts at deportation that may engage Australia's non-refoulement obligations.

2.69 These measures would also apply to children and so raise questions as to the compatibility of the measures with the obligation to consider the best interests of the child.

2.70 The committee's assessment of the compatibility of the measures for each of these human rights is set out below.

Right to liberty

2.71 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to liberty—the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. This prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

2.72 Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

Compatibility of the measure with the right to liberty

2.73 The statement of compatibility explains that the measures in Schedule 1 engage the right to liberty. The statement of compatibility further explains that while the right to liberty is engaged, any limitation on the right is otherwise justified.

2.74 The committee considers that ensuring the safety of Australians is a legitimate objective for the purpose of international human rights law. However, the statement of compatibility does not explicitly explain how the measures are rationally connected to that objective, nor how they are proportionate. In particular, it is unclear whether there are sufficient safeguards to ensure that the detention of persons after their return to Australia following an unsuccessful return to their home country will not lead to cases of arbitrary detention.

2.75 The statement of compatibility notes that:

> The Australian Government's position is that the detention of individuals is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. In the context of Article 9, detention that is not "arbitrary" must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.[2]

2.76 However, the UN Human Rights Committee (HRC) recently considered Australia's mandatory detention regime in the context of refugees subject to adverse security assessments. The HRC found the detention to be in violation of the right to liberty in article 9 of the ICCPR because of the blanket and mandatory nature of detention for those who have been refused a visa but who are unable to be removed from Australia.[3]

2.77 In particular, the Australian system provides for no consideration of whether detention is justified and necessary in each individual case—detention is simply required as a matter of policy. It is this essential feature of the mandatory detention regime that raises concerns as to its compatibility with the right to liberty in article 9 of the ICCPR.

2.78 As set out above, extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore sought the advice of the

2 Explanatory memorandum (EM), Attachment A [43].

3 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013).

Minister for Immigration and Border Protection as to 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, if it is the least rights restrictive approach that could be taken in order to achieve the stated objective.

Minister's response

Under existing law, a person who has been removed to another country, and is then refused entry by the destination country, does not need a visa to return to Australia. When this happens, any bars imposed before they left that prevent them from making a further visa application will continue to apply when they are returned to Australia.

This is not the case, however, if the person is turned around in transit. The legislative changes will ensure that a consistent approach is taken for a person whose removal is aborted in transit prior to reaching the destination country.

Under the changes, sections 42, 48 and 48A will operate consistently for the range of situations that might prevent the department from completing a removal once it is underway.

- The changes ensure that, for the very small number of cases where a person is turned around in transit, the person can return to Australia under the same visa conditions they had before being removed and that those conditions will remain in force while alternative removal arrangements are undertaken.
- This will enable new removal arrangements to be made without being delayed by further visa applications- thereby facilitating the least restrictive approach to detention by removing access to unintended mechanisms that could delay removal.

The application of the same measures to persons that currently apply to a person returned from a destination country to those returned from a transit country could not, in itself, lead to arbitrary detention. Their detention in Australia is not unlawful (by virtue of compliance with section 189 of the Migration Act), and would not be arbitrary as it would be for the purpose of either removing the person from Australia or granting them a visa.

To ensure a person in immigration detention is held lawfully under section 189 of the Migration Act, as an unlawful non-citizen (UNC), and to avoid the possibility of the person being unlawfully or arbitrarily detained, my department undertakes regular reviews of immigration detainees. These reviews include:

- confirming an UNC's identity and unlawful immigration status;
- ensuring any outstanding matters relating to the person's immigration status are resolved as soon as possible; and

- ensuring that voluntary requests for removal from Australia are facilitated as soon as reasonably practicable, as required under section 198 of the Migration Act.[4]

Committee response

2.79 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.80 In its initial analysis, the committee set out the basis of the HRC decision against Australia concerning the continued detention of 46 refugees subject to adverse ASIO security assessments. The HRC found that their indefinite detention on security grounds amounted to arbitrary detention and to cruel, inhuman or degrading treatment, contrary to articles 9(1), 9(4) and 7 of the ICCPR. The HRC considered the detention of the refugees to be in violation of the right to liberty in article 9 of the ICCPR because the government:

- had not demonstrated on an individual basis that their continuous indefinite detention was justified; or that other, less intrusive measures could not have achieved the same security objectives;
- had not informed them of the specific risk attributed to each of them and of the efforts undertaken to find solutions to allow them to be released from detention; and
- had deprived them of legal safeguards to enable them to challenge their indefinite detention, in particular, the absence of substantive review of the detention, which could lead to their release from arbitrary detention.[5]

2.81 Accordingly, the HRC's assessment provides clear standards to be met for detention to be compatible with article 9.

2.82 The minister's response sets out three examples of regular reviews undertaken by his department which are said to ensure that that no person in immigration detention is arbitrarily detained. These reviews, while important, do not meet the standard set out by the HRC. None of the mechanisms are set out in statute and no person in immigration detention has any legal entitlement to require those reviews to occur, such as by seeking administrative or judicial review. The mechanisms set out in the minister's response are entirely at the discretion of the department and the minister personally.

2.83 As acknowledged in the statement of compatibility, the bill would widen the scope of non-citizens who will be ineligible to apply for a visa and subsequently liable for detention under the Migration Act. For the reasons set out above, that detention

4 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 7.

5 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013).

is arbitrary. Accordingly, the bill engages and limits the right not to be arbitrarily detained in breach of article 9 of the ICCPR.

2.84 **The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, is that it is incompatible with article 9 of the International Covenant on Civil and Political Rights (right to liberty).**

2.85 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to:

- provide an individual assessment of the necessity of detention in each individual case;
- provide each individual subject to immigration detention a statutory right of review of the necessity of that detention;[6] and
- in the case of individuals detained for a lengthy period of time, provide a periodic statutory right of review of the necessity of continued detention.

Non-refoulement obligations

2.86 Australia has non-refoulement obligations under the Refugee Convention for refugees, and under both the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) for people who are found not to be refugees.[7] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[8]

2.87 Non-refoulement obligations are absolute and may not be subject to any limitations.

6 Any statutory right of review would need to ensure the appropriate protection of national security sources as provided for in the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

7 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

8 See Refugee Convention, article 33. The non-refoulement obligations under the CAT and ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

2.88 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.[9]

2.89 Australia gives effect to its non-refoulement obligations principally through the Migration Act.

Compatibility of the measure with the right to non-refoulement

2.90 The statement of compatibility notes that the amendments may lead to an unlawful non-citizen being ineligible to make a further application for a protection visa. However, the statement highlights the availability of the minister's non-compellable powers under the Migration Act to grant a visa.[10]

2.91 The obligation of non-refoulement and the right to an effective remedy require an opportunity for effective, independent and impartial review of the decision to expel or remove.[11] In this regard, the committee notes that there is no right to merits review of a decision that is made personally by the minister.

2.92 In relation to this, treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT.

2.93 As the committee has noted previously, administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards of 'independent, effective and impartial' review required to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.[12] The committee notes that review mechanisms are important in guarding against the irreversible harm which may be caused by breaches of Australia's non-refoulement obligations.

---

9 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 45, and Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014), Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013, 51.

10 EM, Attachment A [43].

11 See *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v. France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000), paras 11.5 and 12 and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14), see also: Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

12 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), paragraphs [1.89] to [1.99]. See also *Fourth Report of the 44th Parliament* (18 March 2014) paragraphs [3.55] to [3.66] (both relating to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013).

2.94 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

Minister's response

> A person in Australia who is not able to apply for a protection visa will not be removed in breach of Australia's non-refoulement obligations. Any new claims for protection that were not previously assessed will be appropriately considered, and my department has administrative processes in place, such as an International Treaties Obligation Assessment or my ability to exercise my powers under the Migration Act and grant a person a visa, which are designed to assess such claims and safeguard Australia's non-refoulement obligations. Removals do not take place where outstanding obligations require assessment. For cases affected by this change that raise new claims upon return to Australia, those claims will be considered through existing mechanisms within the (new) removal planning framework whereby application bars can be lifted where appropriate.[13]

Committee response

2.95 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.96 The legal advice to the committee since its inception in 2012 is that administrative processes are insufficient to protect against unlawful refoulement as required by international law.

2.97 The obligation of non-refoulement and the right to an effective remedy require an opportunity for effective, independent and impartial review of the decision to expel or remove.[14] The consistent view of the committee was detailed in its initial analysis in the previous report.

2.98 The mechanisms set out in the minister's response are entirely administrative and there is no legal protection against non-refoulement in the form of a reviewable decision.

2.99 As the committee has noted previously, administrative and discretionary safeguards are less reliable than the protection of safeguards set out in legislation, and are insufficient in and of themselves to satisfy the standards of 'independent,

---

13 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 8.

14 See *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v. France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000), paras 11.5 and 12 and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14), see also: Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

effective and impartial' review required to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.[15] The committee notes that review mechanisms are important in guarding against the serious and irreversible harm which may be caused by breaches of Australia's non-refoulement obligations.

2.100 **The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) is that the proposed legislation fails to provide for effective and impartial review of non-refoulement decisions. Accordingly, the committee considers that the measure is incompatible with Australia's non-refoulement obligations under international law.**

2.101 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal.

Obligation to consider the best interests of the child

2.102 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[16]

2.103 This principle requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

Compatibility of the measure with the obligation to consider the best interests of the child

2.104 As set out above, the measures in Schedule 1 of the bill have the effect of denying a person who has been unsuccessfully removed from Australia from making further applications for a protection visa. The fact that the person has been refused

15 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014), paragraphs [1.89] to [1.99]. See also *Fourth Report of the 44th Parliament* (18 March 2014) paragraphs [3.55] to [3.66] (both relating to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013).

16 Article 3(1).

entry by their home country may be a relevant factor in assessing the legitimacy of their protection claim. It may also be evidence that they are effectively stateless. These measures would also apply to children. Accordingly, it is necessary to consider how it would be in a child's best interests to be denied the right to make a new protection visa application where they had been refused entry by their home country. The engagement of the measures in Schedule 1 with the obligation to consider the best interests of the child is not considered in the statement of compatibility.

2.105 The committee therefore requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child and, particularly, 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.

Minister's response

> The changes maintain Australia's obligations and responsibilities under the Convention on the Rights of the Child (CRC) that were in place prior to departure on the aborted removal. For the removal to have been initiated, an assessment against the CRC will have been undertaken where necessary. The fact of the removal being aborted at a transit destination does not of itself change that assessment nor the requirement for removal from Australia.
>
> The proposed changes are aimed at ensuring the legitimate objective of ensuring the removal of persons (including children where appropriate) who have no legal right to remain in Australia as required by the Migration Act.
>
> The limitation provides the opportunity for new removal arrangements to be made (likely through a different transit point) without the delay that currently exists, by preventing persons from making a further visa application unless protection circumstances have changed since departure on the aborted removal.
>
> It is reasonable that any bars imposed before a person left that prevented them from making a further visa application would continue to apply when they are returned to Australia following travel that is aborted during transit.[17]

Committee response

2.106 **The committee thanks the Minister for Immigration and Border Protection for his response.**

17 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 8-9.

2.107 The committee agrees that the measure pursues the legitimate objective of ensuring the removal of persons who have no legal right to remain in Australia. The committee also agrees that the measure is rationally connected to that objective as barring a person from making further protection claims after a failed deportation will strengthen the government's capacity to effect a further deportation without delay.

2.108 In terms of proportionality, the response does not explain in detail the safeguards in place to ensure that a child is not subject to subsequent deportation attempt without legitimate protection claims being considered.

2.109 In its initial analysis, the committed noted that the fact that the child had been refused entry by their home country may be a relevant factor in assessing the legitimacy of their protection claim. It may also be evidence that they are effectively stateless. While there may be many innocuous reasons for the travel being aborted, it cannot be said in every case that the failure of transit arrangements is not relevant to the merits of a child's protection claim.

2.110 The response also asserts that it is reasonable that any bars imposed before a person left that prevented them from making a further visa application would continue to apply when they are returned to Australia following travel that is aborted. Given that the fact that the travel failed could be because of circumstances that give rise to, or further strengthen a protection claim, the minister's response does not explain why it is necessary or appropriate to deny a child the right to make a fresh protection claim on their return to Australia in those cases.

2.111 **The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) is that it is incompatible with that obligation.**

2.112 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal.

Expansion of visa cancellation powers

2.113 Schedule 2 of the bill includes amendments which the explanatory memorandum (EM) describes as 'technical and consequential amendments arising out of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (the Character Act).'[18] The Character Act introduced new powers to refuse or cancel visas on 'character' grounds. The Character Act has the effect of automatically cancelling a visa if, among other things, the person was imprisoned for

18 EM 14.

a sentence of 12 months or more, or was convicted of a sexually based offence involving a child. The Character Act also creates new personal ministerial powers to reverse decisions made by the Administrative Appeals Tribunal or an officer of the department. In addition, the Character Act significantly decreased the threshold under which a person would fail the 'character test' and increased the minister's powers to cancel visas on the basis of incorrect information.

2.114 When considering the bill that became the Character Act, the committee considered that it engaged a number of human rights and related obligations.[19] Schedule 2 of the bill now makes a number of amendments to the new cancellation powers introduced by the Character Act which reduce procedural safeguards, including amendments that:

- do not require a person in detention to be informed that they have only two working days to apply for a visa after they have had their visa cancelled by the minister personally under section 501BA;[20]
- require a refugee to be held indefinitely even if there is no prospect they can ever be removed, or if the visa decision is unlawful;[21]
- extends a ban on most further visa applications in cases where the minister has personally cancelled a visa;[22]
- automatically cancel or refuse any other visas in cases where the minister has personally set aside a decision by the Administrative Appeals Tribunal or a departmental officer;[23] and
- exclude a person for a prescribed time from entering Australia who has a visa refused or cancelled personally by the minister under sections 501B, or 501BA.[24]

2.115 The committee considers that the changes in Schedule 2 widen the circumstances in which a person may be subject to immigration detention, visa cancellation and potential refoulement. Accordingly, Schedule 2 engages the following rights and obligations:

- non-refoulement obligations;
- the right to liberty;

---

19 See Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 13-28.

20 Item 8, Schedule 2.

21 Item 9, Schedule 2.

22 Item 18, Schedule 2.

23 Item 19, Schedule 2.

24 Item 20, Schedule 2.

- the right to freedom of movement;
- the obligation to consider the best interests of the child; and
- the right to equality and non-discrimination.

2.116 The committee's assessment of the compatibility of the measures for each of these human rights is set out below.

Right to liberty

2.117 The right to liberty is described above at paragraphs [2.71] to [2.72].

Compatibility of the measures with the right to liberty

2.118 The statement of compatibility explains that the measures in Schedule 2 engage but do not limit the right to liberty. The reasoning behind this conclusion is unclear in the statement of compatibility. The statement of compatibility nevertheless goes on to explain why any limitation on the right to liberty is justified.

2.119 The committee considers that ensuring the safety of Australians is a legitimate objective for the purposes of international human rights law. However, it is unclear whether these amendments are rationally connected to that objective. In terms of proportionality the statement of compatibility states that there are extensive policy guidelines.[25]

2.120 However, there is no discretion once a visa is cancelled or if it is cancelled automatically by operation of the provisions of the Migration Act. Moreover, a decision to revoke mandatory cancellation can only be made by the minister using his personal, non-compellable, discretionary powers.

2.121 The statement of compatibility notes that:

> The detention of a non-citizen under these circumstances is considered neither unlawful nor arbitrary under international law. The Government has processes in place to mitigate any risk of a non-citizen's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[26]

2.122 However, none of these mechanisms entail a statutory requirement for periodic review of the necessity of immigration detention in each individual case. As noted above at paragraphs [2.76] to [2.77], it is the blanket and mandatory nature of detention for those who have been refused a visa but who remain in immigration detention that makes such detention arbitrary.

25 EM, Attachment A [48].

26 EM, Attachment A [49].

2.123 The committee notes that no specific explanation is provided for why the bill includes amendments that a non-citizen who has had a visa cancelled by the minister personally under section 501BA does not need to be informed that they may only apply for a visa within 2 working days. Moreover, given the time critical nature of a person's response to cancellation, no justification is provided as to how it is sufficient that such information will have been provided previously in a different context, particularly given the very serious consequences for the individual concerned and given their pre-existing vulnerability as a person in detention. It is unclear how this amendment is necessary or reasonable.

2.124 Returning to Schedule 2 as a whole, the committee accepts that the safety of the Australian community, particularly in the current security environment, may be considered to be both a pressing and substantial concern and a legitimate objective. However, as mandatory detention applies to individuals regardless of whether they are a threat to national security, the measure does not appear to be rationally connected to this objective and may not be proportionate as it is not likely to be the least rights restrictive approach to achieve the legitimate objective.

2.125 The committee therefore sought the advice of the Minister for Immigration and Border Protection 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 the stated objective.

Minister's response

> The amendments proposed in Schedule 2 to the Bill do not expand visa cancellation powers or the grounds upon which a person may have their visa cancelled; they also do not alter the detention powers or framework already established in the Migration Act. Nor does this Bill propose any changes to the mandatory cancellation and revocation framework. This Bill seeks to ensure that legislative provisions which apply to other Ministerial powers within the character provisions apply equally to section 501BA.
>
> Section 501BA, which gives me the power to overturn the decision of a delegate or AAT member to revoke the mandatory cancellation of a non-citizen's visa, was introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* and came into effect on 11 December 2014. This power is non-delegable and can only be exercised when I am satisfied that the cancellation of the visa is in the national interest and the person does not pass certain limbs of the character test.
>
> The Statement of Compatibly in the Explanatory Memorandum to the Bill outlines the Government's position that the detention of unlawful non-citizens as the result of visa cancellation is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. These amendments will put those whose visas are cancelled on the basis of section 501BA on the same

> footing as non-citizens who have had their visa/s cancelled under any other character provision (sections 501, 501A and 5018). These amendments present a reasonable response to achieving a legitimate purpose under the Covenant, which is the safety of the Australian community.
>
> I note that such persons will be required to be detained under section 189 of the Migration Act as unlawful non-citizens, and will be liable to be removed from Australia under section 198 of the Migration Act. However, the cancellation of a non-citizen's visa in circumstances where they present a risk to the Australian community, and their subsequent detention prior to removal, follows a well established process within the legislative framework of the Migration Act. The safety of the Australian community, particularly in the current security environment, is considered to be both a pressing and substantial concern and a legitimate objective to this proposal. Further, people who are affected by these measures can seek judicial review of my cancellation decision, and I repeat what I have said above in relation to the effectiveness of this review mechanism.[27]

Committee response

2.126 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.127 The committee agrees that the bill does not expand the grounds upon which a person may have their visa cancelled and that the bill does not alter the detention powers or framework already established in the Migration Act. What Schedule 2 of the bill does is seek to make a number of amendments to the cancellation powers introduced by the Character Act which reduce important procedural safeguards, including amendments that:

- do not require a person in detention to be informed that they have only two working days to apply for a visa after they have had their visa cancelled by the minister personally under section 501BA;[28]
- require a refugee to be held indefinitely even if there is no prospect they can ever be removed, or if the visa decision is unlawful;[29]
- extend a ban on most further visa applications in cases where the minister has personally cancelled a visa;[30]
- automatically cancel or refuse any other visas in cases where the minister has personally set aside a decision by the Administrative Appeals Tribunal or a departmental officer;[31] and

27 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 9-10.

28 Item 8, Schedule 2.

29 Item 9, Schedule 2.

30 Item 18, Schedule 2.

- exclude a person for a prescribed time from entering Australia who has a visa refused or cancelled personally by the minister under sections 501B, or 501BA.[32]

2.128 The committee considers that the changes in Schedule 2 widen the circumstances in which a person may be subject to immigration detention, as the reduction in procedural safeguards may result in more individuals being caught by the broadened cancellation powers. This position was accepted in the statement of compatibility.[33]

2.129 The response states that immigration detention is not arbitrary for the purposes of international law. However, as set out above at paragraphs [2.80] to [2.82] this is not the committee's understanding of the state of international law.

2.130 The response also states that individuals affected by the measures can seek judicial review of the minister's cancellation powers. While judicial review may be available, merits review of those powers is not available.

2.131 Judicial review is a considerably limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the decision maker). The court cannot undertake a full review of the facts (that is, the merits) of a particular case to determine whether the case was correctly decided.

2.132 Accordingly, there is no effective review of the visa cancellation powers available to the minister as any judicial review will not be able to consider whether the visa cancellation was the correct or preferable decision.

2.133 **The committee's assessment of the proposed expansion of visa cancellation powers against article 9 of the International Covenant on Civil and Political Rights (right to liberty), in the context of Australia's mandatory immigration detention policy, is that it is incompatible with article 9 of the International Covenant on Civil and Political Rights (right to liberty).**

2.134 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to:

- provide an individual assessment of the necessity of detention in each individual case;
- provide each individual subject to immigration detention a statutory right of review of the necessity of that detention;[34] and

---

31 Item 19, Schedule 2.

32 Item 20, Schedule 2.

33 EM, Attachment A [43].

34 Any statutory right of review would need to ensure the appropriate protection of national security sources as provided for in the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

- in the case of individuals detained for a lengthy period of time, provide a periodic statutory right of review of the necessity of continued detention.

Non-refoulement obligations and the right to an effective remedy

2.135 Australia's non-refoulement obligations are described above at paragraphs [2.86] to [2.89].

Compatibility of the measures with Australia's non-refoulement obligations

2.136 The statement of compatibility notes that the amendments may lead to an unlawful non-citizen being ineligible to make a further application for a protection visa, but notes the ability of the minister to exercise his non-compellable powers under the Migration Act to grant a visa.[35]

2.137 As set out above in relation to Schedule 1 at paragraphs [2.92] to [2.93] the committee's view is that the minister's non-compellable powers are an insufficient protection against non-refoulement and that international law is very clear that administrative arrangements are insufficient to protect against unlawful refoulement.

2.138 Where the processes identified as a safeguard against refoulement involve purely administrative and discretionary mechanisms, these are insufficient, on their own, to comply with Australia's non-refoulement obligations.

2.139 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

Minister's response

> I respectfully disagree with the Committee's view that Schedule 2 of this Bill expands visa cancellation powers. This Bill does not propose any new cancellation grounds. This Bill seeks to ensure that legislative provisions which apply to other Ministerial powers within the character provisions apply equally to section 501BA, which was introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*.
>
> Australia does not seek to resile from or limit its non-refoulement obligations. Nor do the amendments affect the substance of Australia's adherence to these obligations. As with other character cancellation powers, a person cancelled under section 501BA will be unable to apply for any visa other than a protection visa.
>
> However; I routinely consider non-refoulement obligations as part of my decision to cancel a visa on character grounds, and anyone who is found to

35 EM, Attachment A [50].

engage Australia's non-refoulement obligations will not be removed in breach of those obligations.[36]

Committee response

2.140 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.141 The committee welcomes the minister's commitment not to resile from or limit Australia's non-refoulement obligation. The committee also welcomes the minister's routine practice to consider non-refoulement obligations as part of decisions to cancel visas on character grounds.

2.142 However, for the reasons set out above at paragraphs [2.92] to [2.93] the committee's view is that the minister's non-compellable powers are an insufficient protection against non-refoulement and that international law is very clear that administrative arrangements are insufficient to protect against unlawful refoulement.

2.143 **The committee's assessment of the proposed expansion of visa cancellation powers against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) is that the proposed legislation fails to provide for effective and impartial review of non-refoulement decisions. Accordingly, the committee considers that the measure is incompatible with Australia's non-refoulement obligations under international law.**

2.144 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal.

Right to freedom of movement

2.145 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter one's own country. The right may be restricted in certain circumstances.

2.146 The right to enter one's own country includes a right to remain in the country, return to it and enter it. There are few, if any, circumstances in which depriving a person of the right to enter their own country could be reasonable.

36 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 10.

Australia cannot, by stripping a person of nationality or by expelling them to a third country, arbitrarily prevent a person from returning to his or her own country.

2.147 The reference to a person's 'own country' is not restricted to the formal status of citizenship. It includes a country to which a person has very strong ties.

Compatibility of the measures with the right to freedom of movement

2.148 The committee notes that the expanded visa cancellation powers, in widening the scope of people being considered for visa cancellation, may lead to more permanent residents having their visas cancelled and potentially being deported from Australia. The statement of compatibility does not address this issue.

2.149 The language of article 12(4) confers a right not to arbitrarily deprived of the right to enter one's 'own country'. The provision does not require 'citizenship' or 'nationality'. In interpreting these words according to their 'ordinary meaning' as required by the Vienna Convention on the Law of Treaties (VCLT), the phrase 'own country' clearly may be read as a broader concept than the terms 'citizen' or 'national'.

2.150 The UN HRC has interpreted the right to freedom of movement under article 12(4) of the ICCPR as applying to non-citizens where they had sufficient ties to a country, and indeed noted that 'close and enduring connections' with a country 'may be stronger than those of nationality'.[37]

2.151 The HRC's views are not binding on Australia as a matter of international law. Nevertheless, as the UN body responsible for interpreting the ICCPR, the HRC's views are highly authoritative interpretations of binding obligations under the ICCPR and should be given considerable weight by the government in its interpretation of Australia's obligations. Moreover, these statements of the HRC in relation to article 12(4) are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the VCLT.[38]

2.152 Article 32 of the VCLT provides that in the interpretation of treaties recourse may be had to supplementary means of interpretation in circumstances where the meaning is ambiguous or unreasonable. Supplementary means of interpretation include the preparatory work of a treaty, such as the negotiating record or *travaux*

37 Views: *Nystrom v. Australia* Communications No 1557/2007, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) ('Nystrom'). This was subsequently affirmed by the HRC in *Warsame,* UN Doc CCPR/C/102/D/1959/2010.

38 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of that treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

préparatoires. The committee notes that the *travaux préparatoires* for article 12(4) show that the terms 'national' and 'right to return to a country of which he is a national' were expressly considered and rejected by states during the negotiation of the ICCPR.

2.153 The *travaux préparatoires* for article 12(4) also show that Australia expressed concern during the negotiations about a right of return for persons who were not nationals of a country but who had established their home in that country (such as permanent residents in the Australian context). Accordingly, the phrase 'own country' was proposed by Australia as a compromise, and the right to enter one's 'own country' rather than the right to return to a country of which one is a 'national' was agreed in the final text of the ICCPR.[39]

2.154 In this context, the right to return to one's 'own country' applies to persons who are not nationals, but have strong links with Australia. As such, the measures in the bill in expanding the visa cancellation powers and the power to ban people from returning to Australia engage and limit the right of a person to return to one's own country. This has not been justified in the statement of compatibility.

2.155 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> I respectfully disagree with the committee's view that a person's right to freedom of movement extends to countries to which that person is not a citizen nor has a lawful right to enter and/or reside there. It is my position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country. In any event, the Bill does not seek to enhance cancellation and refusal powers, but to ensure that legislative provisions which apply to other of my personal powers within the character provisions apply equally to section 501BA. Further, the non-citizen's ties to the Australian community, including their length of residence is taken into account by delegates when considering whether to exercise the discretion to revoke the cancellation of the visa. The proposed amendments are therefore compatible with human rights because insofar as they engage Australia's human rights obligations, the safety of the Australian community, particularly in the current security environment is

39 See Right to enter one's country, Commission on Human Rights, 5th Session (1949), Commission on Human Rights, 6th Session (1950), on Human Rights, 8th Session (1952) 261 in Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987) 261.

> considered to be both a pressing and substantial concern and a legitimate objective to this proposal.[40]

Committee response

2.156 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.157 The committee notes that the minister disagrees with the committee's assessment that the right to freedom of movement covers not only citizens but permanent residents who have lived for many years in Australia and have strong ties with Australia such that they consider Australia to be their 'own country'. While the committee provided extensive legal reasoning for its position, the minister does not explain the legal basis of his views.

2.158 As set out above, the language of article 12(4) does not require 'citizenship' or 'nationality', but adopts the broader concept of 'own country'. This has been recognised by the UN Human Rights Committee (HRC) in its General Comment on Article 12 which concludes:

> The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.[41]

2.159 Even if the phrase 'own country' were to refer to 'national' as the minister contends, nationality under international law is a matter of fact, of which the conferral of citizenship under municipal law is only one factor. The ICJ has found that as a matter of customary international law:

> nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.[42]

2.160 The response also states that the bill does not seek to enhance cancellation or refusal powers. However, the statement of compatibility for the bill does explain that the bill would widen the circumstances in which a person may be subject to

---

40 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 10-11.

41 United Nations Human Rights Committee, ICCPR General Comment No. 27: Article 12 (Freedom of Movement), 67 sess, UN Doc CCPR/C/21/Rev.1/Add.9, [20].

42 *Nottebohm (Liechtenstein v. Guatemala)* Judgment 6 April 1955, ICJ Reports 1955, 23.

immigration detention, as the reduction in procedural safeguards may result in more individuals being caught by the broadened cancellation powers.[43]

2.161 **The committee's assessment of the proposed expansion of visa cancellation powers, including barring a person from applying for other visas, against article 12(4) of the International Covenant on Civil and Political Rights (freedom of movement—right to enter one's own country) is that the measures may be incompatible with the right to freedom of movement in relation to Australian permanent residents with longstanding or otherwise strong ties to Australia.**

2.162 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require that any person who has lived for many years in Australia and has such strong ties with Australia that they consider Australia to be their 'own country' be only subject to visa cancellation if the minister is satisfied that there is no other way to protect the security of the Australian community.

Best interests of the child

2.163 The obligation to consider the best interests of the child is described above at paragraph [2.102] to [2.103].

Compatibility of the measure with the obligation to consider the best interests of the child

2.164 As set out above, the Character Act introduced provisions automatically cancelling a visa if, among other things, the person was imprisoned for a sentence of 12 months or more. The bill makes a number of amendments to the new cancellation powers introduced by the Character Act which reduce procedural safeguards. The measures will apply to children who are convicted of an offence and imprisoned for a sentence of 12 months or more. The cancellation of a child's visa on the grounds of character raises questions as to how the obligation to consider the best interests of the child is considered as part of the visa cancellation process, when the visa being cancelled is held by a child.

2.165 This obligation to consider the best interests of the child is discussed in the statement of compatibility, however, it is unclear whether this analysis is focused on the children of adults who have their visa cancelled on character grounds or children whose visas are directly cancelled on character grounds.

2.166 The procedure for automatic loss of a visa does not appear to provide for a consideration of the best interests of the child, as the provision applies automatically to those who have been convicted of an offence and sentenced to more than 12 months imprisonment. The provision does not take into account each child's capacity for reasoning and understanding in accordance with their emotional and intellectual maturity. It does not take into account the child's culpability for the

43 EM, Attachment A [43].

conduct in accordance with normative standards of Australian law. It does not take into account whether the loss of their visa and right to stay in Australia would be in the best interests of the child given their particular circumstances.

2.167 The committee therefore requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider the best interests of the child and, particularly, 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.

Minister's response

> The Government is committed to acting in accordance with Article 3 of the CRC. The concerns raised by the Committee in relation to the best interests of the child relate to amendments that were made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* and came into effect on 11 December 2014. To clarify, while section 501 is applicable to minors, it is generally not used to cancel the visas of minors who have a criminal record, nor does it allow the cancellation of the visas of dependent family members. Secondly, the Bill does not propose any changes to the discretionary revocation process or my (Ministerial) decision making process. In both circumstances the best interests of any child(ren) affected by the decision is a primary consideration, which is weighed against factors such as the risk the person presents to the Australian community.
>
> As stated in the Statement of Compatibility to the Bill, delegates making a decision on character grounds are bound by a relevant Ministerial Direction which requires a balancing exercise of these countervailing considerations and while rights relating to family and children generally weigh heavily against cancellation, there will be circumstances where this will be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record. The safety of the Australian community, particularly in the current security environment is considered to be both a pressing and substantial concern and a legitimate objective to this proposal.[44]

Committee response

2.168 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.169 The committee disagrees that its original comments relate to amendments that were made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*. The current bill would widen the circumstances in which a person may be subject to immigration detention, as the reduction in procedural

44 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 11.

safeguards may result in more individuals being caught by the broadened cancellation powers. Accordingly the committee's comments are in relation to those children who may be caught by the wider application of the cancellation powers and the reduced safeguards.

2.170 The committee notes that the response explains that while section 501 is applicable to minors, it is generally not used to cancel the visas of minors who have a criminal record. While it may not generally be used, as a matter of departmental policy, the fact that there exists a statutory power that is available to be used by the minister must be assessed by the committee in accordance with its statutory mandate.

2.171 In relation to the discretionary revocation process and the minister's decision-making processes referred to in the response, neither of these processes are subject to a mandatory legal requirement that the minister consider the best interests of the child as a primary consideration in making any revocation decision. Those processes are administrative and entirely discretionary.

2.172 The procedure for automatic loss of a visa does not appear to provide for a consideration of the best interests of the child, as the provision applies automatically to those who have been convicted of an offence and sentenced to more than 12 months imprisonment.

2.173 The provision does not take into account each child's capacity for reasoning and understanding in accordance with their emotional and intellectual maturity. It does not take into account the child's culpability for the conduct in accordance with normative standards of Australian law. While the minister notes that the current security environment is considered to be both a pressing and substantial concern and that the rights of the child may be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record, the response does not address the automatic nature of the provisions.

2.174 **As set out above, the committee's assessment of the proposed expansion of visa cancellation powers against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) is that the changes are incompatible with the obligation to consider the best interests of the child.**

2.175 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require that before any child's visa is cancelled there is an individual assessment of the necessity of that cancellation with the best interests of the child being a primary consideration. That assessment must be subject to independent review.

Right to equality and non-discrimination (rights of persons with disabilities)

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

2.177 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.178 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[45] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[46] 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.[47]

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

2.180 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.

2.181 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 make decisions that have legal effect.

Compatibility of the measure with the right to equality and non-discrimination (rights of persons with disabilities)

2.182 Individuals with mental health concerns are significantly overrepresented in Australia's prison system.[48] Accordingly, the bill, in extending the automatic visa cancellation of individuals sentenced to 12 months or more in prison is likely to disproportionately affect individuals with mental health concerns. Mental health disorders are a disability for the purposes of the CRPD and thus a protected attribute for the purposes of the right to equality and non-discrimination.

---

45 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.

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

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

48 Australian Institute of Health and Welfare, *The mental health of prison entrants in Australia,* Bulletin 104 (June 2012) available from: http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422198&libID=10737422198.

2.183 Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. Indirect discrimination does not necessarily import any intention to discriminate and can be an unintended consequence of a measure implemented for a legitimate purpose. The concept of indirect discrimination in international human rights law therefore looks beyond the form of a measure and focuses instead on whether the measure could have a disproportionately negative effect on particular groups in practice. However, under international human rights law such a disproportionate effect may be justifiable. More information is required to establish if the measure does impact disproportionately on persons with disabilities, and if so, if such a disproportionate effect is justifiable.

2.184 The committee therefore requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider the right to equality and non-discrimination and, particularly, 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.

Minister's response

> Whilst noting the concerns of the Committee in relation to individuals in prison with mental health disorders, I respectfully disagree that this Bill proposes any changes that limit the right to equality and non-discrimination on the basis of disability. These amendments ensure that the powers under section 501CA and section 501BA are consistent in their application with other section 501 cancellation powers.
>
> In the Statement of Compatibility to the Explanatory Memorandum for the Migration Amendment (Character and General Visa Cancellation) Act 2014, which relevantly amended section 501 of the Migration Act to capture persons found not fit to plead on mental health grounds, former Minister Morrison explained that the amendments in that Bill were not intended to distinguish people with a mental illness for the purpose of limiting, restricting or not recognising their equal rights with other members of the community, or for the purpose of treating them differently. Former Minister Morrison also stated that the amendment was a reasonable and proportionate response as it enlivened visa cancellation or refusal consideration only, with the full circumstances of the case being assessed during the consideration process, which takes into account the person's rights under Article 26 of the ICCPR. It was stated that the amendment did not enliven Article 26 of the ICCPR as the right can be limited if it is for maintaining public order and safety of the Australian community.
>
> Likewise, the proposed amendments at section 501(7)(f) are aimed at providing a mechanism for my department to mitigate any risk of a person who has been found by a court to not be fit to plead but also found on the

> evidence to have committed the offence, being released from care or prison into the Australian community without first being considered under the character provisions. The seriousness of the offence and any indicative sentence of imprisonment where available are taken into account when deciding whether to cancel or refuse the visa under this ground. I maintain the position that the amendments do not enliven Article 26 of the ICCPR as this right can be limited if it is for maintaining public order and safety of the Australian community, which is the case here.[49]

Committee response

2.185 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.186 The committee reiterates its view that the measure does clearly on its face engage and limit article 26 of the ICCPR**.** Individuals with mental health concerns are significantly overrepresented in Australia's prison system.[50] Accordingly, the bill, in extending the automatic visa cancellation of individuals sentenced to 12 months or more in prison, is likely to disproportionately affect individuals with mental health concerns. Mental health disorders are a disability for the purposes of the CRPD and thus a protected attribute for the purposes of the right to equality and non-discrimination.

2.187 While the minister's response states that there is no intention to treat people with a mental health concern differently, that is not decisive in determining whether the measures are discriminatory. Where a measure impacts on particular groups disproportionately, it establishes prima facie that there may be indirect discrimination. Indirect discrimination does not necessarily import any intention to discriminate and can be an unintended consequence of a measure implemented for a legitimate purpose. Accordingly, it is necessary to examine whether the disproportionate effect is justified.

2.188 However, as the minister does not address the issue of disproportionate impact he provides no information on whether such a disproportionate impact is in fact justified. There is no statutory requirement to consider whether in fact a person has undergone treatment and whether they remain a threat to national security or the Australian community, and as such it is difficult to assess the measure as justifiable.

2.189 **The committee's assessment of the proposed expansion of visa cancellation powers against articles 2, 16 and 26 of the International Covenant on Civil and**

---

49 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 12.

50 Australian Institute of Health and Welfare, *The mental health of prison entrants in Australia,* Bulletin 104, June 2012, available from http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422198&libID=10737422198.

Political Rights, and article 5 of the Convention on the Rights of Persons with Disabilities (right to equality and non-discrimination) raises questions as to whether the changes are compatible with Australia's international human rights law obligations. In the absence of a justification for the disproportionate effect of the measure on persons with disabilities, the committee is unable to conclude that the measure is compatible with the right to equality and non-discrimination on the basis of disability.

2.190 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require that before a visa is cancelled any mental health claims are appropriately considered in an assessment of the person's ongoing threat to the community and national security and that the individual have a right to independent review of any assessment that they are or remain a threat to the community.

Bars on further applications by children and persons with a mental impairment

2.191 Section 48A of the Migration Act provides that a non-citizen who, while in the migration zone, has made an application for a protection visa that was refused, or who held a protection visa that was cancelled, may not make a further application for a protection visa. Section 48A was amended in 2014 by the *Migration Amendment Act 2014* (the MA Act) and the *Migration Legislation Amendment Act (No.1) 2014* (the MLA Act).

2.192 The MA Act prevented a further application even if the second application was based on different protection grounds. The MLA prevented a further application even if, at the time of the first application, the person was a child or unable to understand the application (for example, due to their mental health).

2.193 The effect of this bill would be to ensure that the bar on further applications applies even if the person is both a child (for example) and makes an application on different protection grounds.

2.194 The committee considered that the MLA engaged Australia's non-refoulement obligations, the obligation to consider the best interests of the child, the right of the child to be heard in judicial and administrative proceedings, the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity, and the right to equality and non-discrimination. The amendments in this bill ensure that the amendments in the MLA also apply in circumstances where the individual may wish to apply for a protection visa on a different substantive ground and, as such, the bill further restricts access to a protection visa. Accordingly, this bill also engages these rights.

2.195 The committee's assessment of the compatibility of the measures for each of these human rights is set out below.

Non-refoulement obligations and the right to an effective remedy

2.196 Australia non-refoulement obligations are described above at paragraphs [2.86] to [2.89].

Compatibility of the measures with Australia's non-refoulement obligations

2.197 The statement of compatibility notes that while the amendments engage rights under the CAT and the ICCPR, there are administrative arrangements in place to ensure that protection claims are assessed before an individual is removed from Australia.[51]

2.198 As set out above at paragraphs [2.92] to [2.93] in relation to Schedule 1, the minister's personal, non-compellable powers are an insufficient protection against non-refoulement, and international law is very clear that administrative arrangements are insufficient to protect against unlawful refoulement.

2.199 Where the processes identified as a safeguard against refoulement involve purely administrative and discretionary mechanisms, these are insufficient, on their own, to comply with Australia's non-refoulement obligations. The committee therefore considers that the amendments could increase the risk of Australia breaching its non-refoulement obligations.

2.200 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

Minister's response

> A person in Australia who is not able to apply for a protection visa will not be removed in breach of Australia's non-refoulement obligations. This is the case regardless of whether a person is a child or has a mental impairment. All individuals' circumstances are assessed on a case-by-case basis, and any new claims for protection that were not previously assessed will be appropriately considered, and consideration given to circumstances including the person's age and mental health. My department has administrative processes in place, such as an International Treaties Obligation Assessment and my ability to exercise my powers under the Migration Act and grant a person a visa, which are designed to further assess protection claims and, moreover, safeguard Australia's non-refoulement obligations.
>
> The changes do not affect the assessment of legitimate claims that would give rise to non-refoulement obligations. All claims made prior to removal will have been assessed and non-refoulement obligations complied with before departure. For cases affected by this change that raise new claims upon return to Australia, those claims will be considered through existing

51 EM, Attachment A [55].

mechanisms within the (new) removal planning framework whereby application bars can be lifted where appropriate and assessment of obligations undertaken in line with existing provisions.[52]

Committee response

2.201 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.202 The mechanisms set out in the response are entirely administrative and there is no legal protection against non-refoulement in the form of a reviewable decision. For the reasons set out above at paragraphs [2.96] to [2.99] these are not sufficient protections for the purposes of international human rights law.

2.203 **The committee's assessment of the proposed bar on further applications by children and persons with a mental impairment against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) is that the proposed legislation fails to provide for effective and impartial review of non-refoulement decisions. Accordingly, the committee considers that the measure is incompatible with Australia's non-refoulement obligations under international law.**

2.204 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal.

Obligation to consider the best interests of the child

2.205 The obligation to consider the best interests of the child is described above at paragraphs [2.102] to [2.103].

Compatibility of the measures with the obligation to consider the best interests of the child

2.206 As noted above, the bill would prevent a child from making a further protection visa application even in circumstances where allowing the visa application would likely be in their best interests (such as where they had a valid independent protection claim).

2.207 This obligation is not addressed in the statement of compatibility. The committee notes that when the provisions were first included in the MLA the

52 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 13.

committee concluded that the measures were likely to be incompatible with the obligation to consider the best interests of the child.

2.208 The committee therefore requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the obligation to consider the best interests of the child and, particularly, 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.

Minister's response

> The best interests of the child are a primary consideration in administrative decisions made under the Migration Act, and an assessment in relation to a child's best interests of either the child's removal or a person's removal which would particularly affect a child will have been undertaken during the administrative processes which took place prior to attempting removal of the child or the other person. For example, the best interests of the child are a primary consideration in a delegate's visa cancellation decision, in a visa refusal decision, and if a visa has ceased naturally, a child's best interests will also be considered prior to the initiation of the removal operation.
>
> Consequently, in barring persons from making a further application, it is recognised that these persons will have already had an opportunity to make a visa application which has already been considered and, where appropriate, taken into account a child's best interests in accordance with the CRC.[53]

Committee response

2.209 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.210 The bill would prevent a child from making a further protection visa application even in circumstances where allowing the visa application would likely be in their best interests (such as where they had a valid independent protection claim). How this statutory prohibition is in the best interests of the child is not specifically addressed in the minister's response. The response highlights the range of administrative mechanisms which the department and the minister rely on to ensure decisions are in the best interests of the child. However, the bill would bar a child from making a further protection visa application which may put before the department new information or material that may be relevant. It is not explained how these administrative processes provide an equivalent protection to a statutory right to make a further protection visa application when this would be in the child's best interests.

53 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 13-14.

2.211 **The committee's assessment of the proposed bar on further applications by children against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) is that the measure is incompatible with Australia's obligation to consider the best interests of the child.**

2.212 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to require the department to consider a protection claim made by a child where it would be in their best interests for the department to do so. A decision made in relation to that protection claim should be reviewable.

Right of the child to be heard in judicial and administrative proceedings

2.213 Article 12 of the CRC provides that state parties shall assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child. The views of the child must be given due weight in accordance with the age and maturity of the child.

2.214 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Compatibility of the measures with the right of the child to be heard in judicial and administrative proceedings

2.215 The amendments in Schedule 3 further limit the ability of children to make a subsequent visa application on alternative protection grounds even where they did not contribute to or consent to the first application.

2.216 When the MLA was introduced the committee noted that the effect of the proposed amendments in Schedule 1 was to create an assumption, in cases involving a subsequent visa application by a child, that the previous visa application made on behalf of the child was valid. This assumption would apply without a consideration of the age of the child, their relationship with the person who made the application on their behalf, or an individual assessment of the extent to which the application was consistent with the wishes of the child. In the committee's view, to effectively deem the previous application as valid without considering these factors represented a limitation on the right of the child to contribute to, or be heard in, judicial and administrative proceedings. The measures in this bill further limit a child's ability to make a subsequent visa application and thus further restrict the rights of the child. This right is not addressed in the statement of compatibility.

2.217 The committee therefore requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the right of the child to be heard in judicial and administrative proceedings and, particularly, 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.

Minister's response

> I agree that the proposed amendment engages article 12 of the CRC, and that an assessment of a child's best interests includes respect for the child's right to express his or her views freely, and for due weight to be given to those views, depending on the child's age and maturity. However, I also note - as stated above - that an assessment in relation to a child's best interests of either the child's removal or a person's removal which would particularly affect a child will have been undertaken during the administrative processes which took place prior to attempting removal of the child or the other person. For example, the best interests of the child are a primary consideration in a delegate's visa cancellation decision, in a visa refusal decision, and if a visa has ceased naturally, a child's best interests will also be considered prior to the initiation of the removal operation.
>
> Consequently, in barring persons from making a further application, it is recognised that these persons will have already had an opportunity to make a visa application which has already been considered and, where appropriate, taken into account a child's best interests.
>
> The changes do not affect the assessment of legitimate claims that would give rise to convention obligations. All claims made prior to removal will have been assessed and obligations satisfied before departure.
>
> For cases affected by this change that raise new claims upon return to Australia those claims will be considered through existing mechanisms within the (new) removal planning framework whereby application bars can be lifted where appropriate and assessment of obligations undertaken in line with existing provisions.[54]

Committee response

2.218 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.219 The response states that an assessment in relation to a child's best interests would have been taken into account prior to attempting to remove the child and that accordingly the bar on making a further application simply recognises that the child would have already had an opportunity to make a visa claim and have their best interests considered.

2.220 However, the amendments in Schedule 3 further limit the ability of children to make a subsequent visa application on alternative protection grounds even where they did not contribute to or consent to the first application.

---

54 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 14.

2.221 The effect of these amendments is to create an assumption, in cases involving a subsequent visa application by a child, that the previous visa application made on behalf of the child was valid. This assumption would apply without a consideration of the age of the child, their relationship with the person who made the application on their behalf, or an individual assessment of the extent to which the application was consistent with the wishes of the child. In the committee's view, to effectively deem the previous application as valid without considering these factors represents a limitation on the right of the child to contribute to, or be heard in, judicial and administrative proceedings.

2.222 The response also refers to a range of administrative mechanisms which are in place to ensure that despite a child being barred from making a subsequent protection visa application the child will not be removed without the department being satisfied that it has met its non-refoulement obligations. These mechanisms are administrative and discretionary. For the reasons set out above at paragraphs [2.96] to [2.99] these are insufficient for the purposes of international human rights law.

2.223 **The committee's assessment of the proposed bar on further applications by children against article 12 of the Convention on the Rights of the Child (right of the child to be heard in judicial and administrative proceedings) is that the measure is incompatible with the right of the child to be heard in judicial and administrative proceedings.**

2.224 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to provide that prior to applying a statutory bar on a child preventing a subsequent protection visa application, the department must consider the age of the child, their relationship with the person who made the application on their behalf, and whether the previous application was consistent with the wishes of the child. Any decision to apply a statutory bar must be reviewable.

Right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity

2.225 Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) requires states to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

Compatibility of the measures with the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity

2.226 As set out above, the bill provides that the bar on further applications applies even if the person is both a person with a mental impairment and makes an application on different protection grounds. The right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity is not addressed in the statement of compatibility. The committee notes that it previously considered the MLA amendments which introduced these restrictions

were likely to be incompatible with the rights of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.

2.227 Persons with intellectual and mental impairment may be particularly at risk as asylum seekers. 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.

2.228 If a person with an intellectual or mental impairment is not provided with the support required to make an informed decision about lodging a visa application and is then barred from making a subsequent visa application because an application had been lodged 'on their behalf' but without the participation of the person in that decision-making process (and on different protection grounds), this limits the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity. This was not addressed in the statement of compatibility.

2.229 The committee therefore requested the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity and, particularly, 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.

Minister's response

> As with the discussion above concerning the best interests of the child, the proposed amendments apply to persons who have already made a visa application which has been finally determined. An assessment of the person's claims will have taken their particular disability and personal circumstances into account.
>
> The proposed changes are aimed at ensuring the legitimate objective of ensuring the removal of person (including persons with disabilities, where appropriate) who have no legal right to remain in Australia as required by the Migration Act.
>
> The limitation provides the opportunity for new removal arrangements to be made (likely through a different transit point) without the delay of the non-application of the limitation, by preventing them from making a further visa applications unless circumstances have changed since departure on the aborted removal.
>
> It is reasonable that any bars imposed before they left that prevent them from making a further visa application would continue to apply when they

> are returned to Australia following travel that is aborted during transit. This applies equally to all persons including those with disabilities.[55]

Committee response

2.230 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.231 The committee's initial analysis was focused on specific requirements under the CRPD to ensure supported rather than substituted decision-making. Persons with intellectual and mental impairment may be particularly at risk as asylum seekers. 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.

2.232 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.[56]

2.233 If a person with an intellectual or mental impairment is not provided with the support required to make an informed decision about lodging a visa application and is then barred from making a subsequent visa application because an application had been lodged 'on their behalf' but without the participation of the person in that decision-making process (and on different protection grounds), this limits the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity. This was not addressed in the minister's response.

---

55 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 15.

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

2.234 **The committee's assessment of the proposed bar on further applications by persons with a mental impairment against article 12 of the Convention on the Rights of Persons with Disabilities (right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity) is that the measure is incompatible with the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.**

2.235 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to provide that prior to applying a statutory bar preventing a person with an intellectual or mental impairment from making a subsequent visa application, the department must be satisfied that in the original application the person was provided with the support required to make an informed decision about lodging a visa application and was actively involved in the decision-making process regarding that visa application. Any decision to apply a statutory bar must be reviewable.

Migration Amendment (Complementary Protection and Other Measures) Bill 2015

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 14 October 2015

Purpose

2.236 The Migration Amendment (Complementary Protection and Other Measures) Bill 2015 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to:

- amend the statutory complementary protection framework standards for equivalency with the new statutory refugee framework, as inserted by Part 2 of Schedule 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*;
- amend the reference to 'protection obligations' in subsection 36(3) to specify the source of the obligations;
- amend the definition of 'country' in subsection 5H(1), which outlines the meaning of 'refugee', to be the same country as the 'receiving country' as applies in subsection 5(1) of the Migration Act;
- align the statutory provisions relating to protection in another country (third country protection) with the definition of 'well-founded fear of persecution' in section 5J of the Migration Act;
- amend subsection 36(2C), to remove duplication between paragraph 36(2C)(b) and subsection 36(1C) in the Migration Act, which both operate to exclude an applicant from the grant of a protection visa on character-related grounds;
- amend subsection 336F(5), which authorises disclosure of identifying information to foreign countries or entities, to include information pertaining to unauthorised maritime arrivals who make claims for protection as a refugee and fall within the circumstances of subsection 36(1C) of the Migration Act;
- amend subsection 502(1), which allows the Minister for Immigration and Border Protection to personally make a decision that is not reviewable by the Administrative Appeals Tribunal (AAT), to apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person; and
- amend subsection 503(1), which relates to the exclusion of certain persons from Australia, to apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person.

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

Background

2.238 The committee first reported on the bill in its *Thirtieth Report of the 44th Parliament* (previous report), and requested further information from the Minister for Immigration and Border Protection as to the compatibility of the bill with Australia's international human rights obligations.[1]

Changes to the statutory framework for complementary protection—real risk in the entire country

2.239 Australia owes protection obligations under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to persons who face a real risk of suffering significant harm if removed from Australia to a receiving country. This is referred to as 'complementary protection' under the Migration Act.[2] Significant harm is defined under the Migration Act to refer to torture, imposition of the death penalty, and other treatment which engages Australia's non-refoulement obligations under the ICCPR and the CAT.

2.240 Currently, under the Migration Act a person will not be considered to be entitled to a protection visa on complementary protection grounds if it would be reasonable for that person to relocate to an area of their home country where they would not be at risk of significant harm.

2.241 The bill seeks to amend the Act such that a person will not be considered eligible for protection unless the risk they face relates to all areas of their home country. That is, if an individual is found to be able to live without a risk of significant harm in a small part of their home country they would be ineligible for protection regardless if it would be reasonable or practicable for them to travel to or live in that area of their home country.

2.242 The committee noted in its previous report that it considers that this provision engages Australia's non-refoulement obligations as a person who does not meet the statutory criteria under the Migration Act may be subject to return to their home country.

Non-refoulement obligations

2.243 Australia's non-refoulement obligations are described above at paragraphs [2.86] to [2.89].

Compatibility of the measure with Australia's non-refoulement obligations

2.244 The statement of compatibility acknowledges that Australia's non-refoulement obligations are engaged by the bill, but states that:

1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 19-27.

2 See section 36(2)(aa) of the *Migration Act 1958*.

> …the UN Human Rights Committee (UNHRC) has described the non-refoulement obligation under the ICCPR as being engaged only if a person faces a risk of harm in the whole of a country. In addition, commentary from the UN Committee Against Torture (UNCAT) has suggested that there must exist a risk [of harm] in the entire territory of the target State and that there must be no internal flight alternative, thus acknowledging the same approach should be applied in the consideration of complementary protection claims regarding torture, as is applied by the internal relocation principle in the consideration of Refugee Convention claims. As such, this amendment is compatible with human rights because it reflects Australia's non-refoulement obligations.[3]

2.245 In its previous report, the committee noted that the weight of jurisprudence indicates that under international human rights law an 'internal flight option'—the ability to find safety in one part of your home country—does not negate an individual's claim for protection against refoulement.[4]

2.246 In removing the requirement that the minister must be satisfied that it is reasonable for a person to relocate to an area of their home country the bill would result in a person being ineligible for protection in circumstances where it is unreasonable or impracticable for them to relocate internally.

2.247 The committee noted further that there is no statutory requirement obliging a decision maker to take into account whether the person can safely and legally access an alternative flight option upon returning to the receiving country. While such matters may be considered as a matter of departmental policy, this is an insufficiently robust protection for the purposes of international human rights law. The committee has consistently stated 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 under international human rights law.[5] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

---

3 Explanatory memorandum (EM), statement of compatibility (SOC), paragraph [21].

4 See *Alan v Switzerland*, Merits, Communication No 21/1995, UN Doc CAT/C/16/D/21/1995, UN Doc A/51/44, Annex V, 68, IHRL 3781 (UNCAT 1996), *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (1999) and Manfred Nowak (Former UN Special Rapporteur on Torture) *An Analysis of the various legal issues under Article 3 CAT* (available from http://www.hklawacademy.org/downloads/cat1/d2am/ProfessorManfredNowakAnAnalysisoftheVariousLegalIssuesundeArticle3.pdf). In contrast see *H.M.H.I. (name withheld) v. Australia,* Communication No. 177/2001, U.N. Doc. A/57/44 at 166 (2002).

5 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).

2.248 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to how the proposed amendments are compatible with Australia's absolute non-refoulement obligations.

Minister's response

I note the Committee's view that the Bill would result in a person being ineligible for protection even though it may not be reasonable for them to relocate internally, and that this would therefore leave individuals subject to refoulement, in breach of Australia's international obligations.

It is my intention that, in assessing whether a person may be personally at a real risk of significant harm, a consideration of whether the level of risk of harm is one that the person will face in all areas of the receiving country will no longer encompass the consideration of whether the relocation is 'reasonable' in light of the individual circumstances of the person.

In assessing whether it is reasonable for a person to relocate to another area of the receiving country in the refugee context, Australian case law indicates that some decision-makers (including merits review tribunal members) have considered broader issues such as the practical realities of relocation, which have included considering diminishment in the quality of life or potential financial hardship of a protection visa applicant. This goes beyond the intention that Australia's protection should only be available to persons who face the relevant harm in all parts of the receiving country and hence cannot access that country's protection. The *Migration Act 1958* (Migration Act) was amended by the *Migration Amendment (Resolving the Asylum Legacy Caseload) Act 2014* to reflect this intention in the refugee context, and the *Migration Amendment (Complementary Protection and Other Measures) Bill 2015* reflects this intention in the complementary protection context. This provides certainty to applicants and decision-makers by providing consistency on this issue.

I am committed to acting in accordance with Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and maintain that while an assessment of whether it is 'reasonable' for an applicant to relocate to another area within the receiving country is proposed to be removed by the Bill, what constitutes a real risk that a person will suffer significant harm under the Migration Act has not changed. When considering whether a person can relocate to another area, decision-makers will continue to be required to consider whether a there is a real risk that a person will suffer significant harm if:

- the person will be arbitrarily deprived of his or her life; or
- the death penalty will be carried out on the person; or
- the person will be subjected to torture; or

- the person will be subjected to cruel or inhuman treatment or punishment; or
- the person will be subjected to degrading treatment or punishment.

As a matter of policy, decision-makers are also required to determine whether a real risk of significant harm exists for a person when considering whether they can safely or legally access the relocation area from their point of return to the receiving country, such that it would mitigate a 'real risk' of 'significant harm' to the person. Notwithstanding that this is not expressed in the Bill, this policy is consistent with the domestic legal interpretation and has been applied in the refugee context since the relevant Migration Act provisions were amended. It will likewise be applied appropriately in the complementary protection context proposed by the Bill.[6]

Committee response

2.249 **The committee thanks the Minister for Immigration and Border Protection his response.**

2.250 The committee notes that in assessing whether a person may be at a real risk of significant harm, the minister intends that consideration of whether the level of risk of harm is one that the person will face in all areas of the receiving country will no longer encompass the consideration of whether relocation is 'reasonable' in light of the individual circumstances of the person.

2.251 As the committee noted in its previous report, international human rights law jurisprudence indicates that internal relocation must be both reasonable and practicable.[7] The UNHCR has discussed the meaning of 'well-founded fear' in relation to internal relocation. In assessing whether a well-founded fear exists, the UNHCR noted that if 'internal relocation is both possible and reasonable for that individual, this has a direct bearing on decisions related to the well-foundedness of the fear'.[8]

2.252 The UNHCR reiterates this position—that relocation must be *reasonable*—in its *Handbook on Procedures and Criteria for Determining Refugee Status*:

> The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such

6 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 2-3.

7 See James C. Hathaway and Michelle Foster, *Global Consultations on international protection*, June 2003, available at: http://www.refworld.org/docid/470a33b70.html; Reinhard Marx, 'The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures' (2002) 14 *International Journal of Refugee Law* 179.

8 UNHCR Position on Relocating Internally as a Reasonable Alternative to Seeking or Receiving Asylum, UNHCR/IOM/24/99, 9 February 1999, paragraph 9.

> situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.[9]

2.253 For many years, many jurisdictions, including Australia,[10] Canada,[11] New Zealand,[12] and the UK[13] have adopted the approach set out in the UNHCR Handbook, examining whether internal relocation is reasonable, or whether it would be unduly harsh to expect internal relocation. This test applies equally to complementary protection claims under the ICCPR and the CAT.

2.254 The committee acknowledges that the minister confirms that what constitutes a real risk that a person will suffer significant harm under the Migration Act has not changed, and that decision-makers will continue to be required to consider whether a real risk exists. However, in removing consideration of whether relocation is 'reasonable', the committee reiterates its view that the bill risks the return of persons in violation of Australia's absolute non-refoulement obligations.

2.255 As the European Court of Human Rights explained in relation to non-removal to torture under Article 3 of the European Convention on Human Rights:

> …reliance on an internal flight alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Therefore, as a precondition of relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill- treatment.[14]

2.256 The committee welcomes the minister's advice that, as a matter of policy, decision-makers will be required to take into account whether the person can safely and legally access an alternative flight option upon returning to the receiving country. However, the committee notes that the minister acknowledges that such a requirement 'is not expressed in the Bill'.[15]

2.257 The committee reiterates its view this is an insufficiently robust protection to ensure that a person is not returned to significant harm, for the purposes of

---

9 UNHCR (2011), paragraph 9.

10 *Al-Ahmadi v Minister for Immigration and Multicultural Affairs* [2000] FCA 1081 [18].

11 *Rasaratnam v MEI* (1992) 1 FC 706 (CA); *Thirunavukkarasu v MEI* (1993) 1 FC 589 (CA).

12 *Butler v Attorney-General* (1999) NZAR 205 (CA).

13 *Ex part Robinson v SSDH* (1997) FG 3 96/7394/D.

14 *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9, at [266].

15 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 3.

international human right law, as there will be no enforceable obligation on the minister and his department to consider the reasonableness or practicability of any relocation.

2.258 **The committee's assessment of the removal of the requirement that a decision-maker must consider whether internal relocation is 'reasonable' when determining whether a person may be at a real risk of significant harm against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) is that the proposed amendments would insufficiently protect against refoulement of persons to whom Australia owes protection obligations.**

2.259 **The proposed amendment would remove the statutory requirement that decision-makers determine whether it is reasonable for a person applying for a contemporary protection visa to travel, gain admittance and settle in an area where a real risk of harm does not exist, and thereby creates risks that decisions will be made in violation of Australia's non-refoulement obligations. For these reasons, the committee considers that the bill is incompatible with international human rights law.**

2.260 In order to address the human rights compatibility issues raised above, the Migration Act could be amended to define what constitutes 'reasonable' relocation, in a manner consistent with international human rights law.

Changes to the statutory framework for complementary protection—behaviour modification

2.261 The bill would also remove Australia's protection obligations in circumstances where an individual could avoid significant harm if the person could take reasonable steps to modify their behaviour. A person would not be required to modify their behaviour if to do so would conflict with a characteristic that is fundamental to the person's identity or conscience including their religion, race, disability status or sexual orientation.

2.262 The committee noted in its previous report that it considers that this provision engages Australia's non-refoulement obligations as an individual, who would otherwise be granted protection in Australia, may be deemed ineligible if they could modify their behaviour in a way that was considered not to be in conflict with their fundamental identity.

Non-refoulement obligations

2.263 Australia's non-refoulement obligations are described above at paragraphs [2.86] to [2.89].

Compatibility of the measure with Australia's non-refoulement obligations

2.264 The statement of compatibility provides that:

> In the complementary protection context, a person may be able to modify their behaviour in a manner that would not conflict with their identity or belief system (for example, by refraining from engaging in an occupation that carries risk where it is reasonable for the person to find another occupation) and could thereby avoid the risk of significant harm. If this is the case, they should not necessarily be provided with protection, as their return would not itself engage *non-refoulement* obligations – the risk of harm would only arise if they chose to undertake certain actions. This amendment is therefore consistent with Australia's *non-refoulement* obligations.[16]

2.265 The jurisprudence does not support the position outlined in the statement of compatibility. The obligation to protect against refoulement is not contingent on the oppressed avoiding conduct that might upset their oppressors.[17] The courts have found that persecution does not cease to be persecution simply because those persecuted can eliminate the harm by taking avoiding action within the country of nationality.[18] This principle applies equally in the refugee assessment space as it does in assessing complementary protection under the ICCPR and CAT.

2.266 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to how the amendment is compatible with Australia's absolute non-refoulement obligations.

Minister's response

> I note the Committee's concerns regarding proposed new subsection 5LAA(5) of the Bill, which provides that there is not a real risk of significant harm if a person could take reasonable steps to modify their behaviour so as to avoid a real risk of significant harm, other than a modification that includes a modification that would conflict with a characteristic that is fundamental to the person's identity or conscience, or conceal an innate or immutable characteristic.
>
> While I acknowledge the Committee's views, at paragraph 1.111, that *the obligation to protect against non-refoulement is not contingent on the oppressed avoiding conduct that might upset their oppressors,* in

16 EM, SOC, paragraph [31].

17 See *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31; *RT (Zimbabwe) and others v Secretary of State for the Home Department* [2012] UKSC 38; *CJEU judgment* in C-199/12, C200/12 and C201/12, *X, Y and Z*, 7 November 2013; CJEU – C-71/11 and C-99/11 *Germany v Y and Z*, 5 September 2012; *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 at [40]-[41] per McHugh and Kirby JJ.

18 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 at [40] per McHugh and Kirby JJ.

introducing this provision into the statutory complementary protection context, my intent is to reflect that some harm can be brought about by a person's own voluntary actions, and that in some circumstances, it is reasonable to expect a person not to engage in such action, so as to avoid a real risk of significant harm. If a person is able to modify their behaviour in a manner that does not conflict with their core identity or belief system, as mentioned in proposed subsection 5LAA(5), and in doing so, could avoid a real risk of significant harm, then they should not necessarily be provided with protection, as their return would not itself engage non-refoulement obligations. The risk of harm would only arise if they chose to undertake certain actions. This amendment is therefore consistent with non-refoulement obligations.

To support the position that this provision is concerned with reasonable modification only, the Bill includes an express list of modifications, at new paragraph 5LAA(5)(c), that a person cannot be required to do. These are:

- alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
- conceal his or her true race, ethnicity, nationality or country of origin;
- alter his or her political beliefs or conceal his or her true political beliefs;
- conceal a physical, psychological or intellectual disability;
- enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
- alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status

I respectfully submit my view that the Committee is inaccurate in its assertion, at paragraph 1.113, that a person could be required to not attend or participate in any political activity, such as attending a rally, if such conduct is not considered to be of fundamental importance to the person's conscience. In accordance with new subparagraph 5LAA(5)(c)(iii), the Bill does not require modification that would alter or conceal a person's political beliefs.

Furthermore, I also respectfully submit that the Committee's claim that a person who has previously worked as a journalist in their home country could be required to cease work as a journalist if the content of their published work risked attracting persecution, is inaccurate. Proposed subsection 5LAA(5) is concerned with reasonable modification of future behaviour and takes into account what reasonable steps a person could objectively take to avoid a risk upon returning to their receiving country, not just what they would do on their return (for example, a person refraining from engaging in an occupation that carries risk where it is reasonable for the person to find another occupation). If a person were to

claim protection on the basis that their published work as a journalist would attract persecution, such claims would be assessed against both the refugee and complementary protection provisions in the Migration Act in order to determine whether Australia's non-refoulement obligations under the Refugees Convention, or the ICCPR or the CAT are engaged. Similarly, a person would not be required to cease work as a journalist, if to do so would require the altering or concealment of their political beliefs.

While I acknowledge that this provision engages human rights that relate to Australia's non-refoulement obligations under the ICCPR and the CAT (including articles 18(1) and 19 of the ICCPR), I maintain that it is possible to limit certain rights, as long as the limitation is reasonable, proportionate and adapted to achieve a legitimate objective. In relation to these amendments, my objective is to ensure that only those who face a real risk of significant harm, as a necessary and foreseeable consequence of their removal from Australia to a receiving country, are granted a protection visa on complementary protection grounds. In this context, I believe that it is reasonable to expect, in some circumstances, for a person not to engage in particular actions so as to avoid a real risk of significant harm, noting that this does not apply to a modification of behaviour that conflicts with their identity or core belief system. If a person is able to reasonably modify their behaviour in this way, they do not require Australia's protection as their return would not place them at risk of harm and therefore not engage Australia's non-refoulement obligations – a risk of harm would only arise if they chose to undertake certain actions. I confirm that Australia does not intend to resile from its non-refoulement obligations.

This provision will require decision-makers to objectively consider whether a person could take reasonable steps to modify their behaviour, so as to avoid a real risk of significant harm, which will be assessed on a case-by-case basis. Any modification would also be limited to what is reasonable in the person's individual circumstances.

The reasons supporting this view have been set out in the Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum to the Bill, and I reiterate those reasons here.[19]

Committee response

2.267 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.268 The committee welcomes the minister's commitment that Australia does not intend to resile from its non-refoulement obligations. Nevertheless, the committee reiterates that under the bill as drafted, significant new statutory hurdles have been introduced in Australia's protection regime.

19 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 3-5.

2.269 At the outset, the committee notes that the proposed amendment effectively puts the onus on an applicant to avoid the risk of actions that are violations of international human rights law. This is a position fundamentally at odds with international human rights law.

2.270 Further, under international refugee law, a person cannot be denied complementary protection status based on a requirement that she or he change or conceal her or his identity, opinions or characteristics in order to avoid persecution.[20] The High Court of Australia has held that persecution does not cease to be persecution 'because those persecuted are able to eliminate the harm by taking action to avoid it'.[21]

2.271 The committee acknowledges that the bill includes an express list of modifications that a person cannot be required to do, including conceal or alter a person's core political beliefs. However, notwithstanding the minister's response, the committee considers that a person could be required to not attend or participate in political activity, such as attending a rally, if such conduct is not considered to be of fundamental importance to the person's conscience. Indeed, the bill requires an assessment of not only whether a person could refrain from certain actions but also take positive actions to conceal aspects of their identity or conscience that are not assessed as fundamental. It is not clear how a decision-maker will assess this standard in practice.

2.272 On the question of concealment generally, the committee notes that in 2014, the High Court in *Minister for Immigration and Border Protection v SZSCA*, confirmed that focussing on an assumption about how the risk of persecution may be avoided distracts a decision-maker from the task of determining whether there is a real chance of persecution.[22]

2.273 The committee maintains that this is the central question a decision-maker should ask, not whether the risk of persecution could be avoided by the person claiming protection concealing certain non-fundamental aspects of him or herself.

2.274 **The committee's assessment of section 5LAA(5), which would remove Australia's protection obligations in circumstances where an individual could avoid significant harm if the person could take reasonable steps to modify their behaviour, against article 3(1) of the Convention against Torture and Other Cruel,**

---

20 See, for example, A*ppellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31;: *Karouni v Gonzales* (2005) 399 F 3d 1163 (USCA, 9th Cir); Refugee Appeal No 74665/03 [2005] INLR 68; Fosu v Canada (2008) 335 FTR 223 (Can. FC 2008). *Bundesrepublik Deutschland v Y (C-71/11)* and *Z (Case C-99/11*), Court of Justice of the European Union (Grand Chamber) 5 September 2012, paragraph 79.

21 *Appellant S395/2002v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, [40] (McHugh and Kirby JJ).

22 [2014] HCA 45 at [17].

Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) is that it creates an exception to protection under the Migration Act that is not supported by, and is at odds with, international human rights law.

2.275 **As a practical concern, the proposed amendment creates hurdles to establishing a need for protection that are difficult to determine, by drawing decision-makers into an assessment of what may constitute a fundamental aspect of an applicant's identity or conscience, and thereby creates risks that decisions are made in violation of Australia's non-refoulement obligations. For these reasons, the committee considers that section 5LAA(5) is incompatible with international human rights law.**

2.276 In order to address the human rights compatibility issues raised above, the Migration Act could be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal.

Excluded persons

2.277 Currently, section 502 of the Migration Act provides that the Minister for Immigration and Border Protection may declare a person to be an excluded person on character grounds. An excluded person may not seek merits review of a decision at the Administrative Appeals Tribunal to deny their protection visa application. This provision currently only applies to persons who have been denied a protection visa on refugee grounds and not those who have applied for a protection visa on the grounds of complementary protection. This bill would extend the application of section 502 to individuals seeking a protection visa on the grounds of complementary protection.

2.278 In its previous report, the committee considered that this amendment, in removing a person's ability to seek merits review of a decision to refuse a visa on character grounds, engages the protection against refoulement, including the right to an effective remedy. Effective and impartial review by a court or tribunal of decisions to deport or remove a person is integral to complying with non-refoulement obligations.

Non-refoulement obligations

2.279 Australia's non-refoulement obligations are described above at paragraphs [2.86] to [2.89].

Compatibility of the measure with Australia's non-refoulement obligations

2.280 The statement of compatibility explains that:

> While merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT that it is required in the assessment of non-refoulement obligations. Anyone who is found through visa or Ministerial intervention processes to engage Australia's non refoulement obligations will not be removed in breach of those obligations. All persons impacted by the personal decisions made by the Minister will remain able to access judicial review which satisfies the obligation in Article 13 [ICCPR] to have review by a competent authority.[23]

2.281 In its previous report, the committee agreed that there is no express requirement specifically for merits review in the articles of the relevant conventions or jurisprudence relating to obligations of non-refoulement. However, the committee noted its view that merits review of such decisions is required to comply with the obligation under international law for effective review, based on its consistent analysis of how the obligation applies, and may be fulfilled, in the Australian domestic legal context.

2.282 The committee considered that judicial review is not sufficient to fulfil the international standard required of 'effective review', where it is only available on a number of restricted grounds of review that do not relate to whether that decision was the correct or preferable decision.

2.283 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to how the amendment is compatible with Australia's absolute non-refoulement obligations.

Minister's response

> I note the Committee's view that the proposed amendment to subsection 502(1) in the Bill, in removing a person's ability to seek merits review of a decision to refuse a visa on character-related grounds, engages the protection against refoulement, including the right to an effective remedy.
>
> Section 502 of the Migration Act provides me with the power, in certain circumstances, to declare a person to be an 'excluded person' and therefore, in this context, a person is not able to seek merits review of a decision at the Administrative Appeals Tribunal. These circumstances apply where I intend to make a personal decision to refuse to grant or cancel a protection visa on character related grounds and require me to decide that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared an excluded person.
>
> Currently section 502 applies in respect of persons who have been refused the grant of a protection visa on refugee grounds for reasons relating to the character of the person. I now consider it appropriate to extend the scope of section 502 to also apply to persons who have been refused the

23 EM, SOC, paragraph [57].

grant of a protection visa on complementary protection grounds for reasons relating to the character of the person.

This provision provides that any personal decision of mine is protected from merits review if the decision is made in the national interest, and it also requires me to cause notice of the making of the decision to be tabled in both Houses of Parliament within 15 sittings days after the day of my decision. It is anticipated that such decisions will be rarely made, but if they are made on national interest grounds, such decisions will not be reviewable by the AAT. Decisions to refuse to grant or cancel a protection visa will involve my consideration of the national interest.

I note the Committee's concerns that the provision to protect my personal decisions from merits review may engage and limit the right to an effective remedy, as the person will not enjoy the same rights to merits review as a person who was the subject of a decision by a delegate of the Minister. These amendments present a reasonable response to achieving a legitimate objective, which is the safety of the Australian community, noting that the amendments only apply in respect of persons who are refused the grant of a complementary protection visa on character related grounds. In addition:

- my personal decision will be consequent to an administrative process that is undertaken within the administrative law framework and in accordance with principles of natural justice; and
- judicial review is still available. In a judicial review action, the Court would consider whether or not the power given by the Migration Act has been properly exercised. For a discretionary power such as personal decisions of mine under the Migration Act, this could include consideration of whether the power has been exercised in a reasonable manner. It could also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.

I respectfully disagree with the Committee's view, at paragraph 1.128, that 'judicial review is not sufficient to fulfil the international standard required of "effective review", because it is only available on a number of restricted grounds of review that do not relate to whether that decision was the correct or preferable decision'. The entire purpose of judicial review is to assess whether the primary decision was legally correct, and to determine any error or unfairness in the decision-making process. Judicial review remains an effective mechanism by which administrative decisions, which includes decisions in relation to protection visa applications, are assessed by a higher authority. Although I agree that the intent of judicial review may not be to avoid harm to the individual concerned, it does not mean that it is not an appropriate means by which this is assessed.

In introducing this proposed amendment, I am not seeking to resile from or limit Australia's non-refoulement obligations, nor will it affect the

> substance of Australia's adherence to these obligations. Anyone who is found through visa or Ministerial intervention processes to engage Australia's non refoulement obligations will not be removed in breach of those obligations. All persons impacted by the personal decisions made by me will remain able to access judicial review which satisfies Australia's obligation under Article 13 of the ICCPR to have review by a competent authority.[24]

Committee response

2.284 **The committee thanks the Minister for Immigration and Border Protection for his response.**

2.285 The committee welcomes the minister's commitment to not resile from or limit Australia's non-refoulement obligations. However, the committee remains concerned that judicial review as provided in relation to section 502 is insufficient to fulfil the international standard of effective review.

2.286 Treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT. For example, the UN Committee against Torture in *Agiza v Sweden* found:

> The nature of refoulement is such…that an allegation of breach of…[the obligation of non-refoulement in] article [3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy… requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove...The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[25]

2.287 Similarly, the UN Committee against Torture in *Josu Arkauz Arana v France* found that the deportation of a person under an administrative procedure without the possibility of judicial intervention was a violation of article 3 of the CAT.[26]

2.288 In relation to the ICCPR, in *Alzery v Sweden* the UN Human Rights Committee emphasised that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement (as contained in article 7 of the ICCPR):

> As to…the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the…[right to an

24 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 5-6.

25 Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) [13.7].

26 *Josu Arkauz Arana v. France*, CAT/C/23/D/63/1997, (CAT), 5 June 2000.

> effective remedy and the prohibition on torture in articles 2 and 7 of the ICCPR require] an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in…[this] case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the [ICCPR].[27]

2.289 The committee notes that these statements are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[28]

2.290 The case law quoted above therefore establishes the proposition that, while merits review is not expressly required, there is strict requirement for 'effective review' of non-refoulement decisions.

2.291 Applied to the Australian context, judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977*, and represents a considerably limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the decision-maker as provided by statute). The court cannot undertake a substantive review that engages with the facts (that is, merits review) of a particular case to determine whether the case was correctly decided.

2.292 Accordingly, in the Australian context, the committee remains of the view that judicial review is not sufficient to fulfil the international standard required of 'effective review', because it is only available on restricted grounds of review that do not relate to whether that decision was the correct decision on the available evidence. To illustrate, judicial review of the minister's decision to deny a complementary visa application will not extend to review of whether a change in factual circumstances in the applicant's favour means that the correct decision is to issue a complementary protection visa. It should be recalled that the purpose of effective review of non-refoulement decisions under international law is to 'avoid irreparable harm to the individual'.

---

27 Mohammed Alzery v. Sweden, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006)) [11.8].

28 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of that treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

2.293 By contrast, merits review allows a person or entity other than the primary decision-maker to reconsider the facts, law and policy aspects of the original decision and to determine what is the correct or preferable decision.

2.294 In light of the above, the committee reiterates that, in the Australian context, the requirement for independent, effective and impartial review of non-refoulement decisions is not met by the availability of judicial review, but may be fulfilled by merits review.

2.295 **The committee's assessment of the extension of section 502, providing that the minister may declare a person to be an excluded person on character grounds, and thus unable to seek merits review of a decision at the Administrative Appeals Tribunal to deny their complementary protection visa application, against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) is that the unavailability of merits review of the minister's decision fails to meet the requirement for independent, effective and impartial review of non-refoulement decisions. Accordingly, the committee considers that this provision is incompatible with international human rights law.**

2.296 In order to address the human rights compatibility issues raised above, the Migration Act could be amended to require a departmental review of all non-refoulement claims prior to any person's removal from Australia and that any decision taken by the department following such a review is at a minimum reviewable by the Administrative Appeals Tribunal.

Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 [F2015L01461]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 3 December 2015 (Senate)

Purpose

2.297 The Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 (the regulation) amends the Migration Regulations 1994 to confirm that the effect of regulation 2.08F is to provide that any application made by certain visa applicants for a Permanent Protection Visa (PPV) will be converted into an application for a Temporary Protection Visa (TPV).

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

Background

2.299 The instrument concerns the operation of regulation 2.08F of the Migration Regulations 1994. This regulation was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act), which commenced on 16 December 2014.

2.300 The committee considered the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (RALC bill) in its *Fourteenth Report of the 44th Parliament*.[1]

2.301 The committee first reported on the regulation in its *Thirtieth Report of the 44th Parliament* (previous report), and requested further information from the Minister for Immigration and Border Protection as to the compatibility of the regulation with Australia's international human rights obligations.[2]

Conversion of permanent protection visa applications into temporary protection visa applications

2.302 The regulation amends regulation 2.08F of the Migration Regulations 2004, which provides that certain applications for a PPV made before 16 December 2014 are to be converted to applications for a TPV. The amendment will affect persons whose application for a PPV was made before 16 December 2014 and:

- has been the subject of a court order requiring the minister to reconsider the application;

1 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) 70-92.

2 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 68-77.

- has been remitted to the minister for reconsideration by the Administrative Appeals Tribunal; or
- had not been decided by the minister before 16 December 2014 (due to, for example, a remittal from the Administrative Appeals Tribunal or a court).

2.303 The effect of the conversion is that people covered by the amendment who have applied for a PPV will be considered to have never applied for a PPV and will be taken to have applied for a TPV, and will only be granted temporary protection in Australia if found to engage Australia's protection obligations.

2.304 In its previous report, the committee considered that the regulation, in converting PPV applications to TPV applications, engages a number of human rights, including non-refoulement obligations; the right to health; the right to protection of the family; the obligation to consider the best interests of the child; and the right to freedom of movement. These rights are considered in detail below.

Non-refoulement obligations

2.305 Australia's non-refoulement obligations are described above at paragraphs [2.86] to [2.89].

Compatibility of the measure with Australia's non-refoulement obligations

2.306 The changes under the regulation provide for the conversion of existing applications for PPVs into applications for TPVs.

2.307 TPVs are granted for a period of up to three years at one time, rather than being permanent as is the case with PPVs.[3] The statement of compatibility acknowledges that TPVs engage Australia's non-refoulement obligations, but states that the amendments:

> …will not result in the return or removal of persons found to engage Australia's protection obligations in contravention of its non-refoulement obligations. The position of the Government has always been that grant of a protection visa is not the only way of giving protection to persons who engage Australia's protection obligations, and that grant of a temporary visa is a viable alternative.[4]

2.308 The statement of compatibility did not address whether there will be sufficient safeguards in place to ensure that any reapplication process takes account of the risk of refoulement if the person is denied continuing protection. In addition, while the statement of compatibility states that the grant of a visa is not the only way of giving protection to persons, the committee reiterates its long-standing view that administrative and discretionary safeguards are less stringent than the protection of statutory processes, and are insufficient in and of themselves to satisfy the standards

3 Explanatory memorandum (EM), *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act), Attachment A 9.

4 Explanatory statement (ES) 6.

of 'independent, effective and impartial' review required to comply with Australia's non-refoulement obligations under the ICCPR and the CAT.[5]

2.309 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to how the proposed amendments are compatible with Australia's absolute non-refoulement obligations.

Minister's response

> The amendments to regulation 2.08F will not result in the return or removal of a person found to engage Australia's protection obligations in contravention of its non-refoulement obligations under the CAT and ICCPR. The grant of a permanent visa is not the only way of compliance with Australia's non-refoulement obligations. Temporary protection visa (TPV) holders who continue to claim Australia's protection are able to seek a further TPV or Safe Haven Enterprise Visa (SHEV) when their initial visa will expire. The Government does not regard its protection obligations as automatically ceasing when a visa expires. Where protection continues to be sought, cessation of the visa triggers a new assessment of these obligations in the context of current individual and country circumstances. Applicants who continue to engage Australia's protection obligations and satisfy other visa criteria will be granted a further TPV or a SHEV. An applicant who engages Australia's nonrefoulement obligations will not be returned or removed in contravention of these obligations.[6]

Committee response

2.310 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.311 The committee appreciates the government does not regard its protection obligations as automatically ceasing when a visa expires. However, the minister's response does not indicate whether there will be sufficient safeguards in place to ensure that any reapplication process takes account of the risk of refoulement if the person is denied continuing protection.

2.312 TPVs require refugees and complementary protection claimants to prove afresh their claims for protection every three years. The international legal framework does provide for the cessation of refugee status or protection obligations where, for example, the conditions in the person's country of origin have materially

---

5 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (2 February 2015) paragraphs [1.89] to [1.99]. See also Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014) paragraphs [3.55] to [3.66] (both relating to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013).

6 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 16.

altered such that the reasons for a person becoming a refugee have ceased to exist. However, as noted by the United Nations High Commissioner for Refugees, the international protection regime 'does not envisage a potential loss of status triggered by the expiration of domestic visa arrangements,'[7] which is to say the expiry of a visa should not, of itself, affect a person's refugee status.

2.313 Indeed, under international human rights law the burden of proof in determining whether conditions in the person's country of origin have materially altered such that protection is no longer required rests with the asylum state.[8] That this is the correct question at international human rights law was identified by Allsop J in *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs*:

> The approach is not to ask whether a claim of such a well-founded fear has been made out, but to ask whether, in respect of someone who has been recognised as a refugee (that is who has made out that claim), circumstances have so changed as to warrant the conclusion that the well-founded fear which previously existed can no longer be maintained as a basis for refusing to avail himself or herself of the protection of the country of nationality and, so, that the protection of the Convention should cease. A lack of demonstrable clarity in the reality and durability of the change in relevant circumstances will lead to the grounds for cessation not being established.[9]

2.314 TPVs reverse the burden of proof and require TPV applicants to prove their need for protection a fresh every three years.

2.315 **The committee's assessment of the conversion of Permanent Protection Visa applications into Temporary Protection Visa applications against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) is that the measure is incompatible with Australia's obligations under international human rights law. The measure places the burden of proof on applicants to demonstrate that conditions in their country of origin have not materially changed.**

2.316 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to provide a presumption in favour of renewing a TPV application. This presumption could be defeated in circumstances where the Australian government can prove that the conditions in the person's country of origin

---

7 UNHCR, 'UNHCR concerned about confirmation of TPV system by High Court' (20 November 2006) http://www.unhcr.org.au/pdfs/TPVHighCourt.pdf.

8 Outline of Submissions on Behalf of the Office of the United Nations High Commissioner for Refugees (as Amicus Curiae) (2007) 19 *International Journal of Refugee Law* 360, 367.

9 [2006] FCAFC 60 (12 May 2006) at [183].

have materially altered such that the reasons for a person becoming a refugee have ceased to exist.

Right to health

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

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

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

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

Compatibility of the measure with the right to health

2.320 As noted above, the changes made by the regulation confirm the conversion of existing applications for PPVs into applications for TPVs.

2.321 The right to health was not addressed in the statement of compatibility for the regulation, and instead the statement of compatibility refers to the discussion of these issues in the statement of compatibility for the RALC bill. The statement of compatibility for the RALC bill noted that, under the new arrangements, people who were found to engage Australia's non-refoulement obligations would be granted a TPV for a period of up to three years at one time (rather than a permanent protection visa).[10] The statement of compatibility noted that the right to health was

10 EM RALC Act, Attachment A 9.

engaged by the amendments, and that TPV holders are entitled to access Medicare and the Australian public health system.[11]

2.322 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, 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'. 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.

2.323 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to how the proposed amendments are compatible with the right to health.

Minister's response

> The legislation converting permanent protection visa applications to temporary protection visa applications is aimed at achieving the legitimate objectives of dissuading people from taking potentially life threatening journeys to Australia, as well as the need to maintain the integrity of Australia's migration system and protect the national interest. Permanent protection visas may be marketed by people smugglers as motivators for unauthorised maritime entry to Australia.
>
> I note the committee's concerns regarding possible mental health problems for TPV and SHEV holders, but consider that there is a rational connection between any limitations this policy may place on the right to health and achieving these objectives, and that these are reasonable and proportionate measures. As outlined in the Statement of Compatibility with human rights as set out in the Explanatory Statement to the Regulation, all TPV and SHEV holders have access to Medicare and mainstream medical services. In addition, they are able to access:
>
> - The Government's Programme of Assistance for Survivors of Torture and Trauma (PASTI). PASTI provides direct counselling and related support services, including advocacy and referrals to mainstream health and related services;

11 EM RALC Act, Attachment A 17.

- PASTI has established rural, regional and remote outreach services to enable survivors of torture and trauma to access services outside metropolitan areas;

- The Government's Better Access initiative to receive rebates through Medicare should they wish to access selected mental health services provided by general practitioners, psychiatrists, psychologists and eligible social workers and occupational therapists; and

- The Mental Health Service in Rural and Remote areas (MHSRRA), which provides rural and remote areas with more allied and nursing mental health services. The MHSRAA enables survivors of torture and trauma to access these services in areas with lower levels of mental health services.

Given that TPV and SHEV holders have access to Medicare and mainstream health services, as well as the additional services identified above, any limitation on a temporary visa holder's right to health is mitigated by the availability of these services, and is reasonable and proportionate to the objective of deterring people form making dangerous boat journeys to Australia.[12]

Committee response

2.324 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.325 The committee accepts that in light of the potentially life-threatening journey, deterring people from making dangerous boat journeys to Australia is a legitimate objective. The committee also accepts that the need to maintain the integrity of Australia's migration system, as well as protect the national interest, are legitimate objectives.

2.326 The minister's response notes that PPVs may be marketed by people smugglers as motivators for unauthorised maritime entry to Australia. However the minister provides no evidence that this is the case. As noted in its previous report and repeated above, the Attorney-General's Department's guidance on the preparation of statements of compatibility 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'.

2.327 In the absence of empirical data or evidence that PPVs are marketed by people smugglers to encourage individuals to attempt the dangerous boat journey to Australia, the committee is unable to agree that the measure is rationally connected to the objective sought.

12 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 16-17.

2.328 However, even assuming that the measure is rationally connected to the objective sought, it is unclear if the limitations are a proportionate way to achieve it.

2.329 The committee acknowledges that TPV and Safe Haven Enterprise Visa (SHEV) holders have access to Medicare, mainstream health services, and the additional targeted health services identified by the minister.

2.330 Nevertheless, the committee reiterates its comments from its previous report where it emphasised that the practical operation and consequences of TPVs may have significant adverse consequences for the health of TPV holders. Health services designed to mitigate the potentially serious adverse health effects arising from the TPV regime may alleviate some problems but they cannot appropriately resolve the danger inherent in the TPV regime.

2.331 TPVs require refugees to prove afresh their claims for protection every three years. Research shows that TPVs lead to insecurity and uncertainty for refugees which, in turn, may cause or exacerbate existing mental health problems, or cause anxiety and psychological suffering. Such research indicates that restrictions on family reunion places further stress on TPV holders which may lead to mental health problems.[13]

2.332 This regulation expands the class of people who would become TPV holders, rather than holders of a PPV, and as such, engages and limits the right to health, which includes mental health.

2.333 The committee notes further that while access to Medicare and mainstream health services is clearly an important aspect of protecting the right to health, it does not fully mitigate against the health-related harm (particularly psychological harm) that may be caused to individuals through the issuing of TPVs rather than providing permanent protection. Neither do the additional targeted health services identified by the minister.

2.334 **The committee's assessment of the conversion of Permanent Protection Visa applications into Temporary Protection Visa applications against article 12(1) of the International Covenant on Economic, Social and Cultural Rights is that the measure is incompatible with Australia's obligations under international human rights law.**

2.335 **As set out above, the minister's response does not sufficiently justify the limitation on the right to health as rationally connected to the objective sought. The minister provides no evidence that people smugglers market permanent protection visas as motivators for unauthorised maritime entry to Australia.**

13 See, for example, Greg Marston, *Temporary Protection Permanent Uncertainty* (RMIT University 2003) 3. http://dpl/Books/2003/RMIT_TemporaryProtection.pdf; Australia Human Rights Commission, *A last resort? - Summary Guide: Temporary Protection Visas,* https://www.humanrights.gov.au/publications/last-resort-summary-guide-temporary-protection-visas.

Further, as set out above, the minister's response does not sufficiently justify the amendment as a proportionate limitation on the right to health. Accordingly, the committee considers that the changes made by the regulation to confirm the conversion of existing Permanent Protection Visa applications into Temporary Protection Visa applications are incompatible with the right to health.

2.336 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to ensure that a presumption in favour of renewing a TPV application exists. In addition, health services specifically targeted at TPV holders may be extended.

Right to protection of the family and obligation to consider the best interests of the child

2.337 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the ICESCR. Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection.

2.338 An important element of protection of the family, arising from the prohibition under article 17 of the ICCPR against unlawful or arbitrary interference with family, is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation, or forcibly remove children from their parents, will engage this right.

2.339 Under the Convention on the Rights of the Child (CRC), Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[14]

2.340 This principle requires active measures to protect children's rights and promote their survival, growth, and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[15]

2.341 The committee notes that, while there is no universal right to family reunification, article 10 of the CRC nevertheless obliges Australia to deal with applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family, and require family unity to be protected by society and the state.

14 Article 3(1).

15 UN Committee on the Rights of Children, General Comment 14 on the right of the child to have his or her best interest taken as primary consideration, CRC/C/GC/14 (2013).

Compatibility of the measure with the right to protection of the family and the obligation to consider the best interests of the child

2.342 The statement of compatibility for the RALC bill explained that:

> The temporary protection regime provides that refugees granted temporary protection visas are not eligible to sponsor family members.[16]

2.343 This has the consequence that a person holding a TPV cannot access family reunion and, if separated from their close family members, will remain so separated while holding a TPV. Converting all PPV applications into TPV applications will mean that those granted a TPV will be unable to access family reunion, regardless of whether this would result in permanent family separation and whether this is in the best interests of the child.

2.344 In its previous report the committee noted that the right to protection of the family and the obligation to consider the best interests of the child as a primary consideration may only be limited if the measure is reasonable, necessary and proportionate in pursuit of a legitimate objective.

2.345 The statements of compatibility for both the RALC bill and this regulation do not address these issues. As set out above, the committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

2.346 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> The Government is committed to acting in accordance with Article 3 of the CRC. In developing this regulation, the best interests of the child have been treated as a primary consideration. However, other considerations may also be primary considerations, including:
>
> - seeking to prevent anyone, including children, from taking potentially life threatening journeys to Australia;
> - maintaining the integrity of Australia's borders and national security;
> - maintaining the integrity of Australia's migration system;

16 EM RALC Bill, Attachment A 12.

- protection of the national interest; and
- encouraging regular migration.

Part of the Government's intention in re-introducing TPVs was to deter children from taking potentially life threatening journeys to achieve resettlement in Australia.

This goal, as well as the need to maintain the integrity of Australia's migration system and protect the national interests, were also primary considerations. I consider that these primary considerations outweigh the best interests of the child in seeking family re-unification.

There is no right to family reunification under international law. The protection of the family unit under articles 17 and 23 of the ICCPR does not amount to a right to enter Australia where there is no other right to do so. Likewise, Article 10 of the CRC does not amount to a right to family reunification. These rights can be subject to proportionate and reasonable limitations which are aimed at legitimate objectives. The objectives for re-introducing TPVs are set out above.

I consider that these objectives are legitimate and that the re-introduction of TPVs, in conjunction with other aspects of border protection policy, is a proportionate measure for achieving these objectives. I further consider that the measures have been effective in achieving these objectives. This has allowed the Government to provide increased opportunities for people to arrive in Australia via regular means, including obtaining a permanent visa for resettlement under Australia's Refugee and Humanitarian Programme, which allows family groups to migrate together.[17]

Committee response

2.347 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.348 The committee reiterates that, in light of the potentially life threatening journey, deterring people from making dangerous boat journeys to Australia is a legitimate objective. The committee also accepts that the need to maintain the integrity of Australia's migration system, as well as protect the national interest, are legitimate objectives.

2.349 Nevertheless, as the committee noted above, in order to demonstrate that a limitation is permissible, legislation proponents must 'provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective'. The minister's response provides no empirical data, or other evidence, that indicates that re-introducing TPVs deters children from taking potentially life threatening journeys to achieve resettlement in Australia.

17 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 17-18.

2.350 In the absence of empirical data or other evidence the committee is unable to agree that the measure is rationally connected to the objective sought.

2.351 **The committee's assessment of the conversion of Permanent Protection Visa applications into Temporary Protection Visa applications against articles 17 and 23 of the International Covenant on Civil and Political Rights, article 10 of the International Covenant on Economic, Social and Cultural Rights (right to protection of the family) and article 3 of the Convention on the Rights of the Child (obligation to consider the best interests of the child) is that the measure is incompatible with Australia's obligations under international human rights law.**

2.352 **As set out above, the minister's response does not sufficiently justify the limitation on the right to protection of the family and the obligation to consider the best interests of the child as rationally connected to the objective sought, and the minister provides no evidence that people smugglers market Permanent Protection Visas as motivators for unauthorised maritime entry to Australia. Accordingly, the committee considers that the changes made by the regulation to confirm the conversion of existing Permanent Protection Visa applications into Temporary Protection Visa applications are incompatible with the right to protection of the family and the obligation to consider the best interests of the child.**

2.353 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to provide PPVs for children.

Right to freedom of movement

2.354 The right to freedom of movement is set out above at paragraphs [2.145] to [2.147].

Compatibility of the measure with the right to freedom of movement

2.355 A TPV only allows a visa holder to travel in compassionate and compelling circumstances, as approved by the minister in writing, and to places other than the country in respect of which protection was sought.[18] In its previous report the committee therefore considered that the right to freedom of movement is engaged and limited by the measure.

2.356 This right was not addressed in the statement of compatibility. As set out above, the committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

18 See Subclass 785-Temporary Protection Visa, which as a result of 785.611 is subject to condition 8570, see Schedules 2 and 8 to the Migration Regulations 1994.

2.357 The committee therefore sought the advice of the Minister for Immigration and Border Protection as to whether the proposed changes are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Minister's response

> With respect, I do not accept that the Committee's assessment that the right to freedom of movement is limited by the amendment. The Committee notes that:
>
> > "The right to freedom of movement includes the right to move freely within a country for those who are lawfully within a country, the right to leave any country and the right to enter a country of which you are a citizen."
>
> TPV and SHEV holders are able to move freely within Australia and to choose their place of residence. They are also able to leave Australia at any time - there are no legal barriers to their departure and they are able to obtain Australian travel documents to facilitate their travel. Anyone who is found to be a refugee for the purpose of the Refugees Convention is able to apply for a Convention Travel Document (also known as a Titre de Voyage). Those who engage Australia's protection obligations on complementary protection grounds are able to seek a Certificate of Identity. These travel documents are available to both permanent and temporary protection visa holders.
>
> Condition 8570 is imposed on temporary protection visas and requires visas holders to seek the Department's permission before travelling overseas if they do not want to risk being found to have breached their visa condition. The condition does not prevent a person from departing Australia.
>
> Permission to travel, other than to the country against which protection was sought, is granted in compassionate and compelling circumstances (which may include visiting close family members). Where this condition is breached, consideration may be given to cancelling the visa. This would affect a person's right to re-enter Australia if they are overseas at the time of visa cancellation. A person in Australia at the time their visa is cancelled would not be removed from Australia where that would be inconsistent with Australia's non-refoulement obligations.
>
> Condition 8570 is intended to protect the integrity of the protection visa program by ensuring that visa holders do not travel to the country in relation to which they were found to engage Australia's protection obligations.[19]

19 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (dated 11 January 2016) 18-19.

Committee response

2.358 **The committee thanks the Minister for Immigration and Border Protection for his response**.

2.359 The committee acknowledges the minister's advice that TPV and SHEV holders are able to obtain Australian travel documents to facilitate their travel, and that individuals who engage Australia's protection obligations on complementary protection grounds are able to seek a Certificate of Identity.

2.360 However, the committee remains concerned that Condition 8570 conditions the right of individuals on TPVs to travel overseas on the discretion of the Department of Immigration and Border Protection.

2.361 In contrast to the minister's statement, requiring holders of TPVs to seek the department's permission before travelling clearly limits the right to freedom of movement. This is particularly so when it appears that permission to travel overseas will never be granted in relation to the country against which protection was sought, and will only be granted to other countries in 'compassionate and compelling circumstances'. The fact that this 'may', but will not necessarily, include visiting close family members indicates the significant limitation on freedom of movement.

2.362 As the committee noted in its previous report, freedom of movement includes the right to leave a country for permanent emigration and also for the purpose of travelling abroad. States are required to provide necessary travel documents to ensure this right can be realised. Further, freedom to leave the territory of a state 'may not be made dependent on any specific purpose', and the right of the individual to determine the state destination 'is part of the legal guarantee'. This right is accorded to all individuals within a state.[20]

2.363 **The committee's assessment of the conversion of Permanent Protection Visa applications into temporary protection visa applications against article 12 of the International Covenant on Civil and Political Rights is that the measure is incompatible with Australia's obligations under international human rights law.**

2.364 In order to address the human rights compatibility issues raised above, the Migration Act may be amended to ensure that a person has the right to obtain relevant travel documents and to travel overseas, without seeking the Department of Immigration and Border Protection's permission. The Migration Act could be amended to provide a departmental review of protection claims in the event that a person sought to travel to a country from which they had previously sought protection in Australia.

20 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999), paragraph [8]. See also paragraphs [9] to [10].

Shipping Legislation Amendment Bill 2015

Portfolio: Infrastructure and Regional Development
Introduced: House of Representatives, 25 June 2015

Purpose

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

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

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

Background

2.367 The committee previously considered the bill in its *Twenty-seventh Report of the 44th Parliament* (previous report) and requested further information from the Minister for Infrastructure and Regional Development as to the compatibility of the bill with the right to just and favourable conditions of work.[1]

12-month permit system for access to Australian coastal shipping

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

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

1 Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament* (8 September 2015) 16-19.

Right to just and favourable conditions of work

2.370 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2]

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

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

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

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

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

2.374 The statement of compatibility suggests that the measure engages the right to just and favourable conditions of work but does not explicitly consider whether the measure limits the right. Further, no information is provided as to whether the bill would expand the number of individuals who work in Australian coastal waters on below award wages or the proportion of individuals who are paid below award wages.

2.375 The statement of compatibility states that Australia is not required to set wages and conditions for seafarers on foreign vessels under the ICESCR. This appears to misunderstand the nature of Australia's obligations under international law. Australia is obligated to apply international human rights law to everyone subject to

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

its jurisdiction. This includes people in Australian coastal waters that form part of Australia's territory. As part of Australia's sovereignty, Australia applies a number of domestic laws to foreign flagged vessels in its coastal waters including the *Navigation Act 2012*.

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

2.377 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.

2.378 The committee therefore sought the advice of the Minister for Infrastructure and Regional Development 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.

Minister's response

> The Bill is seeking to strike a sensible balance between reduced barriers to access of foreign vessels and the long-term availability of personnel with maritime backgrounds and skills to fill critical jobs in the industry.
>
> The Parliamentary Joint Committee on Human Rights' assessment, as outlined in paragraphs 1.82 and 1.83 of the Human rights scrutiny report dated 8 September 2015, is noted. Whilst Australia has sovereignty over its ports, as stated in the Statement of Compatibility with Human Rights the Australian Government is of the view that it does not have obligations under Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to set wages and conditions on foreign flagged vessels. In that regard the Government respectfully disagrees with the Committee's comments contained in paragraph 1.79 of its report.
>
> In any case, the Government considers the amendments are reasonable, necessary and proportionate to achieving the legitimate objective of ensuring efficient and reliable coastal shipping services as part of the national transport system. The Government considers that a foreign flagged vessel and its seafarers should be covered by Australian workplace relations laws if the vessel is engaged predominantly in domestic trade. If not, that vessel can continue its existing international arrangements. This compromise seeks to balance the rights and responsibilities of relevant parties.

> For completeness, the Government draws to the attention of the Committee, Marine Order 11 (Living and Working Conditions on Vessels) 2015 (Marine Order 11) made under the *Navigation Act 2012* (Navigation Act). Marine Order 11 would continue to apply to foreign flagged vessels engaged in coastal trading in addition to the terms and conditions agreed to in an individual seafarer's contract of employment.
>
> The Navigation Act and Marine Order 11 implement relevant terms of the International Labour Organization Maritime Labour Convention 2006 (MLC). The MLC establishes minimum working and living conditions standards for seafarers, including in relation to the minimum age of seafarers, the content of employment agreements, hours of work and rest, sleeping arrangements, paid annual leave, medical care, accommodation, ship provisions, health and safety protections and seafarers' complaint handling.
>
> The attachment [**see Appendix 1**] provides historical context for the amendments. I trust this response has addressed the Committee's concerns on these issues.[3]

Committee response

2.379 **The committee thanks the Minister for Infrastructure and Regional Development for his response**.

2.380 The bill seeks to reduce the barriers faced by foreign vessels in providing Australian coastal shipping services. Those ships would be plying their trade between Australian ports and almost exclusively in Australian territorial waters. As such, those ships would fall within Australia's jurisdiction for the purposes of international human rights law.

2.381 The response states that the Australian Government does not have obligations to set wages and conditions on foreign flagged vessels but provides no reasoning in law as to why Australia, in regulating intra-state trade, is not bound by its international human rights law obligations.

2.382 To the extent that the bill would result in more individuals working on ships undertaking interstate trade within Australia on less than Australian award wages, the bill would appear to limit the right to just and favourable conditions of work. The loss of Australian jobs and their replacement by employees working on lower foreign wages is acknowledged in the regulatory impact statement (RIS) attached to the explanatory memorandum to the bill.[4]

2.383 The response refers to Marine Order 11, however, this order does not require the payment of Australian award wages. According to the RIS, the Seagoing Industry Award 2010 (Seagoing Industry Award) Part A is between $4 169 and $5 202

3 See Appendix 1, Letter from the Hon Warren Truss MP, to the Hon Philip Ruddock MP (dated 22 October 2015) 1-2.

4 Explanatory memorandum (EM), regulatory impact statement (RIS) 75.

more expensive per ship per day than the International Transport Federation's Uniform Collective Agreement (ITFUCA) rate.[5] This suggests that foreign workers employed in ships plying Australian coastal waters will be paid significantly less than Australian award wages. To the extent that the bill does limit the right to just and favourable conditions of work, the response states that the government considers the amendments are reasonable, necessary and proportionate but does not set out in detail, following the committee's analytical framework, how the limitation is justified.

2.384 The committee agrees that revitalising domestic shipping is likely to be a legitimate objective for the purposes of international human rights law and that the RIS provides evidence that the measures in the bill are rationally connected to that objective. However, there is no information in the response or statement of compatibility to demonstrate that there are not other less rights restrictive ways to achieve this objective. For example the RIS explains that the modelling undertaken for the cost-benefit analysis of the measures in the bill did not include the cost of the potential loss of Australian seafarer jobs.[6] Accordingly, the committee needs further information as to the proportionality of the measure.

2.385 **The committee's assessment of the 12-month permit system for access to Australian coastal shipping by foreign flagged vessels against articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (right to just and favourable conditions of work) raises questions as to whether the measures are a justified limitation on the right.**

2.386 **As set out above, the minister's response does not sufficiently justify that limitation for the purposes of international human rights law. Accordingly, the committee seeks further information from the Minister for Infrastructure and Regional Development as to whether the limitation on just and favourable conditions of work is proportionate, in particular with reference to the economic benefits of the bill and the impact on Australian jobs in the domestic shipping industry.**

5 EM, RIS 50.

6 RIS 75.

Charter of the United Nations (Sanctions–Syria) Regulation 2015 [F2015LO1463]

Charter of the United Nations (Sanctions–Iraq) Amendment Regulation 2015 [F2015L01464]

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673]

Portfolio: Foreign Affairs
Authorising Legislation: Charter of the United Nations Act 1945
Last day to disallow: 3 December 2015 (Senate) (or 22 February 2016 (Senate) for the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673])

Purpose

2.387 The Charter of the United Nations (Sanctions—Syria) Regulation 2015 and the Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 (together the cultural sanctions regulations) seek to give effect to a resolution of the United Nations Security Council in relation to the protection of Iraqi and Syrian cultural property.[1]

2.388 The Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) (the UN Sanction Enforcement Law regulation) amends the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008, to include contravention of aspects of the cultural sanctions regulations relating to Syria as a 'UN sanction enforcement law'. The effect of this is to make breach of those provisions a criminal offence under the *Charter of the United Nations Act 1945* (the Act).

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

Background

2.390 In February 2015, the UN Security Council passed resolution 2199 that provides:

> …all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March

1 The analysis in this entry also applies to the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 3) [F2015L02098].

> 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people…[2]

2.391 Under international law, Australia is bound by the Charter of the United Nations 1945 (UN Charter) to implement UN Security Council decisions.[3] UN Security Council resolution 2199 requires Australia to implement appropriate steps to prevent the trade in Iraqi and Syrian cultural property that are consistent with Australia's international obligations including human rights obligations.

2.392 The committee previously considered the cultural sanctions regulations in its *Thirty-first Report of the 44th Parliament* (previous report) and requested further information from the Minister for Foreign Affairs as to the compatibility of the regulations with the prohibition against arbitrary detention and the right to a fair trial (presumption of innocence).[4]

Offences of dealing with 'illegally removed cultural property'

2.393 The cultural sanctions regulations provide that anyone who suspects an item is illegally removed cultural property from Iraq or Syria must notify either the Secretary of the Department of Foreign Affairs and Trade (DFAT); the Department of Communications and the Arts; or a member of the police. If the Secretary of DFAT reasonably believes that a person has possession or control of an item that might be illegally removed cultural property, the secretary may direct the person to comply with arrangements for storage of the item as specified by the secretary.

2.394 A person commits an offence of strict liability if they fail to comply with arrangements specified by the secretary, liable to up to 50 penalty units.

2.395 In addition, as breach of such provisions in relation to Syria have been designated as a UN sanction enforcement law, a person commits an offence under the Act by engaging in conduct (including doing an act or omitting to do an act) that contravenes the provisions. This is then punishable by up to 10 years imprisonment and/or a fine of up to 2500 penalty units (or $450 000).[5].

2.396 For both property from Iraq and Syria, there is an additional offence (specified as a UN sanction enforcement law) for persons who give, trade in or transfer the title of illegally removed cultural property, otherwise than in accordance

---

2 United Nations Security Council, Resolution 2199 (2015), paragraph 17, 7379th meeting.

3 See article 2(2) and article 41 of the Charter of the United Nations 1945.

4 Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament* (8 September 2015) 12-20.

5 See the combined effect of the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673], which designates regulation 5 of the Charter of the United Nations (Sanctions—Syria) Regulation 2015 as a UN Sanction Enforcement Law under section 2B of the *Charter of the United Nations Act 1945*, read with section 27 of that Act which makes contravention of a UN sanction enforcement law a criminal offence.

with a direction of the secretary.[6] This is also punishable by up to 10 years' imprisonment and/or a fine of up to $450 000.

2.397 In its previous report the committee considered these measures engage and may limit the prohibition against arbitrary detention, on the basis that the offences, could lead to up to ten years imprisonment, were imprecisely drafted.

Right to liberty (prohibition against arbitrary detention)

2.398 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to liberty—the procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

2.399 Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

2.400 The UN Human Rights Committee has explained:

> The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.[7]

2.401 In addition, the UN Human Rights Committee has noted that any substantive grounds for detention 'must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.[8]

Compatibility of the measure with the right to liberty (prohibition against arbitrary detention)

2.402 The statements of compatibility for the cultural sanctions regulations state that the regulations advance the protection of human rights in Syria and Iraq as they assist with international efforts to deprive terrorist organisations from funding

---

6 See Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2), specifying regulation 10 of the Charter of the United Nations (Sanctions—Iraq) Regulation 2008 and regulation 6 of the Charter of the United Nations (Sanctions—Syria) Regulation 2015 as UN sanction enforcement laws under section 2B of the *Charter of the United Nations Act 1945*, read with section 27 of that Act which makes contravention of a UN sanction enforcement law a criminal offence.

7 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)* (16 December 2014) paragraph 12.

8 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)* (16 December 2014) paragraph 22.

human rights violations in Syria and Iraq by trading in illegally removed cultural property. The statement of compatibility for the UN Sanction Enforcement Law regulation states that the regulation does not engage any human rights.

2.403 There is no discussion in any of the statements of compatibility about any rights that may be limited by the regulations, including the right not to be arbitrarily detained.

2.404 In assessing whether the regulations engage and may limit the right not to be arbitrarily detained, the committee notes that arbitrary detention under international human rights law is much broader than unlawful detention. Detention that is lawful under Australian law may nevertheless be arbitrary and thus in breach of Australia's obligations under article 9 of the ICCPR.

2.405 In its previous report, the committee considered that there are significant questions as to whether the limitation on the right to arbitrary detention imposed by the regulations is sufficiently precise for the purposes of international human rights law. For example:

- The definition of what constitutes 'illegally removed cultural property' is defined as an item of property that 'has been illegally removed' from Syria or Iraq after certain dates. It is unclear what constitutes illegal removal.
- It is also unclear if an item would be considered to be 'illegally' removed if the person removing it did so without direct authority but for the purposes of safe-keeping.
- In addition, there is no definition as to what may be considered to be 'cultural property' or what may be considered an item of 'archaeological, historical, cultural, rare scientific, or religious importance'.
- A person is required to comply with written directions from the secretary 'for storage of the item'. No further detail is specified as to what these directions may be, nor is there a requirement that the arrangements be reasonable.
- There is no requirement that a direction is in force in relation to the property before the offence could apply.

2.406 Even if the limitation was sufficiently precise, the committee considered further that it had not been demonstrated that the measures impose a proportionate limitation on the right not to be arbitrarily detained.

2.407 The committee therefore sought the advice of the Minister for Foreign Affairs as to:

- whether the offence provisions are sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including that there are sufficient safeguards in place

and the measure is no more rights restrictive than necessary to achieve that objective.

Minister's response

> The Committee sought my views on offences dealing with illegally removed cultural property from Syria, and whether they were sufficiently prescribed and justifiable to engage and limit the prohibition on arbitrary detention (article 9 of the International Covenant on Civil and Political Rights). The Committee noted that the offence related to the failure to comply with the direction in relation to illegally removed cultural property in Syria (under Regulation 5 of the Syria Regulation) is also designated as a UN Sanction Enforcement Law. The Department of Foreign Affairs and Trade acknowledges that this was a drafting error and will therefore make a revised UN Sanction Enforcement Law Declaration, which will remove Regulation 5 of the Syria Regulation as a UN Sanction Enforcement Law' Accordingly, the penalty for this Regulation will be the same as for the Iraq Regulation.
>
> …
>
> The Committee also noted that the Regulations fail to outline the procedure for the storage and return of cultural items of Iraq and Syria. This process is outside the purview of the Regulations which is solely to implement UN Security Council Resolution 2199, and would be decided through administrative processes between relevant government agencies.[9]

Committee response

2.408 **The committee thanks the Minister for Foreign Affairs for her response**.

2.409 The committee welcomes the minister's advice that that the failure to comply with a direction in relation to illegally removed cultural property in Syria was designated as a UN Sanction Enforcement Law was a drafting error. The committee appreciates the minister's assurance that a revised UN Sanction Enforcement Law Declaration will remove the additional punishment.

2.410 However, the committee notes that the minister's response does not address the committee's concerns over the lack of precision surrounding the offences dealing with illegally removed cultural property from Syria and Iraq. The committee also notes that the minister's response does not explain whether the limitation is a reasonable and proportionate measure designed to achieve the stated objective of depriving terrorist organisations from funding human rights violations in Syria and Iraq by trading in illegally removed cultural property.

2.411 **In the absence of information from the minister, the committee maintains its concern that the offences of dealing with illegally removed cultural property**

9 See Appendix 1, Letter from the Hon Julie Bishop MP, Minister for Foreign Affairs, to the Hon Philip Ruddock MP (dated 21 December 2015, received 19 January 2016) 1-2.

engage and limit the prohibition on arbitrary detention because they are drafted in terms which are insufficiently precise and therefore risk being unpredictable or overly broad. In the absence of further information from the minister as to why this limitation is proportionate, the committee is unable to conclude that the measures are compatible with international human rights law.

Strict liability offence

2.412 The cultural sanctions regulations both provide that strict liability applies if a person is directed by the Secretary of DFAT to comply with specified arrangements for storage of the item, and the person fails to comply with the arrangement. The regulations state that a penalty of 50 penalty unit applies.

2.413 The effect of applying strict liability to an element of an offence means that no fault element needs to be proven by the prosecution but the defence of mistake of fact is available to the defendant.

2.414 The imposition of strict liability engages and limits the right to a fair trial, in particular the right to be presumed innocent.

Right to a fair trial (presumption of innocence)

2.415 Article 14(2) of the ICCPR provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

2.416 Strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. However, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such offences must be reasonable, necessary and proportionate to that aim.

Compatibility of the measure with the right to a fair trial (presumption of innocence)

2.417 Strict liability in this instance means that the prosecution does not have to prove any fault element in a person failing to comply with arrangements as directed. This is despite there being no detail in legislation as to what those arrangements might be, how the person might be directed or what the timeframe is for a failure to comply. The Attorney-General's Department's own *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that strict liability should only be applied to all elements of an offence if the offence is not punishable by imprisonment and there are legitimate grounds for penalising persons lacking fault.[10]

10 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition) 23.

2.418 In its previous report the committee accepted that seeking to deprive terrorist organisations from funding human rights violations in Syria and Iraq is a legitimate objective for the purposes of international human rights law. However, the committee sought the advice of the Minister for Foreign Affairs as to:

- the rational connection between the limitation and the stated objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective.

Minister's response

> The Committee also sought my views on the justification for the imposition of a strict liability offence in Regulation 5 of the Syria Regulation and Regulation 9 of the Iraq Regulation, for the failure to comply with a direction in relation to illegally removed cultural property of Syria and Iraq.
>
> A strict liability offence is appropriate for the Regulations due to the fact that a person who has been correctly issued with a direction to return the illegally removed cultural property is effectively put 'on notice' by the issuing of that direction to return the item. As a result, they have received sufficient notice of their obligations under the Regulations and have had the opportunity to avoid an unintentional contravention. It would therefore be unnecessary to impose a requirement to prove the individual's intention not to comply with the notice.
>
> Strict liability is also appropriate as the offences are not punishable by imprisonment: the offences are only punishable by a fine of less than 60 penalty units. The requirement to prove fault under the Regulations would reduce the effectiveness of the enforcement regime in deterring the trade of illegally removed Syrian and Iraqi cultural property. I also note that honest and reasonable mistake of fact is available as a defence to strict liability offences under Section 9.2 of the Criminal Code.[11]

Committee Response

2.419 **The committee thanks the Minister for Foreign Affairs for her response**.

2.420 While strict liability offences should not be imposed for prosecutorial convenience, the committee considers that the deterrence of trade in illegally removed cultural property from Syria and Iraq is a legitimate aim, and that strict liability carrying a penalty of non-imprisonment for failing to comply with a direction to store such property, is reasonable and proportionate to that aim. The committee agrees that a person directed by the Secretary of DFAT to comply with arrangements specified by the secretary for storage of suspected illegally removed cultural property is put on notice by that direction such that they have the opportunity to avoid an unintentional contravention.

11 See Appendix 1, Letter from the Hon Julie Bishop MP, Minister for Foreign Affairs, to the Hon Philip Ruddock MP (dated 21 December 2015, received 19 January 2016) 1-2.

2.421 **The committee therefore accepts that the imposition of strict liability for the offence of failing to comply with a direction by the Secretary of the Department of Foreign Affairs and Trade to store suspected illegally removed cultural property from Syria and Iraq is reasonable, necessary and proportionate, and thus not inconsistent with the presumption of innocence.**

Fair Work (State Declarations — employer not to be national system employer) Endorsement 2015 (No. 1) [F2015L01420]

Portfolio: Employment
Authorising legislation: Fair Work Act 2009
Last day to disallow: This instrument is exempt from disallowance (see subsection 14(5) of the Fair Work Act 2009)

Purpose

2.422 This instrument endorses a declaration by the New South Wales (NSW) government that Insurance and Care NSW is not a national system employer for the purposes of section 14(2) of the *Fair Work Act 2009* (Fair Work Act).

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

Background

2.424 The committee first reported on the instrument in its *Thirtieth Report of the 44th Parliament* and requested further information from the Minister for Employment as to the compatibility of the instrument with the right to work.[1]

2.425 Section 14(1) of the Fair Work Act provides that a national system employer means any of the following in its capacity as an employer of an individual:

- a constitutional corporation;
- the Commonwealth or a Commonwealth authority;
- a person who employs a flight crew officer, maritime employee or waterside worker in connection with constitutional trade or commerce;
- a body corporate incorporated in a territory; or
- a person who carries on an activity in a territory and employs a person in connection with the activity.

2.426 A national system employee is an individual employed by a national system employer (section 13 of the Fair Work Act).

2.427 The Parliaments of Victoria, South Australia, Tasmania, Queensland and New South Wales referred power to the Commonwealth Parliament to extend the Fair Work Act to employers and their employees in these states that are not already covered by sections 13 and 14. Division 2A and Division 2B of Part 1-3 of the Fair Work Act give effect to state workplace relations references by extending the meaning of national system employee and national system employer (sections 30C, 30D, 30M and 30N of the Fair Work Act).

1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 64-67.

2.428 Section 14(2) of the Fair Work Act allows states and territories to declare (subject to endorsement by the Commonwealth Minister) that certain employers over which the Commonwealth would otherwise have jurisdiction are not national system employers.

2.429 The effect of an endorsement is that an employer specified in it will not generally be subject to the Fair Work Act and will instead be subject to the workplace relations arrangements prescribed by the relevant state or territory. An endorsement has the effect that a specified employer's employees are not generally subject to the Fair Work Act, because only employees of national system employers can be national system employees. However, Parts 6-3 and 6-4 of the Fair Work Act, which relate to unlawful termination of employment, notice of termination and parental leave and which apply to employers and employees nationally, will continue to apply.

2.430 This instrument endorses a declaration made under the *Industrial Relations Act 1996* (NSW) that Insurance and Care NSW is not a national system employer, commencing 9 September 2015.

Alteration of persons' workplace relations arrangements

2.431 The instrument, in removing Insurance and Care NSW as a national system employer generally subject to the Fair Work Act, will instead see employees of Insurance and Care NSW subject to the workplace relations arrangements prescribed by NSW, and so engages and may limit the right to just and favourable conditions of work.

Right to just and favourable conditions of work

2.432 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2]

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

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

- the immediate obligation to satisfy certain minimum aspects of the right;

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

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

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

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

2.436 The instrument is not accompanied by a statement of compatibility as the instrument is not specifically required to have such a statement under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). However, the committee's role under section 7 of the Act is to examine all instruments for compatibility with human rights (including instruments that are not required to have statements of compatibility).

2.437 The explanatory statement to the instrument states:

> The effect of an endorsement is that an employer specified in it will not generally be subject to the Fair Work Act and will instead be subject to the workplace relations arrangements prescribed by the relevant State or Territory. An endorsement has the effect that a specified employer's employees are not generally subject to the Fair Work Act, because only employees of national system employers can be national system employees. However, Parts 6-3 and 6-4 of the Fair Work Act, which relate to unlawful termination of employment, notice of termination and parental leave and which apply to employers and employees nationally, will continue to apply.[3]

2.438 The committee notes that to the extent that the NSW workplace relations arrangements could be less generous than the arrangements under the Fair Work Act, the measure in the instrument may be regarded as a retrogressive measure.

2.439 Under article 2(1) of the ICESCR, Australia has certain obligations in relation to economic and social rights. These include an obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right to just and favourable conditions of work. A lessening in workplace relations arrangements available to an employee may therefore be a retrogressive measure for human rights purposes. A retrogressive measure is not prohibited so long as it can be demonstrated that the measure is justified, that is, it addresses a legitimate objective, it is rationally connected to that objective and it is a proportionate means of achieving that objective.

3 Explanatory statement (ES) 2.

2.440 The committee's assessment of the instrument against the ICESCR raises questions as to whether the instrument promotes or limits the right to just and favourable conditions of work.

2.441 The committee therefore sought the advice of the Minister for Employment as to the existence of any differences between the workplace relations arrangements under the Fair Work Act and those under NSW law and whether the instrument promotes or limits the right to just and favourable conditions of work.

Minister's response

> The Committee considered the legislative instrument - 'Fair Work (State Declarations - employer not to be a national system employer) Endorsement 2015 (No.1)' and seeks further information on the 'existence of any differences between workplace relations arrangements under the *Fair Work Act 2009* and those under New South Wales (NSW) law and whether the instrument promotes or limits the right to just and favourable conditions for work'.
>
> The instrument endorses a declaration made by the New South Wales Treasurer and Minister for Industrial Relations, the Hon Gladys Berejiklian MP-namely, the *Industrial Relations (National System Employers) Amendment (Insurance and Care NSW) Order 2015*, which provides that Insurance and Care NSW is not a national system employer for the purposes of the *Fair Work Act 2009* (the Fair Work Act).
>
> Section 14 of the Fair Work Act provides that, if a declaration is made under a state law that a body established for a public or local government purpose is not a national system employer, and the Minister endorses that declaration, the body is not a national system employer.
>
> It appears that this is the first time the Committee has sought to comment upon a section 14 endorsement, noting that dozens of such these instruments have been made since the commencement of the Fair Work Act in 2009, by both this Government and the former Labor Government, in each case, with the assistance of a state Government.
>
> The making of a ministerial endorsement under section 14 of the Fair Work Act must be considered in the context of the national workplace relations system and state referrals of workplace relations matters. The national workplace relations system is supported by the states' agreements to refer certain matters to the Commonwealth. Those referrals had the effect of extending Fair Work Act coverage to private sector employers and employees otherwise outside Commonwealth power (for example, unincorporated employers). NSW, Queensland, South Australia and Tasmania did not refer power in relation to their public sector workforces, as reflected in their referral legislation. Consequently, employers and employees in the public sector in these states remain covered by the relevant state industrial relations system.

> The capacity to exclude bodies established for public or local government purposes set out in section 14 of the Fair Work Act is an inherent component of the states' agreements to refer their relevant workplace relations powers to the Commonwealth. A refusal to make a ministerial endorsement under section 14 of the Fair Work Act where the criteria set out in that section have been met could be seen as contrary to the framework underpinning the state referrals. Further, in light of NSW and other states retaining public sector employees within the state workplace relations system, such a refusal to endorse could amount to an interference with the functioning of a state in an impermissible way.
>
> Insurance and Care NSW was established as a NSW Government agency under the *State Insurance and Care Governance Act 2015* (NSW). Staff for the agency are being transferred from other state public sector bodies. Those employees continue to receive their existing employment arrangements in accordance with clause 9 of Schedule 4 of the *State Insurance and Care Governance Act 2015* (NSW). Those employees, when working for other state public sector bodies, were not covered by the national workplace relations system.
>
> Accordingly, there has been no change in employment conditions relating to these employees. The Fair Work Act did not to apply to them and that will continue to be the case.
>
> The human right to just and favourable conditions of work is not limited by this endorsement. Concerns to the contrary should be directed to the NSW Government.[4]

Committee response

2.442 **The committee thanks the Minister for Employment for her response.**

2.443 The committee considers that the response demonstrates that there has been no change to existing workplace entitlements as a result of the instrument.

2.444 **Accordingly, the committee considers that the instrument is compatible with the right to just and favourable conditions of work and has concluded its examination of the instrument.**

4 See Appendix 1, Letter from Senator the Hon Michaelia Cash, Minister for Employment, to the Hon Philip Ruddock MP (received 11 January 2016) 2.

Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 [F2015L00877]

Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 [F2015L00878]

Portfolio: Treasury
Authorising legislation: Federal Financial Relations Act 2009
Last day to disallow: 16 September 2015 (Senate)

Purpose

2.445 The Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 1 (Determination 1) specifies the amounts payable for the schools, skills and workforce development, and housing National Specific Purpose Payments (National SPPs) for 2013-14. The Federal Financial Relations (National Specific Purpose Payments) Determination 2013-14 No. 2 (Determination 2) specifies the amount payable for the Disability National SPP for 2013-14. These instruments are referred to as 'the determinations'.

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

Background

2.447 The committee first commented on the determinations (including a number of instruments relating to national partnership payments) in its *Twenty-eighth Report of the 44th Parliament*, and requested further information from the Treasurer as to whether the determinations were compatible with Australia's human rights obligations.[1]

2.448 The committee then considered the Treasurer's response in its *Thirtieth Report of the 44th Parliament*, and concluded its examination of the instruments relating to national partnership payments. The committee requested further information in relation to the remaining instruments and their compatibility with Australia's international human rights obligations.[2]

Payments to the states and territories for the provision of health, education, employment, housing and disability services—National Specific Purpose Payments

2.449 Under the Intergovernmental Agreement on Federal Financial Relations (the IGA), the Commonwealth provides National SPPs to the states and territories as a

1 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 10-14.

2 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 102-109.

financial contribution to support state and territory service delivery in the areas of schools, skills and workforce development, disability and housing.

2.450 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each National SPP, the manner in which these total amounts are indexed, and the manner in which these amounts are divided between the states and territories. The Determinations have been made in accordance with these provisions.

2.451 Payments under the determinations assist in the delivery of services by the states and territories in the areas of health, education, employment, disability and housing. Accordingly, the determinations engage a number of human rights. Whether those rights are promoted or limited will be determined by the amounts of the payments in absolute terms and in terms of whether the amounts represent an increase or decrease on previous years.

2.452 The committee has previously noted, in its assessment of appropriations bills, that proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

Multiple rights

2.453 The committee considered in its previous analysis that the determinations engage and may promote or limit the following human rights:

- right to equality and non-discrimination (particularly in relation to persons with disabilities);[4]
- rights of children;[5]
- right to work;[6]
- right to social security;[7]
- right to an adequate standard of living;[8]
- right to health;[9] and

3 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013); Parliamentary Joint Committee on Human Rights, *Third Report of the 44th Parliament* (4 March 2014); and Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (24 June 2014).

4 Article 26 of the ICCPR and the Convention on the Rights of Persons with Disabilities.

5 Convention on the Rights of the Child (CRC).

6 Articles 6, 7 and 8 of the ICESCR.

7 Article 9 of the ICESCR.

8 Article 11 of the ICESCR.

- right to education.[10]

Compatibility of the determinations with multiple rights

2.454 The statements of compatibility for the determinations each simply state that the instruments do not engage human rights.[11]

2.455 Australia has obligations to progressively realise economic, social and cultural rights using the maximum of resources available and this is reliant on government allocation of budget expenditure. The obligations under international human rights law are on Australia as a nation state—it is therefore incumbent on the Commonwealth to ensure that sufficient funding is provided to the states and territories to ensure that Australia's international human rights obligations are met.

2.456 Where the Commonwealth seeks to reduce the amount of funding pursuant to National SPPs, such reductions in expenditure may amount to retrogression or limitations on rights.

2.457 The committee therefore sought the advice of the Treasurer as to whether the Determinations are compatible with Australia's human rights obligations, and particularly, whether the Determinations are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; whether a failure to adopt these Determinations would have a regressive impact on other economic, social and cultural rights; whether any reduction in the allocation of funding (if applicable) is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights; and whether the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).

2.458 The Treasurer's response explained the various rights that the instruments engage and promote. However, the committee considered that the response did not explain whether the payments have changed over time (as any reduction in payments could limit or have a retrogressive impact on human rights).

2.459 The committee therefore requested further information from the Treasurer as to whether the determinations are compatible with Australia's international human rights obligations, in particular, whether there has been any reduction in the allocation of funding, and if so, whether this is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights.

9 Article 12 of the ICESCR.

10 Article 13 and 14 of the ICESCR and article 28 of the CRC.

11 Determination 1, EM 2 and Determination 2, EM 2.

Treasurer's response

> On 11 November 2015, Mr Laurie Ferguson MP wrote to me in his role as Deputy Chair of the Parliamentary Joint Committee on Human Rights, seeking additional information regarding the human rights compatibility of two instruments made by my predecessor.
>
> This followed the advice that I provided to the Committee in my letter of 14 October 2015 that the determination and payment of National Specific Purpose Payments (NSPPs) to the States and Territories for 2013-14 (F2015L00877 and F2015L00878) assisted in the realisation of a number of human rights, and that neither the determination nor payment of the NSPPs had a detrimental impact on any human rights.
>
> In its Thirtieth Report of the 44th Parliament, the Committee requested further information about how funding for the determinations has changed over time; specifically, whether there has been any reduction in funding.
>
> Funding for the NSPPs, including the growth from year to year, is in line with Schedule D of the Intergovernmental Agreement on Federal Financial Relations. The funding amounts for the Schools, Skills and Workforce Development, Affordable Housing, and Disability NSPPs between 2011-12 and 2013-14 are attached.
>
> The Skills and Workforce Development, Affordable Housing, and Disability Services NSPPs have not experienced a reduction in funding over this period. In fact, the funding amounts for each have increased.
>
> The determination of the National Schools NSPP for 2013-14 provided funding for government schools of $2,080.3 million. This is a reduction relative to previous years. The reduction is because Students First funding replaced the National Schools NSPP (and various National Partnership payments) on 1 January 2014. Thus the NSPP funding was only for half of the 2013-14 financial year.
>
> Once Students First funding for government schools is taken into account, the total funding provided to government schools in 2013-14 was $4,475.4 million. This constitutes a year-on-year increase in funding over this period.
>
> On this basis, I confirm my previous assessment that the determination and payment of NSPPs assists in the realisation of a number of human rights, and neither the determination nor payment of these particular NSPPs has a detrimental impact on any human rights.[12]

Committee response

2.460 **The committee thanks the Treasurer for his response.**

2.461 In particular, the committee thanks the Treasurer for providing a comparison of funding amounts for the various NSPPs over recent years. The committee

12 See Appendix 1, Letter from the Hon Scott Morrison MP, Treasurer, to the Hon Philip Ruddock MP (dated 20 January 2016) 1-2.

considers that the response demonstrates that there has been no reduction in funding allocation to the NSPPs in these determinations, and as such, that these payments would not have a retrogressive impact on human rights.

2.462 **The committee therefore considers that the determinations are compatible with Australia's international human rights obligations.**

The Hon Philip Ruddock MP
Chair

Appendix 1

Correspondence

Senator the Hon Michaelia Cash

Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MB15-000242

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

Dear Chair

Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 [F2015L01462]; and
Fair Work (State Declarations – employer not to be national system employer) Endorsement 2015 (No.1) [F2015L01420]

I refer to the letter of 10 November 2015 from Mr Laurie Ferguson MP, Deputy Chair, Parliamentary Joint Committee on Human Rights, concerning the Building Code amendment and the Fair Work declaration.

The Committee sought my advice about the human rights compatibility of these instruments. I enclose a response to the questions posed by the Committee and I trust this addresses remaining issues raised by the Committee.

Should the Parliamentary Joint Committee on Human Rights require further information, please contact my office on (02) 6277 7320.

Yours sincerely

Senator the Hon Michaelia Cash
7 / 1 / 2015

Encl.

Response to the Committee's concerns regarding the Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015

The Committee is concerned that the statement of compatibility with human rights that accompanied the explanatory statement to the Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 (the Building Code instrument) does not sufficiently justify the limitation to the right to privacy, for the purposes of international human rights law of individuals who are subject to drug and alcohol testing in accordance with the policies required by the instrument.

The Committee questions whether the policy framework for drug and alcohol testing required under the Building Code instrument prescribes effective safeguards to protect the privacy of individuals being tested in that it does not detail how testing is to be conducted, or the procedures for the retention or destruction of testing samples. The Committee seeks my advice as to whether there are sufficient safeguards in place to protect the right to privacy.

The Government's requirement that some form of drug and alcohol testing occur on Commonwealth funded construction sites does not in any way impact upon a person's 'right to respect for individual sexuality' or 'right to respect for reproductive autonomy' nor does it concern the 'prohibition on unlawful or arbitrary state surveillance'.

Any impact the Government's requirements have on the right to privacy contained in article 17 is entirely reasonable, necessary and proportionate, especially when one considers more pressing interest a worker has in being able to attend Commonwealth funded construction sites confident in the knowledge that there is a system in place to ensure their colleagues are not affected by drugs or alcohol.

In response to the specific questions on implementation raised by the Committee, it appears there is a misunderstanding of the nature and operation of the legislative instrument. The Building Code requires that contractors on Commonwealth funded construction projects have a drug and alcohol testing policy. The legislative instrument does not prescribe the policy that is to apply nor does it outline an exhaustive list of matters the policy must address. How the requirements of the Building Code are implemented at a certain workplace is a matter to be determined at the workplaces level, subject to existing safety, privacy and industrial laws.

Response to the Committee's concerns regarding the Fair Work (State Declarations – employer not to be national system employer) Endorsement 2015 (No.1)

The Committee considered the legislative instrument—'Fair Work (State Declarations – employer not to be a national system employer) Endorsement 2015 (No.1)' and seeks further information on the 'existence of any differences between workplace relations arrangements under the *Fair Work Act 2009* and those under New South Wales (NSW) law and whether the instrument promotes or limits the right to just and favourable conditions for work'.

The instrument endorses a declaration made by the New South Wales Treasurer and Minister for Industrial Relations, the Hon Gladys Berejiklian MP—namely, the *Industrial Relations (National System Employers) Amendment (Insurance and Care NSW) Order 2015*, which provides that Insurance and Care NSW is not a national system employer for the purposes of the *Fair Work Act 2009* (the Fair Work Act).

Section 14 of the Fair Work Act provides that, if a declaration is made under a state law that a body established for a public or local government purpose is not a national system employer, and the Minister endorses that declaration, the body is not a national system employer.

It appears that this is the first time the Committee has sought to comment upon a section 14 endorsement, noting that dozens of such these instruments have been made since the commencement of the Fair Work Act in 2009, by both this Government and the former Labor Government, in each case, with the assistance of a state Government.

The making of a ministerial endorsement under section 14 of the Fair Work Act must be considered in the context of the national workplace relations system and state referrals of workplace relations matters. The national workplace relations system is supported by the states' agreements to refer certain matters to the Commonwealth. Those referrals had the effect of extending Fair Work Act coverage to private sector employers and employees otherwise outside Commonwealth power (for example, unincorporated employers). NSW, Queensland, South Australia and Tasmania did not refer power in relation to their public sector workforces, as reflected in their referral legislation. Consequently, employers and employees in the public sector in these states remain covered by the relevant state industrial relations system.

The capacity to exclude bodies established for public or local government purposes set out in section 14 of the Fair Work Act is an inherent component of the states' agreements to refer their relevant workplace relations powers to the Commonwealth. A refusal to make a ministerial endorsement under section 14 of the Fair Work Act where the criteria set out in that section have been met could be seen as contrary to the framework underpinning the state referrals. Further, in light of NSW and other states retaining public sector employees within the state workplace relations system, such a refusal to endorse could amount to an interference with the functioning of a state in an impermissible way.

Insurance and Care NSW was established as a NSW Government agency under the *State Insurance and Care Governance Act 2015* (NSW). Staff for the agency are being transferred from other state public sector bodies. Those employees continue to receive their existing employment arrangements in accordance with clause 9 of Schedule 4 of the *State Insurance and Care Governance Act 2015* (NSW). Those employees, when working for other state public sector bodies, were not covered by the national workplace relations system.

Accordingly, there has been no change in employment conditions relating to these employees. The Fair Work Act did not to apply to them and that will continue to be the case.

The human right to just and favourable conditions of work is not limited by this endorsement. Concerns to the contrary should be directed to the NSW Government.

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH
MINISTER FOR AGED CARE
MINISTER FOR SPORT

Ref No: MC15-019559

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

Dear ~~Chair~~ Philip

Thank you for the letter of 10 November 2015 from the Deputy Chair, the Hon Laurie Ferguson MP, seeking my response to the Committee's view on the compatibility with human rights of the *Health Insurance Amendment (Safety Net) Bill 2015* (the Bill).

The Committee's *Thirtieth Report of the 44th Parliament: Human Rights Scrutiny Report* states that the measures contained in the Bill 'engage and limit the right to social security and the right to health' under international human rights law. Specifically, the Committee seeks my advice 'as to whether the limitation is a reasonable and proportionate measure for the achievement of the objective, in particular, whether financially vulnerable patients are likely to be unreasonably affected by the changes and, if so, what safeguards are in place to protect financially vulnerable patients.' I have considered these matters and provide the enclosed information in response.

I believe the measures contained in the Bill are not incompatible with Australia's human rights obligations and that they are reasonable and proportionate to the achievement of a legitimate objective. The changes to the safety net arrangements aim to redistribute safety net benefits to people with concession cards. Additionally, the Government provides incentives for health care providers to bulk-bill concession card holders, providing additional protection against out-of-pocket costs for these services. The Government is committed to protecting Medicare and to ensuring that it continues to provide access to high quality health care.

I trust this information will be of assistance to the Committee.

Yours sincerely

The Hon Sussan Ley MP

Encl.

01 DEC 2015

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7220

Response to the Parliamentary Joint Committee on Human Rights' *Thirtieth Report to the 44th Parliament*, concerning the *Health Insurance Amendment (Safety Net) Bill 2015.*

The Committee states that the measures contained in the Bill 'engage and limit the right to social security and the right to health' under international human rights law. Specifically, the Committee seeks my advice 'as to whether the limitation is a reasonable and proportionate measure for the achievement of the objective, in particular, whether financially vulnerable patients are likely to be unreasonably affected by the changes and, if so, what safeguards are in place to protect financially vulnerable patients.' These issues are considered below.

Improved access for concessional patients and non-concessional single patients

There have been two independent reviews of the Extended Medicare Safety Net (EMSN). The *Extended Medicare Safety Net Review Report 2009* was a review of the whole EMSN. The *Extended Medicare Safety Net Review of Capping Arrangements Report 2011* evaluated the introduction of caps on benefits payable through the EMSN. These reports were prepared by the Centre for Health Economics Research and Evaluation at the University of Technology, Sydney, following open tender processes.

The 2009 and 2011 reviews found that most EMSN benefits have flowed to patients living in relatively higher income areas. Analysis of current Medicare data confirms that this distribution has persisted. This is a reflection of different patterns of service use, as well as the tendency of doctors working in higher socio-economic areas to charge high fees, particularly for people without concession cards. The 2009 review noted that the EMSN 'may be helping wealthier people to afford even more high-cost services'. The 2011 review found that after the capping of safety net benefits for selected MBS items, the reduction in EMSN expenditure was relatively greater in wealthier areas and major cities, compared to lower socioeconomic and regional areas.

The existing safety nets also provide relatively poor access for non-concessional single people on low incomes, particularly people below retirement age who do not have children. A much smaller proportion of single people without concession cards qualify for the EMSN than any other group. This is due to the ability of family members to pool out-of-pocket costs to qualify for EMSN benefits. Singles, on the other hand, can only count their own out-of-pocket costs towards the threshold. If the Bill is not passed, a non-concessional single in 2016 would need to accumulate $2,030 in out-of-pocket costs to access the EMSN.

The new Medicare safety net introduces lower thresholds for most patient groups, including a new lower threshold for singles. It places uniform caps on the amount of out-of-pocket costs which can accumulate to the eligibility threshold and the total benefits payable for all Medicare Benefits Schedule (MBS) services. The combined effect of the lower thresholds and capping arrangements will be to create a relative shift in safety net payments to concessional patients and single people without concession cards.

Threshold changes

The 2016 thresholds for the new Medicare safety net will be:

- $400 for concessional families and singles,
- $700 for FTB (A) families and singles who do not have a concession card, and
- $1,000 for all other families.

If the Bill is not passed, the 2016 thresholds for the Extended Medicare safety will be:

- $647.90 for concession cardholders and FTB (A) families, and
- $2,030 for all other families and singles.

I expect the proportion of benefits flowing to people charged more moderate fees to increase and consequently a greater share of safety net benefits for those in lower socioeconomic areas. The Department of Health estimates an additional 53,000 people will receive a safety net benefit under the new arrangements. The number of eligible concession card holders is expected to increase by 80,500. The number of non-concession card holders is expected to decrease by 27,500, however, there will be a net increase in non-concessional single people.

Capping arrangements

Although the EMSN was intended to assist patients who have high out-of-pocket costs, it has had an inflationary impact in some areas. While the Government pays 80 per cent of the increase in fees, the patient still pays the remaining 20 per cent. In some cases, the increase in fees has been so high that Medicare data indicate that patients now face higher out-of-pocket costs than they would have if the safety net had not existed. More generally, the 2009 review estimated that the EMSN was directly responsible for a 2.9 per cent increase in provider fees per year (excluding GPs and pathology). Clearly, this has implications for patients who need services, but do not qualify for the EMSN, and the health system as a whole.

Benefit cap

Caps were introduced on safety net benefits for selected items in 2010. These caps placed an upper limit on the Commonwealth contribution for the service. This led to some moderation in the fees charged in some areas for these services. The introduction of safety net benefit caps for all MBS items is therefore expected to have a moderating effect on fee inflation.

At present, around 570 MBS items have a maximum safety net benefit or 'cap' in order to limit the incentives for providers to charge high fees for these items. However, the 2011 review into capping arrangements concluded that numerous opportunities remain for providers to shift billing practices in order to avoid caps.

Cataract surgery provides an example of billing practice shifting around capped items. Caps were introduced for cataract surgery in 2010. The 2011 review found that the fees charged for uncapped MBS item 20142 (the initiation of management of anaesthesia for lens surgery) increased by 400 per cent at the 90th percentile provider fee, indicating the possibility of provider fee sharing between ophthalmologists and anaesthetists to avoid the cap on cataract surgery.

When EMSN benefit caps were expanded in 2012, a cap was placed on the item for the initiation of anaesthesia in association with cataract surgery. Since then, some providers have shifted fees to other items, including to a routine diagnostic test. Although most doctors charge around $40 for the test, some patients have been billed over $1,000. While safety net benefit caps could be introduced for the diagnostic test item, currently there is the possibility that the high fee would move to another uncapped item. The new Medicare safety net, by capping benefits for all MBS items, would protect patients against this type of fee inflation in the future.

Accumulation cap

The 2009 review also found that one of the main incentives for fee inflation was the ability for people to cross the threshold of the EMSN in a single high fee service. This is because when a practitioner knows a patient is likely to qualify for the EMSN, they can increase their fees with the knowledge the Government is paying the majority of the cost.

For example, the maximum fee for brain stem audiometry (a form of hearing test) - an item with an MBS Fee of around $192 - increased to more than $3,995 in 2014. The patient qualified for EMSN benefits in a single service and was rebated 80 per cent of all costs in excess of the relevant threshold. The accumulation cap will in many cases remove the incentive for providers to charge very high fees relative to the MBS Fee.

The new thresholds already take into account the effects of an accumulation cap. In addition, people who are charged up to 150 per cent of the MBS Fee will not experience more out-of-pocket costs before reaching the threshold.

The accumulation and safety net benefit caps for all MBS items will address the chief structural flaws of the EMSN. The threshold settings and capping arrangements will create a more level-playing field for patients to qualify for assistance. The accumulation cap weakens the link between the patient's ability to pay high fees and the likelihood of reaching the threshold. In combination with the lower threshold levels, the capping arrangements will facilitate access to the new Medicare safety net for an additional 80,500 concessional patients.

Removal of the Greatest Permissible Gap rule

At paragraph 1.89 of the Report, the Committee raises the potential impact of the removal of the Greatest Permissible Gap (GPG) rule on financially disadvantaged people, particularly for 'one-off' services. The removal of the GPG will have no effect on most services that are bulk billed. For those that are not bulk billed, the impact of the removal of the GPG will be largely offset by the reduced thresholds of the new Medicare safety net. The GPG does not apply to in-hospital services. A worked example, prepared by my Department, to demonstrate the interaction of the removal of the GPG rule and the new Medicare safety net for a high-priced MBS item is at Attachment A.

A significant proportion of the services to which the GPG rule is applied are bulk-billed, and many of these are diagnostic imaging MBS items. There is a bulk-billing incentive for diagnostic imaging services provided to concessional people and children under 16 years of age. Diagnostic imaging providers receive 95 per cent of the MBS Fee if they bulk-bill a patient in one of these categories. This is independent of the operation of the GPG rule. This means that there is no change to the rebate paid for these services when bulk-billed. The bulk-billing rate across all diagnostic imaging services for patients in these groups is around 90 per cent.

The MBS items subject to the GPG rule are for high priced services that are often embedded in a 'cycle of care', e.g. Assisted Reproductive Technology services. The nature of many of these high priced items means that at the time a patient receives such a service, he or she will have, at the least, already seen their GP for a referral and a specialist for an initial consultation. While there is a reduction in the standard MBS benefit available, there is an increase in the amount of out-of-pocket costs that accrue to the safety net thresholds, and the patient reaches the safety net sooner. This will be of particular benefit to concessional singles and families who under the new Medicare safety net have a threshold of $400. Registered families are able to pool out-of-pocket costs to reach the safety net threshold.

Once the patient has qualified for the safety net, there is a cap on the amount of safety net benefits that will be paid (as is currently the case with many high cost out-of-hospital services), meaning that the net impact on the financial position of the patient is usually unchanged.

For the reasons outlined above, I believe these measures are not incompatible with Australia's human rights obligations and that they are reasonable and proportionate to the achievement of a legitimate objective.

Attachment A

Worked example of the interaction between the removal of the Greatest Permissible Gap rule and the new Medicare safety net for MBS item 61425

MBS Item: 61425		
MBS Item Descriptor: BONE STUDY - whole body and single photon emission tomography, with, when undertaken, blood flow, blood pool and delayed imaging on a separate occasion		
MBS Fee: $600.70	2014-15 total services: 96,680	Bulk billing rate: 90.4 per cent

- In this example, let's assume the fee charged by the provider is $650 (average fee out-of-hospital when not bulk billed was $668 in 2014-15).
- For a patient that is not bulk-billed:
  - The table below illustrates, prior to reaching the threshold, the patient will pay $10.60 more in out-of-pocket costs with the removal of the GPG rule.
  - As the fee charged is within 150 per cent of the MBS Fee, the extra $10.60 in out-of-pocket costs accumulates towards the patient's threshold.
  - However, for patients who have reached the threshold, the difference in the patient's out-of-pocket costs is reduced to $2.15.

	With GPG	Without GPG	Difference
Medicare rebate	$521.20	$510.60	-$10.60
Patient contribution which accumulates towards the safety net threshold	$128.80	$139.40	+$10.60
Patient contribution after reaching the safety net threshold	$25.75	$27.90	+$2.15

- For the same item, let's assume the patient was bulk-billed out-of-hospital. The bulk-billing rate out-of-hospital for this item is 90.4 per cent.
- The table below shows that the rebate for MBS item 61425 is $570.70 when provided out-of-hospital and bulk-billed. This figure is the same regardless of whether the GPG rule applies to the item. That is, the removal of the GPG rule will not change the benefit payable for any service provided out-of-hospital that is bulk-billed.

	GPG out-of-hospital rebate	Rebate plus bulk-billing incentive	Difference
Medicare rebate	$522.30	$570.70	+$48.35

THE HON DR PETER HENDY MP
ASSISTANT MINISTER FOR PRODUCTIVITY

Reference: C15/123475

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 dated 24 November 2015 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Omnibus Repeal Day (Spring 2015) Bill 2015 (the Bill). I welcome this opportunity to respond to the issues raised by the Committee's in the *Thirty-First Report of the 44th Parliament*.

Removal of consultation requirements when changing disability standards.

The proposed repeal of subsections 382(1) and (5) of the *Telecommunications Act 1997* (the TC Act) forms part of a broader reform of statutory consultation requirements in the Communications and the Arts portfolio. Statutory consultation requirements have, over time, developed into a variety of inconsistent approaches with respect to the time and method of consultation. The legitimate objective of making consultation requirements consistent across portfolio legislation will reduce the complexity and inflexibility of current arrangements, providing stakeholders with certainty and consistency, and allowing rule-makers to undertake targeted, appropriate and satisfactory consultation using standardised consultation requirements already provided for in Section 17 of the *Legislative Instruments Act 2003* (the LI Act).

The consultation provisions in section 382 of the TC Act do not strictly require that consultation be undertaken before an instrument is made. Rather, the provisions require the Australian Communications and Media Authority (ACMA) to 'so far as is practicable, try to ensure' that an adequate opportunity is provided for representations to be made. The 60 day period referred to in subsection 382(5), for persons to make representations, applies in the context of the ACMA's obligations to try to consult so far as is practicable.

Subsection 17(1) of the LI Act on the other hand requires a rule-maker, before making a legislative instrument, to be satisfied that he or she has undertaken consultation that is

appropriate and reasonably practicable. Accordingly, both section 382 of the TC Act and section 17 of the LI Act are framed in terms of 'practicable' consultation. The LI Act provides for equivalent requirements for the ACMA to consult when any changes are made to disability standards.

The legislated consultation obligations in section 17 of the LI Act will ensure that persons with disabilities continue to be consulted by the ACMA in the making of disability standards, particularly as the ACMA ensures the effectiveness of any standard providing for the needs of persons with disabilities. Therefore the repeal of subsections 382(1) and (5) of the TC Act would not limit requirements for consultations with persons with disabilities, and there is no limitation on the right to equality and non-discrimination in relation to persons with disabilities.

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

In the present context of disability standards made by the ACMA, if the Parliament were dissatisfied with the ACMA's response to the requirement for appropriate and reasonably practicable consultation under section 17 of the LI Act, then Parliament could disallow the instrument.

The proposed repeal of subsections 382(1) and (5) of the TC Act therefore may engage but do not limit the right to equality and non-discrimination and the rights of persons with disabilities, due to the operation of comparable provisions in Section 17 of the LI Act.

Removal of requirement for independent reviews of Stronger Futures measures

I note the Committee considers that the removal of a legislated requirement for independent review of the *Stronger Futures in the Northern Territory Act 2012* (the SF Act), as set out in Schedule 11 of the Bill, may mean that any human rights impacts of measures in the SF Act may not be appropriately evaluated. I further note that the Committee is currently conducting a review of the SF Act and related legislation and intends to consider the effect of the proposed amendments in Schedule 11 of the Bill as part of that inquiry.

I hope the Committee finds the information contained herein to be of use.

Yours sincerely

DR PETER HENDY

15 / 12 / 2015

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS15-029746

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

Dear Philip, Mr Ruddock

I refer to the two letters from the Parliamentary Joint Committee on Human Rights (the committee) dated 10 November 2015 in relation to the committee's comments contained in its *Thirtieth Report of the 44th Parliament*. I apologise for the delay in responding.

The committee has sought comment in relation to the Migration Amendment (Complementary Protection and Other Measures) Bill 2015, the Migration and Maritime Powers Amendment Bill (No. 1) 2015, and the Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 [F2015L01461]. My response addressing the committee's comments is attached.

Thank you for bringing the committee's views to my attention.

Yours sincerely

PETER DUTTON 11/01/16

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Migration Amendment (Complementary Protection and Other Measures) Bill 2015

Changes to the statutory framework for complementary protection – real risk in the entire country

1.105 The committee's assessment of the proposed changes to the statutory framework for complementary protection against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6(1) and 7 of the International Covenant on Civil and Political Rights (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.106 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations, in light of the committee's concerns raised above.

I note the Committee's view that the Bill would result in a person being ineligible for protection even though it may not be reasonable for them to relocate internally, and that this would therefore leave individuals subject to refoulement, in breach of Australia's international obligations.

It is my intention that, in assessing whether a person may be personally at a real risk of significant harm, a consideration of whether the level of risk of harm is one that the person will face in all areas of the receiving country will no longer encompass the consideration of whether the relocation is 'reasonable' in light of the individual circumstances of the person.

In assessing whether it is reasonable for a person to relocate to another area of the receiving country in the refugee context, Australian case law indicates that some decision-makers (including merits review tribunal members) have considered broader issues such as the practical realities of relocation, which have included considering diminishment in the quality of life or potential financial hardship of a protection visa applicant. This goes beyond the intention that Australia's protection should only be available to persons who face the relevant harm in all parts of the receiving country and hence cannot access that country's protection. The *Migration Act 1958* (Migration Act) was amended by the *Migration Amendment (Resolving the Asylum Legacy Caseload) Act 2014* to reflect this intention in the refugee context, and the *Migration Amendment (Complementary Protection and Other Measures) Bill 2015* reflects this intention in the complementary protection context. This provides certainty to applicants and decision-makers by providing consistency on this issue.

I am committed to acting in accordance with Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and maintain that while an assessment of whether it is 'reasonable' for an applicant to relocate to another area within the receiving country is proposed to be removed by the Bill, what constitutes a real risk that a person will suffer significant harm under the Migration Act has not changed. When considering whether a person can relocate to another area, decision-makers will continue to be required to consider whether a there is a real risk that a person will suffer significant harm if:

- the person will be arbitrarily deprived of his or her life; or
- the death penalty will be carried out on the person; or
- the person will be subjected to torture; or

- the person will be subjected to cruel or inhuman treatment or punishment; or
- the person will be subjected to degrading treatment or punishment.

As a matter of policy, decision-makers are also required to determine whether a real risk of significant harm exists for a person when considering whether they can safely or legally access the relocation area from their point of return to the receiving country, such that it would mitigate a 'real risk' of 'significant harm' to the person. Notwithstanding that this is not expressed in the Bill, this policy is consistent with the domestic legal interpretation and has been applied in the refugee context since the relevant Migration Act provisions were amended. It will likewise be applied appropriately in the complementary protection context proposed by the Bill.

Changes to the statutory framework for complementary protection – behaviour modification

1.114 The committee's assessment of the proposed changes to the statutory framework for complementary protection (behaviour modification) against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6(1) and 7 of the International Covenant on Civil and Political Rights (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.115 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

I note the Committee's concerns regarding proposed new subsection 5LAA(5) of the Bill, which provides that there is not a real risk of significant harm if a person could take reasonable steps to modify their behaviour so as to avoid a real risk of significant harm, other than a modification that includes a modification that would conflict with a characteristic that is fundamental to the person's identity or conscience, or conceal an innate or immutable characteristic.

While I acknowledge the Committee's views, at paragraph 1.111, that *the obligation to protect against non-refoulement is not contingent on the oppressed avoiding conduct that might upset their oppressors*, in introducing this provision into the statutory complementary protection context, my intent is to reflect that some harm can be brought about by a person's own voluntary actions, and that in some circumstances, it is reasonable to expect a person not to engage in such action, so as to avoid a real risk of significant harm. If a person is able to modify their behaviour in a manner that does not conflict with their core identity or belief system, as mentioned in proposed subsection 5LAA(5), and in doing so, could avoid a real risk of significant harm, then they should not necessarily be provided with protection, as their return would not itself engage non-refoulement obligations. The risk of harm would only arise if they chose to undertake certain actions. This amendment is therefore consistent with non-refoulement obligations.

To support the position that this provision is concerned with reasonable modification only, the Bill includes an express list of modifications, at new paragraph 5LAA(5)(c), that a person cannot be required to do. These are:

- alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
- conceal his or her true race, ethnicity, nationality or country of origin;

- alter his or her political beliefs or conceal his or her true political beliefs;
- conceal a physical, psychological or intellectual disability;
- enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
- alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

I respectfully submit my view that the Committee is inaccurate in its assertion, at paragraph 1.113, that a person could be required to not attend or participate in any political activity, such as attending a rally, if such conduct is not considered to be of fundamental importance to the person's conscience. In accordance with new subparagraph 5LAA(5)(c)(iii), the Bill does not require modification that would alter or conceal a person's political beliefs.

Furthermore, I also respectfully submit that the Committee's claim that a person who has previously worked as a journalist in their home country could be required to cease work as a journalist if the content of their published work risked attracting persecution, is inaccurate. Proposed subsection 5LAA(5) is concerned with reasonable modification of future behaviour and takes into account what reasonable steps a person *could* objectively take to avoid a risk upon returning to their receiving country, not just what they *would* do on their return (for example, a person refraining from engaging in an occupation that carries risk where it is reasonable for the person to find another occupation). If a person were to claim protection on the basis that their published work as a journalist would attract persecution, such claims would be assessed against both the refugee and complementary protection provisions in the Migration Act in order to determine whether Australia's non-refoulement obligations under the Refugees Convention, or the ICCPR or the CAT are engaged. Similarly, a person would not be required to cease work as a journalist, if to do so would require the altering or concealment of their political beliefs.

While I acknowledge that this provision engages human rights that relate to Australia's non-refoulement obligations under the ICCPR and the CAT (including articles 18(1) and 19 of the ICCPR), I maintain that it is possible to limit certain rights, as long as the limitation is reasonable, proportionate and adapted to achieve a legitimate objective. In relation to these amendments, my objective is to ensure that only those who face a real risk of significant harm, as a necessary and foreseeable consequence of their removal from Australia to a receiving country, are granted a protection visa on complementary protection grounds. In this context, I believe that it is reasonable to expect, in some circumstances, for a person not to engage in particular actions so as to avoid a real risk of significant harm, noting that this does not apply to a modification of behaviour that conflicts with their identity or core belief system. If a person is able to reasonably modify their behaviour in this way, they do not require Australia's protection as their return would not place them at risk of harm and therefore not engage Australia's non-refoulement obligations – a risk of harm would only arise if they chose to undertake certain actions. I confirm that Australia does not intend to resile from its non-refoulement obligations.

This provision will require decision-makers to objectively consider whether a person could take reasonable steps to modify their behaviour, so as to avoid a real risk of significant harm, which will be assessed on a case-by-case basis. Any modification would also be limited to what is reasonable in the person's individual circumstances.

The reasons supporting this view have been set out in the Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum to the Bill, and I reiterate those reasons here.

Excluded persons

1.131 The committee's assessment of the proposed extension of the Minister's power to exclude a person from merits review against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.132 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

I note the Committee's view that the proposed amendment to subsection 502(1) in the Bill, in removing a person's ability to seek merits review of a decision to refuse a visa on character-related grounds, engages the protection against refoulement, including the right to an effective remedy.

Section 502 of the Migration Act provides me with the power, in certain circumstances, to declare a person to be an 'excluded person' and therefore, in this context, a person is not able to seek merits review of a decision at the Administrative Appeals Tribunal. These circumstances apply where I intend to make a personal decision to refuse to grant or cancel a protection visa on character-related grounds and require me to decide that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared an excluded person.

Currently section 502 applies in respect of persons who have been refused the grant of a protection visa on refugee grounds for reasons relating to the character of the person. I now consider it appropriate to extend the scope of section 502 to also apply to persons who have been refused the grant of a protection visa on complementary protection grounds for reasons relating to the character of the person.

This provision provides that any personal decision of mine is protected from merits review if the decision is made in the national interest, and it also requires me to cause notice of the making of the decision to be tabled in both Houses of Parliament within 15 sittings days after the day of my decision. It is anticipated that such decisions will be rarely made, but if they are made on national interest grounds, such decisions will not be reviewable by the AAT. Decisions to refuse to grant or cancel a protection visa will involve my consideration of the national interest.

I note the Committee's concerns that the provision to protect my personal decisions from merits review may engage and limit the right to an effective remedy, as the person will not enjoy the same rights to merits review as a person who was the subject of a decision by a delegate of the Minister. These amendments present a reasonable response to achieving a legitimate objective, which is the safety of the Australian community, noting that the amendments only apply in respect of persons who are refused the grant of a complementary protection visa on character related grounds. In addition:

- my personal decision will be consequent to an administrative process that is undertaken within the administrative law framework and in accordance with principles of natural justice; and
- judicial review is still available. In a judicial review action, the Court would consider whether or not the power given by the Migration Act has been properly exercised. For a discretionary power such as personal decisions of mine under the Migration Act, this could include consideration of whether the power has been exercised in a reasonable manner. It could also include consideration of whether natural justice has been afforded and whether the reasons given provide an evident and intelligible justification for why the balancing of these factors led to the outcome which was reached.

I respectfully disagree with the Committee's view, at paragraph 1.128, that 'judicial review is not sufficient to fulfil the international standard required of "effective review", because it is only available on a number of restricted grounds of review that do not relate to whether that decision was the correct or preferable decision'. The entire purpose of judicial review is to assess whether the primary decision was legally correct, and to determine any error or unfairness in the decision-making process. Judicial review remains an effective mechanism by which administrative decisions, which includes decisions in relation to protection visa applications, are assessed by a higher authority. Although I agree that the intent of judicial review may not be to avoid harm to the individual concerned, it does not mean that it is not an appropriate means by which this is assessed.

In introducing this proposed amendment, I am not seeking to resile from or limit Australia's non-refoulement obligations, nor will it affect the substance of Australia's adherence to these obligations. Anyone who is found through visa or Ministerial intervention processes to engage Australia's non refoulement obligations will not be removed in breach of those obligations. All persons impacted by the personal decisions made by me will remain able to access judicial review which satisfies Australia's obligation under Article 13 of the ICCPR to have review by a competent authority.

Migration and Maritime Powers Amendment Bill (No. 1) 2015

1.149 The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, against article 9 of the International Covenant on Civil and Political Rights (right to liberty) raises questions as to whether the measure is justifiable under international human rights law.

1.150 As set out above, extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, in the context of Australia's mandatory immigration detention policy, limits the right to liberty. As set out above, 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 Immigration and Border Protection as to:

- **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, is it the least rights restrictive**
- **approach that could be taken in order to achieve the stated objective.**

Under existing law, a person who has been removed to another country, and is then refused entry by the destination country, does not need a visa to return to Australia. When this happens, any bars imposed before they left that prevent them from making a further visa application will continue to apply when they are returned to Australia.

This is not the case, however, if the person is turned around in transit. The legislative changes will ensure that a consistent approach is taken for a person whose removal is aborted in transit prior to reaching the destination country.

Under the changes, sections 42, 48 and 48A will operate consistently for the range of situations that might prevent the department from completing a removal once it is underway.

- The changes ensure that, for the very small number of cases where a person is turned around in transit, the person can return to Australia under the same visa conditions they had before being removed and that those conditions will remain in force while alternative removal arrangements are undertaken.
- This will enable new removal arrangements to be made without being delayed by further visa applications – thereby facilitating the least restrictive approach to detention by removing access to unintended mechanisms that could delay removal.

The application of the same measures to persons that currently apply to a person returned from a destination country to those returned from a transit country could not, in itself, lead to arbitrary detention. Their detention in Australia is not unlawful (by virtue of compliance with section 189 of the Migration Act), and would not be arbitrary as it would be for the purpose of either removing the person from Australia or granting them a visa.

To ensure a person in immigration detention is held lawfully under section 189 of the Migration Act, as an unlawful non-citizen (UNC), and to avoid the possibility of the person being unlawfully or arbitrarily detained, my department undertakes regular reviews of immigration detainees. These reviews include:

- confirming an UNC's identity and unlawful immigration status;
- ensuring any outstanding matters relating to the person's immigration status are resolved as soon as possible; and
- ensuring that voluntary requests for removal from Australia are facilitated as soon as reasonably practicable, as required under section 198 of the Migration Act.

1.163 The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.164 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

A person in Australia who is not able to apply for a protection visa will not be removed in breach of Australia's non-refoulement obligations. Any new claims for protection that were not previously assessed will be appropriately considered, and my department has administrative processes in place, such as an International Treaties Obligation Assessment or my ability to exercise my powers under the Migration Act and grant a person a visa, which are designed to assess such claims and safeguard Australia's non-refoulement obligations. Removals do not take place where outstanding obligations require assessment. For cases affected by this change that raise new claims upon return to Australia, those claims will be considered through existing mechanisms within the (new) removal planning framework whereby application bars can be lifted where appropriate.

1.169 The committee's assessment of the proposed extension of the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with the rights of the child.

1.170 As set out above, extending the statutory bar on protection visa claims in the event of an unsuccessful removal from Australia, limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child and, particularly:

- **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.**

The changes maintain Australia's obligations and responsibilities under the Convention on the Rights of the Child (CRC) that were in place prior to departure on the aborted removal. For the removal to have been initiated, an assessment against the CRC will have been undertaken where necessary. The fact of the removal being aborted at a transit destination does not of itself change that assessment nor the requirement for removal from Australia.

The proposed changes are aimed at ensuring the legitimate objective of ensuring the removal of persons (including children where appropriate) who have no legal right to remain in Australia as required by the Migration Act.

The limitation provides the opportunity for new removal arrangements to be made (likely through a different transit point) without the delay that currently exists, by preventing persons from making a further visa application unless protection circumstances have changed since departure on the aborted removal.

It is reasonable that any bars imposed before a person left that prevented them from making a further visa application would continue to apply when they are returned to Australia following travel that is aborted during transit.

1.185 The committee's assessment of the proposed expansion of visa cancellation powers against article 9 of the International Covenant on Civil and Political Rights (right to liberty) raises questions as to whether the measures are justifiable under international human rights law.

1.186 As set out above, the expansion of visa cancellation powers limits the right to liberty. 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 Immigration and Border Protection 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 the stated objective.**

The amendments proposed in Schedule 2 to the Bill do not expand visa cancellation powers or the grounds upon which a person may have their visa cancelled; they also do not alter the detention powers or framework already established in the Migration Act. Nor does this Bill propose any changes to the mandatory cancellation and revocation framework. This Bill seeks to ensure that legislative provisions which apply to other Ministerial powers within the character provisions apply equally to section 501BA.

Section 501BA, which gives me the power to overturn the decision of a delegate or AAT member to revoke the mandatory cancellation of a non-citizen's visa, was introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* and came into effect on 11 December 2014. This power is non-delegable and can only be exercised when I am satisfied that the cancellation of the visa is in the national interest and the person does not pass certain limbs of the character test.

The Statement of Compatibly in the Explanatory Memorandum to the Bill outlines the Government's position that the detention of unlawful non-citizens as the result of visa cancellation is neither unlawful nor arbitrary *per se* under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. These amendments will put those whose visas are cancelled on the basis of section 501BA on the same footing as non-citizens who have had their visa/s cancelled under any other character provision (sections 501, 501A and 501B). These amendments present a reasonable response to achieving a legitimate purpose under the Covenant, which is the safety of the Australian community.

I note that such persons will be required to be detained under section 189 of the Migration Act as unlawful non-citizens, and will be liable to be removed from Australia under section 198 of the Migration Act. However, the cancellation of a non-citizen's visa in circumstances where they present a risk to the Australian community, and their subsequent detention prior to removal, follows a well-established process within the legislative framework of the Migration Act. The safety of the Australian community, particularly in the current security environment, is considered to be both a pressing and substantial concern and a legitimate objective to this proposal. Further, people who

are affected by these measures can seek judicial review of my cancellation decision, and I repeat what I have said above in relation to the effectiveness of this review mechanism.

1.192 The committee's assessment of the proposed expansion of visa cancellation powers against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.193 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

I respectfully disagree with the Committee's view that Schedule 2 of this Bill expands visa cancellation powers. This Bill does not propose any new cancellation grounds. This Bill seeks to ensure that legislative provisions which apply to other Ministerial powers within the character provisions apply equally to section 501BA, which was introduced by the Migration Amendment (Character and General Visa Cancellation) Act 2014.

Australia does not seek to resile from or limit its non-refoulement obligations. Nor do the amendments affect the substance of Australia's adherence to these obligations. As with other character cancellation powers, a person cancelled under section 501BA will be unable to apply for any visa other than a protection visa.

However, I routinely consider non-refoulement obligations as part of my decision to cancel a visa on character grounds, and anyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations.

1.206 The committee's assessment of the proposed expansion of visa cancellation powers, including barring a person from applying for other visas, against article 12(4) of the International Covenant on Civil and Political Rights (freedom of movement—right to enter one's own country) raises questions as to whether the measures are justifiable under international human rights law.

1.207 As set out above, the expansion of visa cancellation powers limits the right to freedom of movement. 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 Immigration and Border Protection as to:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

I respectfully disagree with the committee's view that a person's right to freedom of movement extends to countries to which that person is not a citizen nor has a lawful right to enter and/or reside there. It is my position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country. In any event, the Bill does not seek to enhance cancellation and refusal powers, but to ensure that legislative provisions which apply to other of my personal powers within the character

provisions apply equally to section 501BA. Further, the non-citizen's ties to the Australian community, including their length of residence is taken into account by delegates when considering whether to exercise the discretion to revoke the cancellation of the visa. The proposed amendments are therefore compatible with human rights because insofar as they engage Australia's human rights obligations, the safety of the Australian community, particularly in the current security environment is considered to be both a pressing and substantial concern and a legitimate objective to this proposal.

1.213 The committee's assessment of the proposed expansion of visa cancellation powers against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.214 As set out above, the expansion of visa cancellation powers limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider the best interests of the child and, particularly:

- **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.**

The Government is committed to acting in accordance with Article 3 of the CRC. The concerns raised by the Committee in relation to the best interests of the child relate to amendments that were made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* and came into effect on 11 December 2014. To clarify, while section 501 is applicable to minors, it is generally not used to cancel the visas of minors who have a criminal record, nor does it allow the cancellation of the visas of dependent family members. Secondly, the Bill does not propose any changes to the discretionary revocation process or my (Ministerial) decision making process. In both circumstances the best interests of any child(ren) affected by the decision is a primary consideration, which is weighed against factors such as the risk the person presents to the Australian community.

As stated in the Statement of Compatibility to the Bill, delegates making a decision on character grounds are bound by a relevant Ministerial Direction which requires a balancing exercise of these countervailing considerations and while rights relating to family and children generally weigh heavily against cancellation, there will be circumstances where this will be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record. The safety of the Australian community, particularly in the current security environment is considered to be both a pressing and substantial concern and a legitimate objective to this proposal.

1.224 The committee's assessment of the proposed expansion of visa cancellation powers against articles 2, 16 and 26 of the International Covenant on Civil and Political Rights, and article 5 of the Convention on the Rights of Persons with Disabilities (right to equality and non-discrimination)

raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.225 As set out above, the expansion of visa cancellation powers may limit the right to equality and non-discrimination on the basis of disability. As set out above, the statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider the right to equality and non-discrimination and, particularly:

- **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.**

Whilst noting the concerns of the Committee in relation to individuals in prison with mental health disorders, I respectfully disagree that this Bill proposes any changes that limit the right to equality and non-discrimination on the basis of disability. These amendments ensure that the powers under section 501CA and section 501BA are consistent in their application with other section 501 cancellation powers.

In the Statement of Compatibility to the Explanatory Memorandum for the *Migration Amendment (Character and General Visa Cancellation) Act* 2014, which relevantly amended section 501 of the Migration Act to capture persons found not fit to plead on mental health grounds, former Minister Morrison explained that the amendments in that Bill were not intended to distinguish people with a mental illness for the purpose of limiting, restricting or not recognising their equal rights with other members of the community, or for the purpose of treating them differently. Former Minister Morrison also stated that the amendment was a reasonable and proportionate response as it enlivened visa cancellation or refusal consideration only, with the full circumstances of the case being assessed during the consideration process, which takes into account the person's rights under Article 26 of the ICCPR. It was stated that the amendment did not enliven Article 26 of the ICCPR as the right can be limited if it is for maintaining public order and safety of the Australian community.

Likewise, the proposed amendments at section 501(7)(f) are aimed at providing a mechanism for my department to mitigate any risk of a person who has been found by a court to not be fit to plead but also found on the evidence to have committed the offence, being released from care or prison into the Australian community without first being considered under the character provisions. The seriousness of the offence and any indicative sentence of imprisonment where available are taken into account when deciding whether to cancel or refuse the visa under this ground. I maintain the position that the amendments do not enliven Article 26 of the ICCPR as this right can be limited if it is for maintaining public order and safety of the Australian community, which is the case here.

1.236 The committee's assessment of the proposed bar on further applications by children and persons with a mental impairment against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non-refoulement) raises

questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.237 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how the changes can be compatible with Australia's absolute non-refoulement obligations in light of the committee's concerns raised above.

A person in Australia who is not able to apply for a protection visa will not be removed in breach of Australia's non-refoulement obligations. This is the case regardless of whether a person is a child or has a mental impairment. All individuals' circumstances are assessed on a case-by-case basis, and any new claims for protection that were not previously assessed will be appropriately considered, and consideration given to circumstances including the person's age and mental health. My department has administrative processes in place, such as an International Treaties Obligation Assessment and my ability to exercise my powers under the Migration Act and grant a person a visa, which are designed to further assess protection claims and, moreover, safeguard Australia's non-refoulement obligations.

The changes do not affect the assessment of legitimate claims that would give rise to non-refoulement obligations. All claims made prior to removal will have been assessed and non-refoulement obligations complied with before departure. For cases affected by this change that raise new claims upon return to Australia, those claims will be considered through existing mechanisms within the (new) removal planning framework whereby application bars can be lifted where appropriate and assessment of obligations undertaken in line with existing provisions.

1.242 The committee's assessment of the proposed bar on further applications by children and persons with a disability against article 3(1) of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.243 As set out above, extending the bar on further applications by children limits the obligation to consider the best interests of the child. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the obligation to consider the best interests of the child and, particularly:

- **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.**

The best interests of the child are a primary consideration in administrative decisions made under the Migration Act, and an assessment in relation to a child's best interests of either the child's removal or a person's removal which would particularly affect a child will have been undertaken during the administrative processes which took place prior to attempting removal of the child or the other person. For example, the best interests of the child are a primary consideration in a delegate's visa cancellation decision, in a visa refusal decision, and if a visa has ceased naturally, a child's best interests will also be considered prior to the initiation of the removal operation.

Consequently, in barring persons from making a further application, it is recognised that these persons will have already had an opportunity to make a visa application which has already been considered and, where appropriate, taken into account a child's best interests in accordance with the CRC.

1.248 The committee's assessment of the proposed bar on further applications by children against article 12 of the Convention on the Rights of the Child (right of the child to be heard in judicial and administrative proceedings) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.249 As set out above, extending the bar on further applications by children and persons with a disability, limits the right of the child to be heard in judicial and administrative proceedings. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the right of the child to be heard in judicial and administrative proceedings and, particularly:

- **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.**

I agree that the proposed amendment engages article 12 of the CRC, and that an assessment of a child's best interests includes respect for the child's right to express his or her views freely, and for due weight to be given to those views, depending on the child's age and maturity. However, I also note - as stated above - that an assessment in relation to a child's best interests of either the child's removal or a person's removal which would particularly affect a child will have been undertaken during the administrative processes which took place prior to attempting removal of the child or the other person. For example, the best interests of the child are a primary consideration in a delegate's visa cancellation decision, in a visa refusal decision, and if a visa has ceased naturally, a child's best interests will also be considered prior to the initiation of the removal operation.

Consequently, in barring persons from making a further application, it is recognised that these persons will have already had an opportunity to make a visa application which has already been considered and, where appropriate, taken into account a child's best interests.

The changes do not affect the assessment of legitimate claims that would give rise to convention obligations. All claims made prior to removal will have been assessed and obligations satisfied before departure.

For cases affected by this change that raise new claims upon return to Australia those claims will be considered through existing mechanisms within the (new) removal planning framework whereby application bars can be lifted where appropriate and assessment of obligations undertaken in line with existing provisions.

1.254 The committee's assessment of the proposed bar on further applications by persons with a mental impairment against article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) (right of persons with disabilities to be recognised as persons before the law and to the

equal enjoyment of legal capacity) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.255 As set out above, extending the bar on further applications by persons with a mental impairment limits the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity. As set out above, the statement of compatibility does not justify that limitation. The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity and, particularly:

- **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.**

As with the discussion above concerning the best interests of the child, the proposed amendments apply to persons who have already made a visa application which has been finally determined. An assessment of the person's claims will have taken their particular disability and personal circumstances into account.

The proposed changes are aimed at ensuring the legitimate objective of ensuring the removal of person (including persons with disabilities, where appropriate) who have no legal right to remain in Australia as required by the Migration Act.

The limitation provides the opportunity for new removal arrangements to be made (likely through a different transit point) without the delay of the non-application of the limitation, by preventing them from making a further visa applications unless circumstances have changed since departure on the aborted removal.

It is reasonable that any bars imposed before they left that prevent them from making a further visa application would continue to apply when they are returned to Australia following travel that is aborted during transit. This applies equally to all persons including those with disabilities.

Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015

1.349 The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, articles 6(1) and 7 of the International Covenant on Civil and Political Rights; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (non refoulement) raises questions as to whether the changes are compatible with Australia's international human rights law obligations.

1.350 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to how, in light of the committee's concerns raised above, the changes are compatible with Australia's absolute non-refoulement obligations.

The amendments to regulation 2.08F will not result in the return or removal of a person found to engage Australia's protection obligations in contravention of its non-refoulement obligations under the CAT and ICCPR. The grant of a permanent visa is not the only way of compliance with Australia's non-refoulement obligations. Temporary protection visa (TPV) holders who continue to claim Australia's protection are able to seek a further TPV or Safe Haven Enterprise Visa (SHEV) when their initial visa will expire. The Government does not regard its protection obligations as automatically ceasing when a visa expires. Where protection continues to be sought, cessation of the visa triggers a new assessment of these obligations in the context of current individual and country circumstances. Applicants who continue to engage Australia's protection obligations and satisfy other visa criteria will be granted a further TPV or a SHEV. An applicant who engages Australia's non-refoulement obligations will not be returned or removed in contravention of these obligations.

1.358 The Committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 12(1) of the International Covenant on Economic, Social and Cultural Rights raises questions as to whether the changes are compatible with the right to health.

1.359 As set out above, converting permanent protection visa applications into temporary protection visa applications into temporary protection visa applications, limits the right to health. 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 Immigration and Border Protection as to:

- **Whether the proposed changes are aimed at achieving a legitimate objective;**
- **Whether there is a rational connection between the limitation and that objective; and**
- **Whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The legislation converting permanent protection visa applications to temporary protection visa applications is aimed at achieving the legitimate objectives of dissuading people from taking potentially life threatening journeys to Australia, as well as the need to maintain the integrity of Australia's migration system and protect the national interest. Permanent protection visas may be marketed by people smugglers as motivators for unauthorised maritime entry to Australia.

I note the committee's concerns regarding possible mental health problems for TPV and SHEV holders, but consider that there is a rational connection between any limitations this policy may place on the right to health and achieving these objectives, and that these are reasonable and proportionate measures. As outlined in the Statement of Compatibility with human rights as set out in the Explanatory Statement to the Regulation, all TPV and SHEV holders have access to Medicare and mainstream medical services. In addition, they are able to access:

- The Government's Programme of Assistance for Survivors of Torture and Trauma (PASTT). PASTT provides direct counselling and related support services, including advocacy and referrals to mainstream health and related services;
    - PASTT has established rural, regional and remote outreach services to enable survivors of torture and trauma to access services outside metropolitan areas;

- The Government's Better Access initiative to receive rebates through Medicare should they wish to access selected mental health services provided by general practitioners, psychiatrists, psychologists and eligible social workers and occupational therapists; and
- The Mental Health Service in Rural and Remote areas (MHSRRA), which provides rural and remote areas with more allied and nursing mental health services. The MHSRAA enables survivors of torture and trauma to access these services in areas with lower levels of mental health services.

Given that TPV and SHEV holders have access to Medicare and mainstream health services, as well as the additional services identified above, any limitation on a temporary visa holder's right to health is mitigated by the availability of these services, and is reasonable and proportionate to the objective of deterring people form making dangerous boat journeys to Australia.

1.369 The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights (right to protection of the family) and the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the measures are justifiable under international human rights law.

1.370 As set out above, converting permanent protection visa applications into temporary protection visa applications, limits the right to protection of the family and the obligation to consider the best interests of the child. 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 Immigration and Border Protection as to:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

The Government is committed to acting in accordance with Article 3 of the CRC. In developing this regulation, the best interests of the child have been treated as a primary consideration. However, other considerations may also be primary considerations, including:

- seeking to prevent anyone, including children, from taking potentially life threatening journeys to Australia;
- maintaining the integrity of Australia's borders and national security;
- maintaining the integrity of Australia's migration system;
- protection of the national interest; and
- encouraging regular migration.

Part of the Government's intention in re-introducing TPVs was to deter children from taking potentially life threatening journeys to achieve resettlement in Australia.

This goal, as well as the need to maintain the integrity of Australia's migration system and protect the national interests, were also primary considerations. I consider that these primary considerations outweigh the best interests of the child in seeking family re-unification.

There is no right to family reunification under international law. The protection of the family unit under articles 17 and 23 of the ICCPR does not amount to a right to enter Australia where there is no other right to do so. Likewise, Article 10 of the CRC does not amount to a right to family reunification. These rights can be subject to proportionate and reasonable limitations which are aimed at legitimate objectives. The objectives for re-introducing TPVs are set out above.

I consider that these objectives are legitimate and that the re-introduction of TPVs, in conjunction with other aspects of border protection policy, is a proportionate measure for achieving these objectives. I further consider that the measures have been effective in achieving these objectives. This has allowed the Government to provide increased opportunities for people to arrive in Australia via regular means, including obtaining a permanent visa for resettlement under Australia's Refugee and Humanitarian Programme, which allows family groups to migrate together.

1.378 The committee's assessment of the conversion of permanent protection visa applications into temporary protection visa applications against article 12 of the International Covenant on Civil and Political Rights raises questions as to whether the measures are justifiable under international human rights law.

1.379 As set out above, converting permanent protection visa applications into temporary protection visa applications, limits the right to freedom of movement. 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 Immigration and Border Protection as to:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

With respect, I do not accept that the Committee's assessment that the right to freedom of movement is limited by the amendment. The Committee notes that:

> "The right to freedom of movement includes the right to move freely within a country for those who are lawfully within a country, the right to leave any country and the right to enter a country of which you are a citizen."

TPV and SHEV holders are able to move freely within Australia and to choose their place of residence. They are also able to leave Australia at any time – there are no legal barriers to their departure and they are able to obtain Australian travel documents to facilitate their travel. Anyone who is found to be a refugee for the purpose of the Refugees Convention is able to apply for a Convention Travel Document (also known as a Titre de Voyage). Those who engage Australia's protection obligations on complementary protection grounds are able to seek a Certificate of Identity. These travel documents are available to both permanent and temporary protection visa holders.

Condition 8570 is imposed on temporary protection visas and requires visas holders to seek the Department's permission before travelling overseas if they do not want to risk being found to have breached their visa condition. The condition does not prevent a person from departing Australia.

Permission to travel, other than to the country against which protection was sought, is granted in compassionate and compelling circumstances (which may include visiting close family members). Where this condition is breached, consideration may be given to cancelling the visa. This would affect a person's right to re-enter Australia if they are overseas at the time of visa cancellation. A person in Australia at the time their visa is cancelled would not be removed from Australia where that would be inconsistent with Australia's non-refoulement obligations.

Condition 8570 is intended to protect the integrity of the protection visa program by ensuring that visa holders do not travel to the country in relation to which they were found to engage Australia's protection obligations.

The Hon Warren Truss MP
Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

22 OCT 2015

PDR ID: MC15-004562

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

Dear ~~Chair~~ Philip,

Thank you for your letter dated 8 September 2015 regarding the *Shipping Legislation Amendment Bill 2015* (the Bill).

The Bill is seeking to strike a sensible balance between reduced barriers to access of foreign vessels and the long-term availability of personnel with maritime backgrounds and skills to fill critical jobs in the industry.

The Parliamentary Joint Committee on Human Rights' assessment, as outlined in paragraphs 1.82 and 1.83 of the Human rights scrutiny report dated 8 September 2015, is noted. Whilst Australia has sovereignty over its ports, as stated in the Statement of Compatibility with Human Rights the Australian Government is of the view that it does not have obligations under Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to set wages and conditions on foreign flagged vessels. In that regard the Government respectfully disagrees with the Committee's comments contained in paragraph 1.79 of its report.

In any case, the Government considers the amendments are reasonable, necessary and proportionate to achieving the legitimate objective of ensuring efficient and reliable coastal shipping services as part of the national transport system. The Government considers that a foreign flagged vessel and its seafarers should be covered by Australian workplace relations laws if the vessel is engaged predominantly in domestic trade. If not, that vessel can continue its existing international arrangements. This compromise seeks to balance the rights and responsibilities of relevant parties.

Suite MG 41, Parliament House
CANBERRA ACT 2600

Phone: 02 6277 7680
Fax: 02 6273 4163

For completeness, the Government draws to the attention of the Committee, Marine Order 11 (Living and Working Conditions on Vessels) 2015 (Marine Order 11) made under the *Navigation Act 2012* (Navigation Act). Marine Order 11 would continue to apply to foreign flagged vessels engaged in coastal trading in addition to the terms and conditions agreed to in an individual seafarer's contract of employment.

The Navigation Act and Marine Order 11 implement relevant terms of the International Labour Organization Maritime Labour Convention 2006 (MLC). The MLC establishes minimum working and living conditions standards for seafarers, including in relation to the minimum age of seafarers, the content of employment agreements, hours of work and rest, sleeping arrangements, paid annual leave, medical care, accommodation, ship provisions, health and safety protections and seafarers' complaint handling.

The attachment provides historical context for the amendments. I trust this response has addressed the Committee's concerns on these issues.

Yours sincerely

WARREN TRUSS

Enc

Historical context

Foreign flagged vessels operating domestically under permits issued under the now replaced *Navigation Act 1912* were generally not covered by Australian labour laws. The issue of coverage of foreign flagged vessels operating in the coastal trade became a particular issue following the break-up of the *Australian National Line* in 1999. A case regarding the coverage of the *Maritime Industry Seagoing Award 1999* between the Maritime Union of Australia and CSL Pacific in the early 2000s was heard by the Australian Industrial Relations Commission (AIRC) and the High Court.

In 2003, the High Court found that there was a proper connection between the *Workplace Relations Act 1996* and the regulation of the terms and conditions of employment of foreign resident crews employed by foreign vessel owners. However, the High Court noted that the AIRC could refrain from binding CSL Pacific to the award on the grounds that it was undesirable in the public interest.

In 2006, non-Australian workers on foreign flagged vessels were explicitly excluded from Australian labour laws. In 2010, the *Fair Work Regulations 2009* extended Australian labour law coverage in the maritime industry to licencing and permit arrangements under the *Navigation Act 1912*. These changes effectively remained in place following the commencement of the *Coastal Trading (Revitalising Australian Shipping) Act 2012*.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Philip Ruddock

Thank you for your letter of 24 November 2015 regarding the Parliamentary Joint Committee on Human Rights (the Committee) which sought my advice in relation to various matters arising from the *Charter of the United Nations (Sanctions-Syria) Regulation 2015*, the *Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015*, and the *Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015*.

Charter of the United Nations (Sanctions-Syria) Regulation 2015

The Committee sought my views on offences dealing with illegally removed cultural property from Syria, and whether they were sufficiently prescribed and justifiable to engage and limit the prohibition on arbitrary detention (article 9 of the International Covenant on Civil and Political Rights). The Committee noted that the offence related to the failure to comply with the direction in relation to illegally removed cultural property in Syria (under Regulation 5 of the Syria Regulation) is also designated as a UN Sanction Enforcement Law.
The Department of Foreign Affairs and Trade acknowledges that this was a drafting error and will therefore make a revised UN Sanction Enforcement Law Declaration, which will remove Regulation 5 of the Syria Regulation as a UN Sanction Enforcement Law. Accordingly, the penalty for this Regulation will be the same as for the Iraq Regulation.

Charter of the United Nations (Sanctions-Syria) Regulation 2015
Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015

The Committee also sought my views on the justification for the imposition of a strict liability offence in Regulation 5 of the Syria Regulation and Regulation 9 of the Iraq Regulation, for the failure to comply with a direction in relation to illegally removed cultural property of Syria and Iraq.

A strict liability offence is appropriate for the Regulations due to the fact that a person who has been correctly issued with a direction to return the illegally removed cultural property is effectively put 'on notice' by the issuing of that direction to return the item. As a result, they have received sufficient notice of their obligations under the Regulations and have had the opportunity to avoid an unintentional contravention. It would therefore be unnecessary to impose a requirement to prove the individual's intention not to comply with the notice.

Strict liability is also appropriate as the offences are not punishable by imprisonment: the offences are only punishable by a fine of less than 60 penalty units. The requirement to prove fault under the Regulations would reduce the effectiveness of the enforcement regime in deterring the trade of illegally removed Syrian and Iraqi cultural property. I also note that honest and reasonable mistake of fact is available as a defence to strict liability offences under Section 9.2 of the Criminal Code.

The Committee also noted that the Regulations fail to outline the procedure for the storage and return of cultural items of Iraq and Syria. This process is outside the purview of the Regulations which is solely to implement UN Security Council Resolution 2199, and would be decided through administrative processes between relevant government agencies.

I trust this information is of assistance.

Yours sincerely

Julie Bishop

21 DEC 2015

TREASURER

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Ruddock

On 11 November 2015, Mr Laurie Ferguson MP wrote to me in his role as Deputy Chair of the Parliamentary Joint Committee on Human Rights, seeking additional information regarding the human rights compatibility of two instruments made by my predecessor.

This followed the advice that I provided to the Committee in my letter of 14 October 2015 that the determination and payment of National Specific Purpose Payments (NSPPs) to the States and Territories for 2013-14 (F2015L00877 and F2015L00878) assisted in the realisation of a number of human rights, and that neither the determination nor payment of the NSPPs had a detrimental impact on any human rights.

In its Thirtieth Report of the 44th Parliament, the Committee requested further information about how funding for the determinations has changed over time; specifically, whether there has been any reduction in funding.

Funding for the NSPPs, including the growth from year to year, is in line with Schedule D of the Intergovernmental Agreement on Federal Financial Relations. The funding amounts for the Schools, Skills and Workforce Development, Affordable Housing, and Disability NSPPs between 2011-12 and 2013-14 are attached.

The Skills and Workforce Development, Affordable Housing, and Disability Services NSPPs have not experienced a reduction in funding over this period. In fact, the funding amounts for each have increased.

The determination of the National Schools NSPP for 2013-14 provided funding for government schools of $2,080.3 million. This is a reduction relative to previous years. The reduction is because Students First funding replaced the National Schools NSPP (and various National Partnership payments) on 1 January 2014. Thus the NSPP funding was only for half of the 2013-14 financial year.

Parliament House Canberra ACT 2600
Australia
Telephone: 02 6277 7340 Facsimile: 02 6273 3420

Once Students First funding for government schools is taken into account, the total funding provided to government schools in 2013-14 was $4,475.4 million. This constitutes a year-on-year increase in funding over this period.

On this basis, I confirm my previous assessment that the determination and payment of NSPPs assists in the realisation of a number of human rights, and neither the determination nor payment of these particular NSPPs has a detrimental impact on any human rights.

Yours sincerely

The Hon Scott Morrison MP

20 / 1 / 2016

Table 1: Funding for the Schools, Skills and Workforce Development, Affordable Housing and Disability NSPPs, 2011-12 to 2013-14

Year	Legislative Instrument	Amount ($m)
Schools NSPP (government schools)		
2011-12	F2012L02205	3,755.8
2012-13	F2014L00323	3,945.0
2013-14*	F2015L00877	2,080.3**
Skills and Workforce Development NSPP		
2011-12	F2012L02205	1,363.1
2012-13	F2014L00323	1,387.5
2013-14	F2015L00877	1,409.0
Affordable Housing NSPP		
2011-12	F2012L02205	1,242.6
2012-13	F2014L00323	1,263.7
2013-14	F2015L00877	1,282.7
Disability NSPP		
2011-12	F2012L02205	1,205.0
2012-13	F2014L00323	1,276.1
2013-14	F2015L00878	1,301.9

*The Schools NSPP ceased on 31 December 2013, and was replaced by Students First funding.
**Once Students First funding is taken into account, total government schools funding in 2013-14 equals $4,475.4 million.

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;

---

[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.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights

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.

---

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

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

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

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

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

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

Strict liability and absolute liability offences

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

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

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

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

Mandatory minimum sentencing

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

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

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

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

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

Civil penalty provisions

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

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

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

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

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

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

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

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

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

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

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

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

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

---

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

6 The UN Human Rights Committee, while not providing further guidance, has determined that 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.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights