

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>.

