

# 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 25 February to 3 March 2016, legislative instruments received from 5 February to 3 March 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):

- Biological Control Amendment Bill 2016;
- Broadcasting Legislation Amendment (Media Reform) Bill 2016;
- Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2016;
- Ethical Cosmetics Bill 2016;
- Law and Justice Legislation Amendment (Northern Territory Local Court) Bill 2016;
- Migration Amendment (Free the Children) Bill 2016;
- Primary Industries Levies and Charges Collection Amendment Bill 2016;
- Registration of Deaths Abroad Amendment Bill 2016;

- Regulatory Powers (Standardisation Reform) Bill 2016;
- Restoring Territory Rights (Dying with Dignity) Bill 2016;
- Social Security Amendment (Diabetes Support) Bill 2016;
- Social Services Legislation Amendment (Interest Charge) Bill 2016; and
- Tax Laws Amendment (Tougher Penalties for Country-by-Country Reporting) Bill 2016.

### **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*.<sup>1</sup> 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.

### **Previously considered measures**

1.9 The following instruments implement measures which the committee has previously considered and the committee refers to its previous comments:

- Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542];<sup>2</sup>
- My Health Records (Opt-out Trials) Rule 2016 [F2016L00094];<sup>3</sup> and
- My Health Records Rule 2016 [F2016L00095].<sup>4</sup>

### **Deferred bills and instruments**

1.10 The committee has deferred its consideration of the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 2) [F2016L00117], pending a response from the Minister for Foreign Affairs

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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](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate).

2 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 29.

3 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) 64.

4 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) 64.

regarding instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*.

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

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2016 (No. 1) [F2016L00047] (deferred 23 February 2016, pending a response from the Minister for Foreign Affairs regarding instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*);<sup>5</sup> and
- Child Care Benefit (Vaccination Schedules) (Education) Determination 2015 [F2015L02101] (deferred 23 February 2016, pending a response from the Minister for Social Services regarding the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015).<sup>6</sup>

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5 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 4.

6 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 3.

## Response required

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

### **Flags Amendment (Protecting Australian Flags) Bill 2016**

*Sponsor: Mr Christensen MP*

*Introduced: House of Representatives, 29 February 2016*

#### **Purpose**

1.13 The Flags Amendment (Protecting Australian Flags) Bill 2016 (the bill) seeks to amend the *Flags Act 1953* (the Flags Act) to make a number of acts a criminal offence under the *Criminal Code Act 1995*. These acts include:

- burning, or otherwise damaging or destroying, an Australian flag; or
- defacing, defiling, mutilating, trampling upon, or otherwise desecrating or dishonouring, an Australian flag.

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

#### **Creation of new criminal offence in relation to destructive acts to Australian flags**

1.15 The bill would inset a new section 7A into the Flags Act to make it a criminal offence to perform a number of destructive acts in relation to an Australian flag, including burning, trampling upon or dishonouring the flag, while reckless as to:

- the possibility of death or violence to a person in a public place;
- the damage or destruction to property in a public place;
- the creation of public disorder; or the possibility of another person; or
- persons being offended, insulted or humiliated by the act.

1.16 The committee considers that the criminalisation of certain acts in relation to the Australian flag engages and limits the right to freedom of opinion and expression.

#### ***Right to freedom of opinion and expression***

1.17 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.18 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public

order (*ordre public*),<sup>1</sup> or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.<sup>2</sup>

#### *Compatibility of the measure with the right to freedom of opinion and expression*

1.19 The committee recognises the significance of the Australian flag as a symbol of the nation and its value. It also recognises that many Australians find repugnant the conduct which the bill seeks to criminalise. Nevertheless, the committee is required to scrutinise the bill for compatibility with Australia's human rights obligations.

1.20 The statement of compatibility sets out the intent of the bill is to criminalise conduct in relation to recent events which 'it must reasonably be assumed...were undertaken to dishonour the flag in front of Australians who consider such desecration of their foremost national symbol as highly offensive.'<sup>3</sup>

1.21 The statement of compatibility states that the bill does not engage any of the applicable human rights or freedoms. However, as set out above, the right to freedom of expression extends to the communication of information or ideas through any medium and that would include waving or destroying a flag.

1.22 As the statement of compatibility does not identify that the bill limits the right to freedom of expression, it does not explain how criminalising the conduct of a person who damages the Australian flag and is reckless to whether the act will 'offend', 'insult' or 'humiliate' another person or persons, is a justifiable limitation on their right to freedom of expression.<sup>4</sup>

1.23 As set out above at paragraph [1.18], prohibiting certain acts which threaten public safety or the rights or reputations of others may pursue a legitimate objective for the purposes of international human rights law. However, it is insufficient to prohibit acts on the basis of their merely offending, insulting or humiliating another person.

1.24 The UN Human Rights Committee has previously explained that the:

...value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be

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1 'The expression 'public order (*ordre public*)'...may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*): Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

2 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

3 Explanatory memorandum (EM), statement of compatibility (SOC) [4].

4 EM, SOC [4].

insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant... Accordingly, the Committee expresses concern regarding laws on such matters as...disrespect for flags and symbols.<sup>5</sup>

1.25 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,<sup>6</sup> 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'.<sup>7</sup> To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.26 In this regard, the committee notes that burning or destroying a flag will not constitute an offence 'to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication'.<sup>8</sup> However, the protection in relation to political communication that has been implied by the High Court as a matter of Australian constitutional law is more limited than the freedom of expression protected under international law.

1.27 Therefore, the committee is concerned that the new criminal offence is excessively broad and likely to be disproportionate to any legitimate objective, should such an objective be identified by the legislation proponent, such as public safety or the rights and reputations of others.

**1.28 The committee's assessment of the creation of a new criminal offence in relation to destructive acts to Australian flags against article 19 of the International Covenant on Civil and Political Rights raises concerns as to whether the bill is compatible with the right to freedom of opinion and expression.**

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5 Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, para 38 (2011).

6 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014) [http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights\\_ctte/guidance\\_note\\_1/guidance\\_note\\_1.pdf](http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf).

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

8 Subsection 7A(3).

1.29 As set out above, the bill engages and limits the right to freedom of opinion and expression. 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 legislation proponent as to:

- the objective to which the proposed changes are addressed, and why they address a pressing and substantial concern;
- the rational connection between the limitation on rights and that objective; and
- reasons why the limitation is a reasonable and proportionate measure for the achievement of that objective.

## **Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016**

*Portfolio: Social Services*

*Introduced: House of Representatives, 2 March 2016*

### **Purpose**

1.30 The Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016 (the bill) introduces provisions into four social security Acts to give the Secretary of the Department of Social Services (the secretary) power to issue departure prohibition orders (DPOs) to certain persons who have outstanding social welfare payment debts.

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

### **Departure prohibition orders**

1.32 The bill inserts provisions into the *Social Security Act 1991, A New Tax System (Family Assistance) (Administration) Act 1999, Paid Parental Leave Act 2010* and the *Student Assistance Act 1973*, which empower the secretary to make a DPO if:

- a person has one or more debts to the Commonwealth under the relevant Act; and
- the person does not have satisfactory arrangements in place to repay the debt; and
- the secretary believes on reasonable grounds that it is desirable to make the order to ensure the person does not leave Australia without having paid the debt(s) or having satisfactory arrangements in place for the debt(s) to be paid.

1.33 A person in respect of whom a DPO has been issued must not leave Australia unless authorised by the secretary, or until the DPO has been revoked or set aside by a court. New section 102B of the bill is a criminal offence provision which provides that breaching the prohibition on leaving Australia will be a criminal offence subject to a penalty of 12 months' imprisonment.

1.34 The amendments require the secretary to consider certain matters before making a DPO including; the person's capacity to repay the debt(s); any previous debt recovery action and its outcome; and the length of time the debt(s) have remained unpaid. However, the bill does not set out minimum thresholds on the amount of outstanding debt, or the length of time that a debt remains unpaid that will enliven the secretary's power to make a DPO.

1.35 The committee considers that, by prohibiting certain persons with social security debts from leaving Australia, the bill engages and may limit the right to freedom of movement.

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***Right to freedom of movement***

1.36 Article 12 of the International Covenant on Civil and Political Rights (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.

1.37 The right to freedom of movement is linked to the right to liberty—a person's movement across borders should not be unreasonably limited by the state. It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places.

1.38 Limitations can be placed on the right as long as they are lawful and proportionate. Particular examples of the reasons for such limitations include the need to protect public order, public health, national security or the rights of others.

1.39 The right to freedom of movement also includes a right to leave Australia, either temporarily or permanently. This applies to both Australian citizens and non-citizens. As international travel requires the use of passports, the right to freedom of movement encompasses the right to obtain necessary travel documents without unreasonable delay or cost.

1.40 As with the right to freedom of movement within Australia, there can be limitations on the right to leave a country, including where it is necessary and proportionate to achieve the objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order.

***Compatibility of the measure with the right to freedom of movement***

1.41 The statement of compatibility to the bill recognises that the bill engages the right to freedom of movement, and states that:

The Bill contains provisions to allow for travel on humanitarian grounds or where the person's travel may be in Australia's best interests, through the issuance of a DAC [departure authorisation certificate], in spite of a DPO being in place.

Debtors will also be able to travel through the issuance of DACs where it is likely the person will depart and return to Australia within an appropriate period or where the person has given an appropriate level of security.

Therefore, the human right permitting a person to leave his country under the UDHR, and the ICCPR, is preserved and protected provided the person complies with the law (as provided under this Bill) and makes the arrangements necessary to repay his social welfare payment debt to the country that provided him with the social support. Further, those rights

are enshrined in the capacity for [the] person to travel under a DAC on humanitarian grounds.<sup>1</sup>

1.42 The committee accepts that the objective of the bill, which is to encourage the repayment of social security debts by people who are no longer recipients of social welfare, is a legitimate objective for the purposes of international human rights law. The committee also accepts that the measures in the bill are rationally connected to that objective, as a prohibition on overseas travel is likely to be a strong incentive for a person to repay any outstanding social security debts, or enter into a repayment arrangement.

1.43 However, the bill applies to all social security debts, regardless of whether the debt has arisen through a failure of the individual recipient or the department, and regardless of the amount of the debt and the time that has elapsed since the excess payment occurred. Once a DPO is issued in respect of a person, it becomes a criminal offence for that person to leave Australia if the person knows the order is in force or is reckless as to whether an order is in force.

1.44 The absence of minimum thresholds for the amount of debt, or length of time for repayment of the debt, and the broad nature of the secretary's discretion to make DPOs, raises questions as to whether the measures in the bill are sufficiently circumscribed to ensure that the measures do not disproportionately limit a person's right to freedom of movement and are the least rights restrictive way of achieving the bill's objective.

**1.45 The committee's assessment of the proposed powers to issue departure prohibition orders against article 12 of the International Covenant on Civil and Political Rights (right to freedom of movement) raises questions as to whether the measure adopts the least rights restrictive approach.**

**1.46 As set out above, the proposed powers to issue departure prohibition orders engage and limit 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 Social Services as to whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective, in particular, whether the measure is sufficiently circumscribed to ensure it operates in the least rights restrictive manner.**

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1 Statement of compatibility (SOC) 2-3.

## **Charter of the United Nations (Sanctions—Iran) Document List Amendment 2016 [F2016L00116]**

*Portfolio: Foreign Affairs and Trade*

*Authorising legislation: Charter of the United Nations (Sanctions—Iran) Regulations 2008 [F2015C00063]*

*Last day to disallow: 21 June 2016 (Senate)*

### **Purpose**

1.47 The Charter of the United Nations (Sanctions—Iran) Document List Amendment 2016 [F2016L00116] (the instrument) amends the Charter of the United Nations (Sanctions—Iran) Document List 2014 (Iran list), which lists documents specified by the Minister for Foreign Affairs determining goods to be prohibited for export to, or importation from, Iran. Goods mentioned in the documents will be included in the definition of export and import sanctioned goods for the purposes of the Charter of the United Nations (Sanctions—Iran) Regulations 2008 [F2015C00063] (Iran Sanctions Regulations).

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

### **Offences of dealing with export and import sanctioned goods**

1.49 The Iran Sanctions Regulations define 'export sanctioned goods' as including goods that are mentioned in a document specified by the minister by legislative instrument. The documents that are specified by the minister in the instrument take various forms, including letters and information circulars, rather than setting a clear and comprehensible list of goods that would meet the drafting standards for the framing of an offence.

1.50 Regulations 10 and 12 of the Iran Sanctions Regulations, respectively, prohibit supply of export sanctioned goods to Iran, and importation of import sanctioned goods. The Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2016C00061] (the Declaration), provides that contravention of regulations 10 and 12, of the Iran Sanctions Regulations are contraventions of 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). Therefore, 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 in the Iran Sanctions Regulations. This is then punishable by up to 10 years' imprisonment and/or a fine of up to 2500 penalty units (or \$450 000).

1.51 The committee considers these measures engage and may limit the right to a fair trial, as the definition of 'export sanctioned goods', which is an important element of the offences in the regulations, may, in being determined by reference to goods 'mentioned' in the five listed documents, lack a clear legal basis as the definition is vaguely drafted and imprecise.

### ***Right to a fair trial***

1.52 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals. Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)) and a guarantee against retrospective criminal laws (article 15(1)).

### ***Quality of law***

1.53 Human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

### ***Compatibility of the measure with the right to a fair trial and quality of law test***

1.54 The statement of compatibility for the instrument states that the instrument 'protects human rights by ensuring that persons and entities that violate measures imposed by the UN Security Council will be subject to UN Security Council sanctions.'<sup>1</sup> Neither the Iran List, the Iran Sanctions Regulations, nor the Declaration were accompanied by a statement of compatibility at the time they were registered.

1.55 It is unclear whether the five documents added to the Iran list contain sufficiently precise descriptions of goods, such as would meet appropriate drafting standards for the framing of an offence. For example, the first and second documents, INFCIRC/254/Rev.12/Part 1 and NFCIRC/254/Rev.12/Part 2, appear to provide guidelines for nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software and related technology, as opposed to specific descriptions of particular goods that are prohibited. The committee is therefore concerned that persons potentially subject to these offence provisions may not be able to determine with sufficient precision particular items that are export and import sanctioned goods for the purposes of the Iran Sanctions Regulations.

1.56 The committee also notes for completeness that the construction of the offence provision in this way appears inconsistent with the Commonwealth Guide to Framing Offence Provisions which states that:

It is normally desirable for the content of an offence to be clear from the offence provision itself, so that the scope and effect of the offence is clear to the Parliament and those subject to the offence. This also enables the entirety of the content of an offence to be scrutinised by Parliament. An offence to the following effect would normally be considered undesirable:

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1 Explanatory statement, statement of compatibility [1].

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A person commits an offence if the person fails to comply with obligations set out in Regulations / a document published by the Minister / a code of conduct.<sup>2</sup>

1.57 As set out in the committee's Guidance Note 1, any limitation on a right must be prescribed by law. This requires not only that the measure limiting the right be set out in legislation, but that the law must be precise enough so that people know the legal consequences of their actions or the circumstance under which authorities may restrict the exercise of their rights.

1.58 By defining the term 'export sanctioned goods' with reference to goods mentioned in documents listed in the instrument, the content of the offences to which this definition relates is imprecise and uncertain. Accordingly, there are significant questions as to whether the instrument, read together with the Iran Sanctions Regulations and the Declaration, is sufficiently precise to ensure a fair trial for the purposes of international human rights law.

**1.59 The committee's assessment of the offences of dealing with export and import sanctioned goods against article 14 of the International Covenant on Civil and Political Rights (right to a fair trial) raises questions as to whether the offences as drafted are sufficiently prescribed and justifiable to meet the quality of law test.**

**1.60 As set out above, the offences of dealing with export and import sanctioned goods engage and limit the right to a fair trial as there is an ambiguity in the drafting that requires further explanation. The committee therefore seeks the advice of the Minister for Foreign Affairs as to:**

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **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.**

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2 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 27, available at <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

## **Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113]**

*Portfolio: Prime Minister and Cabinet*

*Authorising legislation: Royal Commissions Act 1902*

*Last day to disallow: 21 June 2016 (Senate)*

### **Purpose**

1.61 The Royal Commissions Amendment Regulation 2016 (No. 1) (the instrument) amends the Royal Commissions Regulations 2001 (the principal regulations) to enable information gathered by the Royal Commission into Trade Union Governance and Corruption (TURC) to be given, accessed and used by different persons and bodies.

1.62 Witnesses before Royal Commissions are afforded only a limited privilege against self-incrimination (as per section 6A of the *Royal Commissions Act 1902* (RC Act)), and the instrument dispenses with the requirement to individually notify the person or body who initially provided such information to the TURC, when information will be transferred to a different person or body.

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

### **Sharing of information in circumstances where the witness was not afforded the privilege against self-incrimination**

1.64 The instrument enables information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, to be given, accessed and used by different persons and bodies without notification to the person or body who initially provided it to the TURC.

1.65 The committee considers that this measure engages the right to a fair trial, fair hearing rights and the right to privacy.

### ***Right to a fair trial and fair hearing rights***

1.66 The right to a fair trial and fair hearing rights are protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right guarantees to all persons a fair and public hearing by a competent, independent and impartial tribunal established by law.

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

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

1.68 The statement of compatibility explains that the provision of access and use of information gathered by the TURC is for the purposes of expediting the prosecution of criminal and civil wrongdoing and the committee acknowledges that this is a legitimate objective. The committee also considers that the measures are rationally connected to this legitimate objective, as enabling information to be passed quickly to agencies will assist them in their investigations of matters arising from the TURC.

1.69 However, the committee considers that the statement of compatibility has not demonstrated that the instrument imposes a proportionate limitation on the right to a fair trial and fair hearing rights in pursuit of that legitimate objective.

1.70 Under the RC Act, hearings may be open or closed, or restricted to certain classes of persons.<sup>1</sup> It is an offence to fail to give evidence or produce documents to a Royal Commission if a person is summonsed to appear or produce documents.<sup>2</sup> When giving evidence, which may be on oath or affirmation, a person is not excused from answering a question on the grounds of self-incrimination, or other grounds of confidentiality.<sup>3</sup> These broad powers granted to a Royal Commission are not ordinarily available to other agencies of government.

1.71 The statement of compatibility acknowledges that providing law enforcement agencies with access and use of information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, engages and limits the right to a fair hearing. The statement of compatibility states:

This access and use of information is reasonable, necessary and appropriate. While the Royal Commissions serve the important function of inquiring into matters of public interest, they do not have powers to prosecute civil or criminal wrongdoing. Provision of access to the Royal Commission's records is the only way by which criminal and civil offences can be further investigated and prosecuted.<sup>4</sup>

1.72 However, the statement of compatibility has not sufficiently explained why provision of access to the TURC records is 'the only way' criminal and civil offences can be further investigated and prosecuted.

1.73 To assess the proportionality of provisions which abrogate the privilege against self-incrimination, the committee looks to the availability of 'use immunities' and 'derivative use immunities'. A 'use immunity' provides that self-incriminatory information or documents provided by a person cannot be used in subsequent

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1 *Royal Commissions Act 1902* (Cth) (RC Act), section 6D(5).

2 RC Act, sections 3 and 6B.

3 RC Act, section 6A.

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

proceedings against that person, but can be used to investigate unlawful conduct by that person and third parties. A 'derivative use immunity' provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.<sup>5</sup>

1.74 For completeness, the committee notes that the Commonwealth Guide to Framing Offences explains that where privilege against self-incrimination is to be overridden, 'it is usual to include a 'use' immunity or a 'use and derivative use' immunity provision, which provides some degree of protection for the rights of individuals.'<sup>6</sup>

1.75 As noted above, witnesses before Royal Commissions are afforded only a limited privilege against self-incrimination.<sup>7</sup> Section 9 of the RC Act also provides for the custody and use of records of Royal Commissions. Sections 9(2) and 9(11) provide that regulations may provide for the custody, use or transfer of, or access to, Royal Commission records; and that such records may be dealt with without consent, notice or opportunity to be heard. Under this instrument copies of and access to information gathered by the TURC may be given to a person or body who:

performs a function relating to law enforcement purposes within the meaning of section 9 of the [RC] Act; or

is responsible for advising a Minister of the Commonwealth, of a State or of a Territory about the administration of a law of the Commonwealth, of that State or of that Territory.

1.76 Section 9 of the RC Act and the instrument provides 'use immunity' and not a 'derivative use immunity' as there is no prohibition on the use of any information, document or thing indirectly obtained as a consequence of the self-incriminating information. The absence in the RC Act and the instrument of a 'derivative use immunity' is relevant to an assessment of the proportionality of the measure. The statement of compatibility provides no information as to the necessity and scope of the intended purposes for which the TURC records are to be shared without the knowledge of affected individuals. The instrument itself contains no safeguards that

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5 A derivative use immunity prevents the use of material that has been compulsorily disclosed to 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.' See *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 380 per Lord Wilberforce at 443.

6 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 27, available at <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

7 RC Act, section 6A.

protect the use of TURC records for the purpose of prosecuting criminal and civil wrongdoing.

**1.77 The committee considers that sharing information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, to be given, accessed and used by different persons and bodies for purposes as broad as 'the administration of a law' engages and limits the right to a fair trial and fair hearing rights. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister to the Prime Minister as to whether the measure is a proportionate means of achieving the stated objective.**

### ***Right to privacy***

1.78 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

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

### *Compatibility of the measure with the right to privacy*

1.79 As set out above at paragraph [1.70], under the RC Act, it is an offence to fail to give evidence or produce documents to a Royal Commission if a person is summonsed to appear or produce documents.<sup>8</sup> When giving evidence, which may be on oath or affirmation, a person is not excused from answering a question on the grounds of self-incrimination, or other grounds of confidentiality.<sup>9</sup> These broad powers granted to a Royal Commission are not ordinarily available to other agencies of government.

1.80 The statement of compatibility acknowledges that sharing information gathered by the TURC to law enforcement agencies engages the right to privacy. The statement of compatibility argues that the instrument promotes freedom from arbitrary or unlawful interference as 'individuals who are, or have been the victims of unlawful interference may have their complaints investigated and offenders brought to justice'.<sup>10</sup>

1.81 As stated above at paragraph [1.68], the statement of compatibility explains that the provision of access and use of information gathered by the TURC is for the purposes of expediting the prosecution of criminal and civil wrongdoing and the committee acknowledges that this is a legitimate objective. The committee also

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8 RC Act, sections 3 and 6B.

9 RC Act, section 6A.

10 EM, SOC [4].

considers that the measures are rationally connected to this legitimate objective, as enabling information to be passed quickly to agencies will assist them in their investigations of matters arising from the TURC.

1.82 However, the committee considers that the statement of compatibility has not demonstrated that the instrument imposes a proportionate limitation on the right to privacy in pursuit of that legitimate objective.

1.83 The statement of compatibility has not explained why it is necessary to permit the provision of access and use of all information gathered by the TURC. For example, it is unclear, whether the regulation could result in the provision of confidential information to another person or body without consent.

1.84 The committee also considers that the statement of compatibility has not sufficiently explained why it is necessary to share information gathered by the TURC to a person or body 'responsible for advising a Minister... about the administration of a law,' if the intention is that the records be used to expedite the prosecution of criminal and civil wrongdoing. A person or body 'responsible for advising a Minister...about the administration of a law,' would appear to encapsulate a large class of persons, with little or no specificity as to their official function, qualifications or attributes and appears to suggest a purpose broader than prosecuting criminal and civil wrongdoing.

**1.85 The committee considers that sharing information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, to be given, accessed and used by different persons and bodies for purposes as broad as 'the administration of a law' engages and limits the right to privacy. As noted above, the statement of compatibility has not sufficiently justified this limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Assistant Minister to the Prime Minister as to whether the measure is a proportionate means of achieving the stated objective.**

## Further response required

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

### **Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551]**

*Portfolio: Immigration and Border Protection*

*Authorising legislation: Migration Act 1958*

*Last day to disallow: 13 August 2015 (Senate)*

#### **Purpose**

1.87 The Migration (Resolving the Asylum Legacy Caseload) Regulation 2015 (the regulation) amends the Migration Regulations 1994 to:

- provide the manner in which the Immigration Assessment Authority will exercise its functions in the fast track assessment process;
- remove most references to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention) and replace them with a new statutory framework reflecting Australia's unilateral interpretation of its protection obligations; and
- establish criteria for the grant of the Temporary Protection Visa (TPV) and Safe Haven Enterprise Visa (SHEV).

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

#### **Background**

1.89 The regulation is consequential to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the RALC Act). The committee reported on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (RALC bill) in its *Fourteenth Report of the 44th Parliament*.<sup>1</sup>

1.90 In this report the committee raised concerns about the compatibility, among other things, of:

- the fast track assessment process with the rights of the child, the right to a fair hearing and the obligation of non-refoulement;
- removing most references to the Refugee Convention from the *Migration Act 1958*, and replacing them with a new statutory framework reflecting Australia's unilateral interpretation of its protection obligations, with multiple human rights; and

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1 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 70-92.

- TPVs with the obligation not to place any person at risk of refoulement, the obligation to consider the best interests of the child as a primary consideration, the right to the protection of the family and the right to health.

1.91 It also concluded that the fast-track assessment process, in excluding merits review for certain applicants, was incompatible with Australia's obligations of non-refoulement.

1.92 The committee noted previously that the statement of compatibility to the regulation relies on the statement of compatibility for the RALC Act to assess the human rights implications of the measures contained in the regulation.<sup>2</sup>

1.93 To the extent that the regulation is consequential to the amendments introduced by the RALC Act, the concerns set out in the committee's previous report in relation to the RALC bill apply to the regulation.<sup>3</sup>

1.94 The committee previously reported on the instrument in its *Twenty-fourth Report of the 44<sup>th</sup> Parliament*, and requested further information from the Minister for Immigration and Border Protection as to whether the measures are compatible with the right to freedom of movement.<sup>4</sup>

### **Safe haven enterprise visas**

1.95 SHEVs were created by the RALC Act. These visas may be granted to persons who are found to be owed protection obligations and who indicate an intention to work or study in regional areas in Australia. The regulation sets out certain criteria for the grant of a SHEV.

1.96 The main criteria for the grant of a SHEV were included by an amendment to the RALC bill, and the committee therefore did not examine the human rights compatibility of the SHEV regime during its consideration of the bill. However, many of the previous report's concerns in relation to TPVs implemented by the RALC bill apply equally to the SHEV regime, particularly in relation to Australia's non-refoulement obligations.<sup>5</sup>

1.97 The regulation raises a human rights compatibility concern in respect of providing that people who hold a SHEV, and people whose last substantive visa was a SHEV, are unable to make a valid application for a Bridging Visa B. A Bridging Visa B has a travel facility attached to it.

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2 See explanatory statement (ES), Attachment B 5-9.

3 See above footnote 1.

4 Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 20-24.

5 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 70-92.

1.98 The committee previously considered that the restriction on travel for SHEV holders engages and limits the right to freedom of movement.

***Right to freedom of movement***

1.99 Article 12 of the International Covenant on Civil and Political Rights (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 a country of which you are a citizen. The right may be restricted in certain circumstances.

1.100 The right to freedom of movement is linked to the right to liberty—a person's movement across borders should not be unreasonably limited by the state. It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places.

1.101 The right to freedom of movement also includes a right to leave Australia, either temporarily or permanently. This applies to both Australian citizens and non-citizens. As international travel requires the use of passports, the right to freedom of movement encompasses the right to obtain necessary travel documents without unreasonable delay or cost.

1.102 Limitations can be placed on the right as long as they are lawful and proportionate. Particular examples of the reasons for such limitations include the need to protect public order, public health, national security or the rights of others.

***Compatibility of the measure with the right to freedom of movement***

1.103 The statement of compatibility for the regulation acknowledges that preventing SHEV holders from applying for a visa that allows the visa holder to travel limits the right to freedom of movement.<sup>6</sup>

1.104 The committee previously acknowledged that protecting the integrity of the protection visa regime may be regarded as a legitimate objective for the purposes of international human rights law. However, the committee found it to be unclear how denying a person the right to travel is rationally connected to that objective.

1.105 The SHEV regime 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.<sup>7</sup> However, it is unclear why it is necessary to require the minister's written approval before the SHEV holder is able to travel to any country, as merely seeking to travel would not appear to indicate in and of itself that a person is not in need of protection.

1.106 Further, the regulation does not allow a SHEV holder, or former SHEV holder to ever apply for a Bridging Visa B. It is not clear how this blanket denial of the right

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6 ES, Attachment B 9.

7 See clause 8570 of Schedule 8 to the Migration Regulations 1994.

to apply for this type of visa could, even if rationally connected to a legitimate objective, be regarded as proportionate to that objective.

1.107 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, in particular, how denying access to travel to SHEV holders to *any* country furthers the objective of maintaining the integrity of the protection visa regime; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and in particular, why it is necessary to prohibit access entirely to Bridging Visa B for all SHEV, or former SHEV, holders.

### **Minister's response**

**1.148 The committee's assessment of denying SHEV holders access to a Bridging Visa B, against article 12 of the International Covenant on Civil and Political Rights [ICCPR] (right to freedom of movement), raises questions as to whether the restrictions are justifiable.**

To clarify, non-citizens who hold a SHEV are able to apply to leave and re-enter Australia. Despite the restriction of access to a Bridging visa B for SHEV holders, this does not mean that they may not travel outside Australia. In order to do this, a SHEV holder must submit a 'Permission to Travel' form and have their request assessed and approved by the Department. In this situation, the Minister must be satisfied that there are compelling or compassionate circumstances that justify the entry to that other country.

If a SHEV holder or a former SHEV holder makes a further application for a SHEV or any other visa, he or she will hold a bridging visa associated with their further visa application. During the time when the applicant only holds a bridging visa, they will be unable to apply for a Bridging visa B, and will be unable to travel. In this circumstance, the applicant must await the outcome of their further substantive visa application or leave Australia.

Article 12 of the ICCPR states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

The Government does not consider that the removal of access to Bridging visa Bs for persons who hold a SHEV, or whose last substantive visa was a

SHEV, is a restriction against article 12. The removal of access does not limit a SHEV holder's (or former holder's) movement inside Australia (Art 12(1)), ability to leave Australia (Art 12(2)), or to enter the SHEV-holder's own country (Art 12(4)).

Rather, the removal of access to Bridging visa Bs restricts the future ability of SHEV holders and former SHEV holders to re-enter Australia if they choose to leave. This restriction is entirely consistent with the Government's immigration regime, which is provided by law (Art 12(3)) under the *Migration Act 1958*.

The Government notes that the SHEV is a temporary visa and does not confer the rights of a permanent visa or citizenship, meaning that Australia is not taken to be a SHEV-holder's 'own country' as stated in Article 12(4) and elsewhere in the ICCPR.

**1.149 As set out above, denying SHEV holders access to a Bridging Visa B engages and may limit 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 there is a rational connection between the limitation and the stated objective, in particular, how does denying access to travel to SHEV holders to any country further the objective of maintaining the integrity of the protection visa regime; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, and in particular, why it is necessary to prohibit access entirely to Bridging Visa Bs for all SHEV, or former SHEV, holders.**

As stated above, the Government does not consider that the removal of access to Bridging visa Bs for SHEV holders and former SHEV holders is a restriction against article 12 of the ICCPR or any other international human right. The Government further does not consider that there is any particular or general right for a SHEV holder or former SHEV holder on a bridging visa to have access to a Bridging visa B, given that the protection visa regime is aimed at fulfilling domestic and international legal obligations for those who are refugees or otherwise owed protection due to a real risk of them suffering significant harm in their country of reference.

The removal of access to Bridging visa Bs for SHEV holders and former SHEV holders follows the Government's decision to place restrictions regarding travel on the holders of protection visas. This decision is discussed at length elsewhere, for example, the letter dated 20 November 2013 from the then-Minister for Immigration and Border Protection, the Hon. Scott Morrison MP, to the then-Chair of this Committee.

The Government agrees that SHEV holders and former SHEV holders certainly have a right to exit Australia, however, it does not agree that they necessarily have a right to re-enter Australia without first being permitted to do so.<sup>8</sup>

### **Committee response**

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

1.109 The minister's response states that the government does not agree that there is a restriction on the right to freedom of movement in restricting access to Bridging Visa Bs for persons who have held a SHEV. The minister bases this on the fact that not being able to access a visa that would allow a visa holder to travel abroad, and thus return to Australia at the conclusion of that travel, does not limit the person's ability to leave Australia. Rather, it just restricts them from returning to Australia at the conclusion of their travel (and they have no right to re-enter Australia as Australia could not be said to be their 'own country').

1.110 The right to leave a country is a right both to legally leave the country as well as practically leave the country. It applies not just to departure for permanent emigration but also for the purpose of travelling abroad. States are required to provide necessary travel documents to ensure this right can be realised.<sup>9</sup> A person who has been recognised as a refugee but does not have the necessary travel documents that would allow them to travel (and return to Australia at the conclusion of their travel) is not able to practically realise their right to leave the country. This right applies to every person lawfully within Australia, including those who have been recognised as refugees. The committee therefore considers that the right to freedom of movement is engaged and limited by the measure.

1.111 No further information is given in the minister's response as to how restricting access to a Bridging Visa B for SHEV holders and former SHEV holders is rationally connected to the stated objective of protecting the integrity of the protection visa regime. The committee understands that a person on a SHEV has the ability to seek the approval of the minister to travel in certain circumstances. However, this does not apply when the person is on a bridging visa pending the determination of their application for a further SHEV or a different visa. The committee appreciates this is for a limited timeframe pending determination of a substantive visa, but adequate reasons have not been advanced by the minister as to why it is necessary to refuse to allow former SHEV holders the ability to travel while they are waiting their substantive visa application being determined.

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8 See Appendix 1, Letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Philip Ruddock MP (received 20 July 2015) 2-3.

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

1.112 The committee's assessment of the measure against article 12 of the International Covenant on Civil and Political Rights (right to freedom of movement) is that it limits the right to freedom of movement and raises questions as to whether this limitation is justifiable.

1.113 The Minister for Immigration and Border Protection's response does not provide any assessment as to whether the limitation on the right to freedom of movement is justifiable. The committee reiterates its request for advice from the Minister for Immigration and Border Protection as to:

- whether there is a rational connection between the limitation and the objective sought to be achieved; in particular, how does denying access to travel to Safe Haven Enterprise Visa, or former, Safe Haven Enterprise Visa holders to any country further the objective of maintaining the integrity of the protection visa regime; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective; in particular, whether it is the least rights restrictive approach; and why it is necessary to entirely prohibit access to Bridging Visa B for all Safe Haven Enterprise Visa, or former Safe Haven Enterprise Visa, holders.

