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 3**.

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Purpose	Establishes a scheme to permit the continuing detention of 'high risk terrorist offenders' at the conclusion of their custodial sentence
Portfolio	Attorney-General
Introduced	Senate, 15 September 2016
Rights	Liberty; freedom from arbitrary detention; right to humane treatment in detention; prohibition on retrospective criminal laws (see **Appendix 2**)
Previous reports	7 of 2016; 8 of 2016
Status	Concluded

Background

2.3 The committee initially reported on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the bill) in its *Report 7 of 2016,* and requested further information from the Attorney-General in relation to the human rights issues identified in that report.[1]

2.4 In order to conclude its assessment of the bill while it is still before the Parliament, the committee requested that the Attorney-General's response be provided by 27 October 2016. A response was not received by this date.

2.5 In the absence of this response, the committee again reported on the bill in its *Report 8 of 2016* and reiterated its previous request for further information as well as seeking an additional response from the Attorney-General as outlined below.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 12-20.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 16-26.

2.6 The committee requested that the Attorney-General's outstanding response as well as the additional response be provided by 18 November 2016. A response was still not received by this date.

2.7 However, the Attorney General's response to the committee's inquiries was received on 28 November 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

2.8 The bill then passed both Houses of Parliament on 1 December 2016 and received Royal Assent on 7 December 2016.

Continuing detention of persons currently imprisoned

2.9 The bill proposes to allow the Attorney-General (or a legal representative) to apply to the Supreme Court of a state or territory for an order providing for the continued detention of individuals who are imprisoned for particular offences under the *Criminal Code Act 1995* (Criminal Code).[3] The Attorney-General may also apply for an interim detention order pending the hearing of the application for a continuing detention order.[4] The effect of these orders is that a person may be detained in prison after the end of their custodial sentence.[5]

2.10 The particular offences in respect of which a person may be subject to continuing detention will include:

- international terrorist activities using explosive or lethal devices;[6]
- treason;[7] and
- a 'serious offence' under Part 5.3,[8] or an offence under Part 5.5,[9] of the Criminal Code.

2.11 Individuals who have committed crimes under these sections of the Criminal Code are referred to in the bill as 'terrorist offenders'.

2.12 The court is empowered to make a continuing detention order where:

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3 See proposed sections 105A.3 and 105A.5.

4 See proposed section 105A.9. An interim detention order can last up to 28 days.

5 See proposed section 105A.9(3).

6 Criminal Code, Schedule 1, Division 72, Subdivision A.

7 Criminal Code, Schedule 1, Division 80, Subdivision B.

8 Criminal Code, Schedule 1, Part 5.3. The offences in Part 5.3 include directing the activities of a terrorist organisation; membership of a terrorist organisation; recruiting for a terrorist organisation; training involving a terrorist organisation; getting funds to, from or for a terrorist organisation; providing support to a terrorist organisation; associating with terrorist organisations; financing terrorism; and financing a terrorist.

9 Criminal Code, Schedule 1, Part 5.5. Offences under this part include incursions into foreign countries with the intention of engaging in hostile activities; engaging in a hostile activity in a foreign country; entering, or remaining in, declared areas; preparatory acts; accumulating weapons etc; providing or participating in training; and giving or receiving goods and services to promote the commission of an offence.

(a) an application has been made by the Attorney-General or their legal representative for the continuing detention of a 'terrorist offender';

(b) after having regard to certain matters,[10] the court is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community; and

(c) the court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.[11]

2.13 The Attorney-General bears the onus of proof in relation to the above criteria.[12] The standard of proof to be applied is the civil standard of the balance of probabilities.[13]

2.14 While each detention order is limited to a period of up to three years, further applications may be made and there is no limit on the number of applications.[14] This means that a person's detention in prison could be continued for an extended period of time.

2.15 This bill provides that a person detained under a continuing detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences, unless it is necessary for certain matters set out in proposed section 105A.4(2).[15]

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10 Under proposed section 105A.8 the court must have regard to the following matters in deciding whether it is satisfied: (a) the safety and protection of the community; (b) any report received from a relevant expert under section 105A.6 in relation to the offender, and the level of the offender's participation in the assessment by the expert; (c) the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment; (d) any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by: (i) the relevant state or territory corrective services; or (ii) any other person or body who is competent to assess that extent; (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs; (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while: (i) on release on parole for any offence; or (ii) subject to a continuing detention order or interim detention order; (g) the offender's criminal history (including prior convictions and findings of guilt in respect of any other offences); (h) the views of the sentencing court at the time the relevant sentence of imprisonment was imposed on the offender; (i) any other information as to the risk of the offender committing a serious Part 5.3 offence; (j) any other matter the court considers relevant.

11 Proposed section 105A.7.

12 Explanatory memorandum (EM) 4.

13 See proposed section 105.A.13(1).

14 Proposed section 105A.7(5) and (6).

15 Proposed section 105A.4.

2.16 The measure allows ongoing preventative detention of individuals who will have completed their custodial sentence. The previous analysis observed that the use of preventative detention, that is, detention of individuals that does not arise from criminal conviction but is imposed on the basis of future risk of offending, is a serious measure for a state to take.

2.17 While noting that the measure engages and limits a range of human rights, the focus of the initial human rights assessment was on the right to liberty, which includes the right to be free from arbitrary detention. Forms of detention that do not arise from a criminal conviction are permissible under international law, for example, the institutionalised care of persons suffering from mental illness. However, the use of such detention must be carefully controlled: it must reasonable, necessary and proportionate in all the circumstances to avoid being arbitrary, and thereby unlawful under article 9 of the International Covenant on Civil and Political Rights (ICCPR).

2.18 The initial human rights analysis noted that post-sentence preventative detention of persons who have been convicted of a criminal offence may be permissible under international human rights law in carefully circumscribed circumstances.[16] The United Nations Human Rights Committee (UNHRC) has stated that:

> …to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society.[17]

2.19 The initial analysis stated that the question therefore is whether the proposed preventative detention regime is necessary and proportionate, and not arbitrary within the meaning of article 9 of the ICCPR, bearing in mind the specific guidance in relation to post-sentence preventative detention.

2.20 For the purposes of this initial analysis, it was accepted that the proposed continuing detention order regime pursues the legitimate objective of 'protecting the community from the risk of terrorist attacks',[18] and the measure is rationally

16 See: United Nations (UN) Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014)[15], [21]. See also: UN Human Rights Committee, General Comment 8: Article 9, Right to Liberty and Security of Persons (30 June 1982).

17 See, for example, UN Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014) [21].

18 EM 3.

connected to this stated objective in the sense that the individual subject to an interim or continuing detention order will be incapacitated while imprisoned. However, questions arose as to whether the regime contains sufficient safeguards to ensure that preventative detention is necessary and proportionate to this objective.

2.21 The proposed continuing detention order regime shares significant features with the current continuing detention regimes that exist in New South Wales (NSW),[19] and Queensland.[20] These state regimes apply in respect of sex offenders and/or 'high risk violent offenders' and have the following elements:

- the Attorney-General or the state may apply to the Supreme Court for a continuing detention order for particular classes of offenders;[21]
- the application must be accompanied by relevant evidence;[22]
- the effect of the continuing detention order is that an offender is detained in prison after having served their custodial sentence in relation to the offence;[23]
- the court may make a continuing detention order if it is satisfied to a 'high degree of probability' that the offender poses an 'unacceptable risk' of committing particular offences;[24]
- in determining whether to make the continuing detention order, the court must have regard to a list of factors;[25]

19 The *Crimes (High Risk Offenders) Act 2006* (NSW) was first enacted in 2006 as the *Crimes (Serious Sex Offenders) Act 2006* to provide for continuing supervision and detention of people convicted of sex offences. The Act was amended in 2013 to extend the regime to people convicted of violent crimes.

20 The *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) was enacted in 2003 to provide for continuing supervision and detention of people convicted of sex offences.

21 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 5; Crimes (High Risk Offenders) Act 2006 (NSW) section 13A.

22 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 5; Crimes (High Risk Offenders) Act 2006 (NSW) section 14; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5D, 5G.

23 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 14; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5D, 5G.

24 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 13; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5B, 5E.

- the court must consider whether a non-custodial supervision order would be adequate to address the risk;[26]
- the term of continuing detention orders can be made for extended periods of time;[27] and
- the availability of periodic review mechanisms.[28]

2.22 As noted in the previous analysis, these continuing detention schemes were the subject of individual complaints to the UNHRC in *Fardon v Australia*,[29] and *Tillman v Australia.*[30] In *Fardon v Australia,* the author of the complaint had been convicted of sex offences in 1989 and sentenced to 14 years' imprisonment in Queensland. At the end of his sentence, the complainant was the subject of continuing detention from June 2003 to December 2006. In *Tillman v Australia* the complainant was convicted of sex offences in 1998 and sentenced to 10 years' imprisonment in NSW. At the end of his sentence, the complainant was the subject of a series of interim detention orders, and finally a continuing detention order of one year (effectively for a period from May 2007 until July 2008).

2.23 The UNHRC found that the continued detention in both cases was arbitrary in violation of article 9 of the ICCPR. In summary, the UNHRC identified the following as relevant to reaching these determinations:

- as the complainants remained incarcerated under the same prison regime the continued detention effectively amounted to a fresh term of imprisonment or new sentence. This was not permissible if a person has not been convicted of a new offence; and is contrary to the prohibition against retrospective criminal laws (article 15 of the ICCPR), particularly as in both instances the enabling legislation was enacted after the complainants were first convicted;

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25 In New South Wales (NSW) this includes community safety, medical assessments, any other information relating to the likelihood of reoffending, the offender's compliance with supervision orders and willingness to engage in assessments or rehabilitation programs, the offender's criminal history, and any other matters that the court considers relevant: see, *Crimes (High Risk Offenders) Act 2006* (NSW) section 17(4). In Queensland this includes medical reports or other information relating to the likelihood that the prisoner will reoffend, the prisoner's criminal history, the prisoner's engagement with rehabilitation programs, community safety, and any other relevant matter: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13.

26 Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 13; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5D, 5G.

27 In Queensland continuing detention orders may be indefinite; in NSW a continuing detention order may be up to five years. The court may also order further continuing detention orders against the same offender: *Crimes (High Risk Offenders) Act 2006* (NSW) sections 17(4), 18(3).

28 Crimes (High Risk Offenders) Act 2006 (NSW) section 24AC.

29 UN Human Rights Committee (1629/2007) (18 March 2010).

30 UN Human Rights Committee (1635/2007) (18 March 2010).

- the procedures for subjecting the complainants to continuing detention were civil in character, despite an effective penal sentence being imposed. The procedures therefore fell short of the minimum guarantees in criminal proceedings prescribed in article 14 of the ICCPR;
- the continued detention of offenders on the basis of future feared or predicted dangerousness was 'inherently problematic'. The application process for continuing detention orders required the court to 'make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.' The complainants' predicted future offending was based on past conduct, for which they had already served their sentences; and
- the state should have demonstrated that the complainant could not have been rehabilitated by means other than detention which were less rights restrictive.

2.24 The UNHRC's findings and the Australian government's formal response were not referred to in the statement of compatibility.

2.25 The previous analysis stated that a number of the concerns about the NSW and Queensland schemes are relevant to an assessment of the current continuing detention proposal, including:

- individuals currently incarcerated may be subject to continuing detention contrary to the prohibition on retrospective criminal law;
- the civil standard of proof applies to proceedings (that is, the standard of the balance of probabilities rather than the criminal standard of beyond reasonable doubt);[31] and
- the difficulties arising from the court being asked to make a finding of fact in relation to the risk of future behaviour.

2.26 However, the analysis noted two points of difference to the NSW and Queensland schemes.

2.27 First, the bill provides that a person detained under a continuing detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences, except in certain circumstances. This safeguard appears to respond to one of the bases upon which the state-level regimes were incompatible with article 9, namely, that the applicants were incarcerated within the same prison regime, and therefore their preventative detention in effect constituted a fresh term of imprisonment after they had served their sentence. However, the bill nonetheless does provide that persons subject to continuing detention orders are to

31 See proposed section 105.A.13(1). Some preventative detention regime proceedings are criminal in nature: *Dangerous Sexual Offenders Act* 2006 (WA) section 40.

be detained in prison and that there is a series of circumstances in which they may be detained in the same area or unit as those prisoners serving criminal sentences.

2.28 Second, the bill requires that a court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'.[32] Accordingly, the bill appears to incorporate some aspects of the test of proportionality under international human rights law.[33]

2.29 The initial analysis noted that this aspect of the bill appears to be a safeguard against the use of a continuing detention order in circumstances where an alternative to detention is available. However, it is not apparent from the bill how this safeguard would operate in practice including whether and how the court would be able to assess or provide for less restrictive alternatives. Under the NSW and Queensland regimes, if satisfied that a prisoner is a serious danger to the community (in Queensland) or is a high risk sex offender or high risk violent offender (in NSW), it is open to a court to make either a continuing detention order or a supervision order.[34] By contrast, the bill does not empower the court to make an order other than a continuing detention order.[35]

2.30 Further, the previous analysis noted that the proposed legislative test requires consideration of whether the continuing detention order is the least rights restrictive only at the particular point of time at which it is being contemplated by the court, at or towards the end of the sentence. It is likely that interventions might be possible earlier in respect of a particular offender, such as effective de-radicalisation and rehabilitation programs. Including a requirement to consider this type of intervention, both prior to and after making any continuing detention order, would support an assessment of the proposed regime as proportionate, particularly that post-sentence detention is provided as a measure of last resort and is aimed at the detainee's rehabilitation and reintegration into society.

2.31 Finally, in the proposed scheme the assessment of 'unacceptable risk' is crucial in determining whether the court is empowered to make a continuing detention order. As the risk being assessed relates to future conduct there are inherent uncertainties in what the court is being asked to determine, akin to the concerns in *Fardon v Australia* and *Tillman v Australia*. The bill provides for the court

32 Proposed section 105A.7.

33 State regimes currently contain a more limited version of this test; the court is required to consider whether a non-custodial supervision order would be adequate to address the risk in deciding whether to make a continuing detention order: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

34 See Dangerous Prisoners (Sexual Offenders) Act 2003 (QLD) section 13; Crimes (High Risk Offenders) Act 2006 (NSW) sections 5B, 5E.

35 The bill does contain an annotation that a control order is an example of a less restrictive measure. However, this does not form part of the operative legislation.

to obtain expert evidence in reaching a determination in relation to risk, though given the nature of the task inherent uncertainties with risk assessments remain.[36]

2.32 Other jurisdictions have sought to minimise these uncertainties by recommending that a 'Risk Management Monitor' be established to undertake a range of functions including developing best practices for risk assessments; developing guidelines and standards; validating new assessment tools; providing for procedures by which experts become accredited for assessing risk; providing education and training in the assessment of risk; and developing risk management plans.[37] Such a body is intended to act as a safeguard in relation to the quality of risk assessments.

Committee's requests for further information from the Attorney-General

2.33 The committee noted that the bill contains certain safeguards which may support an assessment that the regime of continuing detention orders is necessary, reasonable and proportionate; however, its analysis raised questions regarding the adequacy of these safeguards, particularly in light of the UNHRC's determinations in relation to the state-level regimes.

2.34 Accordingly, the committee sought the advice of the Attorney-General as to the extent to which the proposed scheme addresses the specific concerns raised by the UNHRC as set out at [2.23] in respect of existing post-sentencing preventative detention regimes.

2.35 The committee further sought the advice of the Attorney-General as to how the court's consideration of less restrictive measures pursuant to proposed section 105A.7 is intended to operate in practice, including:

- what types of less restrictive measures may be considered by the court;
- what options might be available to the court to assess or make orders in relation to the provision of less restrictive alternatives; and
- whether the Attorney-General will consider whether there are less restrictive alternatives in deciding whether to make an application for a continuing detention order.

2.36 The committee also sought the advice of the Attorney-General as to the feasibility of the following recommendations:

- to address concerns regarding the application of the civil standard of proof to proceedings, that the bill be amended to provide for a criminal standard of proof (as currently is the case under the *Dangerous Sexual Offenders Act 2006* (WA), section 40);

36 See proposed section 105A.6.

37 Victorian Sentencing Advisory Council, High Risk Offenders: Post-sentence preventative detention: final report (2007) 115; NSW Sentencing Council, High-risk Violent Offenders: Sentencing and Post-Custody Management Options (2012).

- to assist in addressing concerns regarding assessments of future 'unacceptable risk', that a Risk Management Monitor be established including the functions outlined at [2.32];
- to assist in addressing concerns regarding the application of retrospective criminal laws (article 15 of the ICCPR), that the bill be amended to only apply to new offenders; and
- that the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime.

2.37 The committee did not receive a response from the Attorney-General within the requested timeframe regarding the human rights issues identified in the initial human rights assessment of the bill.

2.38 The committee therefore restated its request for advice from the Attorney-General in relation to the proposed scheme, including the specific matters set out in its previous request at [2.34], observing the concern that it was not possible to conclude that the proposed regime is compatible with the right to liberty.

2.39 The committee also sought the further advice of the Attorney-General in relation to the following possible amendments which may assist with the human rights compatibility of the scheme:

- to address concerns about whether the court would be empowered to make orders in relation to the provision of less restrictive alternatives, that the bill be amended to provide for alternative orders;
- to assist with concerns about whether continuing detention would be the least rights restrictive in an individual case, that the bill be amended to provide that, prior to making an application for a continuing detention order, the Attorney-General should be satisfied that there is no other less restrictive measure to address any risk;
- to address concerns regarding the application of the civil standard of proof to proceedings, that the bill be amended to provide for a criminal standard of proof (as currently is the case under the *Dangerous Sexual Offenders Act 2006* (WA), section 40);
- to assist in addressing concerns regarding assessments of future 'unacceptable risk', that a Risk Management Monitor be established including the functions outlined at [2.32];
- to assist in addressing concerns regarding the application of retrospective criminal laws (article 15 of the ICCPR), that the bill be amended to only apply to new offenders; and
- that the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime.

2.40 The previous legal analysis raised serious concerns in relation to the proposed continuing detention regime in the context of its assessment against international human rights law.

2.41 The requests by the committee were directed at being able to properly analyse the human rights compatibility of the proposed scheme. This included requests for advice in relation to particular recommendations which may have assisted with the human rights compatibility of the scheme. In the absence of the further advice of the Attorney-General it appeared that the continuing detention regime, in its current form, was likely to be incompatible with the right to liberty (including the right not to be subject to arbitrary detention).

Attorney-General's response

2.42 In his response dated 28 November 2016, the Attorney General states that he intends to move a number of amendments to the bill to implement certain recommendations from the Parliamentary Joint Committee on Intelligence and Security (PJCIS):

- an application for a continuing detention order may be commenced up to 12 months (rather than 6 months) prior to the expiry of a terrorist offender's sentence
- the scope of the offences to which the scheme applies be limited by removing offences against Subdivision B of Division 80 (treason) and offences against subsections 119.7(2) and (3) of the Criminal Code (publishing recruitment advertisements)
- the Attorney-General must apply to the Supreme Court for a review of a continuing detention order (at the end of the period of 12 months after the order began to be in force, or 12 months after the most recent review ended) and that failure to do so will mean that the continuing detention order will cease to be in force
- the Attorney-General must undertake reasonable inquiries to ascertain any facts known to a Commonwealth law enforcement or intelligence or security officer that would reasonably be regarded as supporting a finding that a continuing detention order should not be made (or is no longer required)
- the application for a continuing detention order, or review of a continuing detention order, must include a copy of any material in the possession of the Attorney-General or any statements of facts that the Attorney-General is aware of that would reasonably be regarded as supporting a finding that an order should not be made
- on receiving an application for an interim detention order the Court must hold a hearing where the Court must be satisfied that there are reasonable grounds for considering that a continuing detention order will be made in relation to the terrorist offender

- each party to the proceeding may bring forward their own preferred relevant expert, or experts, and the Court will then determine the admissibility of each expert's evidence
- any responses to questions or information given by the terrorist offender to an expert during an assessment will not be admissible in evidence against the offender in criminal and other civil proceedings
- the criminal history of the offender that the Court must have regard to in making a continuing detention order is confined to convictions for those offences referred to in paragraph 105A.3(1)(a) of the Bill
- if the offender, due to circumstances beyond their control, is unable to obtain legal representation, the Court may stay the proceeding and/or require the Commonwealth to bear all or part of the reasonable cost of the offender's legal representation in the proceeding
- when sentencing an offender convicted under any of the provisions of the Criminal Code to which the continuing detention scheme applies, the sentencing court must warn the offender that an application for continuing detention could be considered
- the continuing detention scheme be subject to a sunset period of 10 years after the day the Bill receives Royal Assent, and
- a control order can be applied for and obtained while an individual is in prison, but the controls imposed by that order would not apply until the person is released.

To enhance oversight of the continuing detention scheme, the amendments also provide that:

- the *Independent National Security Legislation Monitor Act 2010* be amended to require the Independent National Security Legislation Monitor (INSLM) to complete a review of the continuing detention scheme five years after the day the Bill receives Royal Assent, and
- the *Intelligence Services Act 2001* be amended to require that the Committee review the continuing detention scheme six years after the day the Bill receives Royal Assent.[38]

2.43 These amendments, which introduce certain additional safeguards, will improve the legislation. Some of these additional safeguards address aspects of whether a continuing detention order is necessary, reasonable and proportionate in an individual case. The introduction of additional oversight mechanisms and a ten year sunset clause may also assist to improve the proportionality of the regime. This means that the committee will examine any proposed extension to the regime in ten years' time.

38 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

2.44 However, many of the concerns identified in relation to the human rights compatibility of the original bill remain in relation to the amended bill. These are set out below.

2.45 The previous human rights analysis noted that the bill requires that a court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'.[39] This aspect of the bill departs from the regimes in NSW and Queensland that have been found by the UNHRC to be incompatible with the right to liberty, and the bill appears to incorporate some aspects of the test of proportionality under international human rights law.[40] The Attorney-General's response refers to this requirement as assisting to ensure the regime is the least restrictive of human rights. However, the previous analysis identified concerns about how this requirement will work in practice and its adequacy as a safeguard. In response to the committee's request as to what types of less restrictive measures may be considered by the court, the Attorney-General points to control orders. However, as explained in the Attorney-General's response, the court will not be able to make a control order in the alternative:

> The Court that hears an application for a continuing detention order will not be able to make a control order in the alternative. This is due to the fact that currently control orders are issued by federal courts, while applications for a continuing detention order as proposed by the Bill are made to the Supreme Court of a State or Territory. There are also different applicants under each regime, and there are also different threshold requirements which must be met under the respective regimes.[41]

2.46 This gives rise to the concern that, even as amended, the proposed legislation does not enable the court to fully assess or make orders in relation to the provision of less restrictive alternatives. The Attorney-General's response appears to contemplate that this issue might be addressed in the future:

> [The] Independent National Security Legislation Monitor and PJCIS will conduct reviews into the control order regime by 7 September 2017 and 7 March 2018 respectively. Given the detailed and complex policy and practical issues that would need to be explored about the interaction between the proposed post-sentence preventative detention scheme and the control order regime, I suggested to the PJCIS during its inquiry into the Bill that it may be better to defer a detailed consideration of how the

39 Proposed section 105A.7.

40 State regimes currently contain a more limited version of this test; the court is required to consider whether a non-custodial supervision order would be adequate to address the risk in deciding whether to make a continuing detention order: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

41 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

> control order scheme and the proposed scheme under the Bill interact with each other until those reviews occur. The PJCIS agreed.[42]

2.47 As this issue has not been resolved, the bill currently does not appear to ensure that continuing detention is the least rights restrictive approach in each individual case.

2.48 The committee also requested a range of further information from the Attorney-General in relation to the proposed regime. In relation to the standard of proof to be applied in relation to proceedings, the Attorney-General explains the standard as follows:

> *Civil standard of proof*
>
> The 'high degree of probability' standard is a statutory standard which indicates something beyond the traditional civil standard of proof of more probable than not. The existence of the risk of the offender committing a further serious offence must be proved to a higher degree than the normal civil standard of proof, though not to the criminal standard of beyond reasonable doubt. This standard is modelled on the standard used by most States and Territories that have post-sentence preventative detention schemes.[43]

2.49 However, in the case of the NSW and Queensland schemes referred to above, the fact that those schemes contained a civil rather than criminal standard of proof was one of the reasons leading the UNHRC to finding the schemes to be incompatible with the right to be free from arbitrary detention. The Attorney-General's response does not explain, as requested, why the criminal standard of beyond a reasonable doubt as is provided under the *Dangerous Sexual Offenders Act 2006* (WA) section 40 would not be feasible.

2.50 One of the factors identified in the previous human rights analysis of the bill was the inherent difficulties arising from the court being asked to make a finding of 'unacceptable risk' in relation to future behaviour. In relation to the feasibility of establishing a Risk Management Monitor to assist in addressing such concerns, the Attorney-General advises that:

> *Risk Management Monitor*
>
> My Department has convened an Implementation Working Group with legal, corrections and law enforcement representatives from each jurisdiction to progress all outstanding issues relating to implementation of the proposed post sentence preventative detention scheme.
>
> The implementation Working Group has developed an implementation plan in response to PJCIS Recommendation 22. The plan sets the process

42 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

43 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

> and timeframes for the development of the risk assessment tool and ongoing validation. It notes that work will be undertaken in consultation with correctional services, law enforcement and intelligence agencies, and international partners, and ongoing validation will need to be undertaken.
>
> The Working Group may consider whether a Risk Management Monitor or similar will undertake the functions set out at paragraph 1.77 of the Committee's Report 7 of 2016.[44]

2.51 Consideration of these issues going forward is to be welcomed and may improve the scheme. It would, however, be preferable to incorporate any such safeguards from the outset. A significant factor upon which the UNHRC considered that the regimes in NSW and Queensland were incompatible with the right to be free from arbitrary detention was that the continued detention of offenders on the basis of future feared or predicted dangerousness was 'inherently problematic' and required the court to 'make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.' This was notwithstanding that courts under these regimes have access to expert evidence as will be the case under the proposed regime.

2.52 Further, the previous analysis noted that it is likely that interventions might be possible earlier in respect of a particular offender, such as effective de-radicalisation and rehabilitation programs. In relation to the availability of rehabilitation programs and consideration of interventions, the Attorney-General's response states:

> Access to rehabilitation programs is an important part of the scheme. When making a continuing detention order, paragraph 105A.8(e) requires the Court to have regard to any treatment or rehabilitation programs in which the offender has had an opportunity to participate and the level of the offender's participation in any such programs. At present, Corrections Victoria and Corrections New South Wales provide inmates with access to prison based programs which aim to disengage individuals from advocating or using violence to further their goals or beliefs. Jurisdictions other than Victoria and New South Wales have a range of general rehabilitation programs, which are not specifically tailored to violent extremist offenders.
>
> The Commonwealth will continue to consider the availability of such programs with states and territories through the Implementation Working Group.[45]

2.53 Section 105A.8(e) contemplates that the court is to have regard to any treatment or rehabilitation programs in which the offender has had an opportunity

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44 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

45 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

to participate and the level of the offender's participation in any such programs. However, what the proposed legislation does not require the court to consider is whether such interventions were made available and whether they were adequate. Including a requirement to consider the availability and adequacy of this type of intervention, both prior to and after making any continuing detention order, would support an assessment of the proposed regime as proportionate as it would better ensure post-sentence detention is provided as a measure of last resort and is aimed at the detainee's rehabilitation and reintegration into society. The Attorney-General's response provides some information in relation to current programs that are available in NSW and Victoria as well as noting that the government will continue to consider the availability of such programs. The sufficiency of such intervention programs going forward would be an important factor in ensuring the proposed regime is one of last resort in practice.

2.54 In relation to whether the Attorney-General will consider whether there are less restrictive alternatives in deciding whether to make an application for a continuing detention order, the Attorney-General's response provides that:

> Attorney-General's consideration of less restrictive measures
>
> Before the Attorney-General initiated an application for a continuing detention order in relation to a terrorist offender he or she would need to carefully consider all of the information before them. Consideration would also include whether there is a reasonable prospect of success, which would require the Attorney-General to consider whether the risk to the community could be appropriately managed through less restrictive means such as a control order.[46]

2.55 While the Attorney-General's response makes clear that in deciding whether to make an application for a continuing detention order the Attorney-General may consider whether the application has reasonable prospects of success and whether the risk to the community could be appropriately managed through less restrictive means such as a control order, this is not required under the proposed legislation. A requirement for the Attorney-General to consider whether there are less rights restrictive means of managing risk prior to making an application would assist to ensure that the proposed regime imposes a proportionate limit on the right to liberty.

2.56 In summary, the Attorney-General's response has pointed to some additional safeguards that will be incorporated into the bill for the proposed continuing detention scheme, which are to be welcomed. However, it appears that, notwithstanding these amendments, the continuing detention regime remains likely to be assessed as incompatible with the right to liberty (including the right not to be subject to arbitrary detention).

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46 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to Mr Ian Goodenough MP (received 28 November 2016).

Committee response

2.57 **The committee has concluded its examination of this issue.**

2.58 **The proposed continuing detention scheme engages and limits the right to liberty.**

2.59 **The UNHRC has previously found that substantially similar existing preventative detention schemes in Queensland and NSW were incompatible with the right to be free from arbitrary detention and lacked sufficient safeguards.**

2.60 **The Attorney-General's response has pointed to some additional safeguards that will be incorporated into the bill for the proposed continuing detention scheme.**

2.61 **These additional safeguards may address some aspects of whether a continuing detention order is necessary, reasonable and proportionate in an individual case.**

2.62 **However, the preceding legal analysis concludes that the continuing detention regime, as amended, is likely to be incompatible with the right to liberty under international human rights law.**

2.63 **The amendments to the proposed scheme introduce a 10 year sunset period. This means that the committee will have the opportunity to examine any proposed extension to the scheme when it comes before it against the principles articulated above.**

2.64 **Noting the human rights concerns raised by the preceding legal analysis, the committee draws the human rights implications of the bill to the attention of the Parliament.**

Fairer Paid Parental Leave Bill 2016

Purpose	Proposes to amend the *Paid Parental Leave Act 2010* to provide that primary carers of newborn children will no longer receive both employer-provided primary carer leave payments and the full amount of parental leave pay under the government-provided paid parental leave (PPL) scheme; and remove the requirement for employers to provide paid parental leave to eligible employees
Portfolio	Social Services
Introduced	House of Representatives, 20 October 2016
Rights	Social security; work and maternity leave; equality and non-discrimination (see **Appendix 2**)
Previous report	8 of 2016
Status	Concluded

Background

2.65 The committee has previously examined the measures contained in the Paid Parental Leave Amendment Bill 2014 (2014 bill) and Fairer Paid Parental Leave Bill 2015 (2015 bill) in its *Fifth Report of the 44th Parliament*, *Eighth Report of the 44th Parliament*, *Twenty-fifth Report of the 44th Parliament*, and *Thirty-seventh Report of the 44th Parliament*.[1]

2.66 Following the commencement of the 45th Parliament, the Fairer Paid Parental Leave Bill 2016 (the 2016 bill) was reintroduced to the House of Representatives on 20 October 2016. While key measures in the 2016 bill remain the same, there have also been some amendments to this bill (when compared to the measures in the 2015 bill).

2.67 The committee first reported on the 2016 bill in its *Report 8 of 2016*, and requested a response from the Minister for Social Services by 18 November 2016.[2]

2.68 The minister's response to the committee's inquiries was received on 18 November 2016. The response is reproduced in full at **Appendix 3**.

1 The bill reintroduces a measure previously introduced in the Paid Parental Leave Amendment Bill 2014 (2014 bill), which would remove the requirement for employers to provide paid parental leave to eligible employees. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (25 March 2014) 13-16; *Eighth Report of the 44th Parliament* (24 June 2014) 54-57. The committee then considered the Fairer Paid Parental Leave Bill 2015 (2015 bill) in its *Twenty-fifth Report of the 44th Parliament* (11 August 2015) 47-55; and *Thirty-seventh Report of the 44th Parliament* (2 May 2016) 36-44.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 2-5.

Restrictions on paid parental leave scheme

2.69 The previous human rights assessment of the 2014 and 2015 bills considered that the measures engaged the rights to social security, work and maternity leave, and equality and non-discrimination. This is because under the proposed measures primary carers who receive employer-funded parental leave pay would have had their government-funded entitlements reduced or removed. In reducing the social security support available to new parents, the measure is a retrogressive measure for the purposes of international human rights law, and engages the right to social security and the right to maternity leave.[3] Further, where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. As women are the primary recipients of the paid parental leave scheme, reductions to this scheme under the bill would disproportionately impact upon this group and the right to equality and non-discrimination is therefore also engaged.

2.70 On the basis of further information provided by the minister, the previous human rights assessments of the 2014 and 2015 bills concluded that proposed restrictions to the paid parental leave scheme were compatible with human rights.[4]

2.71 However, the assessment of the 2016 bill noted that there were questions as to the proportionality of the reintroduced measures, despite the fact that overall the measures pursued a legitimate objective for the purposes of international human rights law.[5] The provisions in the bill would have taken effect from the first 1 January, 1 April, 1 July or 1 October after the bill received Royal Assent. This meant that under the proposed amendments, it was possible that parents who were already pregnant would no longer qualify for the PPL scheme. The 2015 bill, in comparison, had allowed a period of approximately one year from the date of introduction of the bill for the proposed measures to come into effect.

2.72 As the 2016 bill contained a significant reduction in the period of time before the provisions would take effect from that contained in the earlier versions of the bill, the committee therefore sought the advice of the Minister for Social Services as to whether the limitation was a reasonable and proportionate measure for the achievement of its stated objective, and in particular, why it is necessary to reduce the period of time before the proposed measures will enter into force.

2.73 Subsequently, on 8 February 2017, the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 was introduced into the House of Representatives. Schedule 17 of this bill also seeks to amend the PPL Act to provide that primary caregivers of newborn children will no longer receive

3 For further discussion of retrogressive measures, see *Guidance Note 1* at Appendix 4.

4 See Parliamentary Joint Committee on Human Rights, *Thirty-seventh Report of the 44th Parliament* (2 May 2016) at [2.134], [2.149] and [2.160].

5 For discussion of the likely legitimate objective of the measure, see: Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 4.

both employer provided primary carer leave payments and the full amount of parental leave pay under the government-provided PPL scheme. However, the proposed changes will commence from the first 1 January, 1 April, 1 July or 1 October that is nine months after the date the Act receives Royal Assent, with an earliest commencement date of 1 January 2018.

2.74 As these reintroduced measures will no longer reduce or remove payments to parents who are already pregnant at the time of passage of the bill, they address the committee's previous concerns regarding the proportionality of the measures.

Committee response

2.75 **The committee thanks the Minister for Social Services for his response and has concluded its examination of this issue.**

2.76 **The committee draws its comments in relation to the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 in Chapter 1 of this report to the attention of the Parliament.**

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

Purpose	Seeks to empower the Minister for Immigration and Border Protection to require that certain visa holders complete a revalidation check; provides that certain events that cause a visa that is held and not in effect to cease; and enables the use of contactless technology in the immigration clearance system
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 19 October 2016
Rights	Non-refoulement; effective remedy and liberty; equality and non-discrimination; privacy (see **Appendix 2**)
Previous reports	9 of 2016
Status	Concluded

Background

2.77 The committee first reported on the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (the bill) in its *Report 9 of 2016*, and requested further information from the Minister for Immigration and Border Protection in relation to the human rights issues identified in that report.[1]

2.78 The minister's response to the committee's inquiries was received on 20 January 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Power to require revalidation check relating to a prescribed visa

2.79 Schedule 1 of the bill introduces a new revalidation check framework into the *Migration Act 1958* (Migration Act) which would provide the minister with the discretionary power to make a decision as to whether a person who holds a visa, which is prescribed for the purposes of new subsections 96B(1) or 96E(1), is required to complete a revalidation check for that visa.[2] A 'revalidation check' is 'a check as to whether there is any adverse information relating to a person who holds a visa'.[3] The scope, timing or nature of a revalidation check is otherwise not provided for by the bill. If a revalidation check is not completed, or is not passed, the affected person's visa will cease.

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 9-14.

2 Schedule 1, proposed section 96B.

3 Schedule 1, proposed section 96A(1).

2.80 If the minister thinks it is in the public interest to do so, the minister is also empowered to make a determination, by legislative instrument, for a specified class of persons who are required to complete a revalidation check.[4] This power is a personal non-compellable power and this instrument is not subject to disallowance.

2.81 A person will pass a revalidation check if the minister is satisfied there is no 'adverse information relating to the person'.[5]

2.82 The minister therefore has the power to prescribe any type of visa as being subject to the revalidation check framework. While the explanatory memorandum stated that the measures in Schedule 1 of the bill are designed to initially apply to Chinese nationals who will be granted a new 'longer validity Visitor visa',[6] the bill places no limit on the breadth of this power. Therefore, the proposed measure is not restricted to this class of visa or to any particular group of people.

2.83 The previous analysis identified that the proposed measure engages the right to non-refoulement, as it is possible that the minister's proposed powers regarding the revalidation check could apply to a visa holder or class of visa holders who hold a protection visa, and could lead to a protection visa holder failing the revalidation check and having their visa cancelled. As Schedules 1 and 2 of the bill are administrative measures that would not be reviewable by the Administrative Appeals Tribunal under Part 5 of the Migration Act, the measure also engages the right to an effective remedy. The previous analysis identified that the right to liberty and the right to protection of the family were also engaged.

2.84 As the statement of compatibility did not recognise that these rights were engaged by the measure, the committee therefore sought the advice of the Minister for Immigration and Border Protection as to:

- why there is no limit on the face of the bill as to the type of visas that may be prescribed as being subject to the possibility of a revalidation check; and
- whether, in light of the broad power to prescribe any kind of visa, the measure is compatible with Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family.

2.85 The previous analysis also identified that the measure engages and may limit the right to equality and non-discrimination insofar as there is nothing on the face of the bill that limits the minister's powers to apply the revalidation check to this class

4 Schedule 1, proposed section 96E.

5 Schedule 1, section 96A(2). What constitutes 'adverse information' is not defined in the bill, and is intended to include 'any adverse information *relating* to the person who holds the visa', rather than simply information that is directly about that person – see: explanatory memorandum (EM) 11.

6 EM 5.

of visitor visa for Chinese nationals, contrary to the stated intended application of the provisions.

2.86 In assessing whether the measure is proportionate to managing risks to the Australian community through immigration channels, a possible legitimate objective for the purposes of international human rights law, the previous analysis noted that it is uncertain whether the bill, as currently drafted, will guarantee the right to equality and non-discrimination. This is because there is nothing in the bill that would restrict the use of the power to the stated intention,[7] and the administrative safeguards referred to in the statement of compatibility are less reliable than the protection statutory processes offer.

2.87 The committee therefore also sought the advice of the minister as to whether safeguards could be included in the legislation, such as:

- the minister's power to require a revalidation check be limited to long-term visitor visas;
- the basis upon which a revalidation check may be required be made clear in the legislation, rather than being a matter of ministerial discretion; and
- a requirement that the minister's power to require a person or classes of persons to complete a revalidation check is based on an objective assessment of an increased risk to the Australian community.

Minister's response

2.88 The minister's response addresses each of the matters set out at [2.84] in respect of the compatibility of the measure with multiple rights.

2.89 In response to the committee's question as to why there is no limit on the face of the bill as to the type of visas that may be prescribed as being subject to the possibility of a revalidation check, the minister has advised that the classes of visas that may become subject to a revalidation check would be prescribed through a disallowable instrument, allowing for parliamentary scrutiny over the visas prescribed, and the possibility of disallowance of the instrument.

2.90 The minister also stated that at present, only the new Frequent Traveller stream of the Subclass 600 (Visitor) visa (Frequent Traveller visa) will be prescribed for the purposes of requiring a revalidation check, and this will support the trial of a new longer validity visitor visa, initially only available to Chinese nationals. The minister's response explained why there is no restriction on the class of visas that may be subject to the revalidation check:

> [f]lexibility has been provided to enable other longer validity visa products to be implemented in the future. The revalidation framework may be an appropriate mechanism to manage identified risks in these products. Limiting the types of visas that can be prescribed would restrict the ability

7 Based on objective assessments of risk – see EM, statement of compatibility (SOC) 51.

to use the revalidation framework to reduce red tape and manage risks associated with newly developed or reformed visa products.[8]

2.91 In response to the committee's question as to whether the measure is compatible with Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family, the minister responded that the revalidation framework has no impact on the department's existing protection, cancellation, detention or removal frameworks, and set out that the revalidation framework does not engage Australia's non-refoulement obligations, the right to an effective remedy or the right to liberty for the following reasons:

- where an onshore visa holder does not pass a revalidation check for the visa, this will be referred to a visa cancellation delegate who will consider whether a visa cancellation ground exists under the existing cancellation framework;
- an onshore visa holder will not become an unlawful non-citizen as a direct consequence of not passing a revalidation check, or failing to comply with a revalidation requirement. New subsections 96D(2) and 96H(2) of the bill provide that where an onshore visa holder does not complete or pass a revalidation check, their visa will only cease to be in effect upon departure from Australia;
- an onshore visa holder will not be detained or removed from Australia as a direct consequence of not passing a revalidation check or failing to comply with a revalidation requirement; and
- the revalidation check framework does not prevent a visa holder from applying for a protection visa if they wish to make protection claims while they are still in Australia – therefore the framework does not breach Australia's non-refoulement obligations by requiring a revalidation check, noting that the onus is on the individual to declare that they have protection claims.[9]

2.92 The minister's response also discussed the right to protection of the family, noting that currently only the new Frequent Traveller visa will be prescribed which provides only for a 3-month stay period and a cumulative stay period of no more than 12 months in any 24-month period, and that any other visa classes subject to the revalidation check would first be prescribed by a disallowable instrument.

2.93 It is noted that the prescription of the type of visa subject to a revalidation check will be done through a disallowable instrument. It is generally preferable that limits on the exercise of a broad power are included in primary legislation. However, the committee will examine any instrument that prescribes a visa for the purposes of

8 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 1.

9 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 1-2.

the revalidation check framework for compatibility with human rights. Depending on the type of visa prescribed, the instrument may engage a number of human rights (including the right to protection of the family and freedom of movement).

2.94 The minister's response also addresses each of the matters set out at [2.87] in respect of the right to equality and non-discrimination. The minister did not agree that it would be effective to include the suggested safeguards in the legislation:

- in respect of limiting the revalidation check to long-term visitor visas, the minister stated that '[f]lexibility has been provided to cater for visa products that may be developed or reformed in the future', and noted that new classes of visas made subject to a revalidation check will be prescribed through a disallowable instrument;
- in respect of clarifying the basis of the requirement for a revalidation check in legislation, the minister stated that '[f]lexibility has been provided in the legislation to reduce regulatory burden, whilst managing risks associated with newly developed or reformed visa products'. The minister stated that it is intended that a routine revalidation requirement will be conducted every two years, and that '[s]pecifying a particular interval for a routine revalidation requirement in the legislation would reduce the Department's ability to accommodate changes in government policy that reflect changing global circumstances and may result in an unintended increase in red tape for visa holders.' It was further noted that '[i]f the Parliament considered it was inappropriate for a visa which has been prescribed to be subject to the revalidation check process, a motion could be moved to disallow that regulation'; and
- in response to the committee's suggestion that the legislation include a requirement that the minister's power to require a person or classes of persons to complete a revalidation check be based on an objective assessment of an increased risk to the Australian community, the minister stated that it is intended this power will be exercised in circumstances requiring immediate response, and that:

> [t]he tabling provisions in new subsections 96E(3), 96E(4) and 96E(5) of the Bill ensure that the Parliament can scrutinise the Minister's decision and provide comment on such a determination through a motion of disapproval or other mechanism. This provides additional scrutiny of the Minister's decision.[10]

10 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 4.

2.95 While the flexibility that will apparently be provided by delegated legislation goes to the stated objective of the measure,[11] the minister's response does not address the discussion in the previous analysis that there is nothing in the bill that would restrict the use of the power to the stated intention,[12] and that the administrative safeguards discussed are less reliable than the protection statutory processes offer.

2.96 Further, while proposed subsections 96E(3), 96E(4) and 96E(5) of the bill allow for some oversight by Parliament of the minister's decision to require a person or classes of persons to complete a revalidation check, Parliament has no authority to prevent the minister from exercising this power. As such, as the legislation is currently drafted, the minister could exercise this power in such a way that could have a disproportionate effect on people on the basis of their nationality, religion, race or sex. These provisions are therefore insufficient to protect against a misuse of the minister's power that could have the effect of unjustifiably limiting the right to equality and non-discrimination.

Committee response

2.97 **The committee thanks the Minister for Immigration and Border Protection for his detailed response and has concluded its examination of the issue.**

2.98 **The committee considers that the minister's response has addressed the committee's concerns regarding the right to non-refoulement (the associated right to an effective remedy) and the right to liberty. In respect of other human rights, the committee accepts that the disallowance process for instruments prescribing a visa for the purposes of the revalidation check framework will allow a human rights compatibility assessment to be undertaken once a visa is prescribed.**

2.99 **The measure in section 96E is capable of operating in a manner that is incompatible with the right to equality and non-discrimination. Accordingly, the committee draws this to the attention of the Parliament.**

2.100 **The committee notes that it will continue to examine instruments made pursuant to the proposed measures in order to assess their compatibility with human rights.**

11 EM, SOC 51: namely, to '…allow Australia to appropriately manage and facilitate the travel and movement of visa holders through the provision of up to date advice on potential risks and the application of appropriate measures to reduce the possibility of exposure to risk.

12 Based on objective assessments of risk – see EM, SOC 51.

Migration Legislation Amendment (Regional Processing Cohort) Bill 2016

Purpose	Seeks to amend the *Migration Act 1958* and the Migration Regulations 1994 to prevent 'unauthorised maritime arrivals' and 'transitory persons' who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 from making a valid application for an Australian visa
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 8 November 2016
Rights	Protection of the family; family reunion; children; equality and non-discrimination (see **Appendix 2**)
Previous report	9 of 2016
Status	Concluded

Background

2.101 The committee first reported on the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 (the bill) in its *Report 9 of 2016*, and requested further information from the Minister for Immigration and Border Protection in relation to the human rights issues identified in that report.[1]

2.102 The minister's response to the committee's inquiries was received on 20 January 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Permanent lifetime visa ban for classes of asylum seekers

2.103 The proposed amendments to the *Migration Act 1958* (Migration Act) would serve to prevent asylum seekers who were at least 18 years of age, and were taken to a regional processing country after 19 July 2013,[2] from making a valid application

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 15-22.

2 Regional processing countries include Republic of Nauru (Nauru) or Papua New Guinea (PNG) where off-shore immigration detention centres operate.

for an Australian visa.[3] Such asylum seekers would accordingly face a permanent lifetime ban from obtaining a visa to enter or remain in Australia. If the minister thinks that it is in the public interest to do so, pursuant to the proposed personal, discretionary, non-compellable power of the minister, the minister may determine that the proposed statutory bar to making a valid visa application does not apply to an individual or class of persons in respect of visas specified in the determination.[4]

2.104 The previous analysis identified that the bill engages the right to equality and non-discrimination by its differential treatment of 'cohorts' or groups of people in materially similar situations, that is, people making an application for a visa to enter or remain in Australia. It was noted that the statement of compatibility acknowledged that the proposed ban could amount to differential treatment.[5]

2.105 The previous analysis also noted that the ban would appear to apply a penalty on those who seek asylum and are part of the 'regional processing cohort', contrary to article 31 of the Convention Relating to the Status of Refugees and its Protocol.[6]

2.106 The previous analysis also identified that the ban may also have a disproportionate negative effect on individuals from particular national origins; nationalities; or on the basis of race, which gives rise to concerns regarding indirect discrimination on these grounds.

2.107 The previous analysis stated that, on the information available, the proposed ban does not appear to be compatible with the right to equality and non-discrimination.

2.108 The committee therefore sought the advice of the minister as to whether, in respect to the right to equality and non-discrimination, there is a rational connection

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3 Referred to as the 'regional processing cohort'. See proposed section 5(1) of the *Migration Act 1958* (Migration Act) which defines members of the 'regional processing cohort' as 'unauthorised maritime arrivals' (UMAs) and 'transitory persons' who were taken to a regional processing country after 19 July 2013. UMA is defined in section 5AA(a) of the Migration Act and includes asylum seekers who arrived in the migration zone by boat. A 'transitory person' is defined in section 5(1) of the Migration Act and includes a person who attempted to enter Australia by boat but may have been taken directly to a regional processing country without first having been taken to Australia under Part 3 of the *Maritime Powers Act 2013*.

4 See proposed sections 46A(2)(2AB)-(2AC), 46B(2)(2AA)-(2AB) and proposed section 46A(8) of the Migration Act.

5 On the basis of 'other status' under article 26 of the International Covenant on Civil and Political Rights.

6 Article 31(1) provides: 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

between the limitation and the stated objective, and whether the measure is reasonable and proportionate for the achievement of that objective.

2.109 The previous analysis also identified that the measure engages and limits the right to protection of the family and rights of the child. The measure would foreseeably operate to separate families on the basis that an individual subject to the visa ban will be prevented from joining family members in Australia, including where these family members have been granted a visa to come to or remain in Australia or are Australian citizens. The measure may also impact upon children by preventing an individual subject to a visa ban from being with a child who is an Australian citizen or child who is otherwise entitled to reside in Australia.

2.110 It was noted in the previous analysis that the statement of compatibility acknowledges that the right to protection of the family and rights of the child are engaged and could be limited by the measure, but did not specifically address whether the measure is a permissible limit on the right to protection of the family or rights of the child. It was stated that, on its own, the exercise of the discretionary power by the minister is unlikely to be sufficient to ensure that the measure is a proportionate limit on the right to protection of the family in the context of a blanket visa ban.

2.111 The committee therefore sought the advice of the minister as to whether, in respect to the right to protection of the family and rights of the child, there is a rational connection between the limitation and the stated objective, and whether the measure is reasonable and proportionate for the achievement of that objective.

Minister's response

2.112 In respect of the committee's query about whether the limitation criteria applies to the right to equality and non-discrimination, the minister stated that '[p]ersonal characteristics such as race, ethnicity, nationality (other than not being an Australian citizen), religion, gender or sexual orientation are not criteria for identifying non-citizens in the affected cohort', and that the measure has already been limited insofar as it will not apply to children who were under 18 at the time they were first transferred to a regional processing country, or were born to a member of the affected cohort.[7]

2.113 The minister stated that while differential treatment of the cohort on the basis of 'other status' could amount to a distinction on a prohibited ground under international law, the government's view is that this differential treatment 'is for a legitimate purpose and based on relevant objective criteria and that it is reasonable and proportionate in the circumstances'. This is because the differential treatment is 'a proportionate response to prevent a cohort of non-citizens who have previously sought to circumvent Australia's managed migration program by entering or

7 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 5.

attempting to enter Australia as a [unauthorised maritime arrival] from applying for a visa to enter Australia.'[8]

2.114 The previous analysis identified that to penalise those who seek to enter Australia illegally for the purpose of seeking asylum cannot be a legitimate objective under international law.[9] It is apparent from the minister's response that this is indeed the objective being sought by the measure, as:

> [t]he measures are aimed at further discouraging persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encouraging them to pursue regular migration pathways instead. People smugglers are still active in attempting to encourage illegal migration to Australia and use changes in circumstances and the ongoing media discussion as a basis for proposing the current policy is softening or will soften in the future. The measures are intended to counter this to diminish the ability for people smugglers to attract potential clients.[10]

2.115 Therefore, on the basis of the information provided in the minister's response, and as stated in the previous analysis, the proposed ban does not appear to be compatible with the right to equality and non-discrimination.

2.116 In respect of the committee's query about whether the measure is rationally connected to and proportionate to achieving the stated objective in respect of the right to protection of the family and rights of the child, the minister stated that the flexibility to personally lift the bar and consider the individual circumstances of applicants and their relationships with family members enables the government to 'ensure that it acts consistently with its obligations to families and children in Australia.'[11]

2.117 The minister further noted that the measures are intended to counter the use of people smugglers by asylum seekers in order to 'diminish the ability for people smugglers to attract potential clients.'[12]

2.118 However, as with the statement of compatibility, the minister's response does not specifically address whether the measure is a permissible limit on the right to protection of the family or rights of the child.

2.119 Therefore, and as stated in the previous analysis, the exercise of the discretionary power by the minister is unlikely to be sufficient to ensure that the

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8 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 5.

9 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 18.

10 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 6.

11 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 6.

12 See Appendix 3, letter from the Hon Peter Dutton MP, Minister for Immigration and Border Protection, to the Hon Ian Goodenough MP (received 20 January 2017) 6.

measure is a proportionate limitation on the right to protection of the family in the context of a blanket visa ban.[13] In this respect, it is noted that the default position (without discretionary intervention by the minister) would be for families to remain separated.

Committee response

2.120 **The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of the issue.**

2.121 **Noting the human rights concerns raised above, the committee is unable to conclude that the measure is compatible with the right to equality and non-discrimination, the right to protection of the family and rights of the child. The objective identified in the minister's response, that is, seeking to impose a penalty on those who seek to enter Australia for the purpose of claiming asylum, cannot be a legitimate objective for the purpose of limiting human rights under international law.**

2.122 **The committee draws the human rights implications of the proposed lifetime visa ban for certain classes of asylum seekers to the attention of the Parliament.**

13 See, *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

Privacy Amendment (Re-identification Offence) Bill 2016

Purpose	Seeks to amend the *Privacy Act 1988* to introduce provisions which prohibit conduct related to the re-identification of de-identified personal information published or released by Commonwealth entities
Portfolio	Attorney-General
Introduced	Senate, 12 October 2016
Rights	Fair trial; presumption of innocence; prohibition on retrospective criminal laws (see **Appendix 2**)
Previous report	9 of 2016
Status	Concluded

Background

2.123 The committee first reported on the Privacy Amendment (Re-identification Offence) Bill 2016 (the bill) in its *Report 9 of 2016*, and requested a response from the Attorney-General by 16 December 2016.[1]

2.124 The Attorney-General's response to the committee's inquiries was received on 21 December 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Retrospective effect of the proposed offences

2.125 The bill seeks to act as a deterrent against attempts to re-identify de-identified personal information in published government datasets. It would apply to entities (including small businesses) and individuals.[2]

2.126 Proposed sections 16D, 16E and 16F of the bill all apply to acts that were committed on or after 29 September 2016,[3] this being the date following the Attorney-General's media release that stated the government's intention to introduce a criminal offence of re-identifying de-identified government data.[4] This differs from the usual practice that legislation creating criminal offences operates prospectively from or after the Royal Assent is given to the legislation.

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 23-26.

2 Pursuant to Schedule 1, item 5, paragraph 16CA(1)(a).

3 At Schedule 1, item 5, paragraphs 16D(1)(c), 16E(1)(c) and (e) and 16F(1)(c).

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

2.127 As proposed sections 16D and 16E of the bill would make the proposed offence provisions operate retrospectively, the absolute prohibition on retrospective criminal law is engaged.

2.128 The committee therefore sought the advice of the Attorney-General as to whether consideration has been given to amending paragraphs 16D(1)(c) and 16E(1)(c) such that the offences in these sections operate prospectively, that is, from or after the date of the Royal Assent.

Attorney-General's response

2.129 In his response, the Attorney-General stated that the government 'gave careful consideration' as to whether the proposed offences could operate prospectively from the date of Royal Assent.[5]

2.130 The Attorney-General stated that the amendments were proposed immediately in response to the recently identified vulnerability in the Department of Health's Medicare and Pharmaceutical Benefits Scheme dataset, in order for the government to 'strengthen protections for personal information against re-identification'.[6]

2.131 The Attorney-General noted:

> The release of personal information can have significant consequences for individuals which cannot be easily remedied. In particular, once personal information is made available online it is very difficult - in many cases impossible - to fully retract that information or prevent further access. Applying the offences to conduct occurring from the day after [the media release] provides a strong disincentive to entities who, upon hearing of this intention, may have been tempted to attempt re-identification of any published datasets while the Parliament considers the Bill.[7]

2.132 The Attorney-General also noted that the government took 'swift action to introduce the Bill in the Parliament at the earliest available opportunity' such that the retrospective application will only apply for a short time period.[8]

2.133 The Attorney-General stated that, given these circumstances, the government considered that these 'narrowly prescribed offences' are likely to have a

5 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to the Hon Ian Goodenough MP (received 21 December 2016) 1.

6 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to the Hon Ian Goodenough MP (received 21 December 2016) 1.

7 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to the Hon Ian Goodenough MP (received 21 December 2016) 2.

8 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to the Hon Ian Goodenough MP (received 21 December 2016) 2.

limited retrospective effect, and that entities were clearly given notice that this particular conduct would be made subject to offences from 29 September 2016.[9]

2.134 The previous legal analysis identified that the prohibition on retrospective criminal laws is absolute, which means that it can never be permissibly limited. Therefore, any criminal offence that applies retrospectively breaches the absolute prohibition on retrospective criminal liability, regardless of the reason for the retrospectivity. As a matter of human rights law, this measure is therefore incompatible with the prohibition on retrospective criminal laws.

Committee response

2.135 **The committee thanks the Attorney-General for his response, notes the detailed explanation provided, and has concluded its examination of this issue.**

2.136 **As the prohibition on retrospective criminal laws is absolute under international human rights law, the measure, in applying the criminal offences retrospectively, is incompatible with the prohibition on retrospective criminal laws.**

2.137 **The committee draws the Attorney-General's advice and the human rights implications of the retrospective criminal offences to the attention of the Parliament.**

9 See Appendix 3, letter from Senator the Hon George Brandis, Attorney-General, to the Hon Ian Goodenough MP (received 21 December 2016) 1.

Treasury Laws Amendment (2016 Measures No. 1) Bill 2016

Purpose	Seeks to amend: the *Terrorism Insurance Act 2003* to clarify that losses attributable to terrorist attacks using chemical or biological means are covered by the terrorism insurance scheme; the *Corporations Act 2001* to provide that employee share scheme disclosure documents lodged with the Australian Securities and Investments Commission are not made publicly available for certain start-up companies, and provide protection for retail client money and property held by financial services licensees in relation to over-the-counter derivative products; the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients; and the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to provide income tax relief to eligible New Zealand special category visa holders who are impacted by disasters in Australia
Portfolio	Treasury
Introduced	House of Representatives, 1 December 2016
Right	Fair trial (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.138 The committee first reported on the Treasury Laws Amendment (2016 Measures No. 1) Bill 2016 (the bill) in its *Report 1 of 2017*, and requested a response from the Minister for Revenue and Financial Services by 3 March 2017.[1]

2.139 The minister's response to the committee's inquiries was received on 8 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Civil penalty provisions

2.140 Schedule 5 of the bill introduces a power into the *Corporations Act 2001* (Corporations Act) for the Australian Securities and Investments Commission to make rules by legislative instrument in relation to derivative retail client money.[2] The client money reporting rules may include a penalty amount for a rule, which must not

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 2-4.

2 Schedule 5, item 14, proposed new section 981J.

exceed $1 000 000.[3] This penalty could apply to a natural person. Failure to comply with the rules is a civil penalty provision.[4]

2.141 The initial analysis identified that the measure raised questions as to the compatibility of the measure with the right to a fair trial, insofar as civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) where the penalty may be regarded as 'criminal' for the purposes of international human rights law. This was not addressed in the statement of compatibility.

2.142 The committee therefore sought the advice of the minister as to whether the civil penalty provision may be considered to be criminal in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*) and, if so, whether the measure accords with the right to a fair trial.

Minister's response

2.143 The minister's response applies the committee's *Guidance Note 2* in relation to whether the civil penalty provisions should be considered 'criminal' for the purposes of international human rights law. The minister identifies the following factors which she considers support the view that the client money penalty regime is not 'criminal' in nature:

- the $1 000 000 penalty is not a criminal penalty under Australian law;
- the penalty applies exclusively to licensees and not to the general public;
- there is no criminal sanction if there was a failure to pay the penalty; and
- the size of the maximum penalty is proportionate, 'given the corporate nature of the financial services industry and the amounts of client money that may be handled by licensees subject to the rules.'[5]

2.144 In her response, the minister stated that the government considers that a maximum penalty of $1 000 000 'is appropriate given the scale of potential loss that may result from a contravention', noting that '[t]he market integrity rules have an equivalent penalty regime for the same reason.'[6]

2.145 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law may be a difficult one and often requires a contextual assessment. However, it is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being

3 Schedule 5, item 14, proposed new subsection 981K(3).

4 See Schedule 5, item 14, proposed new subsection 981M(1) in conjunction with existing section 1317E of the *Corporations Act 2001*.

5 See Appendix 3, letter from the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, to the Hon Ian Goodenough MP (received 8 March 2017) 1-2.

6 See Appendix 3, letter from the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, to the Hon Ian Goodenough MP (received 8 March 2017) 1.

classified as 'civil' under Australian domestic law. Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is illegitimate or unjustified. Rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the prohibition against double jeopardy apply.

2.146 In this particular case, on balance, although the proposed civil penalty is substantial, owing to the fact that the penalty will not apply to the general public and reflects the corporate nature of the financial services industry and the amounts of client money that may be handled by licensees subject to the rules, the penalty is unlikely to be criminal in nature.

Committee response

2.147 **The committee thanks the Minister for Revenue and Financial Services for her response and has concluded its examination of this issue.**

2.148 **The committee considers that, although the proposed civil penalty is substantial, the circumstances surrounding its application suggest that it is unlikely that it would be considered criminal for the purposes of international human rights law.**

Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756]

Purpose	Provides safety protections and navigation requirements similar to those established by the *New South Wales Marine Act 1998* (NSW) to apply in the Jervis Bay Territory. Sets minimum safety equipment standards, prescribes requirements for wearing lifejackets and creates offences, including for operating vessels while under the influence of alcohol and drugs in the Jervis Bay Territory
Portfolio	Infrastructure and Regional Development
Authorising legislation	*Jervis Bay Territory Acceptance Act 1915*
Last day to disallow	20 March 2017
Rights	Presumption of innocence; liberty; privacy (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.149 The committee first reported on the Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756] (the Ordinance) in its *Report 1 of 2017*, and requested a response from the Minister for Local Government and Territories by 3 March 2017.[1]

2.150 The Minister for Local Government and Territories' response to the committee's inquiries was received on 3 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Reverse legal burden of proof

2.151 Section 56 of the Ordinance makes it an offence for a person under the age of 18 to either operate a vessel in territory waters or supervise a junior operator, where there is present in his or her breath or blood the youth range prescribed concentration of alcohol. Section 63 makes it a defence for this offence if the defendant proves that, at the time the defendant was operating a vessel or supervising a juvenile operator of the vessel, the presence of alcohol in the defendant's breath or blood of the youth was not caused (in whole or in part) by either the consumption of an alcoholic beverage (other than for religious observance) or consumption or use of any other substance (such as food or medicine) for the purpose of consuming alcohol. This has the effect of reversing the

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 5-12.

legal burden of proof applying to the section 56 offence pursuant to section 13.4 of the *Criminal Code Act 1995* (Criminal Code).

2.152 The previous analysis noted that the measure at section 63 of the Ordinance engages and limits the right to a fair trial by requiring the defendant to prove the legal burden. However, this was not identified in the statement of compatibility.

2.153 The previous analysis noted that the explanatory statement appeared to set out a legitimate objective for the purposes of international human rights law, namely to ensure public safety. While the explanatory statement also set out a possible basis for reversing the evidential burden of proof it did not explain why it is necessary to reverse the legal burden of proof.

2.154 Additionally, the previous analysis noted that while the explanatory statement stated that it is appropriate to reverse the legal burden of proof because of the risks to public safety posed by people affected by alcohol in charge of vessels, there was no explanation as to how reversing the legal burden of proof for the offence would be more effective in reducing such risks as opposed to having the offence in place without any reverse legal burden of proof.

2.155 The committee therefore sought the advice of the Minister for Local Government and Territories as to whether the limitation on the presumption of innocence is rationally connected to, and a proportionate approach to achieving, the stated objective.

Minister's response

2.156 The minister's response advises that the objective of the Ordinance is to 'provide a comprehensive regime for marine safety in the Jervis Bay Territory' and thereby protect the right to life. The minister's response advises that the Ordinance ensures public safety by imposing limits on the permissible level of alcohol present in the breath or blood of persons operating or supervising the operation of vessels in the Jervis Bay Territory (the territory). The minister's response notes that the Ordinance recognises that there are circumstances where such persons will inadvertently or unavoidably have alcohol in their breath or blood and that the defence in section 63 exists to allow for these circumstances.

2.157 The minister's response states that the reversal of the onus of proof in section 63 is appropriate because the circumstances set out in that section are matters that are specifically within the knowledge of the defendant. In relation to applying a legal (rather than an evidential) burden of proof, the minister states that the approach is appropriate because:

- the matters set out in section 63 relate to the purpose of the defendant's consumption of a substance, and would be difficult to prove in the negative if a lower evidential burden applied; and

- the inappropriate use of alcohol and drugs in a marine environment could cause injury or loss of life.[2]

2.158 However, the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) states that the fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant.[3] This statement is made in the context of evidential (rather than legal) burdens of proof: legal reversals of the burden of proof encroach even more significantly on the presumption of innocence, and the Guide has stated that placing a legal burden of proof on a defendant should be kept to a minimum.

2.159 As noted in the initial analysis, the minister's response provides information that may justify the reversal of the *evidential* burden of proof, but has not explained why it is necessary to reverse the *legal* burden of proof. The measure may therefore not be the least rights restrictive way to achieve the stated objective.

Committee response

2.160 **The committee thanks the Minister for Local Government and Territories for her response and has concluded its examination of this issue.**

2.161 **The committee notes that, while the minister's response may justify the reversal of the evidential burden with respect to the defence in section 63, it has not provided sufficient information to justify placing a legal burden on the defendant in these circumstances. The measure may therefore not be the least rights restrictive way to achieve the stated objective.**

2.162 **The committee therefore concludes that the measure, in placing the legal burden of proof on the defendant, unjustifiably limits the right to the presumption of innocence.**

Alcohol and drug testing

2.163 Section 64 of the Ordinance provides that the *Road Transport (Alcohol and Drugs) Act 1977* (Australian Capital Territory) (the ACT Act) applies in relation to a person who operates a vessel in territory waters.

2.164 As the ACT Act applies to the detection of people who drive motor vehicles after consuming alcohol or drugs, offences by those people, and measures for the treatment and rehabilitation of those people, the Ordinance sets out how the ACT Act applies specifically to vessel owners and operators.

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2 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 2.

3 Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011 edition) 50.

2.165 As the Ordinance directly incorporates the law set out in the ACT Act, the previous analysis noted that, in assessing the compatibility of the Ordinance with human rights, the committee is required to assess the compatibility of the incorporated law with human rights.

2.166 The previous analysis noted that the provisions of the ACT Act engage and limit a number of rights, including the right to liberty and the right to privacy.

2.167 With respect to the right to liberty, the previous analysis noted that the statement of compatibility states that while the measure limits the right to liberty it does so 'in circumstances where the person may cause danger to others if they operate a vessel while under the influence of alcohol or drugs.'[4] While ensuring public safety is a legitimate objective for the purposes of international human rights law, the statement of compatibility does not provide further analysis of how the limitation is rationally connected, or proportionate, to the achievement of the stated objective.[5]

2.168 The previous analysis further noted that, in response to a review of the ACT Act, the ACT Human Rights Commission identified that the right not to be arbitrarily detained and arrested may be unlawfully restricted when random drug testing is not predicated on the relevant police officer having a 'reasonable suspicion' on which to ground the request for a sample to test.[6]

2.169 With respect to the right to privacy, the previous analysis noted that the measures appear to be rationally connected to the legitimate objective of ensuring public safety, but that there are questions over whether the limitation on the right to privacy is proportionate to the stated objective. The previous analysis noted that the ACT Human Rights Commission identified that where saliva and blood samples are collected, there need to be measures in place to protect against the possibility that these samples could become public knowledge through their tender in court in criminal proceedings.[7]

2.170 Further, the previous analysis noted that the statement of compatibility does not examine how other rights, such as the right to a fair trial, are engaged and limited by the measure.

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4 Explanatory statement (ES), statement of compatibility (SOC) 4.

5 ES, SOC 4. The statement does quote the UN Human Rights Committee, which states that 'sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws' – see: UN Human Rights Committee, *General Comment 35: Article 9, Right to Liberty and Security of Person* (16 December 2014) [10].

6 ACT Human Rights Commission, Submission to the *Review of the Road Transport (Alcohol and Drugs) Act 1977* (25 July 2008) 3.

7 ACT Human Rights Commission, Submission to the *Review of the Road Transport (Alcohol and Drugs) Act 1977* (25 July 2008) 5.

2.171 The committee therefore sought the advice of the Minister for Local Government and Territories as to the extent to which the ACT Act complies with international human rights law.

Minister's response

2.172 Noting that the ACT Act was previously subject to human rights scrutiny by the ACT Human Rights Commission, the minister's response states that it is not established practice for ACT laws applied to the Jervis Bay Territory to be scrutinised for human rights compatibility at the Commonwealth level. The minister's response advises that the rationale for incorporating ACT Act provisions that relate to road transport into provisions in the Ordinance is that officers of the Australian Federal Police are familiar with the provisions and it is desirable for similar procedures to be adopted in the marine environment for consistency.[8]

2.173 With respect to incorporated ACT measures that engage the right to liberty (by allowing police officers to take persons into custody in certain circumstances), the minister's response states that these measures are a rational and proportionate response to reduce the likelihood of persons injuring themselves and others.[9]

2.174 With respect to incorporated measures that allow alcohol and drug testing on persons operating vehicles in territory waters, the minister's response notes that random drug testing has a deterrent effect on individuals unlawfully using such substances, resulting in safety benefits accruing to the general public. The response also states that similar justifications apply to provisions that make it an offence to refuse to undergo an alcohol or drug test. The minister's response concludes that consequential behavioural changes brought about by these measures indicate that they are the least rights restrictive way to protect the public.[10]

2.175 While deterrence of behaviour that causes a risk to public safety may be a legitimate objective for the purposes of international human rights law, with respect to the right to privacy, the minister's response provides no information about what safeguards are available in the ACT Act to protect the right to privacy for persons who are subject to alcohol and drug testing.

2.176 It is noted that the ACT Act contains some safeguards relating to the collection and retention of samples. For example section 16D requires the destruction of samples and sections 13 and 13F provide precautions for privacy in relation to breath and oral fluid analysis. In addition, section 18B provides that

8 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 4.

9 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 3.

10 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 3.

samples may only be used for four restricted purposes.[11] However, section 64(2) of the Ordinance exempts section 18B of the ACT Act from applying in the territory. The minister's response does not provide information as to whether an equivalent safeguard will apply to samples taken in the territory.

Committee response

2.177 **The committee thanks the Minister for Local Government and Territories for her response and has concluded its examination of this issue.**

2.178 **However, noting the concerns raised around measures that incorporate ACT laws which limit human rights, the committee considers that the minister's response has not sufficiently addressed the question of whether the incorporation of ACT laws is the least rights restrictive approach to achieve the stated objective of the Ordinance. In order to avoid potential incompatibility with the right to privacy, the committee considers it may be appropriate if the Ordinance incorporated further safeguards around the retention, destruction and use of samples.**

Search and entry powers

2.179 Section 83 of the Ordinance empowers a police officer to board a vessel and exercise monitoring powers,[12] for the purpose of: finding out whether the Ordinance and the rules are being, or have been, complied with;[13] investigating a marine accident; conducting a marine safety operation; or asking questions about the nature and operations of the vessel.[14]

2.180 The previous analysis noted that the statement of compatibility recognises that the right to privacy is engaged by the measure,[15] and that the objective of enabling police officers to carry out investigations and enforcement activities effectively is likely to be regarded as a legitimate objective for the purposes of international human rights law. However, the previous analysis questioned whether the limitation is proportionate to the stated objective, in particular, whether it is the least rights restrictive approach.

2.181 The previous analysis noted that while the statement of compatibility provides that the search and entry powers under the Ordinance are limited to the

11 These purposes are: (a) analysis of the sample in accordance with the ACT Act; (b) research relating to drivers of motor vehicles affected by drugs, but only if identifying information about the person who provided the sample cannot be ascertained from it; (c) a proceeding for an offence of culpable driving; and (d) a proceeding for an offence against the *Road Transport (Safety and Traffic Management) Act 1999*, section 7 (furious, reckless or dangerous driving).

12 Set out at section 87.

13 Made pursuant to section 118.

14 The power to require the master of the vessel to answer questions are set out at section 86.

15 ES, SOC 4.

Australian Federal Police, and may only be exercised in limited circumstances,[16] section 92 of the Ordinance provides that a police officer may be 'assisted by other persons in exercising powers or performing functions or duties under this Part, if that assistance is necessary and reasonable'. The previous analysis noted that this would appear to allow the police to confer on *any* person the power to assist in the exercise of these coercive powers.

2.182 The previous analysis also noted that section 83 confers a range of broad purposes for the exercise of these powers that do not require the police officer to have any suspicion at all as to whether an offence or a breach of the rules may have been, or may be being, committed. The previous analysis also noted that there are no requirements that the police officer first seek the consent of the occupier before boarding and that, if consent is not granted, a warrant be sought before search and entry powers are exercised where it is reasonably practicable to do so.

2.183 The committee therefore sought the advice of the Minister for Local Government and Territories as to whether the limitation is proportionate to achieving its objective, including whether there are less rights restrictive ways to achieve the stated objective, such as:

- limiting the exercise of the powers to police officers (and not 'persons assisting' as under section 92); and
- requiring a police officer to seek the consent of the occupier of the vessel before exercising the search and entry powers; and
- if consent is not granted, ensuring the search and entry powers can only be exercised when the police officer holds a reasonable suspicion that the Ordinance and rules may not be being complied with and to investigate accidents or conduct investigations; and
- that the default position is that a warrant be obtained to exercise these powers if consent is not granted, unless it is not reasonably practicable to obtain a search warrant.

Minister's response

2.184 With respect to section 92, and 'persons assisting' police officers, the minister's response advises that the exercise of such a power would be 'extremely rare' in practice. The minister further states that persons assisting a police officer must at all times act at the direction of the police officer they are assisting, and that the police officer is accountable for the actions of the people from whom they have requested assistance. The minister's response concludes that she considers that, on this basis, there is no reason to limit powers under section 64 to police officers.[17]

16 Set out in subsection 83(1).

17 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 5.

2.185 It should be noted in this regard that there is no requirement in the instrument that persons assisting a police officer must act at the direction of the officer they are assisting, and the minister's response does not provide information as to the consequences of not following a police officer's direction.

2.186 With respect to search and entry powers more broadly, the minister's response states that it is reasonable to require operators of vessels to permit entry by police officers for marine safety purposes because such persons are aware that their vessels are subject to regulatory oversight and therefore implicitly accept that their compliance with regulatory requirements will be monitored, including through entry into premises, and so it is not necessary for a police officer to seek consent to enter.[18]

2.187 While it may be accepted that those operating a vessel are subject to regulatory oversight this does not mean that the owners or operators of those vessels waive their right to privacy. The minister's response refers to the Attorney-General's Department's *Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers* (the Guide) which provides that persons who obtain a licence or registration for non-residential premises can be taken to accept entry to those premises for the purposes of ensuring compliance with licensing or registration conditions. However, the minister's response does not go on to consider the next paragraph in the Guide which states that in respect of licensed premises the applicable legislation should impose as a condition of the licence consent to entry onto non-residential premises where the licensed activity happens.[19]

2.188 The Ordinance does not provide that simply by registering a vessel the owner or operator of that vessel has consented to entry for the purpose of ensuring compliance.

2.189 The minister's response also states that, while in practice the relevant powers will normally be exercised where a police officer has established that a reasonable suspicion exists, in 'exceptional rare circumstances' police officers should be able to intervene without first determining whether reasonable suspicion exists. The minister's response concludes that she does not consider it necessary for the Ordinance to require that a police officer must hold a reasonable suspicion before entering and searching a vessel as to do so may impact on the capacity of a police officer to ensure users of the territory marine environment are safe.[20]

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18 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 6.

19 Attorney General's Department, Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers, September 2011, 85.

20 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 6.

2.190 Finally, the minister's response states that, as vessels are able to leave territory waters in a short timeframe, it is generally impractical for a police officer to obtain a warrant, and that requiring a police officer to do so would 'severely limit' their capacity to undertake their safety regulatory role in a responsive manner. The minister concludes that the limitations on the right to privacy imposed by sections 83 and 92 are the least restrictive way to protect the right to life of users of the territory marine environment.[21]

2.191 While recognising the importance of public safety, and that measures pursuing a public safety objective could promote the right to life, consideration of the proportionality of measures in the Ordinance that limit human rights must balance the likelihood of an event occurring that may cause death or injury against the impact of those measures on other rights, such as the right to privacy. In this respect, the minister's response does not demonstrate how the impact of requiring a police officer to determine whether a reasonable suspicion exists or attempt to obtain a warrant where reasonable before exercising these coercive powers would so 'severely limit' the capacity of police officers to protect the safety of users of the marine environment as to limit the right to life. It therefore does not appear that the measures are the least rights restrictive approach to achieve the stated objective.

Committee response

2.192 **The committee thanks the Minister for Local Government and Territories for her response and has concluded its examination of this issue.**

2.193 **However, the committee considers that the minister's response has not sufficiently addressed the question of whether the search and entry powers are the least rights restrictive approach to achieve the stated objective of the Ordinance. In order to avoid potential incompatibility with the right to privacy, the committee considers it may be appropriate if the Ordinance:**

- **limited the exercise of the powers to police officers (and not 'persons assisting' as under section 92), or at a minimum, required that the persons assisting must act at the direction of the police officer;**
- **required a police officer to seek the consent of the occupier of the vessel before exercising the search and entry powers;**
- **if consent is not granted, ensured the search and entry powers can only be exercised when the police officer holds a reasonable suspicion that the Ordinance and rules may not be being complied with and to investigate accidents or conduct investigations; and**

21 See Appendix 3, letter from Senator the Hon Fiona Nash, Minister for Local Government and Territories, to the Hon Ian Goodenough MP (received 3 March 2017) 7.

- **that the default position is that a warrant be obtained to exercise these powers if consent is not granted, unless it is not reasonably practicable to obtain a search warrant.**

Narcotic Drugs Regulation 2016 [F2016L01613]

Purpose	Makes regulations that are necessary for carrying out, or giving effect to, the regulatory framework for the licencing of the cultivation of cannabis and the production of cannabis and cannabis resins for medicinal and scientific purposes, as well as in relation to the manufacture of drugs
Portfolio	Health
Authorising legislation	*Narcotic Drugs Act 1967*
Last day to disallow	13 February 2017
Rights	Work; equality and non-discrimination (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.194 The committee first reported on the instrument in its *Report 1 of 2017*, and requested a response from the Minister for Health by 3 March 2017.[1]

2.195 The minister's response to the committee's inquiries was received on 6 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Requirement to only engage 'suitable persons'

2.196 The Narcotic Drugs Regulation 2016 [F2016L01613] (the regulation) implements part of the regulatory framework for licensing the cultivation, production and manufacture of medicinal cannabis under the *Narcotic Drugs Act 1967* (the Act).[2]

2.197 The regulation prescribes a class of 'unsuitable persons' whom a licence holder (with authority to cultivate, produce or manufacture medical cannabis) must take all reasonable steps not to employ or engage to carry out activities authorised by the licence.[3] These include persons who are undertaking or have undertaken treatment for drug addiction, persons who have a drug addiction, or persons who are undischarged bankrupts. In the context of employing or engaging suitable staff, the regulation also prescribes circumstances in which a person is taken not to be suitable

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 17-19.

2 Amended by the *Narcotic Drugs Amendment Act 2016* to introduce the new framework.

3 See: new subregulation 18(1), prescribed pursuant to subsection 10F(1) of the Act.

to carry out activities authorised by a cannabis licence at a particular time.[4] These include where, in the five years before the person is to be employed, the person has used illicit drugs; been convicted of a drug related offence; or been convicted of an offence against a law of the Commonwealth or a state or territory that involved theft, or that was punishable by a maximum penalty of imprisonment of three months or more.

2.198 The committee noted that the right to work and the right to equality and non-discrimination are engaged and limited by the prohibition on medicinal cannabis licence holders employing or engaging prescribed 'unsuitable persons', and the prevention of certain persons (who in the five years prior to employment or engagement have been subject to certain prescribed circumstances) from carrying out activities authorised by a cannabis licence.

2.199 As the statement of compatibility failed to discuss how the measure engages and limits the right to work and the right to equality and non-discrimination, the committee sought the advice of the Minister for Health as to whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law; how the measure is effective to achieve (that is, rationally connected to) that objective; and whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.200 In his response, the minister referred the committee to the statement of compatibility for the *Narcotic Drugs Amendment Act 2016* (Amendment Act).

2.201 In respect to the right to work, the minister referred to the discussion in the statement of compatibility for the Amendment Act regarding the statutory condition under sections 10F and 12H of the Act, which require a licence holder only employ suitable persons. The statement provided that, for the sake of the 'protection of public health and to help meet Australia's international obligation to control diversion', the provision 'is designed to address the risk of infiltration by organised crime below management level', noting that '[e]mployees will have access to highly divertible cannabis material with a high "street value"'.[5]

2.202 In respect to the right to equality and non-discrimination, the minister stated that the discrimination and prevention of 'unsuitable persons' from being employed is:

> …necessary to address the high risk of diversion of cannabis and other drugs to the illicit drug market, ensure that the medicinal cannabis products made available to the Australian patients are from licit activities

4 See: new subregulation 18(2), prescribed pursuant to subsection 10F(2) of the Act. A 'drug related offence' is defined at regulation 4.

5 See Appendix 3, letter from the Hon Greg Hunt MP, Minister for Health, to the Hon Ian Goodenough MP (received 6 March 2017) 1.

> and licit sources and comply with Australia's obligations under the Single Convention on Narcotic Drugs as they relate to limiting the risk of diversion of drugs.[6]

2.203 The protection of public health and compliance with Australia's international obligation to control diversion would appear to be a legitimate objective for the purposes of international human rights law. The minister's response provides some information as to why it is considered necessary to prescribe each particular class of people in order to achieve the legitimate objective of the measure:

> These persons will be physically handling, and will have direct access to, highly divertible cannabis material with high 'street value'. A person who has a drug addiction, is undertaking or has undertaken treatment for drug addiction, undischarged bankrupts, has used illicit drugs, been convicted for a drug related offence or been convicted of an offence that involved theft, would be unsuitable to engage in activities such as cultivation, production and manufacture of drugs.

2.204 It is acknowledged that in light of the types of circumstances that are prescribed, the nature of the industry and associated risks, it may be that each prescribed category is necessary. The minister's response further identifies that the circumstances in which a person is not taken to be suitable under subsections 18(2) and 39(2) of the regulation are limited to a period of five years, and are not indefinite. Accordingly, on balance, it appears that the measure is likely to be a proportionate limit on the right to work and the right to equality and non-discrimination.

Committee response

2.205 **The committee thanks the Minister for Health for his response and has concluded its examination of this issue.**

2.206 **The preceding analysis indicates that measure is likely to be compatible with the right to work and the right to equality and non-discrimination.**

6 See Appendix 3, letter from the Hon Greg Hunt MP, Minister for Health, to the Hon Ian Goodenough MP (received 6 March 2017), 2.

Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016 [F2016L01649]

Purpose	Amends the Parliamentary Service Determination 2013 to remove the requirement for the Commissioner to endorse a particular certification in relation to the selection process for SES vacancies, remove the requirement for the Commissioner to be satisfied that certain requirements have been met before a Secretary may give notice to an SES employee, and remove the requirement that certain employment decisions are to be notified in the Public Service Gazette
Portfolio	Prime Minister and Cabinet
Authorising legislation	*Parliamentary Service Act 1999*
Last day to disallow	13 February 2017
Right	Privacy (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.207 The committee first reported on the instrument in its *Report 1 of 2017*, and requested a response from the Presiding Officers by 3 March 2017.[1]

2.208 The Presiding Officers' response to the committee's inquiries was received on 3 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Publishing termination decision for breach of the Code of Conduct

2.209 The Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016 [F2016L01649] (the 2016 Determination) was made partly in response to issues identified in relation to the Parliamentary Service Determination 2013 [F2013L01201] (2013 Determination).

2.210 The 2016 Determination raises similar issues to those recently considered by the committee in relation to the Australian Public Service Commissioner's Directions 2016 [F2016L01430] (the 2016 APS Directions).[2]

1 Parliamentary Joint Committee on Human Rights, Report 1 of 2017 (16 February 2017) 20-23.

2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

2.211 The 2016 Determination, which amends the 2013 Determination, addresses many of the concerns raised by the committee in its *First Report of the 44th Parliament* in respect of the 2013 Determination about the limitation on the right to privacy and the rights of persons with disabilities (in relation to the notification of the termination of employment on the ground of physical or mental incapacity).[3] The amendments made by the 2016 Determination reflect the provisions of the 2016 APS Directions.

2.212 In its recent consideration of the 2016 APS Directions, the committee raised concerns with respect to the requirement to notify termination on the grounds of the breach of the Code of Conduct in the Gazette, which engages and limits the right to privacy.[4]

2.213 In his response to the committee's concerns, the Australian Public Service Commissioner (the Commissioner) committed to undertake a review into the necessity of publicly notifying information about termination decisions on the grounds of breach of the Code of Conduct, and will notify the committee of the findings by June 2017.[5]

2.214 The initial human rights analysis identified that the committee's concerns with respect to the right to privacy in the 2016 APS Directions also applied to the 2016 Determination.

2.215 Noting the advice of the Commissioner with respect to the APS Directions 2016, the committee therefore sought the advice of the Presiding Officers as to whether the 2016 Determination will also be reviewed in line with the Commissioner's review into the 2016 APS Directions.

Presiding Officers' response

2.216 The Presiding Officers' response notes that the Australian Public Service Commission is conducting a review of the necessity to gazette information in relation to termination decisions made on the grounds of a breach of the Code of Conduct.

2.217 The Presiding Officers' response notes that a further examination of the 2016 Determination will be conducted in light of the findings of this review.

Committee response

2.218 **The committee thanks the Presiding Officers for their response and has concluded its examination of this issue.**

2.219 **The committee notes that the Presiding Officers will further examine the 2016 Determination in light of the Australian Public Service Commission's review into the 2016 APS Directions.**

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3 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 157-159.

4 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

5 Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 16.

2.220 **The committee will assess any further changes made to the 2016 Determination for their compatibility with international human rights law.**

Transport Security Legislation Amendment (Identity Security) Regulation 2016 [F2016L01656]

Purpose	Amends the Aviation Transport Security Regulations 2005 and the Maritime Transport and Offshore Facilities Security Regulations 2003 with respect to the aviation security identification card and the maritime security identification card schemes
Portfolio	Infrastructure and Regional Development
Authorising legislation	*Aviation Transport Security Act 2004* and *Maritime Transport and Offshore Facilities Security Act 2003*
Last day to disallow	13 February 2017
Right	Presumption of innocence (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.221 The committee first reported on the instrument in its *Report 1 of 2017*, and requested a response from the Minister for Infrastructure and Transport by 3 March 2017.[1]

2.222 The minister's response to the committee's inquiries was received on 3 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Strict liability offences

2.223 The Aviation Transport Security Regulations 2005 [F2016C01035] and the Maritime Transport and Offshore Facilities Security Regulations 2003 [F2016C00956] (the regulations) establish the regulatory frameworks for the aviation security identification card (ASIC) and the maritime security identification card (MSIC) schemes.

2.224 Subregulation 6.06(5) of Schedule 1, Part 1 to the Transport Security Legislation Amendment (Identity Security) Regulation 2016 [F2016L01656] (the regulation) imposes a strict liability offence of 20 penalty units on an issuing body,[2] which may be a natural person, in respect of an ASIC program where the

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 24-25.

2 Defined in regulation 6.01 of the Aviation Transport Security Regulations 2005 as a person or agency that is authorised to issue ASICs; or that is a transitional issuing body.

issuing body becomes aware of a change in a specified detail,[3] and the issuing body does not, within 5 working days after becoming aware of the change, notify the Secretary in writing of the detail as changed.

2.225 An equivalent offence is imposed on an issuing body[4] by Schedule 2, Part 1, subregulation 6.07Q(5) of the regulation in respect of an MSIC plan.

2.226 Strict liability offences limit the right to be presumed innocent until proven guilty 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.

2.227 The statement of compatibility for the regulation does not recognise that the right to the presumption of innocence is engaged and limited by imposing strict liability offences.

2.228 The committee drew to the attention of the minister the requirement for the preparation of statements of compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011*, and the committee's expectations in relation to the preparation of such statements as set out in its *Guidance Note 1*.

2.229 The committee also noted that its *Guidance Note 2* sets out information specific to strict liability and absolute liability offences.

2.230 The committee therefore sought the advice of the Minister for Infrastructure and Transport as to whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law; how the measure is effective to achieve (that is, rationally connected to) that objective; and whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

3 Such as the issuing body's name, or ABN, CAN or ARBN.

4 Defined in regulation 6.07B of the Maritime Transport and Offshore Facilities Security Regulations 2003 as a person or body that is authorised to issue MSICs; or that is a transitional issuing body.

Minister's response

2.231 In his response, the minister stated that it is crucial that the Department of Infrastructure and Regional Development (the department), as the transport security regulator, has the most up-to-date contact information for issuing bodies, noting that the regulations prescribe multiple circumstances when the Secretary of the department 'must contact an issuing body, including for security-sensitive purposes.'[5] The minister also stated that:

> The requirement for issuing bodies to update their contact (or company) details is intrinsically linked to protecting aviation and maritime infrastructure from unlawful interference (including terrorism).[6]

2.232 The minister also noted that since 2012 the department had consulted with industry on changes to enhance issuing body practices, and specifically, from 2014 to 2016, consulted with industry in respect of the draft regulation. The minister noted that '[n]o issuing body expressed concern about the inclusion of the offence in the new Regulation.'[7]

2.233 Whether or not industry agrees with the changes to the regulations does not signify the compatibility of the measure with international human rights law. However, as noted above, strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective, and are a proportionate means of achieving that objective.

2.234 While not directly addressed in the minister's response, the protection of aviation and maritime infrastructure from unlawful interference, including terrorism, appears to constitute a legitimate objective for the purpose of international human rights law. Further explanation in the minister's response as to why a strict liability offence rather than a regular offence provision was necessary to address this apparent objective would have been useful to the committee in assessing the human rights compatibility of the measure including matters of proportionality.

2.235 However, on balance, given that the defence of mistake of fact will still be available, the particular context of the offences and that the penalties for these

5 See Appendix 3, letter from the Hon Darren Chester MP, Minister for Infrastructure and Transport, to the Hon Ian Goodenough MP (received 3 March 2017), 1.

6 See Appendix 3, letter from the Hon Darren Chester MP, Minister for Infrastructure and Transport, to the Hon Ian Goodenough MP (received 3 March 2017), 1.

7 See Appendix 3, letter from the Hon Darren Chester MP, Minister for Infrastructure and Transport, to the Hon Ian Goodenough MP (received 3 March 2017), 2.

offences impose only a fine of 20 penalty units (rather than imprisonment), it is likely that the limitation is proportionate to the objective being sought.[8]

Committee response

2.236 **The committee thanks the Minister for Infrastructure and Transport for his response and has concluded its examination of this issue.**

2.237 **On balance the committee considers that the strict liability offence in this case is likely to be compatible with the presumption of innocence.**

Mr Ian Goodenough MP

Chair

8 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 23: The application of strict liability to all physical elements of an offence is likely to be considered appropriate where the offence is not punishable by imprisonment, and the offence is punishable by a fine of up to 60 penalty units for an individual, or 300 penalty units for a body corporate.