



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.¹ **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationaly connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 20 and 23 March 2017 (consideration of five bills from this period has been deferred);¹
- legislative instruments received between 17 February and 9 March 2017 (consideration of two legislative instruments from this period has been deferred);² and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

1.3 The committee has also concluded its examination of the previously deferred Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017 and makes no further comment on the bill.³

Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.⁴ Instruments raising human rights concerns are identified in this chapter.

1.5 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 117.

4 See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

Response required

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

Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 [F2016L01934]

Purpose	Specifies the amounts to be paid to the states and territories to support service delivery in the areas of schools, skills and workforce development, disability and housing
Portfolio	Treasury
Authorising legislation	<i>Federal Financial Relations Act 2009</i>
Last day to disallow	Exempt
Rights	Equality and non-discrimination; health; social security; adequate standard of living; children; education; work (see Appendix 2)
Status	Seeking additional information

Background

1.7 The committee has previously examined a number of related Federal Financial Relations (National Specific Purpose Payments) Determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the Treasurer as to whether they were compatible with Australia's human rights obligations.¹

1.8 Based on this additional information provided by the Treasurer, the committee was able to conclude that these determinations were compatible with human rights.²

Payments to the states and territories for the provision of health, education, employment, housing and disability services

1.9 The Intergovernmental Agreement on Federal Financial Relations (the IGA) is an agreement providing for a range of payments from the Commonwealth government to the states and territories. These include National Specific Purpose

1 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 10-14; *Thirtieth report of the 44th Parliament* (10 November 2015) 102; and *Thirty-fourth report of the 44th Parliament* (23 February 2016) 115-119.

2 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) 119.

Payments (NSPPs), which are financial contributions to support state and territory service delivery in the areas of schools, skills and workforce development, disability and housing.

1.10 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each NSPP, the manner in which these total amounts are indexed, and the manner in which these amounts are divided between the states and territories.

1.11 Payments under the determinations assist in the delivery of services by the states and territories in the areas of health, education, employment, disability and housing. Accordingly, the determinations engage a number of human rights.

Compatibility of the measure with multiple rights

1.12 As noted above, the committee has considered similar NSPP determinations in a number of previous reports.

1.13 Under international human rights law, Australia has obligations to respect, protect and fulfil human rights. This includes specific obligations to progressively realise economic, social and cultural (ESC) rights using the maximum of resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.

1.14 As such, where the Commonwealth seeks to reduce the amount of funding pursuant to NSPPs, such reductions in expenditure may amount to retrogression or limitations on rights. Any backward step in the level of attainment of such rights therefore needs to be justified for the purposes of international human rights law.

1.15 The statement of compatibility for the Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 (the determination) simply states that the determination 'is compatible with relevant human rights'.³ This mirrors information provided in the statements of compatibility for NSPP determinations previously considered by the committee.

1.16 In the committee's previous assessment of similar NSPP determinations, in response to the committee's request, the Treasurer provided additional information which included a comparison of funding amounts for the various NSPPs over recent years. This additional information allowed the committee to conclude that there had been no reduction in funding allocation to the NSPPs in these determinations, and as such, that these payments would not have a retrogressive impact on human rights.

1.17 It is relevant to the committee's consideration of the determination whether there has been any reduction in funding allocation to the NSPPs since the committee's last assessment at the beginning of 2016. This information has not been provided in the statement of compatibility.

3 Explanatory statement, statement of compatibility 2.

Committee comment

1.18 The preceding analysis raises questions as to whether the determination is compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights. Accordingly, the committee requests the Treasurer's advice as to whether:

- there has been any reduction in the allocation of funding towards NSPPs since its last assessment of related determinations;**
- the determination does or does not support the progressive realisation of economic, social and cultural rights (such as the rights to health and education); and**
- if there has been a reduction in the allocation of funding towards NSPPs, whether this is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights.**

Reverse burden offences and strict liability offences - various

Legislation	<ul style="list-style-type: none"> • Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017;¹ • Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017;² • Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017.³
Rights	Fair trial; presumption of innocence (see Appendix 2)
Status	Seeking additional information

Legislation containing reverse burden offences and strict liability offences

1.19 These bills contain reverse burden offences and strict liability offences. Given the similar issues that they raise, these bills are dealt with collectively in this report entry.

Compatibility of strict liability offences with the right to be presumed innocent

1.20 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent usually requires that the prosecution prove each element of the offence (including fault elements and physical elements). Strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need for the prosecution to prove fault. In the case of a strict liability offence, the prosecution is only required to prove the physical elements of the offence. The defence of honest and reasonable mistake of fact is available to the defendant. Strict liability may apply to whole offences or to elements of offences.

1.21 Strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally

-
- 1 Government bill. See, reverse burden in proposed section 270 (item 30) (this particular reverse burden offence is not addressed in the statement of compatibility); and strict liability offence in proposed section 299A (item 126) (the statement of compatibility correctly identifies this issue in relation to strict liability offences).
 - 2 Private member's bill. See, strict liability offence in proposed section 168A(3) (item 4); and reverse burden offence in proposed section 168A(1)-(2) (the statement of compatibility does not provide an assessment of this reverse burden and strict liability offence).
 - 3 Government bill. See, strict liability offences in proposed sections 26BCC(3)-(4) (item 14), reverse burden offence at sections 26BCC(5)-(9) (statement of compatibility does not provide an assessment of reverse burden offences or strict liability offences and does not identify that any rights are engaged and limited).

connected to that objective and are a proportionate means of achieving that objective. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences including that:

It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.⁴

1.22 Each of the bills identified above either has not addressed, or has not sufficiently addressed, whether the strict liability offence is a permissible limit on human rights.

1.23 It is noted that the Senate Standing Committee on the Scrutiny of Bills also has a mandate in relation to strict liability offences and will generally write to legislation proponents asking whether such strict liability provisions are justifiable where the issue has been insufficiently addressed in the explanatory materials accompanying the bill. Further analysis in relation to specific strict liability offences is provided in that committee's *Alert Digest*. The Attorney-General's Department has also issued relevant guidance material in relation to strict liability offences.⁵

Committee comment

1.24 Noting that strict liability offences engage and limit the right to be presumed innocent, the preceding legal analysis raises questions about whether each strict liability offence is a permissible limitation on this right. The statement of compatibility for each of the bills identified above has either not addressed, or has not sufficiently addressed, whether the relevant strict liability offence is a permissible limitation on human rights.

1.25 The committee draws to the attention of legislation proponents its *Guidance Note 2* which sets out information specific to strict liability and absolute liability offences.

1.26 The committee requests the legislation proponent in each case to provide further information as to:

- whether the strict liability offence is aimed at achieving a legitimate objective for the purposes of international human rights law;**

4 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

5 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) at: <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>.

- **how the strict liability offence 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.**

Compatibility of reverse burden offences with the right to be presumed innocent

1.27 As noted above, article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

1.28 An offence provision which requires the defendant to carry an evidential or legal burden of proof (commonly referred to as 'a reverse burden') with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in legislation, these defences or exceptions may effectively reverse the burden of proof and must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

1.29 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

1.30 The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences in order to assist legislation proponents (including reverse burden offences). *Guidance Note 2* provides in relation to reverse burden offences that:

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.⁶

1.31 Each of the bills identified above has not addressed whether the relevant reverse burden is a permissible limitation on human rights.

1.32 It is noted that the Senate Standing Committee on the Scrutiny of Bills also has a mandate in relation to reverse burden offences and will generally write to

6 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

legislation proponents asking whether such reverse burden offences are justifiable where the issue has been insufficiently addressed in the explanatory materials. Further analysis in relation to the specific reverse burden offences is provided in that committee's *Alert Digest*. The Attorney-General's Department has also issued relevant guidance material in relation to reverse burden offences.⁷

Committee comment

1.33 Noting that reverse burden offences engage and limit the right to be presumed innocent, the preceding legal analysis raises questions about whether each reverse burden offence is a permissible limitation on this right. The statement of compatibility for each of the bills identified above has not addressed whether the relevant reverse burden is a permissible limitation on human rights.

1.34 The committee draws to the attention of legislation proponents its *Guidance Note 2* which sets out information specific to reverse burden offences.

1.35 The committee requests the legislation proponent in each case to provide further information as to:

- **whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the reverse burden offence 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.**

⁷ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) at: <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>.

Further response required

1.36 The committee seeks a further response from the relevant with respect to the following instrument.

Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696]

Purpose	Amends the Migration Regulations 1994 to make various changes to the immigration citizenship policy, including changing the definition of 'member of the family unit' for most visas (except protection, refugee and humanitarian visas)
Portfolio	Immigration and Border Protection
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	13 February 2017
Right	Protection of the family (see Appendix 2)
Previous report	1 of 2017
Status	Seeking further additional information

Background

1.37 The committee first reported on the Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696] (the regulation) in its *Report 1 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 3 March 2017.¹

1.38 The minister's response to the committee's inquiries was received on 10 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Narrowing the definition of the member of a family unit

1.39 Schedule 4 of the regulation changes the general definition of 'member of the family unit' such that extended family members are no longer included in this definition. A member of a family unit will therefore only include the spouse or de facto partner of a primary applicant, and the dependent children, under the age of 23 or who are over this age but incapacitated, of the primary applicant or their partner (previously there was no age limit for the children of an applicant).² A child over 23 who is not incapacitated will therefore be considered an extended family

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

2 Schedule 4, subregulation 1.12(2).

member, and would not fall within the definition of a 'member of the family unit' (and therefore not entitled to family reunion).

1.40 In respect of protection, refugee and humanitarian visas,³ a person will continue to be a member of the family unit of another person (the family head) if the person meets the criteria for the general definition of a member of a family unit, as well as if the person is a dependent child of any age or a single dependent relative of any age who is usually resident in the household of the family head.⁴

1.41 The initial human rights analysis noted that the right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. The definition of what constitutes 'family' under international human rights law is broad; it refers not only to spouses, parents and children, but also to unmarried and same-sex couples and extended family members.⁵

1.42 The initial human rights analysis noted that the measure engages and limits the right to protection of the family for visa holders, other than holders of protection, refugee and humanitarian visas,⁶ as it could operate to separate parents and their adult children and extended members of the same family by excluding those family members from being considered a 'member of the family unit'. This would apply regardless of the circumstances of an individual family.

1.43 The statement of compatibility identifies that the right to protection of the family unit is engaged by the measure, however, it also states that:

...protection of the family unit under articles 17 and 23 [of the ICCPR] does not amount to a right to enter and remain in Australia where there is no other right to do so. Nor do they give rise to an obligation on a State to take positive steps to facilitate family reunification.⁷

1.44 Although Australia's obligations under international human rights law do not extend to non-citizens over whom Australia has no jurisdiction, where a person is under Australia's jurisdiction for the purposes of international human rights law, human rights obligations will apply. As such, Australia is required not to arbitrarily or unlawfully (for the purposes of international human rights law) interfere in the family

3 As defined at schedule 4, subregulation 1.12(3).

4 Schedule 4, subregulation 1.12(4).

5 See, for example, UN Human Rights Committee, General Comment 16: Article 17 (Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation) 1988 at [5] which stated that the term 'family' should 'be given a broad interpretation to include all those comprising the family as understood in the society of the State Party concerned'. See also UN Human Rights Committee, General Comment 19: Article 23 (The Family), 1990 at [2].

6 The previous definition of member of the same family unit will continue to apply to these visa classes – see: explanatory statement (ES), statement of compatibility (SOC) 11.

7 ES, SOC 12.

life of visa holders. For example, if a visa holder is residing in Australia, the government must respect, protect and fulfil this person's right to protection of their family. This includes ensuring family members are not involuntarily separated from one another.

1.45 The initial human rights analysis noted that the statement of compatibility does not explicitly identify the legitimate objective of the measure; however, it does note that the new provisions are intended to better align 'migration pathways for relatives of new migrants with those for Australian citizens and existing permanent residents'.⁸ This analysis noted that it was unclear whether this constituted a legitimate objective for the purposes of international human rights law.

1.46 The initial analysis further stated that it was unclear whether the measure was rationally connected to, and a proportionate means of achieving, a legitimate objective. The committee therefore sought the advice of the minister as to:

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

1.47 The minister's response notes that the adult children of a primary applicant or of the primary applicant's spouse (or de facto partner) continue to be eligible to be included where they are aged under 23 years and are financially dependent. Adult children of any age also continue to be eligible where they are financially dependent due to incapacity to work.

1.48 The minister's response further notes that Australia has a right, under international law, to take reasonable steps to control the entry, residence and expulsion of aliens. While it is well-established under international law that nation states generally have the right to control such immigration matters, this is subject to particular human rights obligations such as the right to protection of the family.

1.49 The minister's response states that the right to protection of the family unit under articles 17(1) and 23(1) of the International Covenant on Civil and Political Rights (ICCPR) does not amount to a right to enter and reside in Australia where there is no other right to do so. The minister further states that while the ICCPR requires the protection of the family, there is no positive obligation to take steps to facilitate family reunification.

8 ES, SOC 12.

1.50 While there is no positive obligation on Australia to facilitate family reunion, Australia does have international obligations in relation to actions that interfere with the family life of those within its jurisdiction.

1.51 A measure which limits the ability of certain family members to join others in a country, or prevents certain family members from staying in a country, is a limitation on the right to protection of the family, and therefore must be proportionate to the pursuit of a legitimate objective in order to be compatible with human rights.⁹

1.52 The minister's response provides insufficient information to evaluate whether the measure pursues a legitimate objective, is effective to achieve that objective, and is proportionate to it. Accordingly, it is difficult to conclude, in the absence of further information, that the measure is a permissible limitation on the right to protection of the family.

Committee response

1.53 The preceding analysis indicates that narrowing the definition of 'member of the family unit' engages and limits the right to protection of the family. The minister's response does not sufficiently address whether this limitation is permissible as a matter of international human rights law.

1.54 Accordingly, the committee requests the further advice of the minister as to:

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

9 See, for example, *Sen v the Netherlands* (Application no. 31465/96) (2001) ECHR; *Tuquabo-Tekle And Others v The Netherlands* (Application no. 60665/00) (2006) ECHR [41]; *Maslov v Austria* (Application no. 1638/03) (2008) ECHR [61]-[67].

Advice only

1.55 The committee draws the following instruments to the attention of the relevant minister on an advice only basis. The committee does not require a response to these comments.

Federal Financial Relations (National Partnership payments) Determination No. 112-115 (October 2016)-(January 2017)

Purpose	Specifies the amounts to be paid to the states and territories to support the delivery of specified outputs or projects, facilitate reforms by the states or reward the states for nationally significant reforms
Portfolio	Treasury
Authorising legislation	<i>Federal Financial Relations Act 2009</i>
Last day to disallow	Exempt
Rights	Health; social security; adequate standard of living; children; education (see Appendix 2)
Status	Advice only

Background

1.56 In 2015 the committee previously examined a number of related Federal Financial Relations (National Partnership payments) Determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the Treasurer as to whether they were compatible with Australia's human rights obligations.¹

1.57 In 2016 the committee then reported on a number of new Federal Financial Relations (National Partnership payments) Determinations in its *Report 7 of 2016*, and sought further information from the Treasurer as to the compatibility of these determinations.²

1.58 The committee concluded its consideration of these determinations in its *Report 8 of 2016*. Based on additional information provided by the Treasurer, the committee was able to conclude that the determinations were unlikely to constitute a retrogressive measure for the purposes of international human rights law, and that

1 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 10-14; and *Thirtieth report of the 44th Parliament* (10 November 2015) 102.

2 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 40-43.

they were likely to assist and provide a mechanism for the progressive realisation of a number of economic, social and cultural (ESC) rights.³

1.59 The committee recommended at that time that the type of information provided by the Treasurer be included in future statements of compatibility for related National Partnership payments determinations to assist the committee to assess the continued compatibility of NPPs with human rights.⁴

1.60 This report considers a number of new Federal Financial Relations (National Partnership payments) Determinations (the determinations).⁵

Payments to the states and territories for the provision of health, education, employment, housing and disability services

1.61 The Intergovernmental Agreement on Federal Financial Relations (the IGA) is an agreement providing for a range of payments from the Commonwealth government to the states and territories. These include National Partnership payments (NPPs), which are financial contributions to support the delivery of specified projects, facilitate reforms or provide incentives to jurisdictions that deliver on nationally significant reforms. These NPPs are set out in National Partnership agreements made under the IGA, which specify mutually agreed objectives, outcomes, outputs and performance benchmarks.

1.62 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each NPP in line with the parameters established by the relevant National Partnership agreements. Schedule 1 to the determinations sets out the amount payable under the NPPs, contingent upon the attainment of specified benchmarks or outcomes relating to such things as healthcare, employment, disability, education, community services and affordable housing.

Compatibility of the measure with multiple rights

1.63 As noted above, the committee has considered similar NPP determinations in a number of previous reports.

1.64 In its previous analysis, the committee noted that setting benchmarks for achieving certain standards, which may consequently result in fluctuations in funding allocations, has the capacity to both promote rights and, in some cases, limit rights,

3 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 84-87.

4 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 87.

5 Federal Financial Relations (National Partnership payments) Determination No. 112 (October 2016) [F2016L01724]; Federal Financial Relations (National Partnership Payments) Determination No. 113 (November 2016) [F2016L01937]; Federal Financial Relations (National Partnership payments) Determination No. 114 (December 2016) [F2017L00049]; and Federal Financial Relations (National Partnership payments) Determination No. 115 (January 2017) [F2017L00050].

including the right to health; the right to social security; the right to an adequate standard of living including housing; the rights of children; and the right to education.

1.65 Under international human rights law, Australia has obligations to progressively realise ESC rights using the maximum of resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.

1.66 Because realisation of these rights is reliant on government allocation of expenditure, a reduction in funding for services such as health and education may be considered a retrogressive measure in the attainment of ESC rights.⁶ Any backward step in the level of attainment of such rights therefore needs to be justified for the purposes of international human rights law.

1.67 The statement of compatibility for each of the determinations contains a standard paragraph, similar to the information provided in relation to determinations previously considered by the committee, which states:

...neither this determination nor the making of National Partnership payments more generally could be said to have a detrimental impact on any human right.⁷

1.68 Accordingly, the statements of compatibility to the new and previous determinations do not provide any particular or general assessment of the extent to which fluctuations in funding, with reference to the achievement or failure to achieve specific benchmarks or outcomes, may promote human rights (where funding is increased) or may be regarded as retrogressive (where funding is reduced).

1.69 As noted above, the committee previously requested further advice from the Treasurer as to whether the setting of benchmarks for the provision of funds under the previous NPPs is compatible with human rights (for example, how the benchmarks may or may not support the progressive realisation of human rights such as the rights to health and education); whether there are any retrogressive trends over time indicating reductions in payments which may impact on human rights (such as health, education or housing); and whether any retrogressive measures or trends pursue a legitimate objective, are rationally connected to their stated objective, and are a reasonable and proportionate measure for the achievement of that objective.

1.70 The provision of that additional information by the Treasurer allowed the committee to conclude that the determinations were likely to be compatible with Australia's international obligations. While the committee recommended this type of

6 The committee has previously considered similar issues in relation to the human rights compatibility of funding allocation measures through appropriation bills; see Parliamentary Joint Committee on Human Rights, *Twenty-third report of the 44th Parliament* (18 June 2015) Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015, 13-17.

7 Explanatory statement, statement of compatibility 2.

information be included in future statements of compatibility, this has not occurred to date.

1.71 Without this additional information included in the statement of compatibility it is difficult for the committee to complete its assessment of the compatibility of NPPs going forward.

Committee comment

1.72 **The committee reiterates its previous recommendation that the type of information previously provided by the Treasurer to the committee be included in future statements of compatibility for related National Partnership Payment determinations to assist the committee to fully assess the compatibility of these determinations with human rights.**

Bills not raising human rights concerns

1.73 Of the bills introduced into the Parliament between 20 and 23 March 2017, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Australian Immunisation Register and Other Legislation Amendment Bill 2017;
- Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017;
- Communications Legislation Amendment (Executive Remuneration) Bill 2017;
- Communications Legislation Amendment (SBS Advertising Flexibility) Bill 2017;
- Copyright Amendment (Disability Access and Other Measures) Bill 2017;
- Fair Work Amendment (Protecting Take Home Pay) Bill 2017;¹
- Fair Work Amendment (Protecting Take-Home Pay) Bill 2017;
- Fair Work Amendment (Protecting Weekend Pay and Penalty Rates) Bill 2017;
- Live Animal Export Prohibition (Ending Cruelty) Bill 2017;
- National Land Transport Amendment (Best Practice Rail Investment) Bill 2017; and
- Social Services Legislation Amendment (Seasonal Worker Incentives for Jobseekers) Bill 2017.

1 Two bills by the same name were introduced during this period.

Chapter 2

Concluded matters

2.1 This report contains no concluding matters.

Mr Ian Goodenough MP
Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Banking and Financial Services Commission of Inquiry Bill 2017;
- Civil Law and Justice Legislation Amendment Bill 2017;
- Fair Work Amendment (Corrupting Benefits) Bill 2017;
- Human Rights Legislation Amendment Bill 2017;
- Social Services Legislation Amendment Bill 2017;
- Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132]; and
- Extradition (People's Republic of China) Regulations 2017 [F2017L00185].

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

- Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017;¹
- Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017;²
- Treasury Laws Amendment (2017 Measures No. 1) Bill 2017;³
- Code for the Tendering and Performance of Building Work 2016 [F2016L01859];⁴ and
- National Disability Insurance Scheme (Plan Management) Amendment Rules 2017 [F2017L00073].⁵

1 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 117.

2 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 117.

3 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 117.

4 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 53.

5 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 117.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.¹

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).²

Right to life

Article 6 of the International Covenant on Civil and Political Rights (ICCPR); and article 1 of the Second Optional Protocol to the ICCPR

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015).

2 Parliamentary Joint Committee on Human Rights, *Guidance Note 1* (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

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

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

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

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note 2* provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]));
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

-
- respect for family life (prohibiting interference with personal family relationships);
 - respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
 - the right to reputation.

Right to protection of the family

Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (CRPD)

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); CRPD; and article 2 of the Convention on the Rights of the Child (CRC)

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).³ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.⁴

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

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

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

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

4 *Althammer v Austria* HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

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

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

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

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

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

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

Ref No: MS17-000673

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Ian,

Dear Mr Goodenough

Thank you for your correspondence of 17 February 2017 in which further information was requested on the Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016.

My response to your request is attached.

Thank you for raising this matter.

Yours sincerely

PETER DUTTON

09/03/17

**Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016
[F2016L01696]**

Committee comment

1.64 The committee notes that the narrowing of the definition of 'member of the family unit' engages and limits the right to protection of the family. The statement of compatibility has not sufficiently justified this limitation for the purposes of international human rights law.

1.65 The committee notes that the preceding analysis raises questions as to whether the limitation on the right to protection of the family seeks to achieve a legitimate objective, whether it has a rational connection to that objective, and whether it is proportionate to that objective.

1.66 Accordingly, the committee requests the advice of the Minister for Immigration and Border Protection as to:

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

The Committee has sought comment regarding recent changes to the definition of 'member of the family unit' for Australian visas, other than refugee and humanitarian, and protection visas.

The Committee noted concern that the amendment to the definition has the effect of limiting the right to protection of the family.

Under the International Covenant on Civil and Political Rights (ICCPR), article 17(1) relevantly states that no one shall be subjected to arbitrary or unlawful interference with his family and that everyone has the right to the protection of the law against such interference. Article 23(1) states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Adult children of a primary applicant or of the primary applicant's spouse (or de facto partner) continue to be eligible to be included where they are aged under 23 years and are financially dependent. Adult children of any age also continue to be eligible where they are financially dependent due to incapacity to work.

The ICCPR does not invoke a positive obligation

In regard to the Committee's comments at 1.60, the proposed changes do not amount to an interference with family, as there is no right to family reunification under international law. The protection of the family unit under Articles 17(1) and 23(1) of the ICCPR does not amount to a right to enter and reside in Australia where there is no other right to do so. While the ICCPR requires the protection of the family, there is no positive obligation to take steps to facilitate family reunification.

Further, there has been no positive action on the part of Australia to separate the family. The visa holders become separated from their family when they choose to travel to Australia without their family members.

In addition, the amended definition applies to some permanent and temporary visas but not to refugee and humanitarian or protection visas. Therefore, it will be, as it always has been, a choice for prospective migrants if they wish to seek to travel or migrate to Australia and in so doing separate themselves from family members. Substantial information is provided including through visa application forms, to inform prospective applicants of which family members are eligible to be included in an application.

While Australia is not legally obliged to facilitate family reunion, it is also noted that there are visa products available which enable family members to travel or migrate to Australia to reunite with their family.

It is open to family members who are not members of the family unit of the primary visa applicant to apply for such other visa classes, where they meet the legislative and validity criteria in their own right.

Effective border control and appropriate targeting of Australia's Migration Programmes

Australia has a right, under international law, to take reasonable steps to control the entry, residence and expulsion of aliens. This allows States to effectively manage the movement of people across and within their territory, which is a legitimate State objective.

In order to effectively achieve this objective, Australia has well managed and targeted immigration programmes that are designed to meet its social and economic needs. The programmes are directed toward supporting and enhancing Australia's national prosperity and social cohesion.

Australia's Skilled migration programmes are designed to meet Australia's economic and labour market needs to complement, and not replace, Australia's domestic labour force and our domestic training efforts. Skilled migrants help address demographic pressures of an ageing population because they are younger, they improve our participation rates and add to productivity because they are highly skilled and help grow our gross domestic product. In general, Skilled migrants have good labour market outcomes, higher than the national average.

The Family Stream of Australia's Migration Programme is primarily targeted at reuniting Australian citizens and permanent residents with their partners and family members who are minors.

Places in the programmes are directed to those who meet the primary visa criteria which are intended to achieve the above aims and deliver a benefit to Australia. These applicants continue to be able to bring with them their direct family members as secondary visa holders, noting that their eligibility is by reference to their relationship to the primary visa applicant. It is imperative to ensure that the limited places available in these targeted programmes are directed to those who are most likely to support and deliver on the intentions of the programmes.

For relatives who are no longer eligible to travel or migrate as secondary applicants, other migration and visa programmes remain open to them, where they meet the primary criteria and, in so doing, demonstrate their ability to make a positive contribution to Australia.

The new definition is consistent with the arrangements for relatives of Australian citizens and existing permanent residents.

As persons affected by this amendment continue to have available visa pathway options to travel or migrate to Australia that may facilitate the unity or reunification of families, this amendment is a reasonable and proportionate measure (see UN Human Rights Committee, *CCPR General Comment No. 19: Article 23 (The Family) - Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990).

Comparison with allied signatory countries

The amended definition of 'member of the family unit', while limiting the family members eligible to be included as secondary visa applicants, continues to be more generous than that of other similar nations, who are also signatories to the ICCPR.

Canada permits a primary applicant for a permanent visa to be accompanied by their spouse or partner, and dependent children up to the age of 19. Children over that age are permitted only where they are dependent due to a medical condition and have been dependent since before they turned 19 years of age.

The United States of America limits eligible family to a person's spouse and unmarried children only up to age 21. Other family members may be eligible to be subsequently sponsored, but only after their migrating family member has become a citizen.

Dependent family members in the United Kingdom are restricted to a person's spouse or partner and a child under 18 years of age or an adult child over 18 only if they are already in the UK as a dependent.

Nearer to Australia, New Zealand only permits a person to seek to migrate with their partner and dependent children who are 24 years of age and under.

Appendix 4

Guidance Note 1 and Guidance Note 2

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.¹ For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.²

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

¹ Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

² For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*, may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department.³

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

³ The Attorney-General's Department guidance may be found at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role>

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).¹

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.²

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.³ However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

¹ For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at <http://www.aph.gov.au/~media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf>.

² The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

³ See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at <http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).⁴ Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

⁴ See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, [522]* (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.⁵

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.⁶ This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if:

- a) the purpose of the penalty is to punish or deter; **and**
- b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

⁵ This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

⁶ The UN Human Rights Committee, while not providing further guidance, has determined that civil penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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