Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at **Appendix 3**.

Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017

Purpose	Seeks to amend the *Biosecurity Act 2015* to make changes to requirements to control exotic mosquitoes and other disease carriers at Australia's airports and seaports, including incoming aircraft and vessels
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives, 15 February 2017
Rights	Fair trial; presumption of innocence (see **Appendix 2**)
Previous report	3 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017 (the bill) in its *Report 3 of 2017*, and requested a response from the Minister for Agriculture and Water Resources by 21 April 2017.[1]

2.4 The minister's response to the committee's inquiries was received on 1 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Strict liability offence

2.5 Proposed section 299A of the bill would introduce a strict liability offence where the person in charge of or the operator of a vessel fails to make a required report. The penalty for contravention of this section is 120 penalty units ($21,600).

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 26-28.

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

2.6 The initial analysis noted that 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.

2.7 Strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. 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.[2]

2.8 The explanatory material accompanying the bill did not sufficiently address whether the strict liability offence is a permissible limit on human rights.

2.9 Accordingly, the committee sought the advice of the Minister for Agriculture and Water Resources as to:

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

Minister's response

2.10 In relation to the questions raised by the committee, the minister's response provides that:

---

2 *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.

The strict liability offence proposed by item 126 [proposed section 299A] of the Bill is essential for enforcing the report of a disposal of sediment where the disposal is:

- for the purpose of ensuring the safety of the vessel in an emergency or saving life at sea;
- accidental; or
- for the purpose of avoiding or minimising pollution from the vessel.

The strict liability offence is compatible with the right to be presumed innocent, as this information would be peculiarly within the knowledge of the defendant. The defendant (the person in charge or the operator of a vessel) will have access to the appropriate information, to detail why the disposal of sediment was necessary due to safety, accident or pollution. Further, it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the circumstances of the disposal, as the defendant (the person in charge or the operator of the vessel) will have the easiest access to appropriate records to show that the disposal related to safety, accident or pollution and that the requirement to report has been met.

Disposal of sediment within Australian territorial seas could pose a significant biosecurity risk, which may need to be managed and monitored. Without the strict liability offence, a report of disposal of sediment may not occur, making it difficult to identify any such biosecurity risk. The requirement to report a disposal of sediment relating to safety accident or pollution is necessary to manage the risk in an appropriate and timely manner.

There is a strong public interest in appropriately managing biosecurity risks and preventing serious damage to Australia's marine environment and adverse effects to related industries. The strict liability offence is necessary to achieve this legitimate policy objective because it aims to deter a failure to report a disposal of sediment relating to safety, accident or pollution.

2.11 Based on the detailed information provided, the measure appears likely to be compatible with the right to be presumed innocent and the right to a fair trial.

Committee response

2.12 The committee thanks the Minister for Agriculture and Water Resources for his response and has concluded its examination of this issue.

2.13 In light of the additional information provided the committee notes that the measure appears likely to be compatible with the presumption of innocence and right to a fair trial. The committee notes that this information would have been useful in the statement of compatibility.

Reverse burden offence

2.14 Proposed section 270 would provide that a person in charge or the operator of a vessel contravenes the provision if the vessel discharges ballast water (whether in or outside of Australian seas for Australian vessels, and in Australian seas for foreign vessels). Proposed section 270(4) provides exceptions (offence specific defence) to the offence under section 270, stating that the offence does not apply if certain conditions are met and certain plans are in place. The defendant carries an evidential burden in relation to these exceptions.

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

2.15 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.

2.16 The initial analysis explained that 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.

2.17 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.

2.18 The initial analysis also drew attention to the committee's *Guidance Note 2* which sets out the committee's usual expectation in relation to reverse burden offences.[3]

2.19 The explanatory material accompanying the bill did not address these matters. Accordingly, the committee sought the advice of the Minister for Agriculture and Water Resources as to:

---

3 *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.

- 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.

Minister's response

2.20 In relation to the questions raised by the committee, the minister's response relevantly provides that:

> The exceptions set out by item 30 of the Bill are:
>
> - peculiarly within the knowledge of the defendant, as the defendant (the person in charge or the operator of the vessel) will have access to the appropriate information and documentation, such as the vessel's records, to show that conditions have been fulfilled, such as the ballast water was discharged at a water reception facility (section 277 of the Act), or that the discharge was part of an acceptable ballast water exchange (section 282 of the Act), and
> - it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish that the conditions have been fulfilled, as the defendant (the person in charge or the operator of the vessel) will have the easiest access to appropriate records to show that conditions set out by the exception have been fulfilled.
>
> The statement of compatibility in the Explanatory Memorandum to the Biosecurity Bill 2014 discussed sections 271, 276, 277, 279, 282, and 283 of the Act, which provide exceptions to the offence of discharging ballast water in Australian seas, as provided for in section 270 of the Act.
>
> In relation to item 30 [proposed section 270(4)] of the Bill, it remains necessary that the defendant (the person in charge or the operator of the vessel) bears the evidential burden in order to achieve the legitimate objective of ensuring the biosecurity risk associated with ballast water is appropriately managed in Australian seas. The reversal of the evidential burden of proof is reasonable and proportionate to the legitimate objective because the knowledge of whether the defendant has evidence of the exception will be peculiarly within their knowledge and comes within the terms for the reverse burden provision to appropriately apply. For these reasons, the reversal of the evidentiary burden of proof is a permissible limitation on human rights.
>
> I also draw the Committee's attention to the revised Explanatory Memorandum to the Bill that was tabled in the Senate on 29 March 2017. The revised Explanatory Memorandum included a revised statement of compatibility, which addresses the reverse burden offence in proposed

section 270 (item 30 of the Bill). The revised Explanatory Memorandum also contemplates the government amendment to the Bill, which was introduced in and passed by the House of Representatives on 28 March 2017.

2.21 Based on the information provided, the measure appears likely to be compatible with the right to be presumed innocent and the right to a fair trial.

Committee response

2.22 The committee thanks the Minister for Agriculture and Water Resources for his response and has concluded its examination of this issue.

2.23 In light of the additional information provided the committee notes that the measure appears likely to be compatible with the presumption of innocence and right to a fair trial. The committee notes that this information would have been useful in the statement of compatibility.

Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017

Purpose	Seeks amend *Competition and Consumer Act 2010* to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives, 13 February 2017
Rights	Fair trial; presumption of innocence (see **Appendix 2**)
Previous report	3 of 2017
Status	Concluded examination

Background

2.24 The committee first reported on the Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (the bill) in its *Report 3 of 2017*, and requested further information from the proponent of the bill by 21 April 2017.[1]

2.25 The Private Member's response to the committee's inquiries was received on 5 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Strict liability offence

2.26 Proposed section 168A(1) would introduce a strict liability offence where a person supplies, or offers to supply, a thing that includes an 'indigenous cultural expression'. The penalty for contravention of this section is a maximum of $25,000 for an individual (approximately 138 penalty units) and $200,000 for a body corporate (approximately 1110 penalty units).

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

2.27 The initial analysis noted that 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 initial analysis stated the concerns ordinarily raised by strict liability offences in relation to the presumption of innocence (also set out above at [2.6]).

2.28 Strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 5-8.

objective. The initial analysis also drew attention to the committee's *Guidance Note 2* which sets out the committee's usual expectation in relation to strict liability offences.[2]

2.29 The statement of compatibility did not sufficiently address whether the strict liability offence is a permissible limit on human rights. Accordingly, the committee sought the advice of the legislation proponent as to:

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

Legislation proponent's response

2.30 In relation to the strict liability offence, Mr Katter's response stated:

> The proposed section 168A(3) sets out that the offence in proposed section 168A(1) is a strict liability offence, subject to the offence-specific defence in proposed section 168A(2). Proposed section 168A(1) makes it an offence for a person to supply or offer to supply a thing to a consumer, which is supplied or offered to be supplied in trade and commerce, and where the thing is an Indigenous cultural expression.
>
> This strict liability offence is not inconsistent with the presumption of innocence contained in Article 14(2) of the International Covenant on Civil and Political Rights ('ICCPR') because the offence is proportionate to and rationally connected with the pursuit of a legitimate objective. It is therefore a permissible limitation on this right.

2.31 The response addresses each of the committee's questions about whether the limitation imposed is permissible. In relation to the objective of the measure the response states:

> a. Legitimate Objective for the Purposes of International Human Rights Law
>
> This legitimate objective is set out in the explanatory memorandum to the Bill. "The purpose of the Bill is to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations and thereby depriving Aboriginal and Torres Strait Islanders of the rightful benefits of their culture."

---

2 *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.

This is a legitimate objective because it aims to address concerns regarding an influx of mass-produced Indigenous-style artwork, souvenirs and other cultural affirmations which purports to be and is sold as authentic Australian indigenous art. Throughout 2016 the Indigenous Art Code and the Arts Law Centre conducted a joint investigation into the sale of Indigenous art or products bearing Indigenous cultural expressions in Australia. From that study, the Arts Law Centre estimates that 'up to 80% of items being sold as legitimate Indigenous artworks in tourist shops around Australia are actually inauthentic.' This led to the 'Fake Art Harms Culture' campaign. The crux of the fake art issue for Indigenous persons is that their culture is being exploited for sale without their consent and arguably sold under false pretences.

In addition, the objective the Bill seeks to achieve is consistent with and in furtherance of Article 11(1) of the United Nations Declaration on the Rights of Indigenous Peoples. Article 11(1) sets out that:

> Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

The objective of the Bill is legitimate because it seeks to promote the rights of Indigenous peoples to protect and develop past, present and future manifestations of their culture. By allowing the supply of Indigenous cultural expressions by persons other than Aboriginal and Torres Strait Islanders, the meaning and authenticity of Indigenous cultural expressions are undermined and devalued.

2.32 Accordingly, the response provides a range of information and evidence as to why the measure pursues a legitimate objective for the purpose of international human rights law.

2.33 In relation to whether the measure is rationally connected to this legitimate objective, the response provides that:

b. Rational Connection to the Objective

The strict liability offence is effective to achieve the above objective because it seeks to limit the circumstances in which a person may supply or offer to supply an Indigenous cultural expression.

This is directly related to the protection of Indigenous culture because it will prevent the supply of artefacts, literature of artwork that is unrepresentative of Indigenous culture. It will also ensure that the authenticity of such cultural expressions is retained, thus protecting the past, present and future manifestation of Indigenous culture.

2.34 In relation to whether the measure is a proportionate means of achieving the legitimate objective of the measure the response states:

> c. Reasonable and Proportionate Means of Achieving the Objective
>
> The inclusion of a strict liability offence is a reasonable means of achieving the objective because requiring the prosecution to prove the existence of a fault element, such as "intention", "recklessness" etc. would not adequately protect Indigenous persons, Indigenous communities and consumers from exploitation. This is because the conduct prohibited by the Bill has the potential to cause widespread detriment to Indigenous communities both financially and culturally. It also has the potential to cause significant loss to consumers. Many consumers purchase Indigenous art or products bearing Indigenous cultural expression in Australia on the understanding that the item they are purchasing is an authorised item or does in fact bear an Indigenous cultural expression.
>
> The strict liability approach is consistent with other provisions of the Australian Consumer Law, including those in respect of unfair practices (the section which the Bill proposes to amend). As outlined in the Explanatory Memorandum to the Australian Consumer Law:
>
> > The strict liability nature of these offences reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches these provisions, whether or not he, she or it intended to engage in the contravention.
>
> The absence of a fault element with respect to the offence is also reasonable in light of Article 11(2) of the United Nations Declaration on the Rights of Indigenous Peoples. Article 11(2) sets out that:
>
> > States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
>
> This right is set out in terms of requiring redress with respect to cultural and spiritual property taken without prior consent. This therefore suggests that creating a strict liability offence is appropriate in these circumstances because it is not difficult for suppliers to ensure they know whether or not the Indigenous cultural expression that they supply is made by or made with the consent of an Indigenous artist and Indigenous community. It simply requires the supplier to ask the producer for certification or confirmation. If the offence was not framed in terms of strict liability but instead required a fault element such as "intention" or "recklessness" this would allow defendants to escape liability in instances where prior consent was not obtained (thus undermining the rights of Indigenous persons as contained in Article 11(2)).

> The strict liability offence is also a proportionate means of achieving the above objective because in addition to the defence of an honest and reasonable mistake still being available to a defendant, there is also an offence-specific defence in proposed section 168A(2). This defence provides that where a person has entered into an arrangement with each Indigenous community and Indigenous artist with whom the Indigenous cultural expression is connected, this will not constitute an offence under proposed section 168(1).
>
> Additionally, the strict liability offence is appropriate and proportionate because:
>
> • the offence is not punishable by imprisonment. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that it is only appropriate for strict liability to apply if the offence is not punishable by imprisonment and that is the case here;
>
> • while the fine imposed is higher than that recommend in the Guide, these fines are consistent with other fines imposed for strict liability offences under the Australian Consumer Law; and
>
> • the offence is narrow and easily capable of avoidance. Suppliers can readily obtain information regarding the origin of products that they supply and should be encouraged to do so. The defence of reasonable mistake of fact in section 207 of the Australian Consumer Law will also help to protect suppliers which rely on information provided to them when they acquire the art for resale.

2.35 Based on the comprehensive information provided in the response, the strict liability offence appears to be rationally connected to, and a proportionate means of achieving, its legitimate objective. Accordingly, the strict liability offence is likely to be compatible with the right to be presumed innocent.

Committee comment

2.36 The committee has concluded its examination of this issue.

2.37 The committee notes that strict liability offences engage and limit the right to be presumed innocent. However, based on the information provided by the legislation proponent, the strict liability offence is likely to be compatible with this right.

Reverse burden offence

2.38 Proposed section 168A(2) provides an exception to the offence proposed in section 168A(1), so that it is a defence if a thing with an 'indigenous cultural expression' is supplied by, or in accordance with an arrangement with, each indigenous community and indigenous artist with whom the indigenous cultural expression is connected. The defendant carries an evidential burden in relation to this exception.

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

2.39 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.

2.40 The initial analysis explained that 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.

2.41 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.

2.42 The initial analysis also drew attention to the committee's *Guidance Note 2* which sets out the committee's usual expectation in relation to reverse burden offences.[3]

2.43 The statement of compatibility did not address whether the reverse burden offence is a permissible limit on human rights. Accordingly, the committee sought the advice of the legislation proponent 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.

Legislation proponent's response

2.44 In relation to the reverse burden offence, Mr Katter provided the following information:

> The offence in proposed section 168A(1)-(2) reverses the burden of proof and places the onus on the defendant to prove their innocence. The proposed offence requires the defendant to prove that the thing was supplied by, or in accordance with an arrangement with, each Indigenous community and Indigenous artist with whom the Indigenous cultural expression is connected. Whilst the Committee notes that consistency with the presumption of innocence in Article 14(2) of the ICCPR generally

3 *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.

requires the prosecution to prove each element of the offence beyond a reasonable doubt, proposed section 168A(1)-(2) is not inconsistent with the right to be presumed innocent because it is a permissible limitation on this right.

There is substantial overlap between the analysis above regarding the strict liability offence in proposed section 168A(3) and the analysis below with respect to the reverse burden offence in proposed section 168A(1)-(2).

2.45 The response addresses each of the committee's questions about whether the limitation imposed is permissible. In relation to the objective of the measure the response states:

> a. Legitimate Objective for the Purposes of International Human Rights Law
>
> The legitimate objective is the same as outlined above with respect to the strict liability offence and is reflected in the explanatory memorandum to the Bill.

2.46 As noted above, this is likely to constitute a legitimate objective for the purposes of international human rights law.

2.47 In relation to whether the measure is rationally connected to this legitimate objective, the response provides that:

> b. Rational Connection to the Objective
>
> The reverse burden offence is effective to achieve the legitimate objective because it seeks to limit the circumstances in which a person may supply or offer to supply an Indigenous cultural expression.
>
> This is directly related to the protection of Indigenous culture because it will prevent the supply of artefacts, literature or artwork that is unrepresentative of Indigenous culture. It will also ensure that the authenticity of such cultural expressions is retained, thus protecting the past, present and future manifestation of Indigenous culture.
>
> Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples sets out that "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional l knowledge and traditional cultural expressions". This right is given to Indigenous peoples, not any other peoples. Consequently the requirement to seek permission from Indigenous communities and Indigenous artists ensures that they have ultimate control over their traditional cultural expressions. To permit otherwise could lead to adverse impacts on Indigenous culture through the propagation of Indigenous cultural expressions that are incorrect according to traditional knowledge. This could lead to the erosion or desecration of traditional practices and the inaccurate portrayal of cultural expressions such as Indigenous dance or art. Consequently in these circumstances there is a rational connection

between the reverse burden of proof and the objective of preventing non-Indigenous Australians from benefitting from the sale of Indigenous cultural expressions and undermining Indigenous culture. In this respect, providing Indigenous Australians with the ability to control the supply of their traditional cultural expressions respects the rights provided to them by the United Nations Declaration on the Rights of Indigenous Peoples.

2.48 In relation to whether the measure is a proportionate means of achieving the legitimate objective of the measure the response states:

c. Reasonable and Proportionate Means of Achieving the Objective

The offence-specific defence, that imposes a burden of proof on the defendant, is a reasonable and proportionate means of achieving the objective of the Bill because:

• the requirement for consent provides the best protection to Indigenous communities and artists. The fact that suppliers are commercialising Indigenous cultural expressions without obtaining any consent places Indigenous communities and artists in a position of vulnerability and exploitation. This defence focusses on the key issue - whether the relevant Indigenous community and artist has consented to the commercialisation of the indigenous cultural expression with which the community and artist is associated;

• this defence (and the legal burden associated with it) is appropriate because the consent or licensing arrangements in place for the supply of the art is peculiarly within the knowledge of the defendant. It would be a difficult and costly exercise for the prosecution to disprove consent and would necessarily require the prosecution to ensure that no Indigenous person or community had granted consent to the defendant. Such a burden would be unreasonable and make the offence difficult to establish. By contrast, it does not impose any significant burden on the defendant - if they have obtained consent to use the Indigenous cultural expression in the manner in which they have, they should be able to establish this without any real difficulty. If they have acquired the art or products bearing the Indigenous cultural expression from a wholesaler, they can make it a condition of the wholesale purchase that the wholesaler provides evidence of consent.

This approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which relevantly provides that "where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence". The Guide also relevantly provides in this respect:

> "...the [Scrutiny of Bills] Committee has indicated that it may be appropriate for the burden of proof to be placed on a defendant where the facts in relation to the defence might be said to be peculiarly within the knowledge of the defendant, or where proof by the prosecution of a

> particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused."

2.49 Based on the comprehensive information provided in the response, the reverse burden offence appears to be rationally connected to, and a proportionate means of achieving, its legitimate objective. Accordingly, the reverse burden offence is likely to be compatible with the right to be presumed innocent.

Committee comment

2.50 The committee notes that reverse burden offences engage and limit the right to be presumed innocent. However, based on the information provided by the legislation proponent, the reverse burden offence is likely to be compatible with this right.

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Purpose	Seeks to amend a number of Acts relating to the criminal law, law enforcement and background checking to including to ensure Australia can respond to requests from the International Criminal Court and international war crimes tribunals; amend the provisions on proceeds of crime search warrants, clarify which foreign proceeds of crime orders can be registered in Australia and clarify the roles of judicial officers in domestic proceedings to produce documents or articles for a foreign country, and others of a minor or technical nature; ensure magistrates, judges and relevant courts have sufficient powers to make orders necessary for the conduct of extradition proceedings; ensure foreign evidence can be appropriately certified and extend the application of foreign evidence rules to proceedings in the external territories and the Jervis Bay Territory; amend the vulnerable witness protections in the *Crimes Act 1914*; clarify the operation of the human trafficking, slavery and slavery-like offences in the *Criminal Code Act 1995*; amend the reporting arrangements under the *War Crimes Act 1945*
Portfolio	Justice
Introduced	House of Representatives, 23 November 2016
Rights	Privacy; fair trial and fair hearing (see Appendix 2) (see **Appendix 2**)
Previous report	2 of 2017
Status	Concluded examination

Background

2.51 The committee first reported on the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 (the bill) in its *Report 2 of 2017*, and requested a response from the Minister for Justice by 13 April 2017.[1]

2.52 The minister's response to the committee's inquiries was received on 27 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 3-9.

Proceeds of crime

2.53 Part 8 of Schedule 1 of the bill seeks to amend the *International Criminal Court Act 2002* and the *International War Crimes Tribunals Act 1995* in relation to existing proceeds of crime provisions. This includes amendments to the authorisation process for proceeds of crime tools and the availability of a range of investigative and restraint tools in respect of an investigation or prosecution at the International Criminal Court (ICC), an International War Crimes Tribunal (IWCT) and to apply in the foreign context. It also seeks to enhance the process for seeking restraining orders and giving effect to forfeiture orders. The proceeds of crime provisions referred to in these Acts make use of the proceeds of crime framework established by the *Proceeds of Crime Act 2002* (POC Act).

2.54 Schedule 2 of the bill seeks to ensure that the provisions of the proceeds of crime investigative tools in the *Mutual Assistance in Criminal Matters Act 1987* (MA Act) align, and are consistent, with the POC Act or are modified appropriately for the foreign context. It seeks to clarify the types of foreign proceeds of crime orders to which the MA Act applies. It also provides that the MA Act applies to interim foreign proceeds of crime orders issued by non-judicial government bodies. The explanatory memorandum states that proposed item 33 of the bill will confirm the existing provision that the definition of 'foreign restraining order' is not limited to orders made by a court, which 'reflects the fact that in some countries restraining orders may be issued by bodies other than courts, such as investigative or prosecutorial agencies'.[2]

Compatibility of the measure with fair trial and fair hearing rights

2.55 The initial human rights analysis noted that the statement of compatibility states that the amendments in Schedule 2 engage the right to a presumption of innocence, as the MA Act permits the Attorney-General to authorise a proceeds of crime authority to apply to register foreign restraining orders, which could allow a person's property to be restrained, frozen, seized or taken into official custody before a finding of guilt has been made. However, the statement of compatibility states that the proposed amendments will not limit a person's right to a presumption of innocence.[3] The statement of compatibility does not examine the compatibility of the measures in Schedule 1 with the right to a fair trial and fair hearing.

2.56 The statement of compatibility explains that the amendments are intended to ensure 'Australia can provide the fullest assistance to the ICC and IWCT in investigating and prosecuting the most serious of crimes and taking proceeds of

2 Explanatory memorandum (EM) 160.

3 EM, statement of compatibility (SOC) 21. Note the SOC also identifies that the right to privacy is engaged and justifiably limited. No comment is made in respect of this right as, based on the information provided in the SOC and the safeguards in the relevant legislation, no concerns are raised in respect of this right.

crime action'.[4] This would appear to be a legitimate objective for the purposes of international human rights law, and the measures would appear to be rationally connected to achieving that objective.

2.57 The statement of compatibility states that, in relation to the proposed amendment to the MA Act in Schedule 2, the Attorney-General's decision to assist a foreign country with registering a foreign restraining order 'will be subject to the safeguards in the MA Act, including all of the mandatory and discretionary grounds for refusal in section 8 of the MA Act' and 'the courts will retain the discretion to refuse to register the order if it is satisfied that it would be contrary to the interests of justice to do so'.[5]

2.58 The initial human rights analysis noted that the committee has previously stated that the MA Act raises serious human rights concerns and that it would benefit from a full review of the human rights compatibility of the legislation.[6] The committee has also raised concerns regarding the POC Act. In particular, the initial analysis noted that the committee has previously raised concerns about the right to a fair hearing and noted that asset confiscation may be considered criminal for the purposes of international human rights law, and in particular the right to a fair trial. As the committee's previous analysis noted:

> …the POC Act was introduced prior to the establishment of the committee and therefore before the requirement for bills to contain a statement of compatibility with human rights. It is clear that the POC Act provides law enforcement agencies [with] important and necessary tools in the fight against crime in Australia. Assessing the forfeiture orders under the POC Act as involving the determination of a criminal charge does not suggest that such measures cannot be taken – rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the [*International Covenant on Civil and Political Rights*].[7]

2.59 The committee previously recommended that the Minister for Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing. In his recent response to the committee in respect of the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, the minister stated he did not consider it necessary to conduct an assessment of the POC Act to determine its compatibility with the

4 EM, SOC 5.

5 EM, SOC 21-22.

6 Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (26 June 2013) 56-61 at 61.

7 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 37-44 at 43-44.

right to a fair trial and fair hearing as legislation enacted prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment, and the government continually reviews the POC Act as it is amended.[8]

2.60 Despite this, the existing human rights concerns with the POC Act and the MA Act mean that any extension of the provisions in those Acts by this bill raise similar concerns as those previously identified. The initial analysis stated that it would therefore be of considerable assistance if these Acts were subject to a foundational human rights assessment.

2.61 In addition, the amendments in item 33 of Schedule 2 provide that an order made under the law of a foreign country—whether made by a court or not—restraining, freezing or directing the seizure or control of property is enforceable in Australia. This is so regardless of whether the person whose property is to be restrained, frozen or seized has been accorded a fair hearing before the order was made. The explanatory memorandum states that this amendment confirms the existing position that the registration of a foreign restraining order is not limited to orders made by a court, which reflects 'the fact that in some countries restraining orders may be issued by bodies other than courts, such as investigative or prosecutorial agencies'.[9] The explanatory memorandum states that the Attorney-General has a discretion whether to authorise the registration of orders and may consider 'the nature of the body issuing the order' in exercising that discretion.[10]

2.62 The initial analysis noted that the registration and enforcement of foreign restraining orders and foreign forfeiture orders under Australian law, without any oversight of the process by which such orders were made, raises questions about the compatibility of the measures with the right to a fair hearing and fair trial. This is particularly acute in relation to the registration of foreign restraining orders made by non-judicial bodies. While the Attorney-General retains a broad discretion to refuse to grant assistance under the MA Act, the existence of a ministerial discretion is not in itself a human rights safeguard. As the committee has previously noted, while the government may have an obligation to ensure that the law is applied in a manner

8 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 43.

9 EM 160 in relation to item 33 of Schedule 2 of the bill.

10 EM 160. This is based on section 8(2)(g) of the MA Act which provides that the Attorney-General may refuse a request by a foreign country for assistance if in the opinion of the Attorney-General it is appropriate in all the circumstances of the case that the assistance should not be granted.

that respects human rights, the law itself must also be consistent with human rights.[11] As the UN Human Rights Committee has explained:

> [t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[12]

2.63 The initial analysis stated that while this bill does not substantially amend the provisions of the POC Act or the MA Act or the application process, human rights concerns remain in relation to these existing Acts. In addition, specifically providing in the bill that a foreign restraining order does not need to be made by a court raises serious concerns about the right to a fair hearing before a person's private property is frozen, seized or subject to restraint.

2.64 The committee reiterated its earlier comments that the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. However, it also raises concerns regarding the right to a fair hearing and the right to a fair trial. The committee reiterated its previous view that both the MA Act and the POC Act would benefit from a full review of the human rights compatibility of the legislation and drew these matters to the attention of the Parliament.

Minister's response

2.65 The minister provided the following information in response to the committee's comments:

> The Government continually reviews the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* and will continue to undertake human rights compatibility assessments where Bills amend those Acts.
>
> The Government reiterates that proceeds of crime orders are classified as civil under section 315 of the Proceeds of Crime Act and do not involve the determination of a criminal charge or the imposition of a criminal penalty.
>
> As the Acts were enacted before the *Human Rights (Parliamentary Scrutiny) Act 2011*, they were not required to be subject to a human rights compatibility assessment.

2.66 It is understood that the MA Act and the POC Act were legislated prior to the to the establishment of the committee, and for that reason, were never required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. However, in

---

11 See Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (27 June 2013) 56-61 at 59.

12 Human Rights Committee, *General Comment 27, Freedom of movement* (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 13.

light of the existing human rights concerns with the POC Act and the MA Act, any extension of the provisions in those Acts requires an assessment of how such measures interact with existing provisions. It would therefore be of considerable assistance if these Acts were subject to a foundational human rights assessment.

Committee response

2.67 The committee thanks the Minister for Justice for his response and has concluded its examination of this issue.

2.68 The preceding analysis indicates that extensions to the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* could raise concerns regarding the right to a fair hearing and the right to a fair trial.

2.69 The committee reiterates its previous view that both the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* would benefit from a full review of the human rights compatibility of the legislation.

2.70 The committee draws these matters to the attention of the Parliament.

Person awaiting surrender under extradition warrant must be committed to prison

2.71 Schedule 3 of the bill seeks to amend the *Extradition Act 1988* (Extradition Act) to provide that where a person has been released on bail and a surrender or temporary surrender warrant for the extradition of the person has been issued, the magistrate, judge or relevant court *must* order that the person be committed to prison to await surrender under the warrant.

Compatibility of the measure with the right to liberty

2.72 The initial human rights analysis noted that the right to liberty is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances. An obligation on courts to order that a person be committed to prison to await surrender under an extradition warrant engages and limits the right to liberty.

2.73 The statement of compatibility acknowledges that the right to liberty is engaged by this measure but states that the limitation on the right is reasonable and necessary 'given the serious flight risk posed in extradition matters and Australia's obligations to secure the return of alleged offenders to face justice'.[13] It also states that the power to remand a person pending extradition proceedings is necessary as reporting and other bail conditions 'are not always sufficient to prevent individuals who wish to evade extradition by absconding'.[14]

13 EM, SOC 24.

14 EM, SOC 24.

2.74 The initial analysis noted that measures to ensure a person does not evade extradition are likely to be a legitimate objective for the purposes of international human rights law, and the measures appear to be rationally connected to that objective. However, in relation to whether the limitation on the right to liberty is proportionate to the objective sought to be achieved, the question arises as to why the power of the court to commit a person to prison is phrased as an *obligation* to commit the person to prison, without any discretion as to whether this is appropriate in all the circumstances.

2.75 The statement of compatibility states that it is appropriate that the person be committed to prison to await surrender as an extradition country has a period of two months in which to effect surrender and '[c]orrectional facilities are the only viable option for periods of custody of this duration'.[15] It states that without this provision the police may need to place the person in a remand centre, for a period of up to two months, yet remand centres 'do not have adequate facilities to hold a person for longer than a few days.'[16] It also goes on to provide that the Extradition Act makes bail available in special circumstances which ensures that 'where circumstances justifying bail exist, the person will not be kept in prison during the extradition process'.[17] However, it is unclear how these existing bail provisions fit with the proposed amendments which *require* the magistrate, judge or court to commit a person, already on bail, to prison to await surrender under the warrant.

2.76 The committee therefore sought the advice of the Minister for Justice as to why the provisions enabling a magistrate, judge or court to commit a person to prison to await surrender under an extradition warrant are framed as an obligation on the court rather than a discretion and how the existing bail process under the Extradition Act fits with the amendments proposed by this bill.

Minister's response

2.77 In relation to why the measure places an obligation (rather than discretion) on the court to commit a person to prison, the following information is provided by the minister:

> The amendments to sections 26 and 35 of the Extradition Act address the logistics for the execution of a surrender warrant when a person is on bail and a surrender warrant has been issued to surrender the person to an extradition country. The surrender warrant is the instrument that empowers the police to bring an eligible person into custody to await transportation out of Australia.

15 EM, SOC 24.

16 EM, SOC 24.

17 EM, SOC 24.

> The amendments to sections 26 and 35 do not affect the existing framework for bail under the Extradition Act. In the extradition context, a magistrate must not release a person on bail unless there are special circumstances justifying such release. The presumption against bail is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. The requirement to demonstrate 'special circumstances' justifying release provides suitable flexibility to accommodate exceptional circumstances that may necessitate granting a person bail (such as where the person is in extremely poor health).
>
> The Extradition Act does not provide for a person to apply to have their bail extended following the issuing of a surrender warrant and while the person awaits surrender to the requesting country. The amendment clarifies that, following a discharge of bail recognisances, a magistrate, eligible Federal Circuit Court Judges or relevant court is to remand the person to prison to await surrender. The amendment is framed as an obligation on [sic] to reflect the unavailability of bail pending logistical arrangements for surrender to the requesting country. If a person seeks to challenge the surrender determination by way of judicial review, the person is able to make a new bail application under section 49C of the Extradition Act to the relevant review or appellate Court. Under section 49C(2) of the Extradition Act a grant of bail by a review or appellate Court terminates each time such a Court has upheld the surrender determination.

2.78 The minister's response clarifies that the proposed measure, which obliges a person to be committed to prison, relates to circumstances where a surrender warrant has been issued and where the person awaits surrender or transfer to the requesting country. As outlined in the response, some safeguards exist in relation to the measure and there is some capacity for an individual to apply for bail should they seek judicial review in relation to the issue of the surrender warrant.

2.79 However, even in circumstances where a person awaits surrender, it is unclear that an obligation for that person to be committed to prison represents the least rights restrictive approach. While there may be some circumstances where an individual poses an unacceptable flight risk such that imprisonment is necessary, it is unclear that each individual awaiting transfer would represent such a risk. Nor is it clear why particular conditions of bail are not adequate to address such risks in relation to individuals. Noting that an extradition country has two months from the issue of the surrender warrant to effect surrender, a person may be deprived of their liberty in prison for an extended period of time. As set out in the minister's response, it appears that there is no general ability for a person to apply to have their bail extended following the issue of the surrender warrant regardless of their individual circumstances. It follows that there is a risk that the measure is not a proportionate limit on the right to liberty. This is because in order for a deprivation of liberty to be

permissible it must be reasonable, necessary and proportionate in the individual case.

2.80 The minister's response also explains that under the Extradition Act there is currently a presumption against bail unless a 'special circumstance' exists. This also raises concerns in relation to the right to liberty under the Extradition Act more broadly as the deprivation of liberty may not be reasonable, necessary and proportionate in the individual case. In this respect it is noted that the Extradition Act was legislated prior to the establishment of the committee, and for that reason, has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. In light of the issues raised in the minister's response and by the amendments, the Extradition Act may benefit from a full review of its human rights compatibility.

Committee response

2.81 The committee thanks the Minister for Justice for his response and has concluded its examination of this issue.

2.82 The preceding analysis indicates that the measure may not be the least rights restrictive in each individual case noting that the measure obliges a court to commit a person awaiting transfer to prison regardless of their individual circumstances. This means that there is a risk that the measure is not a proportionate limit on the right to liberty.

2.83 The committee considers that the *Extradition Act 1988* would benefit from a full review of the human rights compatibility of the legislation.

Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016

Purpose	Seeks to amend the *Migration Act 1958* to: harmonise and streamline Part 5 and Part 7 of the Act relating to merits review of certain decisions; make amendments to certain provisions in Part 5 of the Act to clarify the operation of those provisions; clarify the requirements relating to notification of oral review decisions; and make technical amendments to Part 7AA of the Act
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 30 November 2016
Rights	Non-refoulement; fair hearing; effective remedy (see **Appendix 2**)
Previous report	2 of 2016
Status	Concluded examination

Background

2.84 The committee first reported on Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016 (the bill) in its *Report 2 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 13 April 2017.[1]

2.85 No response was received to the committee's request by that date. Accordingly, the committee's concluding remarks on the bill are based on the information available at the time of finalising this report.[2]

2.86 The bill relates to the schedules of the *Tribunals Amalgamation Act 2015*,[3] which commenced on 1 July 2015. That Act merged key commonwealth merits review tribunals, including the former Migration Review Tribunal and Refugee Review Tribunal (RRT), into the Administrative Appeals Tribunal (AAT).

1 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 10-17.

2 See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

3 The committee considered the Tribunals Amalgamation Bill 2014 in its *Eighteenth Report of the 44th Parliament* (10 February 2015), and found that the bill did not raise human rights concerns.

2.87 The bill consolidates Parts 5 and 7 of the *Migration Act 1958* (Migration Act) into an updated Part 5 of the Migration Act in respect of reviewable decisions by the Migration and Refugee Division (MRD) of the AAT.

2.88 Certain parts of the bill therefore reintroduce existing measures, some of which have previously been considered by the committee.[4]

Limited review of decisions in respect of grant or cancellation of protection visas

2.89 Proposed section 338A, which defines a 'reviewable refugee decision', is proposed to be inserted into the Migration Act by Schedule 4, Part 1, item 34 of the bill. This new section largely mirrors the provisions contained in existing section 411 of the Act.

2.90 Proposed subsection 338A(2) defines what is a 'reviewable refugee decision', which includes a decision to refuse to grant or to cancel a protection visa. However, a decision to refuse to grant or to cancel a protection visa is not classified as a reviewable decision if it was made on a number of specified grounds, relating to criminal convictions or security risk assessments.[5] As such, decisions made on such grounds are not reviewable by the MRD. In addition, subsection 338A(1) provides that a number of reviewable refugee decisions are excluded from review on specified grounds, including:

---

4 See Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43-44; *Twelfth report of the 44th Parliament* (24 September 2014) 24-45 *Twentieth report of the 44th Parliament* (18 March 2015) 80-87; *Fourth Report of the 44th Parliament* (18 March 2014) 51; *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

5 Schedule 1, Part 1, item 34, new paragraph 338A(2)(c) applies in relation to a decision to refuse to grant a protection visa. The relevant grounds for exclusion are decisions made relying on: subsection 5H(2), which corresponds to the exclusion grounds for refugee status under article 1F of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Refugee Convention); subsection 36(1B), which sets out that a person cannot receive a protection visa if determined by the Australian Security Intelligence Organisation (ASIO) to be a risk to security; subsection 36(1C), which sets out that the person is excluded from the grant of a protection visa if the minister considers the person is a danger or threat to Australia's security, or is a danger to the Australian community having been convicted by final judgement of a particularly serious crime; paragraph 36(2C)(a), which excludes people from complementary protection on the basis of the exclusion grounds for refugee status under article 1F of the Refugee Convention; or paragraph 36(2C)(b) which also excludes people from complementary protection if the minister considers the person to be a danger or threat to Australia's security, or a danger to the Australian community, having been convicted by final judgment of a particularly serious crime. New paragraph 338A(2)(d) applies in relation to a decision to cancel a protection visa. The relevant grounds for exclusion are the same as those under paragraph 338(2)(c), with the addition of a further ground: that a person has been assessed by ASIO as a risk to security.

- that the minister has issued a conclusive certificate in relation to the decision, on the basis that the minister believes it would be contrary to the national interest to change or review the decision;
- that the decision to cancel a protection visa was made by the minister personally; and
- that the decision is a 'fast track decision' (A 'fast track decision' is a decision to refuse to grant a protection visa to certain applicants,[6] for which a very limited form of review is available under Part 7AA of the Act.)[7]

2.91 As such, there is a range of decisions relating to the grant or cancellation of protection visas that are either not subject to any merits review (in relation to ministerial decisions to refuse to grant or to cancel protection visas on certain grounds) or which are subject to very limited review (in the case of fast track decisions).

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

2.92 The obligation of non-refoulement requires that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment (see Appendix 2).[8] Non-refoulement obligations are absolute and may not be subject to any limitations.

---

6 These include unauthorised maritime arrivals who entered Australia on or after 13 August 2012 but before 1 January 2014 and who have not been taken to a regional processing country.

7 See the committee's comments on the human rights compatibility of the fast-track review process in Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

8 Australia's obligations arise under the article 33 of the Refugee Convention in respect of refugees, and also under articles 6(1) and 7 of International Covenant on Civil and Political Rights (ICCPR), article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. The non-refoulement obligations under the ICCPR and CAT are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

2.93 Effective, independent and impartial review by a court or tribunal of decisions to deport or remove a person (in the Australian context including merits review), is integral to giving effect to non-refoulement obligations.[9]

2.94 As noted in the initial analysis the measure engages the right to non-refoulement and the right to an effective remedy as it fails to ensure sufficient procedural and substantive safeguards apply to ensure a person is not removed in contravention of the obligation of non-refoulement.[10] The right to non-refoulement is an absolute right: it cannot be subject to any permissible limitations.

2.95 The statement of compatibility identifies that the right to non-refoulement:

> [is] arguably engaged as the amendments go to the review of decisions made under the Migration Act, including review of decisions in relation to protection visa applicants or former protection visa holders, and may impact on whether such applicants or former visa holders, depending on the outcome of the review, may become liable for removal from Australia.[11]

2.96 The initial analysis noted that the statement of compatibility provides that the amendments proposed by the bill 'preserve the existing merits review framework without removing or otherwise diminishing a visa applicant or former visa holder's access to merits review of a refusal or cancellation decision in relation to them.'[12] However, the committee's role is to examine all bills introduced into Parliament for compatibility with human rights,[13] an assessment which must take place regardless of whether the bill reflects the existing law (which may or may not have been subject to a human rights compatibility assessment when introduced).

2.97 In respect of the right to an effective remedy, the statement of compatibility states that as there is no general right or entitlement to hold a visa to enter or remain in Australia, a decision to refuse or cancel a visa is not a violation of a person's rights or freedoms. However, the statement of compatibility goes on to note that if it is considered to be a violation of rights or freedoms, judicial review is

---

9 ICCPR, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45; *Fourth Report of the 44th Parliament* (18 March 2014) 51; *Thirty-sixth report of the 44th Parliament* (16 March 2016) 174-187.

10 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 179-180, 182-183. Treaty monitoring bodies have found that the provision of effective and impartial review of non-refoulement decisions by a court or tribunal is integral to complying with the obligation of non-refoulement under the ICCPR and CAT.

11 Explanatory memorandum (EM), statement of compatibility (SOC) 45.

12 EM, SOC 45.

13 See section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

available to an aggrieved person, and as such, the measure is compatible with this right.[14]

2.98 This reasoning fails to sufficiently acknowledge the scope of Australia's obligations with respect to prohibition on non-refoulement and the right to an effective remedy.

2.99 As set out in the initial analysis, the committee has previously expressed its view that judicial review (the scope of which is discussed in detail below) is not sufficient to fulfil the international standard required of 'effective review' in the context of non-refoulement decisions and, in the Australian context, the requirement for independent, effective and impartial review of non-refoulement decisions is not met when effective merits review of the decision to grant or cancel a protection visa is not available.[15]

2.100 While there is no express requirement for merits review in the articles of the relevant conventions relating to obligations of non-refoulement, the position that merits review of such decisions is required to comply with the obligation under international law is based on a consistent analysis of how the obligation applies, and may be fulfilled, in the Australian domestic legal context.

2.101 In formulating this view, the usual approach of drawing on the jurisprudence of bodies recognised as authoritative in specialised fields of international human rights law that can inform the human rights treaties that fall directly under the committee's mandate has been adopted.

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

> The nature of refoulement is such…that an allegation of breach of…[the obligation of non-refoulement in] article [3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy… requires, in this context, **an opportunity for effective, independent and impartial review of the decision to expel or remove**...The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[16]

14 EM, SOC 46.

15 For the reasoning in support of this view, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 184.

16 *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) [13.7] (emphasis added).

2.103 Similarly, the UN Committee Against Torture in *Josu Arkauz Arana v. France* found that the deportation of a person under an administrative procedure without the possibility of judicial intervention was a violation of article 3 of the CAT.[17]

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

> As to…the absence of independent review of the Cabinet's decision to expel, given the presence of an arguable risk of torture, the…[right to an effective remedy and the prohibition on torture in articles 2 and 7 of the ICCPR require] an effective remedy for violations of the latter provision. By the nature of refoulement, **effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning**. The absence of any opportunity for effective, independent review of the decision to expel in…[this] case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the [ICCPR].[18]

2.105 These statements are accepted internationally to be persuasive interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties (VCLT).[19]

2.106 The jurisprudence quoted above therefore establishes the proposition that, while merits review is not expressly referred to in the ICCPR or CAT, there is strict requirement for 'effective review' of non-refoulement decisions.

2.107 Applied to the Australian context, the committee has previously considered numerous cases, like the present case, where legislation allows only for judicial (rather than merits) review of non-refoulement decisions. Judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977* and the

---

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

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

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

common law. It represents a considerably limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the decision maker) and other related grounds. The court cannot undertake a full review of the facts (that is, the merits) of a particular case, for instance, an assessment as to *refoulement* to torture or persecution, to determine whether the case was correctly decided.

2.108 Accordingly, in the Australian context, judicial review is not sufficient to fulfil the international standard required of 'effective review', because it is only available on a number of restricted grounds of review that do not address whether that decision was the correct or preferable decision. The ineffectiveness of judicial review is particularly apparent when considered against the purpose of effective review of non-refoulement decisions under international law, which is to 'avoid irreparable harm to the individual'.

2.109 In contrast, merits review allows a person or entity other than the primary decision maker to reconsider the facts, law and policy aspects of the original decision and to determine what is the correct or preferable decision. In light of the above, in the Australian context, the requirement for independent, effective and impartial review of non-refoulement decisions is not met by the availability of judicial review, but may be fulfilled by merits review.

2.110 A question is sometimes posed about the difference between the obligations of nation states such as Australia under the ICCPR, CAT and the Refugee Convention and the standards and procedures applied by of the Office of the United National High Commissioner for Refugees (UNHCR). While the UNHRC may assist nation states with refugee status determination (RSD), non-refoulement obligations ultimately rest with nation states who are parties to the relevant conventions. Given the nature of its role, the UNHCR, in assisting nation states with RSD, does not have all of the same procedural safeguards that are expected of nation states. Nor does the UNHCR possess the apparatus of nation states such as courts and tribunals. As the UNHCR is not a nation state it is accordingly not a party to the ICCPR, CAT and Refugee Convention. It does not therefore have legal obligations under these treaties *per se* as these rest with nation states. Further, and significantly, the UNHCR unlike Australia and other nation states does not possess coercive powers to deport or expel an individual. These powers rest with nation states and accordingly it is nation states, including Australia, that have particular responsibilities in relation to the obligation of non-refoulement in accordance with their treaty obligations.

2.111 The committee previously sought further information from the Minister for Immigration and Border Protection as to the compatibility of this measure with the obligation of non-refoulement. As set out above no response was received from the minster by the requested date.

2.112 As the measure does not provide for merits review of decisions relating to the grant or cancellation of protection visas, it is likely to be incompatible with Australia's obligations under the ICCPR and the CAT of ensuring independent,

effective and impartial review, including merits review, of non-refoulement decisions.

Committee comment

2.113 The obligation of non-refoulement is absolute and may not be subject to any limitations.

2.114 Noting in particular that a response was not received from the Minister for Immigration and Border Protection regarding human rights issues identified in the committee's initial assessment of the bill, the committee is unable to conclude on the information before it that the measure is compatible with the obligation of non-refoulement.[20]

2.115 The measure does not provide for merits review of decisions relating to the grant or cancellation of protection visas, and therefore is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.

Unfavourable inferences to be drawn by the Tribunal

2.116 Schedule 1, Part 1, item 53 of the bill proposes to insert into the Migration Act new section 358A, which sets out how the MRD of the AAT is to deal with new claims or evidence in respect of refugee review decisions in relation to a protection visa. This section mirrors current section 423A of the Migration Act.

2.117 Pursuant to this proposed amendment, the MRD must draw an inference unfavourable to the credibility of the claim or evidence if the MRD is satisfied that the applicant does not have a reasonable explanation for why the claim was not raised, or evidence presented, before the reviewable refugee decision was made.

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

2.118 The obligation of non-refoulement and the right to an effective remedy have been described in detail above (see also **Appendix 2**).

2.119 As with the measures discussed above, the initial analysis noted that the right to non-refoulement and the right to an effective remedy are engaged by this measure as it fails to introduce sufficient procedural and substantive safeguards to ensure a person is not removed in contravention of the obligation of non-refoulement. The right to non-refoulement is an absolute right: it cannot be subject to any permissible limitations.

---

20 Any subsequent response received from the minister will be published on the committee's website. See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

2.120 The discussion of the right to non-refoulement in the statement of compatibility includes reference to the requirements of the MRD to conduct a review of the refusal or cancellation decision in accordance with the procedures in amended Part 5 of the Migration Act.[21]

2.121 The committee previously considered the requirement on the then RRT to draw an inference unfavourable to the credibility of the claim or evidence, which mirrors proposed section 358A.[22] In its consideration of then proposed section 423A, the committee found that the section was incompatible with Australia's non-refoulement obligations. The committee expressed its concern that:

> …there are insufficient procedural and substantive safeguards to ensure that this proposed provision does not result in a person being removed in contravention of non-refoulement obligations. For example, people who are fleeing persecution or have experienced physical or psychological trauma may not recount their full story initially (often due to recognised medical conditions such as post-traumatic stress disorder), or else may simply fail to understand what information might be important for their claim.[23]

2.122 The committee was also concerned that:

> …the proposed provision appears to be inconsistent with the fundamental nature of independent merits review and, to that end, would seem to depart from the typical character of merits review tribunals in Australia. In particular, the committee notes that the function of the RRT as a merits review tribunal is to make the 'correct and preferable' decision in a supporting context where applicants are entitled to introduce new evidence to support their applications. However, proposed section 423A would limit the RRT to facts and claims provided in the original application, and require (rather than permit) the drawing of an adverse inference as to credibility in the absence of a 'reasonable explanation' for not including those facts or claims in the original application.[24]

---

21 EM, SOC 45.

22 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43-44. The committee also considered the 'quality of law test' in respect of the requirement on applicants to provide a 'reasonable explanation', and on the basis of information provided by the minister, subsequently found this measure to be compatible with the quality of law test for human rights purposes: Parliamentary Joint Committee on Human Rights, *Twelfth report of the 44th Parliament* (24 September 2014) 30-32.

23 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43.

24 Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 43-44.

2.123 The measure would require the tribunal to draw an inference unfavourable to the credibility of the new claims or evidence raised in the absence of a 'reasonable explanation'. Such an adverse inference may be required to be drawn even where the MRD considers that the evidence is relevant, reliable or credible. This inability of the MRD to be able to freely assess the credibility of evidence may in turn result in denial of protection visas in circumstances where Australia has non-refoulement obligations. As set out above, the provision of independent, effective and impartial review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT. The requirement to draw an unfavourable inference in relation to the credibility of a claim or evidence raised at the review stage is inconsistent with the effectiveness of the tribunal in seeking to arrive at the 'correct and preferable' decision.[25]

2.124 The committee sought further information from the Minister for Immigration and Border Protection as to the compatibility of this measure with the obligation of non-refoulement. As set out above, no response was received from the minster by the requested date.

2.125 As the measure limits the ability of the tribunal to provide effective merits review of decisions relating to the grant of protection visas, it is likely to be incompatible with Australia's obligations under the ICCPR and the CAT of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.

Committee comment

2.126 The obligation of non-refoulement is absolute and may not be subject to any limitations.

2.127 Noting in particular that a response was not received from the Minister for Immigration and Border Protection regarding human rights issues identified in the committee's initial assessment of the bill, the committee is unable to conclude on the information before it that the measure is compatible with the obligation of non-refoulement.[26]

2.128 The measure limits the ability of the Administrative Appeals Tribunal to provide effective merits review of decisions relating to the grant of protection visas, and therefore is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against

25 See, Parliamentary Joint Committee on Human Rights, *Twelfth report of the 44th Parliament* (24 September 2014) 30.

26 Any subsequent response received from the minister will be published on the committee's website. See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

Torture of ensuring independent, effective and impartial review, including merits review, of non-refoulement decisions.

New procedures for the Immigration Assessment Authority

2.129 Schedule 2, Part 3 proposes to amend the Migration Act such that the minister may refer fast track reviewable decisions in relation to members of the same family unit to the Immigration Assessment Authority (IAA) for review together.[27] The amendments also enable the IAA to review two or more fast track reviewable decisions together, whether or not they were referred together.[28] Further, where fast track reviewable decisions have been referred and reviewed together, documents given by the IAA to any of the applicants will be taken to be given to each applicant.[29]

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

2.130 The initial analysis noted that the obligation of non-refoulement is engaged by the measure, as allowing for two or more fast-track decisions to be considered together may not provide effective review for the individual applicants. This concern is particularly relevant in the context of fast track review decisions by the IAA, as the committee has previously raised concerns about procedural fairness in relation to this process. In that context, these measures may fail to provide sufficient procedural and substantive safeguards to ensure a person is not removed in contravention of the obligation of non-refoulement.

2.131 The statement of compatibility sets out that the stated objective of the measure is to 'promote administrative efficiency'.[30] However, the right to non-refoulement, including the obligation to ensure independent, effective and impartial review, is absolute, and cannot even be justifiably limited.

2.132 In this regard, in the previous assessment of the introduction of the IAA in a previous committee report, it was noted that the (then proposed) system – an internal departmental review system – lacks the requisite degree of independence to ensure 'independent, effective and impartial' review under international human rights law.[31] It was identified that this concern is most pronounced in respect of the fact that any such internal reviews by the department would be performed by the

27 Schedule 2, Part 3, item 27 inserts new subsection 473CA(2).

28 Schedule 2, Part 3, item 28 inserts new section 473DG.

29 Schedule 2, Part 3, item 33 inserts new section 473HE.

30 EM, SOC 45.

31 Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 88.

department itself, which, being the executive arm of government, would amount to executive review of executive decision making.[32]

2.133 This was subsequently reiterated in the final assessment of the introduction of the IAA.[33] It was also noted that, while judicial review is still available, it is limited to review of decisions as to whether the decision was lawful and does not consider the merits of a decision.[34] This report also discussed how the right to a fair hearing was engaged and limited by the introduction of the IAA.[35]

2.134 These concerns with the IAA process are relevant to the consideration of the proposed amendments, as the possibility that the individual merits of an applicant's claim will not be treated or considered separately further increases the existing risk of refoulement and further limits the existing limitations on the right to an effective remedy.

2.135 As noted in the initial analysis the right to an effective remedy, including the right to independent, effective and impartial review, is further limited by the proposed amendments to the IAA process, which provide that individual applications need not be treated separately.

2.136 The committee sought the advice of the Minister for Immigration and Border Protection as to whether hearing family applications together (without the consent of the applicants) will ensure the review process under the IAA provides for effective review of such claims so as to comply with Australia's non-refoulement obligations. As set out above, no response was received from the minster by the requested date.

2.137 In the absence of this further information, it is not possible to conclude that the measure is compatible with the obligation of non-refoulement and the right to an effective remedy including the requirement of independent, effective and impartial review of non-refoulement decisions.

---

32 Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 88.

33 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178. It was noted that the fact that the reviewers are employees under the *Public Service Act 1999* affects the independence of such a review and therefore the impartiality of such a review.

34 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178.

35 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 178. Specifically, it was noted that: '… nothing in Part 7AA requires the IAA to give a referred applicant any material that was before the primary decision maker. There is also no right for an applicant to comment on the material before the IAA. These provisions therefore diminish procedural fairness and the applicant's prospects of correcting factual errors or wrong assumptions in the primary decision at the review stage.'

Committee comment

2.138 The obligation of non-refoulement is absolute and may not be subject to any limitations.

2.139 The right to an effective remedy and the obligation of non-refoulement, which includes the right to independent, effective and impartial review of non-refoulement decisions, is further limited by the proposed amendments to the Immigration Assessment Authority process, which provide that individual applications need not be treated separately.

2.140 Noting in particular that a response was not received from the Minister for Immigration and Border Protection regarding human rights issues identified in the committee's initial assessment of the bill, the committee is unable to conclude on the information before it that the measure is compatible with the obligation of non-refoulement and the right to an effective remedy.[36]

36 Any subsequent response received from the minister will be published on the committee's website. See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

Purpose	Seeks to amend the *Native Title Act 1993* to respond to the Federal Court's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 by: confirming the legal status and enforceability of agreements which have been registered by the Native Title Registrar on the Register of Indigenous Land Use Agreements without the signature of all members of a registered native title claimant (RNTC); enable the registration of agreements which have been made but have not yet been registered; and ensure that area Indigenous Land Use Agreements can be registered without requiring every member of the RNTC to be a party to the agreement
Portfolio	Attorney-General
Introduced	House of Representatives, 15 February 2017
Rights	Culture; self-determination (see **Appendix 2**)
Previous report[s]	2 of 2017
Status	Concluded examination

Background

2.141 The committee first reported on the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the bill) in its *Report 2 of 2017*, and requested a response from the Attorney-General by 13 April 2017.[1]

2.142 The Attorney-General's response to the committee's inquiries was received on 28 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Area Indigenous Land Use Agreements and the Native Title Act

2.143 The *Native Title Act 1993* (NTA) provides a legislative process by which native title groups can negotiate with other parties to form voluntary agreements in relation to the use of land and waters called Indigenous Land Use Agreements (ILUAs). Under the NTA ILUAs may be:

- over areas or land where native title has, or has not yet, been determined;
- entered into regardless of whether there is a native title claim over the area or not; or

1 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 18-25.

- part of a native title determination or settled separately from a native title claim.[2]

2.144 There are a number of matters which ILUAs may cover including:

- how native title rights coexist with the rights of other people;
- who may have access to an area;
- native title holders agreeing to a future development or future acts;
- extinguishment of native title;
- compensation for any past or future act;
- employment and economic opportunities for native title groups;
- issues of cultural heritage; and
- mining.[3]

2.145 When registered, ILUAs bind all parties and all native title holders to the terms of the agreement including people that have not been born at the time an ILUA was registered.[4]

2.146 Under the NTA there are three types of ILUAs:

- body corporate ILUAs are made in relation to land or waters where a registered native title body corporate exists;
- 'Area ILUAs' are made in relation to land or waters for which no registered native title body corporate exists; and
- alternative procedure ILUAs.[5]

2.147 The NTA specifies requirements which must be met in order for an agreement to be an 'Area ILUA'. Section 24CD of the NTA provides that all persons in the 'native title group', as defined in the section, must be parties to an Area ILUA. Under section 24CD the native title group consists of all 'registered native title claimants' (RNTC) in relation to land or waters in the area. Section 253 of the NTA defines RNTC as 'a person or persons whose name or names appear in an entry to the Register of Native Title Claims'. The RNTC is often a subset of the larger group native title claim group that may hold native title over the area.[6] Section 251A of the NTA provides for a process for authorising the making of ILUAs by the native title claim group.

---

2 See *Native Title Act 1993* (NTA) section 34CD.

3 See NTA section 24CB.

4 See NTA section 24AA(3).

5 Explanatory memorandum (EM) 2.

6 EM 2.

2.148 The recent Full Federal Court decision in *McGlade v Native Title Registrar & Ors* (*McGlade*),[7] dealt with three main issues relating to the process of Area ILUAs:

- whether each individual member of the RNTC must be party to an area ILUA;
- whether a deceased individual member of the RNTC must be party to an Area ILUA; and
- whether an individual member of the RNTC must sign an area ILUA prior to the application for registration being made.

2.149 The court in *McGlade* held in relation to any proposed Area ILUA, if one of the persons who, jointly with others, has been authorised by the native title claim group to be the applicant, refuses, fails or neglects, or is unable to sign a negotiated, proposed written indigenous land use agreement, for whatever reason, then the document will lack the quality of being an agreement recognised for the purposes of the NTA and will be unable to be registered.[8] Following this decision all individuals comprising the RNTC must sign the agreement otherwise it cannot be registered as an Area ILUA.

Amendments to process for Area ILUAs and validation of existing ILUAs

2.150 The bill seeks to amend the NTA to overturn aspects of the decision in *McGlade* regarding Area ILUAs. The bill seeks to amend the process for authorising ILUAs as follows:

(a) a native title claim group authorising an ILUA under section 251A of the NTA will be able to:

  (i) nominate one or more of the members of the RNTC for the group to be party to the ILUA; or

  (ii) specify a process for determining which of the members of the RNTC for the group is, or are, to be party to the ILUA.[9]

(b) under section 251A a native title claim group will be able to choose to utilise a traditional decision-making process for authorising such matters or agree and adopt an alternative decision-making process;[10]

---

7 [2017] FCAFC 10 (*McGlade*).

8 The decision of the full bench of the Federal Court in *McGlade* reversed the decision of Reeves J in *QGC Pty Ltd v Bygrave* (No 2) (2010) 189 FCR 412 *(Bygrave)* which held the authorisation of the ILUA by the claimant group was of paramount importance, not the signature of all of the persons comprising the applicant. Once authorised, the claimant group could decide who they wanted to sign the Area ILUA. Prior to *Bygrave* an Area ILUA would not be registered unless it was signed by all of the RNTCs.

9 See proposed section 251A(2).

10 See proposed section 251A(2).

(c) in place of the current requirement for all members of the RNTC to be party to the agreement under section 24CD of the NTA, the mandatory parties to an ILUA would include:

(i) the member or members of the RNTC who is or are nominated by the native title claim group, or determined using a process specified by the native title claim group, to be party to the ILUA; or

(ii) if no such members are nominated or determined to be party to the ILUA, a majority of the members of the RNTC.[11]

2.151 The bill also seeks to amend the NTA to:

(a) provide that existing Area ILUAs which have been registered on or before 2 February 2017, but do not comply with *McGlade* as they were not signed by all members of the RNTC, are valid; and

(b) enable the registration of agreements which have been made and lodged for registration on or before 2 February 2017 but do not comply with *McGlade* as they have not been signed by all members of the RNTCs.[12]

Compatibility of the measures with the right to culture

2.152 The right to culture is contained in article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 27 of the International Covenant on Civil and Political Rights (ICCPR).

2.153 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. This right is separate from the right to self-determination as it is conferred on individuals (whereas the right to self-determination belongs to groups). This right has been identified as particularly applying to Indigenous communities, and includes the right for Indigenous people to use land resources, including traditional activities such as hunting and fishing and to live on their traditional lands. The state is prohibited from denying individuals the right to enjoy their culture, and may be required to take positive steps to protect the identity of a minority and the rights of its members to enjoy and develop their culture.[13]

2.154 The initial human rights analysis noted that the proposed amendments to the process for authorising the making of Area ILUAs engage the right to culture. This is because the types of matters which may be the subject of an Area ILUA are

11 See proposed section 24CD(2)(a).

12 EM 6.

13 See, UN Human Rights Committee, *General Comment No. 23: The rights of minorities* (1994); UN Human Rights Committee, C*oncluding Observations of the Human Rights Committee: Australia*, A/55/40 (2000) and Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009).

significant and include such matters as authorisation of any future act and the extinguishment of native title rights and interests. Given that such agreements continue to operate into the future, the process by which ILUAs are authorised by native title claim groups is of great significance for the right to culture.

2.155 Under proposed section 24CD(2)(a)(ii) where no members of the RNTC are nominated or determined to be party to the ILUA, the default position is that agreement from a majority of the members of the RNTC will be sufficient for an Area ILUA to be valid. Noting that the right to culture is an individual rather than collective right, this may have the effect of limiting the right to culture of individuals who do not agree with the ILUA. Similarly, the validation of Area ILUAs that have previously been registered or are lodged for registration which have not been signed by all RNTC members could potentially limit the right to culture for individuals that do not agree to an Area ILUA.

2.156 A limitation on the right to culture will be permissible where it pursues a legitimate objective, is rationally connected to this objective and a proportionate means of achieving this objective.

2.157 The statement of compatibility identifies that the measures engage the right to culture and states that the NTA 'as a whole' promotes the right to enjoy and benefit from culture by establishing processes through which native title can be recognised and protected. It contends that the bill supports this function of the NTA by providing certainty to native title claimants and holders.[14]

2.158 The initial human rights analysis noted that statement of compatibility does not provide an assessment of the potential limitation on individuals' right to culture. Nevertheless, the statement of compatibility explains that the amendments are needed to ensure the views of the broader native title claim group are not frustrated noting that the position following *McGlade* means that if a single member of the RNTC withholds consent to be a party to the Area ILUA the ILUA cannot be registered. The statement of compatibility notes in particular that disputes between RNTC members and the broader claim group can lead to 'delays and burdensome costs.'[15]

2.159 The explanatory memorandum to the bill further notes that while a native title claim group may make an application under section 66B of the NTA removing a member or members of the RNTC who refuse to sign or are unable to sign, 'this process can impose high costs on claim groups.'[16]

14 EM 7.

15 EM 7.

16 EM 4.

2.160 The factors above indicate that, to the extent that the measures limit the right to culture, the measure pursues a legitimate objective for the purposes of international human rights law.

2.161 However, while acknowledging difficulties with the current authorisation process for ILUAs, the initial human rights analysis noted some questions about the proportionality of the measures, particularly in light of the serious matters that ILUAs may cover (including future projects and extinguishment of native title) and the ongoing binding nature of such ILUAs into the future. The proposed amendments would allow an ILUA to be registered even where a significant minority of RNTC members disagree or refuse to sign and may have strong reasons for doing so.

2.162 The statement of compatibility does not address whether reasonable scope could be given to minority views, which is relevant to whether the measure is the least rights-restrictive means of achieving its objective.

2.163 Accordingly, the committee sought the advice of the Attorney-General as to whether the measure is a reasonable and proportionate measure for the achievement of its apparent objective and in particular:

- whether less rights restrictive measures would be workable;
- whether reasonable scope could be given for minority views; and
- any procedural or other safeguards to protect the right to culture for individuals.

Compatibility of the measure with the right to self-determination

2.164 The right to self-determination is protected by article 1 of the ICCPR and article 1 of the ICESCR. The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. This includes peoples being free to pursue their economic, social and cultural development. It is generally understood that the right to self-determination accrues to 'peoples', rather than to individuals.

2.165 The UN Committee on the Elimination of Racial Discrimination has stated that the right to self-determination involves 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference'.[17]

2.166 The initial human rights analysis noted that, as acknowledged in the statement of compatibility, the principles contained in the UN Declaration on the Rights of Indigenous Peoples (the Declaration) are also relevant to the amendments in this bill. The Declaration provides context as to how human rights standards under

17 See UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21, The right to self-determination* (1996).

international law apply to the particular situation of Indigenous peoples.[18] The Declaration affirms the right of Indigenous peoples to self-determination.[19]

2.167 The initial human rights analysis stated that the proposed amendments to the authorisation process of Area ILUAs engage and appear likely to promote the collective right to self-determination, noting that a minority of members of the RNTC would be unable to prevent the making of an ILUA which has been authorised by the native title claim group. The statement of compatibility states that the measures engage and promote the rights contained in the Declaration and the right to self-determination by:

> …emphasis[ing] the fundamental importance of authorisation to the integrity of the native title system. Authorisation processes recognise the communal character of Indigenous traditional law and custom, and ensure that decisions regarding the rights and interest of Indigenous Australians are made with traditional owners.[20]

2.168 While acknowledging that the measures, in general, appear to promote the collective right to self-determination, the initial human rights analysis noted that there are some remaining questions about whether the measures will promote the right to self-determination in all circumstances. The initial human rights analysis stated that, as indicated above at [2.160], it may be considered to be important to give some scope to the reasonable expression of minority views as part of ensuring genuine agreement is reached. It this respect, it is noted that adequately consulting those most likely to be affected by such changes in accordance with the Declaration is of particular importance.

2.169 In relation to the compatibility of the measure with the right to self-determination, the committee therefore sought the advice of the Attorney-General:

- about the extent to which the measures promote the right to self-determination in a range of circumstances;
- as to whether reasonable scope could be given for minority views; and
- as to whether there has been sufficient and adequate consultation with Aboriginal and Torres Strait Islander peoples about the proposed changes.

18 EM 8.

19 UN Declaration on the Rights of Indigenous Peoples, article 3.

20 EM 8.

Attorney-General's response

Right to culture

2.170 In relation to the right to culture, the Attorney-General's response acknowledges that there may be some tension between the protection of communal rights and the individual right to culture:

> One of the main purposes of the Act is to preserve and protect native title rights. Native title rights are generally communal in nature and there may some [sic] tension between the protection and preservation of communal rights and the individual right to enjoy and benefit culture.
>
> The practice of culture and the recognition of native title rights are not necessarily dependent; it is possible for native title holders to engage in a range of cultural practice without a native title claim or determination. Indigenous Land Use Agreements (ILUAs) will often facilitate access for such practices regardless of the nature and extent of native title rights likely to be recognised by a court.

2.171 The Attorney-General's response provides useful information addressing the committee's questions about whether the measures are a reasonable and proportionate limitation on the right to culture.

2.172 In relation to whether less rights restrictive measures would be workable, the Attorney-General's response states:

> ILUAs are a mechanism allowing native title holders and claimants and third parties to agree about the doing of things on land subject to native title. While the exact subject matter of the affected ILUAs is commercial-in-confidence to the parties of those ILUAs, ILUAs can cover a range of matters including agreement about the doing of acts that may affect native title, how native title and other rights in the area will be exercised including how parties will be notified and consulted, and agreement on compensation and other benefits. The effect of the decision has been to bring into doubt the agreements that have been reached on these and other issues, and to raise doubts about the validity of acts done in reliance on the agreement and of benefits transferred or to be transferred in the future. This leaves the ILUAs open to legal challenge.
>
> Allowing the affected ILUAs to remain open to challenge creates great uncertainty about whether agreements struck can continue to be relied upon by both native title holders and third parties. It also raises the prospect of significantly increased costs for the sector both in the form of litigation about the status of affected agreements, which may divert resources away from progressing claims for native title, and potentially the need to re-negotiate ILUAs which may have already taken several years and significant resources to negotiate. Given these consequences I am satisfied that less restrictive measures are not available.

2.173 It can be accepted that the burden to re-negotiate ILUAs which have already been negotiated may take significant time and resources, and uncertainty regarding the status of agreements already registered or lodged for registration may pose significant problems for native title holders and third parties. In these circumstances, legislating to save existing agreements (that have already been registered, or have been lodged for registration) from legal challenge may be the least rights-restrictive feasible method of addressing these problems, less so than, for instance, imposing some interim arrangement that has not been authorised by native title holders, or simply leaving the ILUA open to legal challenge.

2.174 However, it is noted in this respect that ILUAs may cover a range of serious matters, including the extinguishment of native title rights and interests, and accordingly, where the terms of the ILUA are a matter of dispute within the claim group, the measures validating those ILUA's may profoundly affect the interests of certain individuals in relation to the right to culture. This underscores the importance of consultation with affected groups, addressed below.

2.175 In relation to whether reasonable scope could be given in the ILUA authorisation process to minority views, the Attorney-General's response states:

> Minority views within the claim group are given voice through the authorisation process for an ILUA. The authorisation process involves everyone who holds, or who may hold, native title within the area of an ILUA, and requires those parties to use a traditional decision-making process (where one exists), or a process agreed upon by the group, to decide whether or not to authorise the ILUA. Where a claim group does not authorise an ILUA, the agreement cannot be registered. It is only after the authorisation has occurred that the Registered Native Title Claimant (RNTC) - a smaller group of authorised representatives who manage the claim on behalf of the wider group - must become parties to the agreement, before it can be registered.
>
> The measures in the Bill allow an ILUA to be registered where not every member of the RNTC has become party to the agreement; however, the ILUA must still be authorised before this can occur. Where a claim group authorises an ILUA, notwithstanding minority views, the Act allows for that ILUA to be registered. Requiring unanimity on the part of the claim group before ILUAs can be authorised would slow, or possibly entirely stop, agreement-making under the Act, which would dramatically reduce the financial and other benefits which can flow to native title holders as a result of ILUAs.

2.176 This response assists to further explain the authorisation process for an ILUA and indicates that scope is afforded to minority views in these processes but that requiring unanimity on the part of the claim group before ILUAs are authorised may undermine the process of agreement-making under the NTA. The response also clarifies that even if not every member of the RNTC signs the ILUA the ILUA must still

be properly authorised. These factors collectively may assist to support the view that the measures are a proportionate limit on the individual right to culture.

2.177 In relation to whether there are any procedural or other safeguards to protect the right to culture for individuals, the Attorney-General's response states:

> Part of the statutory functions of Native Title Representative Bodies and Service Providers is to provide dispute resolution services. This mechanism provides support to claim groups unable to agree about the conduct of consultations, mediations, negotiations or proceedings about ILUAs.
>
> The measures in the Bill impose a higher standard on decision-making in relation to ILUAs than existed prior to *McGlade.* Before that decision it was sufficient for a single member of the RNTC to be a party to an ILUA. The Bill strikes a balance between the unanimity requirement in *McGlade* and the previously accepted position that a single RNTC member being party to an ILUA was sufficient.
>
> The *McGlade* decision emphasised the role of the s 66B applicant replacement process as a mechanism for removing members of the RNTC who refuse to sign an ILUA, notwithstanding the fact that the wider group has authorised it. The court noted that it is open to a claim group to remove a person from the RNTC for failing to comply with the claim group's will in that regard. However, the process of obtaining a court order under s 66B is costly, and will often delay the making of agreements for groups, which is already a lengthy and expensive process. Requiring a change in the composition of the RNTC under s 66B in order to ensure that an ILUA can be registered imposes significant transaction costs on native title groups.

2.178 These points support the view that the measures may constitute a proportionate limit on human rights. In relation to the section 66B mechanism, it is accepted that this process is costly and may create considerable delay. On balance, on the available information, it appears that the measures are likely to be a reasonable and proportionate limit on the individual right to culture and accordingly compatible with this right.

Right to self-determination

2.179 In relation to the compatibility of the measure with the right to self-determination and whether reasonable scope could be given to minority views, the Attorney-General's response states:

> Through ILUAs the Act provides a framework for native title holders to use their native title rights in particular ways and to make agreements about how activities on land subject to native title may occur. The measures provide greater control to claim groups as a whole, rather than the individual members of the RNTC, over the making of area ILUAs. If allowed to stand, the *McGlade* decision would have required unanimity among the RNTC, even in circumstances where the broader claim group supports the relevant ILUA and have authorised it. Negotiation and authorisation of an

> ILUA are the appropriate forums for a native title group to consider minority viewpoints.

2.180 This response, in key respects, reflects the nature of the right to self-determination as ultimately a collective one. The Attorney-General's response usefully outlines the scope provided to minority views through the authorisation process. The authorisation process, rather than the registration process, appears to be the appropriate mechanism to assist to ensure that genuine agreement is reached and the collective right to self-determination is promoted.

2.181 In relation to whether there has been sufficient and adequate consultation with Aboriginal and Torres Strait Islander peoples about the proposed changes the Attorney-General's response states:

> The consultation process for the Bill was necessarily targeted, given the narrow scope of the measures and their urgency. My department consulted with the peak body representing all Native Title Representative Bodies and Service Providers across the country, the National Native Title Council (NNTC), along with state and territory officials, and peak representative bodies for the mining and agricultural sectors. The NNTC were supportive of the measures and made a submission to the Senate Inquiry into the provisions of the Bill - endorsed by many of the Native Title Representative Bodies and Service Providers - indicating its support. The NNTC and Cape York Land Council also expressed concern that, absent the Bill being passed, the *McGlade* decision will allow individuals to frustrate the will of the group.

2.182 The obligation to consult with Indigenous peoples in relation to actions which may affect them is accepted as part of customary international law.[21] The information provided by the Attorney-General that a number of Native Title Representative Bodies were able to make submissions into the Senate Legal and Constitutional Affairs Inquiry into the bill and that some targeted consultations were undertaken is welcome.

2.183 However, it is noted that the judgment in *McGlade* was handed down on 2 February 2017, and the bill was introduced into parliament within two weeks' time. This is very short period of time given the obligation to consult and the importance and complexity of the issues raised and the need for affected people to develop and communicate their views to representative and other bodies.

2.184 A related human rights issue that some affected parties have raised in relation to the bill is the requirement of 'free, prior and informed consent' contained within the Declaration. While the Declaration is not included in the definition of

---

21 Customary international law is the practice of states accepted by states internationally as law. It has two elements (1) widespread and representative state practice and (2) *opinio juris* (belief by states that such conduct is required because a rule of law renders it compulsory). Customary international law is binding on all states.

'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides clarification as to how human rights standards under international law apply to the particular situation of Indigenous peoples.[22] Aspects of the Declaration may also be considered to represent customary international law, which is binding on Australia. The statement of compatibility recognises the relevance of the Declaration in relation to the committee's mandate of assessing legislation for human rights compatibility.[23]

2.185 There is, however, uncertainty about the requirement of 'free prior and informed consent' as a matter of international human rights law. A number of governments (including Australia) have previously not accepted that aspects of the provisions of the Declaration which require 'free prior and informed consent' (rather than 'consultation') have yet attained the status of customary international law which is binding on Australia.[24] This analysis does not comprehensively address whether the measure complies with this principle and the extent to which it relates to the right to self-determination. However, it is noted that while not in itself legally binding, the Declaration is an important instrument that articulates a range of principles, standards and guidance to governments for the treatment of Indigenous peoples.[25] The principle of 'free prior and informed consent' may be viewed as an important one in the context of developing and amending native title legislation. The standards articulated in the Declaration may also signify future developments in international law which may become legally binding.

2.186 Overall, noting the information provided in the Attorney-General's response, the measures appear to promote the right to self-determination.

Committee response

2.187 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

---

22 EM 8.

23 EM 8.

24 See *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, A/HRC/12/34 (2009) [38]; See, also Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013) 16.

25 See, for example, Trevor Buck, *International Child Law* (Routledge, 2014) 437 – 438; Brenda L Gunn, 'Self-Determination as the Basis for Recognition: Implementing the UN Declaration on the Rights of Indigenous Peoples' 7(30) (May/June 2012) *Indigenous Law Bulletin* 22; Kanchana Kariyawasam, 'The significance of the UN Declaration on the rights of Indigenous Peoples: The Australian Perspectives' 11(2) (2010) *Asia-Pacific Journal on Human Rights and the Law* 1-17; Elvira Pulitano (ed) *Indigenous Rights In the Age of the UN Declaration* (Cambridge University Press, 2012).

2.188 While noting that the measures may profoundly affect certain individuals' enjoyment of their right to culture, the committee notes that the measures are likely to be a reasonable and proportionate limit on the individual right to culture and accordingly may be compatible with the right to culture.

2.189 The committee notes that the measures are likely to promote the right to self-determination.

2.190 The committee also notes the importance of the obligation to consult with Indigenous peoples in relation to actions which may affect them, and the principles outlined in the UN Declaration on the rights of Indigenous peoples.

Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017

Purpose	Seeks to amend the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to implement amendments of the *International Convention for the Prevention of Pollution from Ships 1973,* to ensure that there are strict discharge restrictions for oil, noxious liquid substances, sewage and garbage for certain ships operating in polar waters
Portfolio	Infrastructure and Regional Development
Introduced	House of Representatives, 16 February 2017
Rights	Fair trial; presumption of innocence (see **Appendix 2**)
Previous report	3 of 2017
Status	Concluded examination

Background

2.191 The committee first reported on the Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017 (the bill) in its *Report 3 of 2017*, and requested a response from the Minister for Infrastructure and Transport by 21 April 2017.[1]

2.192 The minister's response to the committee's inquiries was received on 31 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

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

2.193 In its initial analysis, the committee described the relevant requirements of article 14(2) of the International Covenant on Civil and Political Rights (ICCPR), which protects the right to be presumed innocent until proven guilty according to law in relation to strict liability and reverse burden offences.

2.194 The committee noted that, in relation to both strict liability offences and reverse burden offences, such measures will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. The initial analysis also drew attention to the committee's *Guidance Note 2*

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 26-28.

which sets out the committee's usual expectation in relation to strict liability offences and reverse burden offences.[2]

2.195 The statement of compatibility did not sufficiently address these matters. Accordingly, the committee sought the advice of the Minister for Infrastructure and Transport as to:

- whether the strict liability and reverse burden offences are aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the strict liability and reverse burden offences are effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.196 In relation to the questions raised by the committee, the minister's response provides that:

> **Strict liability offences**
>
> 26BCC(3) creates an offence for the master and owner of an Annex IV Australian ship where sewage is discharged in the Antarctic Area outside Australia's exclusive economic zone. The purpose of this offence to [sic] manage the risk of Australian ships discharging sewage into the pristine waters of the Antarctic. This type of discharge could have a significant adverse impact on the environment, human health, safety and other users of the sea, particularly when a reoccurring activity.
>
> 26BCC(4) creates a similar offence, being an offence for the master and owner of an Annex IV Australian ship which discharges sewage in Arctic waters. While Australia does not have the additional burdens of responsibilities for the Arctic area as is the case for the Antarctic under the Antarctic treaty system, the same concerns outlined above in relation to the Antarctic apply to this offence in the Arctic.
>
> **Reverse Burden Provisions**
>
> 26BCC(5)-(9) provide defences to the strict liability offences proposed at 26BCC(3) and (4). These provisions describe exceptions to the strict liability offences and require the defendant to raise evidence about the matters outlined in each provision.
>
> Section 26BCC(5) creates two exceptions. The first is an exception to the strict liability offences where safety of life at sea is endangered. The

2 *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.

second exception requires evidence to be presented about the precautions taken throughout a voyage to minimise damage and the decision about the need to discharge sewage.

Section 26BCC(6) creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the speed of the ship when the discharge occurs.

Section 26BCC(7) also creates an exception requiring evidence to be presented about a combination of factors: the location of the discharge and the physical nature of the discharge when the discharge occurs.

Section 26BCC(8) creates an exception requiring evidence to be presented about the nature of the sewage discharged.

Section 26BCC(9) creates an exception requiring evidence to be presented about the location of the discharge.

Legitimate objective

The Polar Code is an international agreement negotiated under the auspices of the International Maritime Organization (IMO) that includes mandatory provisions covering pollution prevention measures. These measures are important because as sea ice continues to decline, the polar waters are becoming more accessible to vessel traffic. Shipping activities are therefore projected to increase as a result of natural resource exploration and exploitation, tourism, and faster transportation routes. The increase in shipping presents substantial environmental risks for these fragile marine ecosystems. Therefore, I consider that both the strict liability offences and reverse burden provisions are directed toward a legitimate objective.

Rational connection

In aiming to protect the environment the Polar Code places strict limitations on discharge of sewage and garbage from ships travelling in polar waters. The strict liability provisions in the Bill implement the parts of the Polar Code that reflect these limitations. Prevention of the discharge of untreated sewage from passing ships is a necessary step in protecting these waters and will become more important as traffic increases.

The burden of proof is placed on the defendant in the above provisions of the Bill because the facts in issue in the defence might be said to be peculiarly within the knowledge of the accused and the defendants are best placed to give evidence as to their decision making at the time when a discharge occurs. This is a situation in which the relevant facts are likely to be within the knowledge of the defendant, and in which it could be difficult for the prosecution to prove the defendant's state of mind. The Senate Standing Committee for the Scrutiny of Bills has previously indicated that the burden of proof may be imposed on a defendant under these circumstances. In my view, this approach is also consistent with

4.3.1 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

Regarding 26BCC(5), only those present during a particular incident are able to make an assessment as to what is necessary to ensure the safety of life at sea, and the master of the ship is charged with the responsibility for making this judgement. Regarding 26BCC(6), the circumstances surrounding a particular incident, the precautions needed to address that situation, and the assessment undertaken in making a decision, can only be known by those present (specifically the master of the ship). Similarly, regarding 26BCC(7)-(9), the matters described in each of these exceptions is knowable only by those present and charged with decision making responsibilities, being the master of the ship in control of the ship at the time, subject to the direction of the shipowner.

Proportionality

Shipping companies are engaging in a high-investment, high-return commercial activities. Stringent regulatory regimes designed to better manage safety and environment issues throughout the world's oceans are agreed internationally through the IMO, a longstanding international body involving 172 Member States. Those ships travelling through Antarctic and Arctic waters are subject to additional internationally agreed regulatory regimes designed to protect these sensitive waters. Australia has a particular responsibility for parts of the Antarctic waters through the Antarctic Treaty system.

Given the significant consequences of non-compliance for the Antarctic, it is important that the penalty for non-compliance is high enough to be a real incentive to industry. In order to ensure compliance with environmental regimes, high initial outlays by the shipping industry are sometimes required. In these circumstances, and given the very high level of expenditure routinely incurred in shipping operations, it is considered that the strict liability offences and reverse burden provisions contained in the Bill are reasonable and proportionate. Further, these strict liability offences and reverse burden provisions are consistent with other measures in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

There are no less intrusive measures that could be implemented that would achieve the same environmental outcome. I acknowledge the burden placed on shipowners and masters through these provisions, however I note the benefits that also accrue to industry in protecting the environment in which they operate. I also note the support provided by the maritime industry during the international negotiations relating to the Polar Code conducted under the auspices of the IMO.

Given the above, I consider that the strict liability offences and reverse burden provisions contained in the Bill are aimed at achieving a legitimate objective for the purposes of international human rights law, that the offences and provisions are rationally connected to that objective, and

that the limitation is in each case a reasonable and proportionate measure.

2.197 Based on the detailed information provided, the measures appear likely to be compatible with the right to be presumed innocent and the right to a fair trial.

Committee response

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

2.199 In light of the additional information provided the committee notes that the measure appears likely to be compatible with the presumption of innocence and the right to a fair trial. The committee notes that this information would have been useful in the statement of compatibility.

Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016

Purpose	Proposes to make a number of amendments to the *Therapeutic Goods Act 1989*, including to: enable the making of regulations to establish new priority pathways for faster approval of certain products, designate bodies to appraise the suitability of the manufacturing process for medical devices manufactured in Australia, and to consider whether such medical devices meet relevant minimum standards for safety and performance; allow certain unapproved therapeutic goods that are currently accessed by healthcare practitioners through applying to the Secretary of the Department of Health for approval to be more easily obtained; provide review and appeal rights for persons who apply to add new ingredients for use in listed complementary medicines; and make a number of other measures to ensure consistency across the regulation of different goods under the Act
Portfolio	Health and Aged Care
Introduced	House of Representatives, 1 December 2016
Right	Fair trial (see **Appendix 2**)
Previous report	2 of 2017
Status	Concluded examination

Background

2.200 The committee first reported on the Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016 (the bill) in its *Report 2 of 2017*, and requested a response from the Minister for Health by 13 April 2017.[1]

2.201 The minister's response to the committee's inquiries was received on 19 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Civil penalty provisions

2.202 Proposed section 41AF of the bill seeks to introduce a new civil penalty provision that applies if a licence holder carrying out one or more steps in the manufacture of therapeutic goods provides false or misleading information or documents to the Secretary of the Department of Health (the secretary).

1 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 26-28.

2.203 A maximum of 5 000 civil penalty units will apply to an individual who is found to contravene proposed section 41AF. Based on the rate for penalty units as it currently stands this equates to a monetary penalty of up to $900 000.[2] With changes to the rate of penalty units scheduled to increase from July 2017, the maximum penalty will be over $1 million.[3]

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

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

Minister's response

2.206 In relation to the questions raised by the committee, the minister's response provides that:

> This measure (proposed new section 41AF) is clearly identified in the Bill as being a civil penalty, and is plainly distinguishable as such from the corresponding criminal offences in the Bill relating to the same conduct - proposed new sections 41 AD and 41 AE.
>
> Although the maximum levels of these penalties may appear high, this is designed to reflect the size and nature of the therapeutic goods industry, and the significant health dangers that major problems with medicines and medical devices can cause to patients.
>
> It is very important from a public health perspective that the Act discourage the provision of false or misleading information to the Therapeutic Goods Administration (TGA) in the context of the carrying out of its regulatory functions - including in respect of therapeutic goods manufacturers. If the TGA were to rely on false or misleading information to, for example, elect not to suspend or revoke a manufacturing licence, this could potentially have quite serious consequences for public health and safety.

2 The current penalty unit rate is $180 per unit, see section 4AA of the *Crimes Act 1914*.

3 See *Mid-Year Economic and Fiscal Outlook 2016-17*, December 2016, Appendix A. See also Crimes Amendment (Penalty Unit) Bill 2017, which seeks to increase the amount of the Commonwealth penalty unit from $180 to $210, with effect from 1 July 2017. This bill was introduced into the House of Representatives on 16 February 2017.

The new information-gathering power in proposed new section 41AB is needed to support the effective regulation of therapeutic goods manufacturing in Australia so as to safeguard public health, particularly as it relates to informing the TGA about significant matters such as the quality assurance and control measures used by a manufacturer, and whether a manufacturer has been observing the manufacturing principles (as minimum requirements for ensuring quality and safety of therapeutic goods).

The maximum penalty levels for proposed new section 41AF are also consistent with the regime throughout the Act of having civil penalties as an alternative to criminal offences for a range of behaviour that breaches important regulatory requirements. For example, section 9H of the Act (which the Committee considered in its Second Report of the 44th Parliament) sets out a civil penalty for making false statements in, or in connection with a request to vary an entry for a therapeutic good in the Australian Register of Therapeutic Goods, with identical maximum penalty levels to proposed new section 41AF.

It is also important to note that the civil penalty in proposed new section 41AF would not apply to the public in general, but would only arise in the specific regulatory context of manufacturers of therapeutic goods who are licensed under Part 3-3 of the Act.

In addition, proposed new section 41AF does not carry any sanction of imprisonment for non-payment. Section 42YD of the Act makes it clear that if the Federal Court orders a person to pay a civil penalty, the Commonwealth may enforce the order as if it were a judgment of the Court, that is as a debt owed to the Commonwealth.

With these points in mind, this civil penalty provision would not seem likely to be 'criminal' for the purposes of international human rights law and, accordingly, the Committee's question in relation to whether the measure is consistent with the right to a fair trial would not appear to arise.

The Act also protects a person from being required to pay a civil penalty if they have already been convicted of an offence relating to the same conduct, and prohibits criminal proceedings from being started if an order has been made against the person in civil penalty proceedings for the same conduct. Any civil penalty proceedings will be stayed if criminal proceedings relating to the same conduct are, or already have been, started.

In addition, the Act makes it clear that any evidence given by a person in civil penalty proceedings (whether or not any order was made by the Court in those proceedings) will not be admissible in criminal proceedings involving the same conduct.

2.207 Based on the detailed information provided and the particular regulatory context, the measures appear unlikely to be criminal for the purposes of

international human rights law. Accordingly, the criminal process rights contained in articles 14 and 15 of the ICCPR are unlikely to apply. It is noted in this respect that there are also relevant safeguards that would prevent persons being found liable for both a criminal and civil penalty in relation to the same conduct.

Committee response

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

2.209 In light of the additional information provided the committee notes that the measure appears unlikely to be 'criminal' for the purpose of international human rights law. The committee notes that this information would have been useful in the statement of compatibility.

Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016

Purpose	Seeks to enable the Secretary of the Department of Veterans' Affairs to authorise the use of computer programmes to: make decisions and determinations; exercise powers or comply with obligations; and do anything else related to making decisions and determinations or exercising powers or complying with obligations. The bill also empowers the secretary to disclose information about a particular case or class of persons to whomever the secretary determines, if it is in the public interest
Portfolio	Veterans' Affairs
Introduced	House of Representatives, 24 November 2016
Right	Privacy (see **Appendix 2**)
Status	Concluded examination

Background

2.210 The committee reported on the Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 (the bill) in its *Report 3 of 2017*, and requested further information from the minister in relation to the human rights issues identified in that report.[1]

2.211 In order to conclude its assessment of the bill while it is still before the Parliament, the committee requested that the minister's response be provided by 21 April 2017. However, a response was not received by this date.

2.212 Accordingly, the committee's concluding remarks on the bill are based on the information available at the time of finalising this report.[2]

Broad public interest disclosure powers

2.213 Schedule 2 of the bill inserts a provision into each of the *Military, Rehabilitation and Compensation Act 2004* (MRCA), *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) and *Veterans' Entitlements Act 1986* to enable the Secretary of the Department of Veterans' Affairs (DVA) to disclose information obtained by any person in the performance of their duties under those Acts, in a particular case or class of case, to such persons and for such

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 5-8.

2 See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

purposes as the secretary determines, if the secretary certifies it is necessary in the public interest to do so.[3]

2.214 If the information to be disclosed is personal information, the secretary is required to notify the affected person in writing of the intention to disclose this personal information, and give the person a reasonable opportunity to provide a response and consider that response.[4] The secretary will commit an offence if information is disclosed without engaging with the affected person.[5]

Compatibility of the measure with the right to privacy

2.215 The right to privacy encompasses respect for informational privacy, including the right to respect private information and private life, particularly the storing, use and sharing of personal information.

2.216 The initial human rights analysis noted that Schedule 2 of the bill engages and limits the right to privacy by bestowing upon the secretary of the DVA a broad discretionary power to 'disclose any information obtained by any person in the performance in that persons duties' under the relevant act[6] 'to such persons and for such purposes as the secretary determines'.[7]

2.217 The statement of compatibility for the bill acknowledges that the right to privacy is engaged and limited by this measure, but states that to the extent that it may limit rights those limitations are reasonable, necessary and proportionate.

2.218 The explanatory memorandum sets out the objective for the proposed amendment:

> [t]he information sharing provisions, and related consequential amendments, are necessary because, with the creation of a stand-alone version of the [*Safety, Rehabilitation and Compensation Act 1988*] with application to Defence Force members, the ability of the [Military

3 Proposed section 409A of the *Military, Rehabilitation and Compensation Act 2004*, proposed section 151B of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and proposed section 131A of the *Veterans' Entitlements Act 1986.*

4 At proposed subsection 409A(6) of the *Military, Rehabilitation and Compensation Act 2004*, proposed subsection 151B(6) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and proposed subsection 131A(6) of the *Veterans' Entitlements Act 1986.*

5 At proposed subsection 409A(7) of the *Military, Rehabilitation and Compensation Act 2004*, proposed subsection 151B(7) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and proposed subsection 131A(7) of the *Veterans' Entitlements Act 1986.*

6 Namely, the *Military, Rehabilitation and Compensation Act 2004*, *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* or the *Veterans' Entitlements Act 1986*.

7 Lawful interferences with privacy must be sufficiently circumscribed in order to accord with article 17 of the International Covenant on Civil and Political Rights: UN Human Rights Committee, *General Comment 16: Article 17 (Right to Privacy)* (1988) paragraph [8].

> Rehabilitation and Compensation Commission] to share claims information about current serving members with either the Secretary of the Department of Defence or the Chief of the Defence Force is more limited than it is under the MRCA. These amendments will align information sharing under the DRCA with arrangements under the MRCA.[8]

2.219 The statement of compatibility also sets out the following examples of when it may be appropriate for the secretary to disclose personal information:

> …where there is a threat to life, health or welfare, for the enforcement of laws, in relation to proceeds of crime orders, mistakes of fact, research and statistical analysis, APS code of conduct investigations, misinformation in the community and provider inappropriate practices.[9]

2.220 The initial analysis stated that the objective of ensuring claims information about current serving members can be shared with either the Secretary of the Department of Defence or the Chief of the Defence Force would appear to seek to achieve a legitimate objective for the purposes of international human rights law.

2.221 The initial analysis stated that in allowing for disclosure in this way, the measure also appears to be rationally connected to this objective.

2.222 The statement of compatibility sets out that several statutory safeguards will ensure that the secretary's powers will be exercised appropriately, including that:

- the secretary must act in accordance with rules that the minister makes about how the power is to be exercised;
- the minister cannot delegate his or her power to make rules about how the power is to be exercised to anyone;
- the secretary cannot delegate the public interest disclosure power to anyone;
- before disclosing personal information about a person, the secretary must notify the person in writing about his or her intention to disclose the information, give the person a reasonable opportunity to make written comments on the proposed disclosure of the information and consider any written comments made by the person; and
- unless the secretary complies with the above requirements before disclosing personal information, he or she will commit an offence, punishable by a fine of 60 penalty units.[10]

2.223 However, as noted in the initial analysis these safeguards are not sufficient to demonstrate that the limitation on the right to privacy is proportionate to the

8 Explanatory memorandum (EM) 11.

9 EM, statement of compatibility (SOC) 3.

10 EM, SOC 4.

objective sought to be achieved. For example, although the secretary must act in accordance with rules made by the minister, there is no requirement on the minister to make such rules. Under the legislation as drafted, the secretary is empowered to disclose any personal information to any person with the sole criteria for the exercise of this power being that the secretary considers it to be in 'the public interest' to do so.

2.224 The initial analysis noted that the absence in the primary legislation of any substantive detail as to the circumstances in which personal information can be disclosed, and to whom, and the absence of any obligation to make rules confining this power, together created a broad discretionary power to disclose information which raises concerns as to whether the limitation on the right to privacy is proportionate to the objective being sought to be achieved.

2.225 The committee therefore sought the advice of the Minister for Veterans' Affairs as to whether:

- there are safeguards in place to demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved; and
- there are less restrictive ways to achieve the objective of the measure (including whether the primary legislation could set limits on the breadth of the secretary's discretionary power or, at a minimum, it could require the making of rules that set out how the power is to be exercised).

2.226 As noted above, no response was received by the date requested. In the absence of this information, it is not possible to conclude that the measure is compatible with the right to privacy.

Committee comment

2.227 The measure gives the Secretary of the Department of Veterans' Affairs the power to disclose personal information to any person on any basis so long as the secretary considers that disclosure to be in the 'public interest'. The statement of compatibility refers to rules that will govern the exercise of the secretary's broad discretionary power to disclose information. However, there is no obligation to make such rules, and their proposed content is not available to the committee. This broad discretionary power to disclose personal information raises potential concerns in relation to the right to privacy.

2.228 Noting in particular that a response was not received from the minister regarding human rights issues identified in the committee's initial assessment of the bill, the committee is unable to conclude on the information before it that the measure is compatible with the right to privacy.[11]

11 Any subsequent response received from the minister will be published on the committee's website. See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

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	*Federal Financial Relations Act 2009*
Last day to disallow	Exempt
Rights	Equality and non-discrimination; health; social security; adequate standard of living; children; education; work (see **Appendix 2**)
Previous reports	3 of 2017
Status	Concluded examination

Background

2.229 The committee first reported on the Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 [F2016L01934] in its *Report 3 of 2017*, and requested a response from the Treasurer by 21 April 2017.[1]

2.230 The Assistant Minister to the Treasurer's response to the committee's inquiries was received on 19 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.231 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.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 2-4.

2 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.

2.232 Based on this additional information provided by the Treasurer, the committee was previously able to conclude that these determinations were compatible with human rights.[3]

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

2.233 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 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.

2.234 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.

2.235 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

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

2.237 As noted in the initial analysis, 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.

2.238 As such, the initial human rights analysis stated that 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.

2.239 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'.[4] This mirrors

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

4 Explanatory statement, statement of compatibility 2.

information provided in the statements of compatibility for NSPP determinations previously considered by the committee.

2.240 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 on previous occasions 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.

2.241 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 is not provided in the statement of compatibility.

2.242 Accordingly, the committee sought the advice of the Treasurer as to:

- whether there has been any reduction in the allocation of funding towards NSPPs since its last assessment of related determinations;
- whether 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.

Minister's response

2.243 The response of the Assistant Minister to the Treasurer provides a range of relevant information to address these questions.

2.244 In relation to whether there has been a reduction in the allocation of funding towards NSPPs since the last assessment of related determinations, the response provides the following table outlining increases in expenditure:

Sector	2014-15 ($)	2015-16 ($)	Increase
Disability services	1,393,331,000	1,438,826,000	45,495,000
Affordable housing	1,305,771,000	1,324,052,000	18,281,000
Skills and workforce	1,435,176,000	1,455,484,000	20,308,000

2.245 The response further states that even though there was no decrease in funding on this occasion, a year-on-year decrease in the total payment amount does not necessarily indicate a retrogressive measure. The response explains that this is

because a change in the parameters underlying indexation formulas could result in a reduced total payment and other policies and programs may also have an effect on NSPPS. As an example, the response notes that the transition to the National Disability Insurance Scheme is likely to result in reduced funding under the NSPPs but that the total commonwealth government expenditure will be increasing in the area of disability services.

2.246 In relation to whether the determination supports the progressive realisation of economic, social and cultural rights, the response notes that:

- The NSPP for skills and workforce development promotes a range of rights including the right to education and the right to work;
- The NSPP for affordable housing promotes the right to an adequate standard of living specifically in relation to housing;
- The NSPP for disability services promotes a range of human rights for persons with disabilities.

2.247 The information provided demonstrates that the allocation of funding towards NSPPs does not constitute a retrogressive measure under international human rights law. This allocation is likely to be compatible with Australia's obligations under international human rights law to progressively realise economic, social and cultural rights. Moreover, the allocation of funding appears to promote a range of economic and social rights.

Committee response

2.248 The committee thanks the Assistant Minister to the Treasurer for his response and has concluded its examination of this issue. The committee notes that it would have been useful to include the additional information in the statement of compatibility and recommends that such information be included in the future.

2.249 Based on the information provided, the allocation of funding towards National Specific Purpose Payments is likely to be compatible with Australia's obligations under international human rights law to progressively realise economic, social and cultural rights. The National Specific Purpose Payments appear to promote a range of these rights.

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	*Migration Act 1958*
Last day to disallow	13 February 2017
Right	Protection of the family (see **Appendix 2**)
Previous reports	1 of 2017, 3 of 2017
Status	Concluded examination

Background

2.250 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 Immigration and Border Protection by 3 March 2017.[1] The minister's response to the committee's initial inquiries was received on 10 March 2017.

2.251 The committee reported again on the regulation in its *Report 3 of 2017*, and requested a further response from the minister by 21 April 2017.[2]

2.252 The minister's response to the committee's further inquiries was received on 27 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Narrowing the definition of the member of a family unit

2.253 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).[3] A child

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

2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 9-12.

3 Schedule 4, subregulation 1.12(2).

over 23 who is not incapacitated will therefore be considered an extended family member, and would not fall within the definition of a 'member of the family unit' (and therefore not entitled to family reunion).

2.254 In respect of protection, refugee and humanitarian visas,[4] 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.[5]

2.255 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.[6]

2.256 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,[7] 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.

2.257 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.[8]

2.258 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,

---

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

5 Schedule 4, subregulation 1.12(4).

6 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].

7 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.

8 ES, SOC 12.

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 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.

2.259 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'.[9] This analysis noted that it was unclear whether this constituted a legitimate objective for the purposes of international human rights law.

2.260 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 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.

Minister's initial response

2.261 The minister's initial response noted 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.

2.262 The minister's initial response further noted 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.

2.263 The minister's initial response stated 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

9 ES, SOC 12.

where there is no other right to do so. The minister further stated that while the ICCPR requires the protection of the family, there is no positive obligation to take steps to facilitate family reunification.

2.264 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.

2.265 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.[10]

2.266 The committee considered that further information was necessary to evaluate whether the measure pursues a legitimate objective, is effective to achieve that objective, and is proportionate to it. Accordingly, the committee sought 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.

Minister's response to the committee's further requests

2.267 In relation to whether the measure pursues a legitimate objective for the purpose of international human rights law, the minister's response states:

> The Minster notes the concerns raised by the committee in its request for further information and provides the following response to the committee, which is in addition to information previously provided…
>
> *Why the limitation is permissible under international human rights law*
>
> The objective of the amendment is to contribute to the effective management of Australia's Migration Programme. Australia has well managed and targeted migration programmes that are designed to meet social and economic needs. It is imperative to ensure that the limited places available in targeted programmes, such as the Skilled Migration Programme and the Family Stream, are directed to those who are most

10 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].

> likely to support and deliver on the intentions of the programmes. Extended family members excluded by the new definition of MoFU [Member of the Family Unit] are able to apply for other visa classes where they meet the eligibility criteria in their own right. In doing so, the extended family member will be demonstrating their ability to make a positive contribution to Australia.
>
> In addition, the amended definition of MoFU ensures consistency with the current framework for the relatives of Australian citizens and existing permanent residents.

2.268 The minister's response outlines the objective of the measure as meeting Australia's social and economic needs in the context of targeted migration programs. Noting the information provided and the broad scope afforded to states under international law with respect to migration, this appears to be a legitimate objective for the purpose of international human rights law.

2.269 In relation to how the measure is effective to achieve (that is, rationally connected to) that objective, the minister's response states:

> The former definition allowed for more generous migration pathways for relatives of new entrants into Australia, who often benefit from differential visa pricing and processing timeframes attributable to the primary applicant. The amendment is thus effective in achieving the legitimate objectives stated, as it promotes the intentions of the Migration Programme and contributes to its effective management.

2.270 The minister's response also provides a range of information as to the proportionality of the limitation:

> The new definition predominately applies to non-citizens outside Australia applying for visas to enter Australia. In regard to non-citizens within Australia's jurisdiction, this limitation is a reasonable and proportionate measure to achieve the stated objectives as it:
>
> • includes grandfathering provisions, so that lawful non-citizens in Australia are not disadvantaged by this change…
>
> • does not prevent extended family members who do not meet the new MoFU definition to apply for other visa classes in their own right (see first response to the committee…)
>
> • is consistent with the arrangements for relatives of Australian citizens and existing permanent residents (see first response to the committee…)
>
> • is more generous than that of similar nations, who are also signatories to the ICCPR (see first response to the committee)
>
> • will not apply to refugee, humanitarian and protection visas (see first response to the committee).

2.271 In relation to the effect on current visa holders which also goes to issues of proportionality, the minister's response additionally provides the following:

> In response to the committee comments provided at **Item 1.39** [2.253 above], the Minster advises that these changes are not retrospective. They predominantly apply to persons who:
>
> • are **outside** Australia; and
>
> • do not hold a valid visa that allows for entry into Australia; and
>
> • are seeking to make a new application for a visa to enter Australia.
>
> In relation to the practical application of MoFU, specific grandfathering provisions have been introduced as part of this amendment. These provide that lawful non-citizens living in Australia are not disadvantaged by this change (refer sub-regulation 1.12(5)).

2.272 It is noted that the measure has the potential to separate parents and their adult children and other family members and that in particular individual circumstances this may have a severe effect on an Australian resident's right to family life. However, on balance, noting the detailed information provided as to the proportionality of the limit placed on the right to a family life, it appears that the measure may be a proportionate limit on the right to the protection of family.

Committee comment

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

2.274 The committee notes that the measure may be compatible with the right to the protection of the family.

Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016 [F2016L01858]

Purpose	Determines classes of visas for qualifying residence exemptions pursuant to the *Social Security Act 1991*, such that a waiting period does not apply to a person who holds or was the former holder of a visa in a determined class in respect of a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	9 May 2016
Rights	Social security; adequate standard of living (see **Appendix 2**)
Previous reports	2 of 2017
Status	Concluded examination

Background

2.275 The committee first reported on the Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2016 [F2016L01858] (the 2016 Determination) in its *Report 2 of 2017*, and requested a response from the Minister for Social Services by 13 April 2017.[1]

2.276 The minister's response to the committee's inquiries was received on 24 April 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.277 The committee first reported on the enabling legislation (the Budget Savings (Omnibus) Bill 2016 (the bill))[2] in its *Report 7 of 2016*,[3] and, following a response from the Treasurer in respect of the bill, concluded its consideration of the bill in its *Report 8 of 2016*.[4]

1 Parliamentary Joint Committee on Human Rights, Report 2 of 2017 (21 March 2017) 41-43.

2 The bill passed both Houses of Parliament with amendments on 15 September 2016, and received Royal Assent on 16 September 2016.

3 Parliamentary Joint Committee on Human Rights, Report 7 of 2016 (11 October 2016) 2-11.

4 Parliamentary Joint Committee on Human Rights, Report 8 of 2016 (9 November 2016) 57-61.

2.278 Schedule 10 of the bill removed the exemption from the 104-week waiting period for certain welfare payments[5] for new migrants who are family members of Australian citizens or long-term residents with the exception of permanent humanitarian entrants. The committee found that this measure could not be assessed as a proportionate limitation on the rights to social security and an adequate standard of living.[6] The 2016 Determination has been introduced to give effect to the changes introduced by the bill.

Newly arrived residents' waiting period

2.279 Section 4 of the 2016 Determination revokes the Social Security (Class of Visas – Qualifying Residence Exemption) Determination 2015 (2015 Determination), which currently determines visas for the purposes of paragraph 7(6AA)(f) of the *Social Security Act 1991* (the Act). Together with the 2015 Determination, that paragraph exempts from the waiting period certain visa holders[7] in respect of a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card.

2.280 The 2016 Determination puts into effect the amendments in the bill and provides that from 1 January 2017,[8] only Referred Stay (Permanent)[9] visas will be exempted from the waiting period, as prescribed in paragraph 7(6AA)(f) of the Act.

Compatibility of the measure with the right to social security and right to an adequate standard of living

2.281 As noted in the initial human rights analysis for the instrument, 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, particularly the right to an adequate standard of living and the right to health. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.

---

5 Namely, a social security benefit (other than a special benefit), a pension Parenting Payment (single), carer payment, a mobility allowance, a seniors health card or a health care card.

6 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 59.

7 See section 4 of the Social Security (Class of Visas —Qualifying Residence Exemption) Determination 2015 [F2015L01815]: Subclass 100 (Partner); Subclass 110 (Interdependency); Subclass 801 (Partner); Subclass 814 (Interdependency); and Subclass 852 (Referred Stay (Permanent)).

8 At subsection 2(1).

9 At section 5.

2.282 As noted in the previous legal analysis in respect of the bill,[10] the right to social security and the right to an adequate standard of living are engaged and limited by this measure.

2.283 The statement of compatibility provides that the measure 'engages or gives effect' to the right to social security and the right to an adequate standard of living, and that:

> [a]ccess to Special Benefit will still be available for a newly arrived permanent resident who has suffered a substantial change in their circumstances, beyond their control, and are in financial hardship, after arrival. There remains no waiting period for family assistance payments for families with children, such as Family Tax Benefit.[11]

2.284 The committee's previous findings in respect of the enabling legislation noted in particular that information had not been provided as to how the family members will be able to meet basic living expenses during the 104-week waiting period and what specific arrangements, if any, are open to them in situations of crisis.

2.285 The statement of compatibility in relation to the 2016 Determination states that access to Special Benefit is available for a newly arrived permanent resident where there has been a substantial change in their circumstances.

2.286 The initial human rights analysis in relation to the instrument noted that, in light of the information provided in the statement of compatibility, it appears that newly arrived permanent residents would have available to them a type of payment (Special Benefit), which may serve as a safeguard to meet the cost of basic necessities. The initial analysis stated that this may support an assessment that the measure is a proportionate limitation on the right to social security and the right to an adequate standard of living. However, the statement of compatibility does not detail whether such safeguards are in place for other newly arrived residents who are not permanent residents. It is also not clear what level of support Special Benefit provides or how long it would apply for.

2.287 Accordingly, the committee sought the advice from the Minister for Social Services as to the extent to which the Special Benefit is available to newly arrived residents who are not permanent residents and are in financial hardship and what is the level of support provided for by Special Benefit and how long they could be eligible for the Special Benefit.

---

10 Parliamentary Joint Committee on Human Rights, Report 8 of 2016 (9 November 2016) 57-61.

11 Explanatory statement, statement of compatibility 3.

Minister's response

2.288 In relation to the questions raised by the committee, the minister's response provides that:

> In your letter you seek my clarification as to the extent to which Special Benefit is available to people who are in Australia on a temporary visa and the potential level of support available to them through this payment. I appreciate the time you have taken to bring this matter to my attention.
>
> By way of background, Australia's social security system is different from the contributory systems that operate in other countries. It is a taxpayer funded, non-contributory system based on the concepts of residence and need. Access to social security payments is generally restricted to people who are Australian permanent residents or citizens residing in Australia.
>
> Temporary visa holders, such as 457 visas, student and tourist visas, are not Australian residents for social security purposes and are ineligible for social security payments. A person on a temporary visa must first formalise their immigration status as a permanent resident if they wish to stay in Australia and have access to social security payments.
>
> There are some exceptions to the general residency rules for certain determined temporary visa subclasses contained in the Social Security (Class of Visas - Qualification for Special Benefit) Determination 2015 (No. 2). This determination lists a number of visa subclasses that may be eligible to receive Special Benefit. These types of visas include temporary protection visa holders, temporary (provisional) partner visa holders and people granted a visa for the purposes assisting Australian authorities in criminal matters related to human trafficking, or slavery.
>
> Illegal Maritime Arrivals (IMAs) who are assessed as engaging Australia's protection obligations and meet other requirements such as health, security and character checks can be granted a temporary humanitarian or protection visa. Holders of a temporary humanitarian or protection visa remain ineligible for mainstream social security payments because of their temporary visa status. Their access to social security payments is limited to Special Benefit and related ancillary payments, such as Rent Assistance, Health Care Card, and family assistance payments.
>
> People in Australia on a temporary (provisional) partner visa are generally subject to a 104-week newly arrived residence waiting period (NARWP) before being eligible for Special Benefit. However, the 104-week Special Benefit NARWP can be waived in circumstances where the temporary partner visa holder is in financial hardship due a substantial change of circumstances beyond their control after they have first entered Australia (e.g. victim of domestic violence).
>
> Special Benefit is a discretionary income support payment that provides financial assistance to people who, due to reasons beyond their control, are in financial hardship and unable to earn a sufficient livelihood for

themselves and their dependants. To receive Special Benefit, it must be established that the person is not eligible for any other pension or allowance.

The rate of Special Benefit a person receives is discretionary and depends on their individual circumstances, provided it does not exceed the rate of Newstart Allowance or Youth Allowance that would otherwise be payable to the person. In practice, the Newstart Allowance rate (including supplements) is generally paid to those aged 22 years and over while the Youth Allowance rate is paid to those under 22 years.

To establish whether a person is in financial hardship or unable to earn a sufficient livelihood, an available funds test is applied. A person who requires Special Benefit long-term (more than three months) cannot receive a payment until their available funds are $5,000 or less.

For a person who requires the payment on a short-term basis (less than three months), their available funds must be less than their fortnightly rate of payment. Where a person is a member of a couple, the partner's available funds are also included in assessing the person's available funds. In recognition that Special Benefit is a payment of last resort, the value of any in-kind support (such as free boarding and lodging) and income (both earned and unearned) is directly deducted from their maximum rate of payment.

People who receive Special Benefit can be paid for up to 13 weeks from the date of decision. Payment of Special Benefit must then be reviewed before the delegate determines whether payment can continue. If payment of Special Benefit continues, it must be reviewed every 13 weeks, though there is no limit to the length of time a person can receive the payment.

2.289 The response from the minster provides useful information about circumstances in which a Special Benefit will be available. In relation to visa classes in respect of which the 104-week waiting period applies, the minister's response details that the waiting period may be waived in respect of newly-arrived migrants on a temporary (provisional) partner visa in circumstances where there is financial hardship due a substantial change of circumstances beyond their control. As set out in the response, in these circumstances, the individual may be able to access the discretionary Special Benefit payment.

2.290 The Special Benefit appears to provide a safeguard such that these individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of financial hardship. This supports an assessment that the measure is a proportionate limitation on the right to social security and the right to an adequate standard of living. In this respect, it is also noted that the waiting period for social security does not apply to certain visa holders. Accordingly, the measure appears likely to be compatible with the right to social security and the right to an adequate standard of living.

Committee response

2.291 The committee thanks the Minister for Social Services for his response and has concluded its examination of this issue. The committee notes that the additional information provided would have been useful in the statement of compatibility.

2.292 In light of the additional information provided the committee notes that the measure appears likely to be compatible with the right to social security.

Mr Ian Goodenough MP

Chair