

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**.

Australian Citizenship Regulation 2016 [F2016L01916]

Purpose	Remakes existing regulations (which are sunseting) to prescribe a number of matters in relation to citizenship
Portfolio	Immigration and Border Protection
Authorising legislation	<i>Australian Citizenship Act 2007</i>
Last day to disallow	9 May 2017
Rights	Privacy; equality and non-discrimination (see Appendix 2)
Previous report	2 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Australian Citizenship Regulation 2016 (2016 regulation) in its *Report 2 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 13 April 2017.¹

2.4 The minister's response to the committee's inquiries was received on 17 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.5 In 2014 the committee considered the Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014.² This regulation relates to the form of notice of evidence of Australian citizenship (citizenship notice), which is a document that may be provided by the minister as evidence of a person's Australian citizenship.

2.6 Section 37 of the *Australian Citizenship Act 2007* provides that a person may make an application for evidence of their Australian citizenship (citizenship

1 Parliamentary Joint Committee on Human Rights, *2 Report of 2017* (21 March 2017) 33-40.

2 See Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 118-120; *Twelfth report of the 44th Parliament* (24 September 2014) 50-54; and *Sixteenth report of the 44th Parliament* (25 November 2014) 29-32.

notice). When given, that citizenship notice must be in a form prescribed by the Australian Citizenship Regulations and contain any other matter prescribed by the regulations. The Australian Citizenship Regulation 2007 (as amended in 2014) provided that the following information, among other matters, may be included on the back of a notice of evidence of citizenship:

- the applicant's legal name at time of acquisition of Australian citizenship, if different to the applicant's current legal name; and
- any other name in which a notice of evidence has previously been given.

2.7 The 2016 regulation remakes existing regulations (which are sunseting). It is in the same form as the amended 2007 regulation.

2.8 The committee previously concluded that the measure was incompatible with the right to privacy and the right to equality and non-discrimination. At the time, the committee noted that the measure engaged and limited the right to privacy and the right to equality and non-discrimination on the basis that listing previous names on the back of a citizenship notice may identify a transgender person who has changed their gender. As the statement of compatibility had not addressed this issue, the committee corresponded with the minister about whether the limitation was permissible and in particular whether there was a less rights restrictive way of achieving the objectives of the measure (that is, whether the limitation was proportionate). In finding that the measure was incompatible with human rights the committee noted that other identity documents, such as passports, do not include such information so the measure did not appear to be the least rights restrictive approach as required to be a permissible limit on human rights. The committee also concluded that the fact that an individual did not have control over the recording of their previous name also affected the proportionality of the measure noting that the right to privacy includes the right to control the dissemination of information about one's private life.³

Releasing information concerning a person's change of name

2.9 The 2016 regulation, like the amended 2007 regulation, provides that previous names may be listed on the back of a citizenship notice.

Compatibility of the current measure with the right to privacy

2.10 The initial human rights analysis of the 2016 regulation noted that the right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information as well as the right to

3 See Parliamentary Joint Committee on Human Rights, *Sixteenth report of the 44th Parliament* (25 November 2014) 29. Three members of the committee issued a dissenting report in relation to the conclusion that the measure was incompatible with human rights: see *Sixteenth report of the 44th Parliament* (25 November 2014) 61: Dissenting report by Senator Matthew Canavan, Mr David Gillespie MP and Mr Ken Wyatt MP.

control the dissemination of information about one's private life.⁴ By disclosing personal information through the listing of previous names on the back of a citizenship notice, the measure engages and limits the right to privacy. The current statement of compatibility recognises that this regulation engages the right to privacy; and in particular in relation to transgender people who may have changed their name, and having evidence of a previous male or female name may reveal that they have now changed their sex or gender.⁵

2.11 Proof of Australian citizenship may be required to be provided in a range of situations including in the context of employment or access to services. Indirectly revealing that a person has undergone a change of sex or gender accordingly could have significant implications for that individual and could expose them to risks.

2.12 However, limitations on the right to privacy will be permissible where they are not arbitrary; pursue a legitimate objective; are rationally connected to that objective; and are a proportionate means of achieving that objective. The statement of compatibility identifies the objective of the current measure as assisting in verifying identity and preventing identity fraud:

The provision of details of a previous notice of evidence of citizenship on the back of a notice of evidence of citizenship assists in maintaining the integrity of Australia's identity framework. Identity integrity is essential in maintaining Australia's national security, law enforcement and economic interests. It is essential that the identities of persons accessing government or commercial services, benefits, official documents and positions of trust can be verified. False or multiple identities can and do undermine the integrity of border controls and the citizenship programme; underpin terrorist activities; finance crimes; and facilitate fraud.⁶

2.13 The statement of compatibility sets out a detailed explanation of why being able to accurately verify identity information is important including in the context of national police checks, security vetting for government positions, access to social security and credit checks by businesses.⁷

2.14 The information provided in the statement of compatibility establishes that the measure addresses a substantial and pressing concern and may be regarded as a legitimate objective for the purposes of international human rights law. Providing

4 See International Covenant on Civil and Political Rights (ICCPR) article 17; UN Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.

5 Explanatory statement (ES) 5-6.

6 ES 6.

7 ES 7.

details of previous names on the back of a citizenship notice appears to be rationally connected to the legitimate objective of the measure.

2.15 However, the initial human rights analysis raised questions as to the proportionality of the measure, in particular, whether there could be other, less rights restrictive, ways of achieving the legitimate objective. For example, Australian citizens by birth, Australian citizens by conferral and other categories of Australian citizens may all apply for evidence of Australian Citizenship. However, in practice, Australian citizens by birth can choose to rely on their birth certificate or the birth certificate of their parents as proof of Australian citizenship (rather than a citizenship notice).⁸

2.16 A number of state and territory jurisdictions now have provisions for individuals to change their sex and names on their birth certificates (if they meet particular criteria). For example, in New South Wales if an individual met the required criteria under Part 5A of the *Birth, Deaths and Marriages Act 1995* (NSW) they may apply to have their sex changed on their birth certificate. The new birth certificate is not marked in any way to indicate the person's sex has been changed. If a person has changed their name since their birth was first registered, a notation stating that the birth was 'previously registered in another name' will appear on the new certificate. Access to a person's old birth certificate is restricted by legislation once the change of sex is recorded.⁹

2.17 The initial analysis noted that what this means is that an Australian citizen by birth from NSW could provide proof of citizenship without having to directly reveal a change of gender, though if the person has changed their name that fact (but not the name itself) will be recorded on the birth certificate.

2.18 By contrast, an Australian citizen by conferral relying on a citizenship notice to provide proof of citizenship could not avoid any change in gender identity being disclosed. These laws operate in different jurisdictions (one is state and one is federal), but the NSW mechanism for ensuring continuity of information, without directly disclosing personal details on the face of a birth certificate, indicates that there may be a less rights restrictive approach to achieving the legitimate objective of the current legislation. A notation on a citizenship notice that the individual has undergone a change of name since acquiring Australian citizenship rather than

8 See, for example, Department of Foreign Affairs and Trade, Confirming your Australian Citizenship at:
<https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/confirmingcitizenship.aspx>.

9 NSW Registry of Births Deaths and Marriages, Information to apply to alter the register to record a change of sex at:
<http://www.bdm.nsw.gov.au/Documents/apply-for-record-a-change-of-sex.pdf>.

including previous names would appear to be one such less rights restrictive approach.

2.19 As noted in the initial analysis there is a related example in the federal sphere: Australian citizens who have an Australian passport will usually be able to rely on their passport as proof of Australian citizenship. A person who has undergone a change in name and change in gender identity is able to apply to have these changed on their passport without any notation appearing.¹⁰

2.20 The statement of compatibility does not address whether having internal government records about previous names rather than having such information included on an outward facing document would be a suitable way of achieving the legitimate objective of the measure.

2.21 The initial analysis stated that the Australian Government Guidelines on the recognition of Sex and Gender (guidelines) may also be relevant to assessing whether the measure is the least rights restrictive way of achieving its legitimate objective.¹¹ The statement of compatibility argues that the regulation complies with these guidelines and states:

The Guidelines recognise the importance of departments ensuring the continuity of the record of an individual's identity. The Guidelines state that "only one record should be made or maintained for an individual, regardless of a change in gender or other change of personal identity" (paragraph 33 "Privacy and Retaining Records of Previous Sex and/or Gender"). Printing the previous names and dates of birth of applicants on the back of an evidence of Australian citizenship complies with this requirement to ensure the continuity of record and to maintain one record for each client.¹²

2.22 However, as noted in the initial analysis, the guidelines also specifically direct government departments and agencies to 'ensure an individual's history of changes of sex, gender or name...is recorded and accessed only when the person's history is

10 See, for example, Department of Foreign Affairs and Trade, Sex and Gender Diverse Passport Applicants at: <https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changeofsexdoborpop.aspx>.

11 Attorney General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013) at: <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>.

12 ES 8.

relevant to a decision being made.¹³ Therefore, while the guidelines provide that there should be a continuity of record of an individual's identity, this appears to be aimed at consistent internal government records rather than requiring such information to be included on an outward facing document.

2.23 In fact, this aspect of the guidelines appears to be designed to prevent unnecessary disclosures of a change in gender identity and appears potentially to be in conflict with having previous names recorded on citizenship notices. Accordingly, there is a question about whether the measure fully complies with these guidelines and, if it does not, whether this further indicates that there may be less rights restrictive ways (such as internal records) of achieving the legitimate objective of the measure.

2.24 Accordingly, the committee sought the advice of the Minister for Immigration and Border Protection as to whether the limitation on the right to privacy is a reasonable and proportionate measure for the achievement of its legitimate objective including:

- whether a less rights restrictive approach such as notation on a citizenship notice that a person 'previously had another name' rather than listing previous names would be feasible;
- whether a less rights restrictive approach such as having internal government records regarding previous names would be feasible;
- whether the details listed on a passport (which do not list previous names) would be sufficient;
- whether there are or could be safeguards incorporated into the measure for people with specific concerns about having previous names listed (such as exceptions);
- whether the measure complies with relevant guidelines; and
- whether the measure provides sufficient flexibility to treat different cases differently and whether affected groups are particularly vulnerable.

Compatibility of the measure with the right to equality and non-discrimination

2.25 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people

13 Attorney General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013) at: <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> 7.

are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.26 'Discrimination' under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).¹⁴ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.¹⁵

2.27 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.¹⁶

2.28 The initial analysis noted that the disclosure of a person's previous name may operate to have a disproportionate effect on, and therefore indirectly discriminate against, persons who have undergone sex or gender reassignment procedures, to the extent that disclosure could potentially reveal or indicate that history. Indirect discrimination arising in this way would amount to discrimination against individuals on the prohibited grounds of 'other status'. Further, as outlined in the initial analysis, the fact that some Australian citizens by birth may be able to rely on identity documents which do not reveal a change of gender indicates that the measure could potentially also have a disproportionate negative effect on the grounds of national origin.

2.29 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged by the measure but argues that the effect on individuals who have undergone a change of gender does not amount to unlawful discrimination:

Although an individual's sex or gender reassignment may be inferred from information on the back of a notice of evidence of Australian citizenship, an individual may choose to whom this notice is disclosed. The fact of the inclusion of this inferred information is not inconsistent with Articles 2 or

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

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

16 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

26 of the ICCPR; individuals who have undergone sex or gender reassignment are not being treated differently than other individuals.

2.30 However, as noted in the initial analysis this does not fully acknowledge that there may be circumstances where a person may be required to show proof of Australian citizenship including in circumstances such as employment (such that it is not really their choice to reveal such information).

2.31 The initial analysis acknowledged that individuals who have undergone sex or gender reassignment are not being treated differently than other individuals; however, the issue is that the measure appears to have a disproportionate negative effect on these individuals such that it could amount to indirect discrimination. Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination,¹⁷ and where the group is particularly vulnerable, the burden of justification for the measure to be proportionate is higher. The proportionality of this effect was not fully addressed in the statement of compatibility.

2.32 Accordingly, in relation to the compatibility of the measure with the right to equality and non-discrimination, the committee sought the further advice of the Minister for Immigration and Border Protection as to whether, in relation to the apparent disproportionate negative effect on individuals who have undergone sex or gender reassignment or a change in gender identity, the measure is reasonable and proportionate for the achievement of its objective and in particular the matters set out at [2.24] above.

Minister's response

2.33 In relation to whether the measure is a proportionate limit on the right to privacy, the minister provides the following response:

I note the Committee's views that although the limitation on the right of privacy resulting from this Regulation is for a legitimate objective, there remains a concern that the information that may be included on the back of a notice of evidence of Australian citizenship is not a proportionate limitation. However, I am of the view that the measure (which appears in Regulation 12) is in fact a proportionate response to the legitimate objective of reducing the opportunity for identity fraud and ensuring continuity of identity in the Department of Immigration and Border Protection's (the Department's) records.

In particular, if included, the information would appear on the back of the notice of evidence of Australian citizenship. It is not made available to the general public, and it is the individual concerned who has control of the notice of evidence and, consequently, over the disclosure of the

17 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v. the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).

information. Notices of evidence of Australian citizenship are generally used when individuals are dealing with government or other bodies and are used as primary evidence to establish the person's identity and citizenship status. This means that the need to disclose any information appearing on the back of a notice of evidence is limited. Persons holding a notice of evidence maintain control over who or what organisation(s) they wish to disclose the notice to and for what purpose.

2.34 In relation to whether a less rights restrictive approach than listing previous names on the back of a notice is available, the minister states:

I note the Committee's suggestion that a less restrictive approach such as not listing previous names and/or having internal government records regarding previous names would be feasible. However, I respectfully consider that these options, and that of only listing those details which appear on a passport, would weaken the integrity of the document which is utilised to provide continuity of a record of an individual's identity. As previously stated to the Committee in the Statement of Compatibility with Human Rights that accompanied the Explanatory Statement to this amendment, I maintain that this measure complies with the relevant Australian Government Guidelines on the Recognition of Sex and Gender. In addition to providing continuity of a record of an individual's identity, as the Committee has noted, the Guidelines propose that - consistent with Australian Privacy Principle 11 - government departments and agencies 'should ensure that an individual's history of changes of sex/gender or name is... recorded and accessed only when the person's history is relevant to a decision being made' (paragraph 38 of the Guidelines refers).

I submit that the Regulation complies with this recommendation as I understand that another body would only access the relevant information - with the consent of the individual concerned - when the information was relevant to a particular decision. Further, an individual's information would only be recorded at the discretion of the processing officer when that officer considered it was relevant to the notice of evidence.

It is also my view that the processing officer's discretion not to include previous names and/or dates of birth on the back of a notice of evidence is a safeguard which, under policy, supports an individual where there may be concerns regarding the inclusion of certain information. For example, if an officer is satisfied that inclusion of a particular name will endanger the client or another person connected to them, an officer would take that into account in considering whether or not to exercise his or her discretion to include that information on the back of a notice of evidence. There may also be other situations such as cases involving witness protection in which an officer chooses to exercise their discretion not to include a person's previous names and/or dates of birth in the notice of evidence of citizenship.

2.35 It is noted that the minister does not consider it would be feasible to adopt a less rights restrictive approach of listing only those details provided on a passport as

this would 'weaken the integrity of the document which is utilised to provide continuity of a record of an individual's identity'.

2.36 The minister's response also identifies a relevant discretionary safeguard for the processing officer not to include previous names on the back of a notice where there are concerns that the inclusion of this information would endanger the person. It is relevant to the proportionality of the measure that departmental officers will have this power available to them. However, while this discretion is important, discretionary safeguards alone may be insufficient to ensure that a limitation is permissible in each individual case.¹⁸ Further, it is unclear whether or not the potential harm caused by indirectly revealing that a person has undergone a change in sex and gender would be perceived by departmental officers as potentially 'endangering' the client. It may be more effective to have specific safeguards in this context in relation to people who have undergone a change of gender.

2.37 On the basis of the information provided by the minister, the measure may be capable of being compatible with human rights in many cases, however, the discretionary nature of the departmental safeguards mean that there is a risk that in individual cases the limitation on the right to privacy will not be proportionate.

2.38 In relation to the compatibility of the measure with the right to equality and non-discrimination, the minister's response provides that:

The Australian Citizenship Act 2007 and the Australian Citizenship Instructions (ACIs) on notice of evidence provide sufficient flexibility for officers to treat different cases differently, including vulnerable individuals such as refugees and transgender persons and persons in witness protection.

As detailed above, I maintain that the recording of certain information on the back of a notice of evidence to enhance the identity framework is a reasonable measure which is necessary and proportionate to the legitimate objective of reducing the opportunity of identity fraud.

2.39 The minister's response does not directly address the disproportionate effect of the measure on particular groups. As in relation to the right to privacy, the existence of discretionary safeguards in relation to the measure may assist the measure to operate in a proportionate manner. However, discretionary safeguards do not completely mitigate against or address the risks of the disproportionate effect of the measure in all cases.

18 See, for example, *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84]; UN Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

Committee response

2.40 The committee thanks the minister for his response and has concluded its examination of this issue.

2.41 The committee notes that the measure may be capable of operating in a manner compatible with human rights. However, the discretionary aspect to the safeguards relied upon by the minister leaves a risk that there will be cases where the inclusion of previous names on a notice of Australian citizenship may not constitute a proportionate limitation on human rights.

Defence Legislation Amendment (2017 Measures No. 1) Bill 2017

Purpose	This bill seeks to amend several Acts relating to defence to: allow a positive test result for prohibited substances to be disregarded under certain circumstances; simplify termination provisions to align with the new Defence Regulation 2016 [F2016L01568]; ensure greater protections for all Reservists in relation to their employment and education; include the transfer of hydrographic, meteorological and oceanographic functions from the Royal Australian Navy to the Australian Geospatial-Intelligence Organisation; and align a small number of provisions in the <i>Australian Defence Force Cover Act 2015</i> with other military superannuation schemes and provide clarity in definitions
Portfolio	Defence
Introduced	House of Representatives, 29 March 2017
Rights	Fair trial; to be presumed innocent; not to be tried and punished twice; not to incriminate oneself (see Appendix 2)
Previous report	4 of 2017
Status	Concluded examination

Background

2.42 The committee first reported on the bill in its *Report 4 of 2017*, and requested a response from the Minister for Defence by 26 May 2017.¹

2.43 The minister's response to the committee's inquiries was received on 26 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Civil penalty provisions

2.44 Schedule 2, Part 2 of the Defence Legislation Amendment (2017 Measures No. 1) Bill 2017 (the bill) seeks to amend the *Defence Reserve Service (Protection) Act 2001* (the Act) so that various existing criminal offences in the Act are also civil penalty provisions. The range of existing criminal offences to which the new civil penalty provisions would apply relate to discrimination in employment and partnerships, and discrimination against commission agents and contractors. Each of these criminal offences carries a penalty of 30 penalty units (currently \$5,400). The

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 7-11.

proposed corresponding civil penalty would be 100 penalty units (currently \$18,000).²

2.45 Schedule 2, Part 2 of the bill also seeks to amend the Act to introduce a new offence provision. The offence in proposed section 76B relates to victimisation of a person for reasons that include where the person has made a complaint; given information or documents; or brought proceedings under the Act. Contravention of proposed section 76B would amount to a criminal offence with 30 penalty units and the proposed civil penalty would be 100 penalty units.

2.46 Schedule 2, Part 3 of the bill also seeks to amend the Act to introduce three new offence provisions. The new offence in proposed section 18A relates to dissolving a partnership, expelling a partner from a partnership, requiring a partner to forfeit their share in a partnership, or subjecting another partner to detriment concerning the partnership. The new offence in proposed section 23A prohibits the harassment of a protected worker,³ partner or protected co-worker,⁴ if it is engaged in because the subject of the harassment may volunteer to render defence service, is rendering defence service, or has previously rendered defence service.

2.47 Contravention of proposed sections 76B, 18A and 23A would amount to a criminal offence with 30 penalty units and the proposed civil penalty would be 100 penalty units.

Compatibility of the measure with criminal process rights

2.48 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the new civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

2.49 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law may be a difficult one and often requires a contextual assessment. It is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that

2 If the Crimes Amendment (Penalty Unit) Bill 2017 passes the parliament a penalty unit will increase to \$210 so that 100 penalty units would be \$21,000.

3 Protected worker is defined as being an employee, commission agent or contractor, a person seeking to become an employee, commission agent or contractor, or an officer or employee of a commission agent or contractor. See explanatory memorandum (EM) 32.

4 The definition of protected co-worker incorporates relationships where people are working together, even if they are not strictly employed by the same person. See EM 32.

create offences and civil penalties.⁵ Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is necessarily illegitimate or unjustified. Rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the right not to be tried and punished twice (the prohibition against double jeopardy) apply.⁶

2.50 The statement of compatibility explains that many of the civil penalty provisions are intended to promote the right to safe and healthy working conditions and 'enhance the anti-discrimination protections in the Act, and introduce new anti-victimisation and anti-harassment provisions'.⁷

2.51 However, the statement of compatibility does not address whether the civil penalty provisions might be considered 'criminal' for the purposes of international human rights law.

2.52 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look at its classification in domestic law. As the civil penalty provisions are not classified as 'criminal' under domestic law they will not automatically be considered 'criminal' for the purposes of international human rights law.

2.53 The second step in assessing whether the civil penalties are 'criminal' under international human rights law is to look at the nature and purpose of the penalties. In this regard, the explanatory memorandum explains:

Civil penalty provisions provide a less cumbersome and technical enforcement process than criminal prosecutions. Contraventions of the Act can be insidious and indirect, making it difficult to prove an offence beyond reasonable doubt. For example, establishing that an employee was dismissed or disadvantaged for [...] prohibited reasons will often be very difficult to prove to the criminal standard, whereas the standard of proof for a civil penalty could be met. Including a civil penalty regime will provide an important deterrent to indirect discrimination against Reserve members. Civil penalties are also more appropriate when dealing with government employers, who are not liable to criminal remedies.⁸

5 *Guidance Note 2* – see Appendix 4.

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

7 Statement of compatibility (SOC) 9.

8 EM 28.

2.54 Civil penalty provisions are more likely to be considered 'criminal' in nature if they are intended to punish or deter, irrespective of their severity; and apply to the public in general. There is no indication that the regime is intended to be punitive, and it appears restricted to a particular employment context rather than applying to the public in general.

2.55 The third step in assessing whether the penalties are 'criminal' under international human rights law is to look at their severity. In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the maximum amount of the pecuniary penalty that may be imposed under the civil provision relative to the penalty that may be imposed for a corresponding criminal offence is relevant.

2.56 The amount of the pecuniary penalties that would be imposed under the proposed civil penalty provisions in the bill is 100 penalty units (currently \$18,000). The penalties that would be imposed for the corresponding criminal offences is 30 penalty units (currently \$5,400). As such, the civil penalties that would be imposed for the same offences under the Act are substantially higher than the penalties that may be imposed for the corresponding criminal offences (currently \$12,600 higher). These higher penalties may indicate that the civil penalties could be considered 'criminal'.

2.57 The initial human rights analysis therefore raised questions about whether the civil penalties may be considered 'criminal' for the purposes of international human rights law. The committee drew the attention of the Minister for Defence to its *Guidance Note 2* and sought the advice of the minister as to whether:

- the civil penalty provisions introduced by the bill 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 the penalties are considered 'criminal' for the purposes of international human rights law, whether the measures accord with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1))).

Minister's response

2.58 Applying *Guidance Note 2*, the minister's response addresses each element of the test for whether the penalty provisions should be considered 'criminal' for the purposes of international human rights law.

2.59 In relation to the nature of the penalty, the response relevantly provides:

The civil penalties introduced in the Bill will only apply in employment and similar contexts, and not to the public at large. For the most part, the

proposed civil penalties deal with the conduct of employers. The purpose of the civil penalties is to promote the right to safe and healthy working conditions, and to discourage behaviour in civilian employment-like environments that could dissuade a person from providing Australian Defence Force (ADF) Reserve service. The civil penalties are not intended to be punitive or deterrent in nature but, rather, they are intended to bring employers to the discussion table with the employees and Defence, so that an agreement can be reached through mediation.

2.60 In relation to the severity of the penalty, the response relevantly provides:

The maximum civil penalty levels proposed are consistent with the range and type of person who are likely to engage in the relevant conduct. The proposed civil penalty provisions are, for the most part, concerned with the conduct of employers and similar, which can range in size from small businesses through to large enterprises, with a corresponding range in turnover and profit. The maximum level of the civil penalty, 100 penalty units, needs to allow for this variation, providing sufficient discouragement even for the largest employers. It is important from a defence capability perspective to discourage conduct by employers and others that could work to dissuade people from joining the ADF Reserves or from providing ADF Reserve service. A person is far less likely to provide ADF Reserve service if they are afraid of adverse consequences in their civilian employment.

2.61 Noting the particular regulatory context, the purpose of the penalties in relating to the employment of ADF personnel and the severity of the penalty, there appears to be sufficient basis to conclude that the civil penalties are unlikely to be considered '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.

2.62 In any event, the minister's response notes 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 contained in sections 88 to 91 of the *Regulatory Powers (Standard Provisions) Act 2014*.

Committee response

2.63 The committee thanks the minister for her response and has concluded its examination of this issue.

2.64 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 and therefore does not engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights. The committee notes that this information would have been useful in the statement of compatibility.

Social Services Legislation Amendment Bill 2017

Purpose	Contains a number of reintroduced measures including extension of the ordinary waiting period to persons claiming youth allowance (other) or parenting payments
Portfolio	Social Services
Introduced	Senate, 22 March 2017
Right	Social security (see Appendix 2)
Previous reports	4 of 2017
Status	Concluded examination

Background

2.65 The committee first reported on the Social Services Legislation Amendment Bill 2017 (the bill) in its *Report 4 of 2017*, and requested a response from the Minister for Social Services by 26 May 2017.²⁷

2.66 The bill passed both Houses of Parliament on 29 March 2017 and received Royal Assent on 12 April 2017.

2.67 The minister's response to the committee's inquiries was received on 25 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.68 The bill contains a number of reintroduced measures which have previously been examined by the committee. The following schedules to the bill have previously been found to be compatible with human rights:

- Schedule 1—Indexation;²⁸
- Schedule 2—Automation of income stream review processes;²⁹ and
- Schedule 4—Family tax benefit.³⁰

27 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 35-38.

28 Previously contained in the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 51.

29 Previously contained in the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 52.

30 Previously contained in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014. See Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 94-95.

2.69 In relation to Schedule 3—Ordinary Waiting Periods, the committee previously considered this measure in a number of reintroduced bills.³¹ In its *Twelfth report of the 44th Parliament* the committee concluded that the measure, as well as a number of other measures contained in the bill, was compatible with the right to social security and the right to an adequate standard of living on the basis of budget constraints articulated at the time constituting a legitimate objective for the purposes of international human rights law.

Schedule 3—Ordinary Waiting Periods

2.70 Schedule 3 of the bill extends the ordinary waiting period to youth allowance (other) and the parenting payment. Currently, the ordinary waiting period is a one-week period that new claimants must serve before they are able to start accessing payments, and applies to recipients of Newstart Allowance and sickness allowance. A number of exemptions and waivers are available in certain circumstances, including for persons experiencing severe financial hardship.

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

2.71 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.

2.72 The committee has previously considered that the measure engages and limits the right to social security and an adequate standard of living. This is because, in imposing a waiting period for further recipients of social security payments, the measure is a retrogressive measure or backward step for the purposes of international human rights law.³²

31 Previously contained in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014. See Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 78-80; and *Twelfth report of the 44th Parliament* (24 September 2014) 61-62. The measure has since been included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014, Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015, Social Services Legislation Amendment (Youth Employment) Bill 2015, Social Services Legislation Amendment (Youth Employment) Bill 2016 and Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017.

32 For more information on retrogressive measures see *Guidance Note 1* at Appendix 4.

2.73 As noted above, the committee concluded at that time that the measures were likely to be compatible in the context of budgetary constraints that were relied upon at the time as constituting a legitimate objective for the purposes of international human rights law.³³

2.74 The initial human rights analysis noted that, as set out in the committee's *Guidance Note 1*, in order to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. The statement of compatibility does not explain how the measure still pursues the same pressing or substantial concern of budgetary restraints as it did during the committee's consideration of the measure more than two years ago.

2.75 The statement of compatibility sets out that an objective of the measures is 'ensuring a sustainable and well-targeted payment system'.³⁴ While this may be considered legitimate for the purposes of international human rights law, a legitimate objective must be supported by a reasoned and evidence-based explanation. No information is provided in the statement of compatibility as to why the reforms are necessary from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare scheme. Further, while some information is provided about emergency payments where a person is unable to meet basic necessities during the waiting period, it was noted in the previous analysis that the qualifying criteria for these emergency payments is also being tightened by the bill.³⁵ The analysis stated that, in this context, it is unclear whether there will be persons who are left without the means of meeting basic necessities during the waiting period. The availability of emergency payments will affect the proportionality of the measure.

2.76 Accordingly, the committee sought further advice from the Minister for Social Services 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 for the achievement of that objective.

33 See Parliamentary Joint Committee on Human Rights, *Twelfth report of the 44th Parliament* (24 September 2014) 61-62.

34 Explanatory memorandum (EM), statement of compatibility (SOC) 26.

35 EM, SOC 23.

Compatibility of the measure with the right to equality and non-discrimination (indirect discrimination)

2.77 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. The initial human rights analysis stated that, as women are the primary recipients of parenting payments, and social security payments more broadly, reductions to access to such payments under the bill would disproportionately impact upon this group and the right to equality and non-discrimination is therefore also engaged.

2.78 The statement of compatibility acknowledges the engagement of this right, and sets out that:

As more than 90 per cent of parenting payment recipients are women, the changes may more significantly impact on women in that regard. However, the changes are reasonable and proportionate to achieving the legitimate objective of providing consistency across similar working age payments by ensuring that all new claimants meet their own living costs for a short period before receiving Government assistance, where they are able.³⁶

2.79 As noted above, for the purposes of international human rights law a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. It has not been set out in the statement of compatibility as to why 'providing consistency across payments' is a legitimate objective, or why it is necessary to extend the ordinary waiting period to recipients of further social security payments at this time.

2.80 Accordingly, the committee sought further advice from the Minister for Social Services 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 for the achievement of that objective.

Minister's response

2.81 The response from the minister provides some further information about the objective of the measure in respect of budget repair and fiscal constraints:

Budget repair remains a key focus for this Government as outlined in the Treasurer's Budget speech on 9 May 2017 and the 2017-18 Budget papers. The Government has made, and continues to make, necessary and

sensible decisions to keep spending under control in order to return the Budget to surplus. This is important to maintain Australia's AAA credit rating and support longer term economic growth. A number of Budget repair measures that have been legislated to date to help achieve this, including the measure at Schedule 3 of the Bill and other measures designed to ensure welfare payment expenditure is sustainable into the future.

The Ordinary Waiting Period is a period of one week during which claimants with the means to support themselves are expected to do so. As noted in the Statement of Compatibility with Human Rights on the Bill, this reflects a central principle underpinning Australia's social security system that support should be targeted to those in the community most in need in order to keep the system sustainable and fair.

2.82 The minister's response also provides a range of further information as to the proportionality of the measure:

It is important to note that this measure maintains an exemption from the Ordinary Waiting Period for those who are unable to accommodate their own living costs for that one week period because they are in severe financial hardship. The existing severe financial hardship waiver has been modified to better target it to claimants who have experienced a personal financial crisis and are most in need of immediate support, such as those who have experienced domestic violence or have incurred reasonable or unavoidable expenditure. The domestic violence provision in particular is aimed at supporting women, who are more likely to be a victim of domestic violence than men, and ensuring they are able to access support immediately in these circumstances. Additional circumstances that constitute a personal financial crisis may also be prescribed by the Secretary by legislative instrument.

The measure is compatible with the rights to social security, an adequate standard of living, and equality and non-discrimination as any limitation on these rights is proportionate to the policy objective of ensuring a payments system that is well-targeted and sustainable in the context of broader, necessary Budget repair, noting that there will continue to be a safety net for those in need through the new waiver provisions.

2.83 As such, the minister's response details that there is an exception to the Ordinary Waiting Period for those unable to accommodate their own living costs due to severe financial hardship. Further, the minister's response notes that there is also specific support for those who have experienced domestic violence (most of whom are women) to ensure they will have immediate support.

2.84 Each of these measures appear to provide a safeguard such that eligible individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of severe financial hardship including leaving situations of domestic violence. 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. Accordingly, the measure appears likely to be compatible with the right to social security, the right to an adequate standard of living and the right to equality and non-discrimination.

Committee response

2.85 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.

2.86 In light of the additional information provided about the safeguards that exist in relation to the operation of the measure, the measure appears likely to be compatible with the right to social security, the right to an adequate standard of living and the right to equality and non-discrimination.

Mr Ian Goodenough MP

Chair