Part 3

Responses to the committee's comments on bills and legislative instruments

Consideration of responses

3.1 The committee has considered 42 responses to the committee's comments on bills and legislative instruments.

3.2 The committee has concluded its consideration of the bills and legislative instruments in 28 of the responses as the responses provided appear to have adequately addressed the committee's concerns or further information is unlikely to be elicited from the proponent of the bill or legislative instrument. These responses can be found in Appendix 2 and 3 respectively.

3.3 The committee has made further comments in relation to the responses relating to the following bills and instruments:

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013
- Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1), Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2013 (No. 1) and Charter of the United Nations (Sanctions – the Taliban) Regulation 2013
- Corporations and Financial Sector Legislation Amendment Bill 2013
- Court Security Bill 2013 and Court Security (Consequential Amendments) Bill 2013
- Customs (Drug and Alcohol Testing) Regulation 2013
- Environment Protection and Biodiversity Conservation Amendment Bill 2013
- Extradition (Convention for the Suppression of Acts of Nuclear Terrorism Regulation 2012, Extradition (Cybercrime) Regulation 2013, Mutual Assistance in Criminal Matters (Cybercrime) Regulation 2013 and Extradition (Piracy against Ships in Asia) Regulation 2013
- Health Insurance Amendment (Medicare Funding for Certain Types of Abortion) Bill 2013
- Migration Amendment Regulation 2012 (No. 8)
- Parliamentary Service Amendment Bill 2012
- Protection of Cultural Objects on Loan Bill 2012
- Regulatory Powers (Standard Provisions) Bill 2012
- Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013
- Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013

FRLI ID: F2013L00477
Tabled in the House of Representatives and Senate on 18 March 2013
Portfolio: Foreign Affairs
PJCHR comments: Report 6/13, tabled on 15 May 2013
Response dated: 5 June 2013

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 (No. 2)

FRLI ID: F2013L00857
Portfolio: Foreign Affairs

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Amendment List 2013

FRLI ID: F2013L00884
Portfolio: Foreign Affairs

Background

3.4 The *Autonomous Sanctions Act 2011* allows the Minister for Foreign Affairs to make regulations proscribing any person or entity 'for specified purposes or more generally' if satisfied that this will 'facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia' or 'will otherwise deal with matters, things or relationships outside Australia'.[1] The *Autonomous Sanctions Regulations 2011* sets out a list of countries and the type of persons that may be proscribed. In relation to Zimbabwe a person may be proscribed if the Minister is satisfied that he or she is engaging, or has engaged in 'activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe'.[2] In relation to Syria, a person may be proscribed if the Minister is satisfied that the person is 'providing support to the Syrian regime' or is 'responsible for human rights abuses in Syria'.[3]

3.5 The *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) List 2012* sets out a list of persons and entities proscribed by

1 *Autonomous Sanctions Act 2011*, section 10.

2 *Autonomous Sanctions Regulations 2011*, regulation 6, item 8.

3 *Autonomous Sanctions Regulations 2011*, regulation 6, item 7.

the Minister under these powers, in relation to Zimbabwe. The *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2013* amends that list to remove 55 individuals from the list, while the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2013 (No. 2)* further amends the list, to remove sanctions against a further 65 individuals and three entities. Thirty-three individuals remain on the list.

3.6 The *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Syria) List 2012* sets out a list of persons and entities proscribed by the Minister under these powers, in relation to Syria. The *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Syria) Amendment List 2013* amends that list to remove one individual from the list, with 105 individuals remaining on the list.

3.7 The effect of designation (which can apply to a person both in and outside Australia) is that the person's assets (including money held in bank accounts) are frozen and can only be made available to them if the Minister grants a permit. A permit will only allow funds to be made available for basic expenses (such as foodstuffs, rent, medicines and taxes), or where a payment is legally or contractually required to be made. In addition, designation under this regime will have flow-on effects so that the Minister for Immigration and Citizenship will deny the issue of a new visa or cancel an existing visa issued to a designated person.[4]

3.8 The committee sought further information as to how the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2013* was compatible with human rights, in particular, the right to privacy, the right to a family life, and the right to freedom of movement, and a designation under the sanctions regime can properly be determined to be 'in accordance with law'. The Minister's response is attached.

3.9 Following the committee's initial comments, a further two instruments were made, which have substantially the same effect as the first instrument and the committee intends to set out its comments on these three instruments, and the Minister's response, together.

Committee's response

3.10 The committee thanks the Minister for his response.

3.11 At the outset, the committee notes the Minister's concern regarding the effect of disallowing these instruments. The committee notes that there is no

4 See *Migration Regulations 1994*, Public Interest Criterion 4003(c) and regulation 2.43(1)(aa).

suggestion that it would move to disallow these instruments (particularly as the effect of all three instruments is to remove individuals from the autonomous sanctions regime). Rather, the committee's concern relates more broadly to the overall human rights compatibility of the autonomous sanctions regime. The committee's mandate under the *Human Rights (Parliamentary Scrutiny) Act 2011* extends to examining legislative instruments before the Parliament, as well as Acts, for compatibility with human rights. As these instruments re-designate a number of individuals, the committee considers it appropriate to review the sanctions regime for compatibility with human rights as a whole.

3.12 The committee acknowledges the importance of the autonomous sanctions regime as a mechanism of applying pressure on regimes and individuals to help end the repression of human rights internationally. The committee considers this to be an important and legitimate objective.

3.13 However, in analysing compatibility with human rights, where a measure limits rights, the committee notes that not only must it be demonstrated that the limitation seeks to achieve a legitimate objective, it must also be demonstrated that there is a rational connection between the limitation and the objective and that the limitation is proportionate to that objective.

3.14 In the case of the autonomous sanctions regime, the committee notes that subjecting a person to the regime necessarily involves a limitation on their right to privacy, their right to freedom of movement and their right to a fair hearing. As such, it is necessary to consider whether such limitations are proportionate to the important aim to be achieved.

3.15 The committee is concerned that an individual can be made subject to the regime without having had an opportunity to respond to the allegations against them or to challenge the designation before an independent tribunal or court. The committee notes the Minister's statement in his letter that the regime is designed to 'penalise the individuals responsible'. In seeking to punish an individual, it is the committee's view, that international human rights law requires that certain safeguards be made available.

3.16 The committee notes the Minister's advice that 'it would be inappropriate to provide advance notification to an affected individual, as to do so would allow that individual to remove or conceal his or her assets, frustrating the purpose of the sanctions'. The committee accepts that to give advance notice may frustrate the purpose of the sanctions, but it is not clear to the committee how it is proportionate for the executive to make a final order lasting up to three years. The committee notes that in cases such as restraint and confiscation of assets from the proceeds of

crime,[5] the process is for an interim order to be made first, with a final order only being made after an affected person has the opportunity to put forward their case.

3.17 The committee is also concerned that the only opportunity for review of the Minister's decision to designate an individual is to apply to the Minister and ask him to review his own decision. Article 14(1) of the International Covenant on Civil and Political Rights provides:

> In the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

3.18 The autonomous sanctions regime as it applies to individuals, particularly restraining access to financial resources and other assets, would fall within the meaning of a 'suit at law', and as such, the committee considers that a designated individual is entitled, under human rights law, to a fair hearing by an independent tribunal.

3.19 The committee appreciates that this is a complex area that requires careful consideration of the various competing interests. The committee appreciates the preparedness of the Minister to discuss the broader concerns about human rights compatibility to which the autonomous sanction regimes give rise. The committee intends to write to the Minister to ask him whether the Department of Foreign Affairs and Trade might conduct a comprehensive review of the sanctions regime in light of Australia's international human rights obligations and report back to the Parliamentary Joint Committee on Human Rights in the 44th Parliament.

5 See, for example, the *Proceeds of Crime Act 2002*.

SENATOR THE HON BOB CARR

MINISTER FOR FOREIGN AFFAIRS
CANBERRA

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

5 JUN 2013

Dear Mr Jenkins

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013

I refer to your letter of May 15 2013 concerning the compatibility of the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013* ('the Zimbabwe Amendment List') with human rights and requesting clarification on matters set out in the Committee's Sixth Report of 2013.

The Committee requests further information on how the instrument is compatible with the right to privacy, the right to a family life, and the right to freedom of movement; and how a designation under the sanctions regime can be determined to be 'in accordance with law'.

Overview of Australia's autonomous sanctions in relation to Zimbabwe

Autonomous sanctions are highly targeted measures intended to apply pressure on regimes and individuals to end the repression of human rights and democratic freedoms, or to cease regionally or internationally destabilising actions. Australia has implemented autonomous sanctions in relation to Zimbabwe since September 2002 in response to serious human rights abuses and the subversion of the rule of law in that country.

The *Autonomous Sanctions Act 2011* ('the Act') and the *Autonomous Sanctions Regulations 2011* ('the Regulations'), under which the Zimbabwe Amendment List is implemented, are modelled on the legislation under which Australia implements United Nations Security Council ('UNSC') sanctions. Australia and several of our like-mindeds, including the United States, Canada and the European Union, implement autonomous sanctions as well as UNSC measures in response to situations of international concern.

Autonomous sanctions include targeted financial sanctions, travel bans, arms embargoes and restrictions on the supply of strategic and dual use goods. These are the same measures as applied by the UNSC. They are designed both to deny access to goods and funding used to violate international standards or norms, including human rights, and to penalise the individuals responsible and provide an incentive to cease the violations.

PO Box 6022, Parliament House, Canberra ACT 2600
Telephone (02) 6277 7500 Facsimile (02) 6273 4112

In recognition of recent developments in Zimbabwe and to maintain Australia's support for democratic progress, on 7 February 2013 I announced a three-step process for the removal of sanctions, with each step contingent on the completion of clear, concrete action towards democratic elections. The Zimbabwe Amendment List gave legal effect to my announcement on 15 March 2013 that Australia would lift sanctions against 55 individuals in Zimbabwe in response to the completion of the first of these steps, the setting of a date (16 March 2013) for Zimbabwe's constitutional referendum.

While your letter concerned the Zimbabwe Amendment List, to avoid confusion I note that the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 (No 2)* commenced on 28 May 2013. This gives effect to my announcement on 27 May 2013 that Australia would lift sanctions on a further 65 individuals, in response to the completion of the second of the three steps, the holding of a credible constitutional referendum.

Compatibility with human rights

Right to privacy (ICCPR, article 17)

Australia's targeted financial sanctions in relation to Zimbabwe aim to prevent individuals engaged in activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe, from accessing financial resources and other assets to prolong such activities. To the extent that such measures limit these individuals' right to privacy, it is the Government's view that this is an acceptable restriction given their involvement in these activities and the need to protect those suffering from such abuses.

The Regulations include provisions, consistent with similar exemptions in UNSC sanctions regimes, to enable a designated person to access their assets for the purpose of, for example, basic expenses.

Right to freedom of movement (ICCPR, article 12)

The targeted travel ban denies individuals the privileges associated with travelling to, or entering or remaining in Australia. The travel ban does not affect the freedom of movement more broadly; it expresses the government's view that individuals engaged in activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe are not welcome to enter or remain in Australia.

The Regulations include provisions to enable a declared person to travel to, or enter or remain in Australia, if it would be in the national interest or on humanitarian grounds. This provides a sufficient safeguard to take into account any impact on an individual's right to a family life.

'In accordance with law'

I note the Committee's concern over the 'quality of the law' test and the suggestion that this requires advance notification to an affected individual of the circumstances under which, and the extent to which, the individual may be affected by sanctions measures.

It is the Government's view that it would inappropriate to provide advance notification to an affected individual, as to do so would allow that individual to remove or conceal his or her assets, frustrating the purpose of the sanctions. All sanctions measures are publicly accessible. The possible consequences of engaging in sanctioned activities are clear.

I draw to the Committee's attention the mechanisms for the regular review of targeted sanctions measures under the legislative framework introduced in 2011. Under the Regulations, all designations and declarations of individuals automatically lapse after three years, unless the Minister, by legislative instrument, declares that they remain valid. The Minister may also revoke the designation or declaration of an individual, either on the Minister's own initiative or following an application by the affected person.

The effect of disallowing the Zimbabwe Amendment List

I wish to provide the Committee with further context to the Zimbabwe sanctions regime, and the consequences of disallowing the Zimbabwe Amendment List. Such an outcome would be detrimental for Australia's foreign policy, for the situation in Zimbabwe and for the efficacy of our autonomous sanctions. At the outset, I note that the practical effect of disallowing this instrument would in fact be to leave more individuals subject to sanctions.

As Zimbabwe has unequivocally met the criterion that I publicly announced for the first step of the three-step process for the removal of sanctions, failure by Australia to respond will be seen as a sign of bad faith. If this should occur, the key incentive we have to encourage good behaviour and political progress in Zimbabwe will be undermined and the opponents of reform will be strengthened. Any determination that designations of individuals for human rights abuses or for activities undermining democracy are incompatible with human rights would also suggest that the rights of the sanctioned individuals to privacy, family and movement should be given greater weight than the broader rights of the Zimbabwean people.

I note that many of the issues raised by the Committee refer to broader concerns with designations under Australia's autonomous sanctions legislation. Should the Committee wish to discuss these broader concerns I would of course be happy to do so.

Thank you for bringing these concerns to my attention. I trust that this information is of assistance to the Committee.

Yours sincerely

Bob Carr

Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1)

FRLI: F2013L00791
Portfolio: Foreign Affairs

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2013 (No. 1)

FRLI: F2013L00789
Portfolio: Foreign Affairs

Charter of the United Nations (Sanctions - the Taliban) Regulation 2013

FRLI: F2013L00787
Portfolio: Foreign Affairs

PJCHR comments: Report 7/13, tabled on 5 June 2013
Response dated: 19 June 2013

Background

3.20 These instruments seek to amend a number of instruments made under the *Charter of the United Nations Act 1945* to give effect to decisions made by the United Nations Security Council under Chapter VII of the Charter of the United Nations. These give effect to:

- sanctions obligations in relation to Al-Qaida and the Taliban, with these instruments splitting these into two separate Regulations;
- new sanctions in relation to Libyan Arab Jamahiriya and the repealing of sanctions in relation to Sierra Leone;
- changes to the arms embargoes in relation to Somalia and Eritrea;
- removal of certain exemptions in relation to Sudan;
- removal of the prohibition on the import of rough diamonds from Côte d'Ivoire for certain scientific research purposes;
- imposition of strict liability for offences across the regulations that is 'not authorised by a permit'; and
- specification of certain provisions to be a 'UN sanction enforcement law'.

3.21 The committee sought further information as to whether the strict liability provisions in these instruments are consistent with the right to be presumed innocent and whether freezing a designated person's assets is compatible with the right to privacy.

3.22 The Minister's response is attached.

Committee's response

3.23 The committee thanks the Minister for his response.

3.24 The committee thanks the Minister for clarifying that the strict liability offences apply only to body corporates and none would apply to individuals, and in light of this information makes no further comment on this aspect of the instrument. The committee notes that it would have been helpful had this information been included in the statement of compatibility.

3.25 The committee also thanks the Minister for setting out the processes under which a person subject to this regime may apply to be de-listed. The committee notes that under these regulations, a designated person is 'Al-Qaida' or 'the Taliban' or a person or entity designated by the United Nations Security Council (UNSC) under certain Security Council resolutions. Once a person is designated by the UNSC Australia is under an obligation to implement these resolutions.

3.26 The committee appreciates the Minister setting out the UN review process for a person listed by the UNSC to seek to be de-listed. In particular, a person listed under a UN sanctions regime other than the Al Qaida sanctions regime, can submit a request to the Focal Point for Delisting. This then facilitates consultation between a number of States and the UNSC Sanctions Committee to re-consider the listing. This may lead to the person being de-listed, although the person does not have a right to put forward their case and much depends on whether their own government decides to fully argue their case. In relation to the Al-Qaida sanctions regime, a person can submit a request for de-listing to an Ombudsperson who then reviews the case and makes a recommendation on delisting. However, ultimately the UNSC can decide not to accept the recommendation.

3.27 The committee does not agree with the Minister's statement that 'the processes available to a designated person provide sufficient human rights safeguards'. As the European Court of Justice has said in relation to the Focal Point for Delisting process:

> The existence of a de-listing procedure at the level of the United Nations offers no consolation in that regard. That procedure allows petitioners to submit a request to the Sanctions Committee or to their government for removal from the list. Yet, the processing of that request is purely a matter of intergovernmental consultation. There is no obligation on the Sanctions

> Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list.[6]

3.28 The Federal Court of Canada has similar concerns, with Zinn J noting in *Abdelrazik v The Minister of Foreign Affairs*:

> I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness. … It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge.[7]

3.29 However, the committee appreciates that Australia has international obligations to comply with UNSC resolutions. This makes it difficult to ensure that adequate review processes are available in Australia to a person who has been designated by the UN. This is an issue that the UK Supreme Court had to grapple with in relation to similar orders.[8] In that case it was argued that although the UK had international legal obligations to implement the UNSC resolution, the implementation of this into national law needed to respect the basic premises of the UK's own legal order, including the fundamental right to property and the right of access to the courts.

3.30 The committee appreciates that this is a complex area that requires careful consideration of the various competing interests. The committee appreciates the preparedness of the Minister to discuss the broader concerns about human rights compatibility to which the autonomous sanction regimes give rise. The committee intends to write to the Minister to ask him whether the Department of Foreign Affairs and Trade might conduct a comprehensive review of the sanctions regime in light of Australia's international human rights obligations and report back to the Parliamentary Joint Committee on Human Rights in the 44th Parliament.

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6 *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P, para 51.

7 [2009] FC 580 in para 51.

8 See *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534 in relation to the Al-Qaida and Taliban (United Nations Measures) Order 2006 (SI 2006/2952).

SENATOR THE HON BOB CARR

MINISTER FOR FOREIGN AFFAIRS
CANBERRA

19 JUN 2013

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

I refer to your letter of June 5, 2013, seeking clarification on matters set out in the Committee's *Seventh Report of 2013* regarding legislative instruments implementing amendments to certain United Nations Security Council (UNSC) sanctions regimes.

I note that my reply to your letter of May 15, 2013, clarified similar matters set out in the Committee's *Sixth Report of 2013* regarding the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013*.

While the Committee's reports relate to particular legislative instruments, the matters raised by the Committee relate to the implementation of all UNSC and autonomous sanctions regimes, which require regular amendment to remain effective.

Accordingly, I enclose a paper prepared by the Department of Foreign Affairs and Trade (DFAT) on the relationship between sanctions regimes and human rights more generally. Should the Committee be interested in receiving a briefing from DFAT officials, or have any further queries, please contact Rebecca Barton in my office on 6277 7500.

Yours sincerely

Bob Carr

PO Box 6022, Parliament House, Canberra ACT 2600
Telephone (02) 6277 7500 Facsimile (02) 6273 4112

Sanctions and human rights

This paper supplements Senator Carr's reply to the letter of 15 May 2013 from the Chair of the Parliamentary Joint Committee on Human Rights (PJCHR).

Australia implements United Nations Security Council (UNSC) and autonomous sanctions regimes under Australian sanction laws. UNSC sanctions regimes are implemented under the *Charter of the United Nations Act 1945* (CotUNA) and its regulations. There is a set of regulations for each UNSC sanctions regime, except for the counter-terrorism regime established by resolution 1373, which is implemented in Part 4 of CotUNA. Autonomous sanctions regimes are implemented under the *Autonomous Sanctions Act 2011* and its *Autonomous Sanctions Regulations 2011.*

UNSC and autonomous sanctions regimes are imposed in situations of international concern, including human rights abuses. Australia, like all UN Member States, is legally bound to implement UNSC sanctions regimes. Australia, like many other States, chooses also to implement autonomous sanctions regimes, either to supplement a UNSC sanctions regime, or in response to a situation for which there is no UNSC sanctions regime.

UNSC and autonomous sanctions regimes impose targeted measures designed to limit the adverse consequences of a situation of international concern, to seek to influence those responsible for the situation to modify their behaviour, and to penalise those responsible. They impose similar types of sanctions measures, including restrictions on the trade in certain goods and services, targeted financial sanctions against designated persons and entities, and travel bans against designated persons. UNSC and autonomous sanctions regimes give rise to similar human rights considerations.

The PJCHR has raised concerns about **whether Australian sanction laws are compatible with a designated person's rights to privacy, family and freedom of movement** under the *International Covenant on Civil and Political Rights* (ICCPR). Sanctions measures that are targeted against designated persons necessarily involve the balancing of the human rights of those persons with the necessity of preventing broader, and often egregious, human rights abuses arising from a situation of international concern. In that context, specific measures with limited effects on a designated person's rights to privacy, family and freedom of movement represent a reasonable balance.

The PJCHR has raised concerns about **whether the designation of a person or entity by the UNSC can properly be determined to be 'in accordance with law'**. For UNSC sanctions regimes, persons and entities are designated by the UNSC itself or its relevant Sanctions Committee, based on the criteria set out in relevant UNSC resolutions. For example, for the UNSC sanctions regime in relation to the Taliban established by resolution 1988, the UNSC or its Taliban Sanctions Committee may designate 'individuals, groups, undertakings and entities associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan'.

A UNSC decision to designate a person or entity is in accordance with law because it is a decision taken by the UNSC in accordance with the *Charter of the United Nations* (the Charter). The Charter provides that decisions of the UNSC are legally binding upon all UN Member States, including Australia, and that a UN Member State's obligations under the Charter prevail over its obligations under any other international agreement. UNSC decisions to designate a person or entity are automatically incorporated into Australian sanction laws through the definition of 'designated person or entity' therein.

The PJCHR has raised concerns about **whether the strict liability offences under Australian sanction laws are compatible with an individual's right to the presumption of innocence** in Article 14(2) of the ICCPR.

Australian sanction laws implementing UNSC and autonomous sanctions regime provide that the offences of contravening a sanction law, or contravening a condition of an authorisation under a sanction law, are strict liability offences for a body corporate. No offences under Australian sanction laws are strict liability offences for an individual. Accordingly, the question of whether strict liability offences under Australian sanction laws are compatible with Article 14(2) does not arise.

DFAT understands that the PJCHR is also interested in **whether the processes available to a designated person to seek a review of his or her designation are sufficient**. In the context outlined above of the necessity of preventing broader, and often egregious, human rights abuses arising from a situation of international concern, the processes available to a designated person provide sufficient human rights safeguards.

For a UNSC sanctions regime other than the Al Qaida sanctions regime, a designated person may submit a request that he or she be de-listed to the Focal Point for Delisting established by UNSC resolution 1730. The Focal Point must facilitate consultations between the designating government(s), the person's government(s) of citizenship and residence, and the relevant UNSC Sanctions Committee, which may lead to the person being de-listed.

For the UNSC Al Qaida sanctions regime established by resolution 1267, a designated person may submit a request that he or she be de-listed to the Ombudsperson established by resolution 1904. After reviewing the request, the Ombudsperson must make a recommendation to the UNSC Al Qaida Sanctions Committee on whether the person should be de-listed. If the Ombudsperson recommends that a person be de-listed, the recommendation is adopted unless, within 60 days, the Committee decides by consensus to maintain the person's designation, or a Committee member requests that the matter be referred to the UNSC for decision.

For autonomous sanctions regimes, persons and entities are designated by the Minister for Foreign Affairs, based on the criteria set out in the Autonomous Sanctions Regulations. The Regulations provide that a designated person may apply to the Minister to revoke his or her designation, and that each designation must be reviewed every three years.

Corporations and Financial Sector Legislation Amendment Bill 2013

Introduced into the House of Representatives on 20 March 2013; before Reps
Portfolio: Treasury
PJCHR comments: Report 6/13, tabled on 15 May 2013
Response dated: 29 May 2013

Background

3.31 The bill, which has now passed both Houses of the Parliament, seeks to amend a number of Acts[9] to introduce a range of measures relating to the regulation of over-the-counter derivatives and other financial products. The key measures are intended to:

- assist central counterparties in managing defaults of clearing participants;
- improve the allocation of resources by the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA) in assessing the compliance of Australian market licence and clearing and settlement facility licence holders with their legal obligations;
- allow certain Australian regulators including the RBA to exchange protected information with other entities in Australia and overseas in the execution of their duties subject to appropriate safeguards; and
- allow ASIC to gather and share protected information with regulatory entities overseas for supervision and enforcement purposes; and require ASIC to report on the use of those powers.'[10]

3.32 The committee sought clarification in relation to the protection of the right to privacy, the right not to be deprived of one's liberty other than on grounds 'established by law', and whether a number of civil penalty offences contained in the *Corporations Act 2001* should properly be considered as criminal for the purposes of human rights law, and if so, whether they are consistent with the right to a fair hearing.

3.33 The Parliamentary Secretary's response is attached.

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9 The *Corporations Act 2001* (the Corporations Act), the *Payment Systems and Netting Act 1998*,the *Mutual Assistance in Business Regulation Act 1992*, the *Australian Securities and Investments Commission Act 2001*, the *Reserve Bank Act 1959*, the *Clean Energy Regulator Act 2011* and the *Carbon Credits (Carbon Farming Initiative) Act 2011*

10 Explanatory memorandum, p. 3.

Committee's response

3.34 The committee thanks the Parliamentary Secretary for his detailed response, and notes it would have assisted the committee if this information had been included in the statement of compatibility.

Protections where personal information is provided to international or overseas national regulators

3.35 The committee notes the information provided in relation to the protection of information shared with international or foreign regulators. In light of this information the committee makes no further comment on this aspect of the legislation.

Powers of the Reserve Bank to disclose protected information

3.36 The committee notes the explanation for the conferral of the power and the limitations and safeguards on its exercise. In light of this information the committee makes no further comment on this aspect of the bill.

Creation of an offence through the imposition of conditions on the recipient of information about the protections

3.37 The committee notes the explanation and the likely scope of the type of conditions that might be imposed on a person who receives protected information, namely ones that would relate to the protection of the confidential material. The committee acknowledges that the conditions would be known in advance to the person who was subject to them.

3.38 The committee remains concerned about the broad power, even if it is understood to be limited in the manner indicated in the explanatory memorandum and by the context in which the provision is found. While the conditions do not create the offence, there is no offence without the formulation of the relevant conditions. A criminal offence must be created by 'law', a requirement that may not be satisfied by a statute enabling the imposition of conditions and the imposition of conditions in a specific case.

Civil penalty provisions and rights in relation to the determination of criminal charges

3.39 The Parliamentary Secretary's response refers to the jurisprudence of 'foreign courts' in relation to this issue. The committee considers that the decisions of international and regional human rights courts and other human rights bodies, as well as the decisions of the courts of other countries pronouncing on the provisions of the relevant treaties or similarly worded international treaties, may provide assistance in interpreting the provisions of the human rights treaties.

3.40 The committee notes the Parliamentary Secretary's views that there are 'a variety of views' on the issue of civil penalties and that 'it is not possible to produce a detailed analysis and conclusion given the timeframe within which this response has been requested.' The response also notes that the bill itself did not propose the creation of any new civil penalties and that therefore this may not be an appropriate occasion to attempt to reach a concluded view on these issues.

3.41 The committee shares the view that the topic is a complex one that may require the examination of individual civil penalties in their specific statutory context in order to determine whether they should be classified as 'criminal'.

3.42 The committee refers the Parliamentary Secretary to its recent interim *Practice Note 2* on civil penalties, which sets out the issues which the committee would wish to see addressed in future statements of compatibility relating to bills containing civil penalty provisions. In light of the Parliamentary Secretary's statement that some of the civil penalties provisions may possibly be viewed as 'criminal', the committee would welcome a more detailed analysis of the civil penalties provisions of the *Corporations Act 2001* and considers that it may be appropriate to include such an analysis when a bill is next introduced that amends the *Corporations Act 2001.*

The Hon Bernie Ripoll MP

Parliamentary Secretary to the Treasurer

Parliamentary Secretary for Small Business

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

29 MAY 2013

Via email: human.rights@aph.gov.au

Dear Mr Jenkins Harry

Thank you for your correspondence of 15 May 2013 in which the Parliamentary Joint Committee on Human Rights (the Committee) seeks clarification with regard to certain provisions in the Corporations and Financial Sector Legislation Amendment Bill 2013 (the Bill).

I appreciate the Committee's consideration of the Bill and am pleased to have the opportunity to provide clarification on the issues the Committee has raised.

Please find attached detailed responses to the specific issues the Committee has raised.

I trust that this information adequately answers your questions.

Yours sincerely

B Ripoll

BERNIE RIPOLL

PO Box 6022
Parliament House
Canberra ACT 2600

Telephone: 02 6277 4934
Facsimile: 02 6277 8584
http://parlsec.treasurer.gov.au

DETAILED RESPONSES TO QUESTIONS

Protections that apply in relation to personal information supplied to international regulators or regulators in other countries

The amendments that would be made by Part 3 of Schedule 1 to the Bill would enable the Australian Securities and Investments Commission (ASIC) to share protected information, including personal information, with multi-jurisdictional business regulators. As indicated in the explanatory memorandum (EM) for the Bill, the amendments are mainly intended to ensure that information can be shared with certain pan-European regulators such as the European Securities Market Authority (ESMA) and the European Systemic Risk Board (ESRB).

Under ASIC's existing information-sharing provisions, as well as the provisions as expanded by the Bill, protections are available that guard against the misuse of personal information provided to overseas regulators. These protections are as follows:

- Under the *Mutual Assistance in Business Regulation Act 1992* (MABRA), a request for information from a foreign regulator must contain a written undertaking that the information or evidence provided will not be used for the purposes of criminal proceedings against the person or proceedings against the person for the imposition of a penalty, and to the extent to which it is within the ability of the foreign regulator to ensure it, will not be used by any other person, authority or agency for the purposes of any such proceedings. ASIC must not consider a request for information from a foreign regulator unless the written undertaking noted above is received (see MABRA s6(2)). Further, under MABRA, conditions may be imposed on an authorisation to gather information at the request of a foreign regulator (see MABRA s9). Section 7(2) provides that the conditions of a MABRA authorisation "may include (but need not be limited to)" conditions relating to:

  - maintaining the confidentiality of anything provided in compliance with the request, in particular, information that is personal information within the meaning of the *Privacy Act 1988*;

  - the storing of, use of, or access to, any such thing; and

  - copying, returning or disposing of copies of documents provided in compliance with the request.

- Disclosure of information by ASIC to an 'international business regulator' under proposed s127(4)(ca) of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) will be subject to the provisions of s 127(4A) of the ASIC Act, which provides that conditions may be imposed on the information released under s127(4). ASIC has published Regulatory Guide 103: *Confidentiality and release of information* which (among other things) sets out ASIC policy on the conditions it will consider imposing on information released under its statutory powers, including under s127 of the ASIC Act. Specifically RG 103.36 states: *"The conditions ASIC imposes [on the use of disclosed information] may relate to the manner in which the information may be used or may require an undertaking that ASIC be notified before the information is published."* Further, RG 103.37 states: that "ASIC may release information [to a statutory authority] on condition that the agency only uses the material internally." The guidance in RG 103 will apply to releases made under proposed 127(4)(ca) of the ASIC Act.

- As noted in the EM, the main purpose of the provision in the Bill is to allow ASIC to share protected information with certain EU regulators, in particular ESMA and the ESRB. Both of

these entities have secrecy provisions in place which ensure that any personal information will be given appropriate protection. For instance, any confidential information received by ESMA employees whilst performing their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial market participants cannot be identified.[1]

With respect to the Reserve Bank of Australia (the RBA), the key point is that only in exceptional circumstances does it receive information of a personal nature, and that information is not provided to foreign regulators:

- Information will be 'protected' for the purpose of section 79A of the *Reserve Bank Act 1959* if it:

  a. Is collected for the purpose of, or in performance or exercise of, the Banks' functions or powers under Part 7.3 of the *Corporations Act 2001* (the Corporations Act - licensing and regulation of CS facilities);

  b. Is collected for the purpose of, or in performance or exercise of, the Banks' functions or powers under the new Part 7.5A of the Corporations Act (licensing and regulation of derivative trade repositories);

  c. Is obtained under or for the purpose of the *Reserve Bank Act 1959*, the *Banking Act 1959*, the *Payment Systems and Netting Act 1998* or the *Payment Systems (Regulation) Act 1998* AND relates to the affairs of:

     i. A financial institution;

     ii. A related body corporate of a financial institution; or

     iii. A person who is or has been a customer of a financial institution.

  (note that while the definition also refers to the repealed *Banks (Shareholdings) Act 1972* in practice that legislation is not relevant to the question)

- The RBA collects limited 'protected information' which is, or 'protected documents' which contain, 'personal information' as defined in section 6 of the *Privacy Act 1988*. The bodies which the RBA hopes will be prescribed by regulation made under the new paragraph 79A(4)(c) if the Bill is passed are bodies such as Australian Treasury, New Zealand Treasury, the International Monetary Fund, the Bank for International Settlements and the Financial Stability Board ('Regulation Bodies') – all bodies with a mandate relating to stability and/or security of the financial or monetary system, but which are not 'financial sector supervisory agencies' as defined in section 79A(1) or central banks or monetary authorities of a foreign country (sharing with other central banks and with financial sector supervisory agencies is already permitted under paragraphs 79A(4)(a) and (b)). The information which may need to be shared with these Regulation Bodies for the purposes of assessment of financial stability, crisis prevention, crisis management, and co-operative oversight is information about institutions, not individuals. The very nature of the respective mandates of the contemplated Regulation Bodies, and the purpose for which sharing with them would occur, means that the

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[1] The ESMA secrecy provisions are contained in Article 70 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council. The text of the Regulation is located at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010R1095:EN:NOT. The ESRB secrecy provisions are in Article 8 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council, which is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010R1092:EN:NOT.

sharing of information about natural persons will not be necessary (or desirable). Their concerns primarily relate to entities of systemic importance. So the RBA does not contemplate that any personal information will need to be, or will be, shared with Regulation Bodies if the Bill is passed and a regulation is made under the new section 79A(4)(c).

- For completeness we note the following main categories of personal information which may be collected from time to time by the RBA and be 'protected information' or contained in a 'protected document':

  – Business or professional contact details (such as name, position in organisation/title, business address (physical and/or postal), business phone, business email address and business fax) in relation to the executives and other staff the RBA deals with who are employed by:

    : financial institutions;

    : other payment system participants;

    : clearing and settlement facility licensees; and

    : service providers to any of these; and

    : executives and staff of other central banks and regulators.

    While this information is 'personal information' and accordingly protected under the Privacy Act 1988, it is not 'private' information and much of it is publicly available. To the extent that it is publicly available, it is not 'protected information' within the meaning given in section 79A. Nonetheless, it is not shared by the RBA with other regulators, either domestic or international, nor is it proposed that it will be shared with Regulation Bodies, either domestic or international, if the Bill is passed.

  – Contact details (along with personal views and occasionally details of financial transactions) from individuals who are customers of financial institutions and who are making submissions to consultations - typically in the context of the *Payment Systems (Regulation) Act 1998* , or complaints or enquiries related to retail payment systems and regulation. This information is volunteered by the relevant individuals and not collected from the relevant financial institution under any power or compulsion. It is not shared with other regulators or government bodies, either domestic or international, nor is it proposed that it will be shared with Regulation Bodies, either domestic or international, if the Bill is passed.

  – "Large exposure' data for financial institutions. This information is received from APRA. There are instances each quarter in which smaller deposit taking institutions report large exposures to natural persons. The RBA does not and will not share this data with any foreign central bank or any financial sector supervisory agency (other than APRA). It will not if the Bill is passed and a regulation made, share this information with any Regulation Body.

- Trade repository data collected under Part 7.5A of the Corporations Act may include data on an individual's trades. However the RBA will not share this data with foreign central banks or supervisors or with Regulation Bodies. Instead ASIC's draft Derivatives Trade Repository

Rules[2] envision Treasury prescribing overseas regulators under 904B(2) of the Corporations Act, which would allow overseas regulators to request data consistent with their mandate directly from the trade repository.

Broad power of Governor of the Reserve Bank of Australia to disclose protected information

The Bill provides a power for the Governor of the RBA and certain designated delegates to authorise the disclosure of protected information to any person or body. It is noted that such a provision was previously in the RBA's governing legislation and that the power provided under the Bill replicates similar powers provided to other regulators.

It is acknowledged that the amendment would enable protected information and documents to be disclosed at the Governor's discretion. This does not mean, however, that the amendment provides for arbitrary interferences with a person's privacy. In particular, it is noted that:

- The power to authorise the disclosure of protected information or documents is entrusted to the highest office holder within the Reserve Bank; the power may be delegated, but only to other persons who occupy very senior positions within the Bank (i.e. a Deputy Governor or an Assistant Governor).

- This power would only be exercised on a case-by-case basis. Pending the making of a regulation under section 79A(4)(c) this power could be used to permit sharing with a Regulation Body (as defined in the response to the first question in paragraph 1.38 of the above) if such sharing was required as a matter of urgency. In that case the comments in the response to the question in paragraph 1.38 of the Committee's report above apply. Otherwise, it is expected that it would be exercised in exceptional circumstances only – either in an emergency before a body could be listed in a then existing regulation made under section 79A(4)(c) (again the comments in the response to the question in paragraph 1.38 above apply), or to cover a one off disclosure of a type that has not currently been identified as necessary.

- The primary purpose of the power is to provide the flexibility to respond to a legitimate need for the sharing of information, particularly in the context of a crisis which, by its nature, may involve facts and circumstances which have not currently been contemplated.

Offences relating to failure to comply with a condition imposed under proposed new section 79A(7A) – consistency with Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR)

Item 32 of Schedule 1 to the Bill would insert new subsections 79(7A), (7B) and (7C) into the *Reserve Bank Act 1959*. Subsection 79(7A) would enable a person who discloses protected information or documents to impose conditions to be complied with in relation to the information or documents disclosed; subsection 79(7B) provides that the notice imposing the conditions is not a legislative instrument; subsection 79(7C) provides that failure to comply with a condition is an offence punishable on conviction by imprisonment for 2 years.

Proposed subsection 79(7A) does not expressly set out the matters with which the conditions may deal; this is left to the discretion of the person disclosing the protected material. However, it can be implied from the location of the subsection that the conditions would deal with matters relating to

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[2] Available at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp201-attachment-1-published-15-March-2013.pdf/$file/cp201-attachment-1-published-15-March-2013.pdf

the protection of the confidentiality of disclosed material. The relevant paragraphs in the EM also make it clear that this is the sole purpose of this provision. It is therefore certain that any conditions imposed in relation to the disclosure would be directed at ensuring that the disclosed material is appropriately protected in the hands of the recipient. For example, a protected document might be disclosed on condition that no further copies of the document are made or disseminated.

It is also expected that, as a matter of good administrative practice, the nature of any conditions imposed in respect of the disclosure of protected information or documents would be made known to the recipient before the material is disclosed. If the recipient is not prepared to receive the material on those conditions, then the material would not, ordinarily, be disclosed.

The fact that the notice containing the conditions would not itself be a legislative instrument does not mean that the offence is not established by law. The offence of failing to comply with the conditions is quite clearly created by the legislation; the conditions themselves do not create the offence. Further, any offence would be investigated under established criminal investigatory procedures and determined by a court under established judicial procedures.

Civil penalty provisions and rights in relation to the determination of criminal charges

Item 41 of Schedule 1 to the Bill would rewrite subsection 1317E(1) of the Corporations Act, so as to list the civil penalty provisions in that Act in tabular form. The item does not itself create or impose any new civil penalties, but operates on a purely cosmetic level.

Subsection 1317E(1) of the Corporations Act provides that if a Court is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention. Once a declaration has been made, ASIC can seek a pecuniary penalty order under section 1317G or, in the case of a corporation/scheme civil penalty provision, a disqualification order under section 206C. Section 1317G empowers a Court to order a person to pay the Commonwealth a pecuniary penalty up to a maximum amount. The penalty is a civil debt payable to ASIC on behalf of the Commonwealth and may be recovered in civil proceedings. Section 1317L provides that the Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a declaration of contravention or a pecuniary penalty order.

Actions which involve a contravention of a civil penalty provision may also, in certain circumstances, involve criminal conduct. For instance, a failure to exercise a director's powers in good faith (subsection 181(1)) can amount to a criminal offence if done so dishonestly (subsection 184(1)). Actions which involve a contravention of a civil penalty provision (such as those relating to prohibited financial assistance) may also involve criminal offences against other provisions (such as those relating to market manipulation). Section 1317N provides that if criminal proceedings commence, then the civil penalty proceedings are stayed until such time as the criminal proceedings are finalised. Criminal proceedings may also be started after the civil penalty proceedings are finalised: section 1317P.

A useful summary of the operation of the civil penalty provisions, including their history, is set out in paragraphs [3.390.12] - [3.420.12] of *Ford's Principles of Corporations Law*. The Australian Law Reform Commission considered the use of civil penalty regimes in its discussion paper *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (Discussion Paper 65, April 2002) and report *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report 95, December 2002).

It is acknowledged that the nature of civil penalty provisions like those in the Corporations Act has given rise to some academic debate and that the provisions are sometimes described as a hybrid

between the criminal and civil law. It is clear, however, that they are not, for the purposes of domestic law at least, criminal provisions.

It is also acknowledged that some foreign courts take the view that any proceeding which may result in a penalty for wrongful conduct involves the determination of a 'criminal charge' within the meaning of domestic laws giving effect to Articles 14 and 15 of the ICCPR, unless they have a character which is neither criminal nor penal in nature. At least some civil penalty proceedings in the Corporations Act might be characterised as 'criminal charges' on this view. There are, however, a variety of views about this matter and it is not possible to provide a detailed analysis and conclusion given the timeframe within which this response has been requested. In addition, given that the Bill itself imposes no civil penalties, this may not be an appropriate occasion to attempt to reach a concluded view about these complex issues.

It is noted, however, that the civil procedures provided by Australian courts and used in procedures for civil penalty orders are consistent with Articles 14 and 15 of the ICCPR in the following ways:

- Civil penalty procedures are ordinarily conducted in open court, with the court itself acting as guarantor of the fairness of the hearing;
- The defendant's guilt must be proved, albeit to the standard of proof required in civil proceedings (the balance of probabilities). In determining whether it is satisfied that this standard is met, a Court may properly take into account the nature and consequences of the facts to be proved, including the seriousness of an allegation made and the gravity of the consequences flowing from a particular finding: *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362-363 per Dixon J; and
- All defendants are entitled to be present and represented at hearings, to conduct their defence in the usual way, and to seek to appeal any adverse decision.

Court Security Bill 2013

Court Security (Consequential Amendments) Bill 2013

Introduced into the Senate on 16 May 2013; passed by both Houses on 20 June 2013
Portfolio: Attorney-General
PJCHR comments: Report 6/13, tabled on 15 May 2013
Response received: 17 June 2013

Background

3.43 The Court Security Bill 2013 creates a new framework for court security arrangements for federal courts and tribunals. It replaces the current security framework for federal courts and tribunals under Part IIA of the *Public Order (Protection of Persons and Property) Act 1971* (Public Order Act). The Court Security (Consequential Amendments) Bill 2013 makes consequential amendments to the Public Order Act to refer to the new legislation.

3.44 The committee sought clarification as to:

- why it is necessary, when a security officer has the power to detain a person for an alleged offence, to provide an exception allowing the officer not to inform the person in general terms of the alleged offence for which they are being detained and how this is consistent with the right to liberty and the right to be informed promptly.
- it is necessary to empower a security officer to escort a person to and from court premises for their safety in circumstances where a person may not consent to being escorted, and how this is consistent with the right to freedom of movement and the right to privacy.
- whether the power to make a court security order prohibiting a person from being on court premises – that may be made initially without the subject of the order being heard and without the right to review the decision – is consistent with the right to a fair hearing.
- why it is necessary in some instances to impose an evidential burden on a defendant in circumstances that do not appear to be 'peculiarly within the defendant's knowledge, and how this is consistent with the right to be presumed innocent.

3.45 The Attorney General's response is attached.

Committee's response

3.46 The committee thanks the Attorney-General for his response.

Providing persons with reasons for detention

3.47 The committee notes the Attorney-General's response in relation to the committee's questions as to why it is necessary to provide that a security officer is not under an obligation to inform a person in general terms of the alleged offence they are being detained for, and how this is consistent with the right to liberty and the right to be informed promptly. The committee notes that the response stated that this reflects the common law position, is consistent with the approach taken elsewhere and that the Attorney-General considers that the exception 'is reasonable and does not unduly infringe upon the right to liberty'. The committee notes that this statement does not explain the reasons behind why it is considered to be a reasonable approach. While in most cases in which 'it is reasonable to expect that that the person knows of his or her alleged commission of the offence or attempt to commit it', the person arrested will know the reason for the arrest, that will not be so in every instance, depending on the nature of the offence in question and the person's ability to comprehend the circumstances.

Power to escort a person

3.48 The committee thanks the Attorney-General for his advice that clause 29 and 30 of the bill does not empower a security officer to forcibly escort a person to and from court premises for their where they do not consent to being escorted.

Power to make court security orders

3.49 The committee notes the Attorney-General's response that allowing a court to make an interim court security order 'is intended to deal with situations where there are serious and immediate threats of ongoing disruption or violence to courts or persons associated with court proceedings, and where an order is needed to be put in place urgently to address these concerns'. The committee accepts the Attorney General's explanation that this is the intention of the provisions, but notes there is nothing in the bill itself limiting the making of an interim order to situations of 'immediate' threats and 'urgent' situations.

Evidential burden on defendants

3.50 The committee thanks the Attorney-General for his response in relation to the imposition of an evidential burden on a defendant having express permission to make a recording or transmission on court premises, and in light of this information makes no further comment in relation to this.

3.51 The committee notes the Attorney-General's explanation in relation to the evidential burden on whether premises are used exclusively for court proceedings. The explanation effectively states that it is necessary to create this as an evidential burden as from a drafting perspective it was necessary to create this as an exception to an existing offence – as such, in creating this as an exception, this then necessitates reversing the burden of proof.[11] It is stated that 'it can be expected that the proposed new defence … would only apply in very rare circumstances'. The committee notes that imposing an evidential burden, on its face, limits the right to the presumption of innocence in article 14 of the International Covenant on Civil and Political Rights. In the committee's view, administrative convenience (including drafting conventions) and an assurance that a measure is unlikely to be used often, is not a sufficient justification for limiting the right under article 14. The committee also notes, that this position does not appear to be consistent with the *Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

11 As the Criminal Code Act provides that where a defendant wishes to rely on an exception, the defendant bears the evidential burden in relation to that mater (see subsection 13.3(3)).

Attorney-General
Minister For Emergency Management

MC13/06784

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr ~~Jenkins~~ Harry

Thank you for your letter of 15 May 2013 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) requesting further information about the human rights implications of the Court Security Bill 2013 and the Court Security (Consequential Amendments) Bill 2013 (the Consequential Amendments Bill).

As the Committee states in its report, the main purpose of the Court Security Bill is to establish a new legislative framework for security at federal court and tribunal premises. It does this by expanding and clarifying the security powers that may be exercised by security officers and authorised court officers on court premises. The Consequential Amendments Bill makes amendments to the *Public Order (Protection of Persons and Property) Act 1971* (the Public Order Act) reflecting that the new framework for court security will be contained in the Court Security Bill.

I am pleased to assist the Committee by providing the information requested to clarify the operation of the Bill and address the human rights issues that the Committee has identified.

Providing a person with the reasons for detention

Clause 28 of the Court Security Bill empowers a security officer to detain a person on court premises in order to deliver them into the custody of a police officer in certain circumstances.

The Committee seeks clarification as to why the Bill provides that a security officer is not under an obligation to inform a person in general terms of the alleged offence that they are being detained for if it is reasonable to expect that the person knows of his or her alleged commission of the offence or attempt to commit it, and how this is consistent with the right to liberty under article 9 of the International Covenant on Civil and Political Rights (ICCPR).

Clause 28(3)(b) provides that a security officer must inform a person in general terms of the alleged offence, unless it is reasonable to expect that the person knows of his or her alleged commission of the offence or attempt to commit it, or it is impracticable for the security

officer to do so. These two exemptions reflect the exceptions in the common law to the rule that a person arrested must be informed of the reason for the arrest (*Christie v Leachinsky* [1947] AC 573 at 585 cited with approval in *Michaels v The Queen* (1995) 184 CLR 117, 129-130 per Gaudron J. I consider the exception to the duty to inform in the circumstances where it is reasonable to expect that a person knows of his or her alleged commission of an offence or attempt to commit it, is reasonable and does not unduly infringe upon the right to liberty under article 9 of the ICCPR.

I also note that the provision is consistent with the approach taken in the *Maritime Powers Act 2013* in relation to the power of arrest under that Act. Subsection 100(3) of that Act provides that a person arrested must be informed of the reasons for his or her arrest except in certain circumstances, including where the person should, in the circumstances, know the substance of the offence for which he or she is being arrested (paragraph 100(3)(a)).

Power to escort a person

Division 5 of Part 2 of the Court Security Bill has been included so as to ensure that arrangements can be made to ensure the safety of persons arriving and departing court premises. It is not uncommon for threats to be made against parties, judicial officers or court staff, and the threat may extend beyond court premises.

Division 5 has been drafted to ensure that the powers of security officers are appropriately confined and only extend to the powers necessary and appropriate to address the harm that is sought to be avoided.

The Committee seeks clarification as to why it is necessary to empower a security officer to escort a person to and from court premises for their safety in circumstances where a person may not consent to being escorted, and how this is consistent with the right to freedom of movement and the right to privacy.

I clarify that the Bill does not empower a security officer to forcibly escort a person to and from court premises for their safety in circumstances where a person does not consent to being escorted. The use of force provision (clause 30) provides that in escorting a person under clause 29, a security officer may use only such force as is necessary and reasonable in the circumstances to prevent or lessen an imminent threat to the safety of the person or a security officer, for example, an imminent physical attack from another person. The power to use force in clause 30 does not extend to coercively taking somebody between court premises and another place. The specific seeking of consent is, therefore, not required as a person to whom an offer of escort is made may simply refuse the offer should they not wish this form of protection. For these reasons, I consider the relevant provisions are consistent with the right of the person being escorted to freedom of movement and privacy.

I mention that the escort power will further support the existing processes that the family law courts have in place to ensure that clients are safe when they attend a court event (for example separate interviews, attendance by phone or video link, use of safe rooms, and use of separate entry and exit points).

Power to make court security orders

Part 4 of the Court Security Bill provides for an administrative head of a court to seek a court security order which can restrict the behaviour of a specified person in or around court premises, or in relation to a member or official of a court. Orders under this Part can only be sought in circumstances where a person poses an ongoing risk of significant disruption to court proceedings, court administration or lawful activities on court premises, or a risk of violence to persons or property on court premises, or to court members or staff. The provisions are similar in nature to protection or restraining orders available under State and Territory legislation.

The Committee seeks clarification as to whether Part 4 of the Court Security Bill is consistent with the right to a fair hearing under article 14 of the ICCPR in respect of three issues.

Before responding to these issues, I first wish to clarify that registrars and deputy registrars of the Family Court and the Federal Circuit Court cannot make court security orders, as is stated at paragraph 1.67 of the Committee's report. Subclause 41(7) ensures that only judicial officers can make these orders by providing that a registrar or deputy registrar (currently included within the definition of member of a court in clause 5 of the Bill) cannot make a court security order unless the registrar is a Family Law Magistrate (defined in section 4 of the *Family Law Act 1975* as 'a person who holds office concurrently: (a) as a magistrate under the *Magistrates Court Act 2004* (WA); and (b) as the Principal Registrar, or as a Registrar, of the Family Court of Western Australia'). A court security order is a judicial order of a court.

I also wish to emphasise that it is intended that the seeking of a court security order would be a measure of last resort, where the potential security concerns that arise in relation to a particular person cannot be adequately addressed through other security powers. This is reflected in the high thresholds established by clause 41 for a court to make a court security order, and the fact that such orders can only be applied for by an administrative head of a court.

Allowing a court to make an interim court security order is intended to deal with situations where there are serious and immediate threats of ongoing disruption or violence to courts or persons associated with court proceedings, and where an order is needed to be put in place urgently to address these concerns. A court considering whether to make an interim court security order is not required to consider all the factors listed in subclause 41(5). However, an interim order must not prevent a person from conducting legitimate business on court premises (subclause 41(3)). Also, in making an interim order a court must consider arrangements to be put in place while the person is attending court premises to conduct legitimate business.

There is no upper time limit as to how long an interim order may be in force. However, subclause 43(2) requires a member who makes an interim court security order to determine the application for the order under clause 41 as soon as reasonably practicable. This is to ensure that a person has a chance to be heard on the order as soon as reasonably practicable. The requirement for an application to be determined as soon as reasonably practicable after an interim order is made is a high threshold. By way of example, interim orders including workplace orders made under the *Domestic Violence and Protection Orders Act 2008* (ACT) may remain in place for up to two years. The 'as soon as reasonably practicable' requirement

is a significantly higher threshold, and is consistent with the approach taken in section 22 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

Court security orders are judicial orders made by a court and the normal rules of court process and procedural safeguards apply to the making of these orders. A person would be entitled to have legal representation as a matter of course in respect of any hearing on a court security order. In terms of review rights, clause 45 provides that a member of court who may make a court security order may vary or revoke a court security order relating to the members court. Persons may seek also seek to have a court security order varied or revoked through existing appeals processes under the Family Law Act and the *Federal Court of Australia Act 1976*. It is intended that the power of a member to vary or revoke a court security order would generally be exercised on the application of either the administrative head of a court, or the person specified in the order.

Clause 47 has been included in the Court Security Bill to clarify that a judicial officer is not automatically required to disqualify him or herself from hearing other proceedings to which the person the subject of a court security order is or becomes a party. This clarifies that the Bill does not seek to impinge on a court's ability to manage the hearing of proceedings before it independently of the Executive. Where the making of a court security order may lead to a perception of bias against a person, a court would be able to arrange for proceedings involving that person to be heard before a different judicial officer. As such, I consider this provision is consistent with the right to a fair hearing under article 14 of the ICCPR.

Evidential burden on defendants

The Committee has raised the issue of an evidential burden being placed on the defendant in relation to two offences:

- a defendant having express permission to make a recording or transmission on court premises (subclause 39(2) of the Court Security Bill), and

- whether premises are used exclusively for court proceedings (proposed section 12(6) of the Public Order Act).

Clause 39 of the Court Security Bill makes it an offence for a person on court premises to make a recording or transmission of sound or images associated with proceedings in court, or events associated with court proceedings. An exception to this offence is if a person was expressly permitted to make such a recording or transmission (subparagraphs 39(2)(a) and (b)). Subsection 13.3(3) of the *Criminal Code Act 1995*, which applies generally to all offences under Commonwealth legislation, provides that a defendant wishing to rely on an exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The note in clause 39 of the Court Security Bill highlights the operation of subsection 13.3(3).

The Committee seeks clarification as to why it is necessary to impose an evidential burden in clause 39 on a defendant to prove that they had permission to make a relevant recording or transmission. The Committee suggests that this knowledge does not appear to be 'peculiarly within the defendant's knowledge', and queries how this is consistent with the right to be presumed innocent. In particular, the Committee comments that 'it is unclear why a

defendant would be more able to prove that they had express permission for making a recording or transmission than the person who gave – or did not give – the permission'.

I consider that the relevant question is whether the defendant is in a better position to give evidence on that matter vis-à-vis the prosecution, rather than the person who gave – or did not give – the permission. Should the evidential burden not be imposed upon the defendant, the prosecution would be required to prove beyond reasonable doubt that no permission was given. This would involve the prosecution obtaining evidence from all members of court, the administrative head of a court, and any delegates of the administrative head of a court, that no permission was given. This is because, in the absence of an evidential burden, the defendant would not be required to say who he or she claimed had given him or her permission. Given the number of members in any one court, this would place a considerable burden on the prosecution.

In contrast, it would be a simple matter for the defendant to state who gave the defendant the relevant permission. Once a defendant has met the evidential burden of demonstrating that he or she had express permission to make a recording or transmission on court premises, the prosecution would then be required to prove that the defendant did not in fact have the permission he or she claimed.

In this context, I consider that the reversal of the evidential burden is reasonable, proportionate and directed toward a legitimate purpose, and therefore consistent with the right to be presumed innocent.

Schedule 1, item 1 of the Consequential Amendments Bill amends section 12 of the Public Order Act to state that the offences in subsection 12(2) of that Act do not apply in relation to Commonwealth premises being used exclusively as a court as defined in the Court Security Bill. The Committee seeks clarification as to why the Court Security Bill imposes an evidential burden on a defendant to prove if premises were being used exclusively in connection with a court when this does not appear to be 'peculiarly within the defendant's knowledge'.

The purpose of the amendment to section 12 is to ensure that offences in the Public Order Act do not unnecessarily overlap with those in the Court Security Bill. This has necessarily involved creating an exception to the existing offences in subsection 12(2) of the Public Order Act. Subsection 13.3(3) of the Criminal Code Act, which applies generally to all offences under Commonwealth legislation, provides that a defendant wishing to rely on an exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The note in proposed subsection 12(6) of the Public Order Act highlights the operation of subsection 13.3(3).

It is intended that, as a result of the amendment to section 12 of the Public Order Act, conduct on Commonwealth court premises that previously would have been prosecuted as an offence under subsection 12(2) will now be prosecuted as an offence under the Court Security Bill instead. As such, it can be expected that the proposed new defence in proposed subsection 12(6) would only apply in very rare circumstances as, in practice, a person suspected of being engaged in the relevant conduct on court premises would be charged under the relevant offence provisions in the Court Security Bill rather than section 12 of the Public Order Act. I also note that should a charge be brought under section 12 of the Public Order Act, the prosecution will still be required to prove in establishing an offence under that provision that the offence occurred in relation to 'Commonwealth premises'.

In this context, I do not consider that the reversal of the evidentiary burden in relation to proving whether the premises on which the relevant conduct has occurred are being used exclusively in connection with the sittings, or any other operation, of a court as defined in the Court Security Bill unreasonably impinges upon a person's right to be presumed innocent. It requires a defendant to point to evidence that suggests a reasonable possibility that that the premises were being used exclusively in connection with the sittings of a court. If the defendant does so, the prosecution then will be required to prove beyond reasonable doubt that this is not the case. Should this be proven, the conduct giving rise to the prosecution would, in almost all instances, constitute an offence under the relevant provisions of the Court Security Bill.

For the above reasons, I consider that the operation of the provision is consistent with the right to be presumed innocent.

I hope this information is of assistance to the Committee.

The action officer for this matter is Dianne Orr who can be contacted on 02 6141 2967.

Yours sincerely

MARK DREYFUS QC MP

Customs (Drug and Alcohol Testing) Regulation 2013

FRLI ID: F2013L00191
Tabled in the House of Representatives on 12 March 2013 and in the Senate on 25 February 2013
Portfolio: Home Affairs
PJCHR comments: Report 6/13, tabled on 15 May 2013 and Report 7/2013, tabled on 5 June 2013
Response dated: 18 June 2013

Background

3.52 This instrument prescribes matters for the purposes of drug and alcohol testing of those working for the Australian Customs and Border Protection Service. The *Law Enforcement Integrity Legislation Amendment Act 2012* introduced amendments to the Customs Administration Act 1985 to enable drug and alcohol testing, with procedures for carrying out the tests to be set out in regulations. The committee made a number of comments on the amending Act as it was passing through Parliament, including in relation to the provisions that empower the making of this legislative instrument.

3.53 The committee had a number of concerns as to whether the regulations were consistent with the right to privacy. In particular, it was concerned about:

- procedures for the retention of body samples for up to two years, or indefinite retention if used for certain purposes;
- the lack of clarity around provisions which allow 'information obtained from the analysis of a sample' to be used for security vetting - which may go beyond testing for alcohol or prohibited drugs;
- procedures for the identification of persons subject to alcohol and drug tests, which appears to be broader to that explained in the Minister's letter to the committee on 29 October 2012.

3.54 The Minister responded to the committee on 29 May 2013, and the committee responded to this in its Seventh Report of 2013. The committee remained concerned in relation to a number of matters and so sought further clarification in relation to: the retention of information obtained from samples;

- how 'information' obtained from the analysis of a sample is to be defined;
- the sharing of information for medical purposes; and
- the effect of the regulations on the right not to incriminate oneself

3.55 The committee asked for a response to its concerns by 12 June 2013. As at 18 June 2013 the committee had not received a response to its subsequent letter. As

that was the final day for giving notice to disallow this instrument, the committee decided to take the precautionary step of giving notice to disallow the instrument. This was done in order to give the committee adequate time to consider the compatibility of the instrument with the *Human Rights (Parliamentary Scrutiny) Act 2011*, pending the Minister's response.

3.56 The Minister's response, received on the afternoon of 18 June 2013, is attached.

Committee's response

3.57 The committee thanks the Minister for his response.

3.58 The committee appreciates the Minister's commitment, as set out in this letter and his previous letter, to make a number of amendments to the instrument to take into account the committee's concerns, namely:

- to make clear that only information relating to prohibited drugs or alcohol will be collected from samples;
- to limit the information that can be retained indefinitely in the following way:
  - to allow Customs and Border Protection to keep a record only of the fact that a positive drug test has occurred and that the customs worker has been the subject of disciplinary proceedings, any finding of a breach of the Code of Conduct and the outcome of any subsequent proceedings;
  - to permit disclosure of that record only for the purpose of an Australian Government Security Clearance assessment;
- in relation to who has access to the identification of workers' drug or alcohol samples, to make it consistent with the procedures set out in the Minister's letter to the committee on 29 October 2012;[12]
- to review whether it is necessary to empower customs officers to disclose personal information about a customs worker on the basis that the information is already 'publicly known';
- to make clear that information obtained from a drug or alcohol test will only be provided for a customs worker's medical treatment when the worker has consented or in circumstances where the worker lacks capacity to grant consent.

12 Letter published in the PJCHR *Seventh Report of 2012*, Appendix 1.

3.59 The committee considers that in light of the information in the Minister's response, once these changes are implemented this will address the committee's concerns with this instrument.

18 JUN 2013

THE HON JASON CLARE MP
Cabinet Secretary
Minister for Home Affairs
Minister for Justice

Ministerial number: 107880

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
Canberra, ACT 2600

Dear Mr Jenkins

I refer to your letter dated 5 June 2013, on behalf of the Parliamentary Joint Committee on Human Rights, regarding the *Customs (Drug and Alcohol Testing) Regulation 2013*. I note that the Committee, in its Seventh Report of 2013, has raised a number of issues in relation to this Regulation to which it seeks my response.

Whether section 9 will be amended to make clear that the provisions relating to use of information obtained from a drug or alcohol test will not be used in proceedings against a Customs worker (other than those set out in section 16G of the enabling Act) or to investigate other indirect offences in relation to the Customs worker. If not, the committee would like clarification as to whether the section limits the right not to incriminate oneself and if so, whether the limitation is aimed at achieving a legitimate purpose; based on reasonable and objective criteria and is proportionate?

While section 9 does not, by itself, limit the right not to incriminate oneself, as described in my letter of 29 May 2013 the provisions contained in section 9 do not displace or override section 16G of the primary legislation. Section 16G of the *Customs Administration Act 1985* provides broad protection against self-incrimination by preventing any document relevant to the conducting of a test being admissible in evidence against the Customs worker who is subject to a test except in very limited circumstances. Advice to me is that section 16G of the primary legislation already provides adequate safeguards and prevents information obtained from a drug or alcohol test from being used against a Customs worker, and therefore do not consider it necessary to amend section 9 to provide additional safeguards.

Telephone +61 2 6277 7290 | Parliament House, Canberra ACT 2600 Australia | Facsimile +61 2 6273 7098
mha@ag.gov.au

Whether it is intended that future legislative instruments will provide a definition of a 'prohibited drug?

I note the concern of the Committee and apologise for not addressing this question in my earlier response.

As advised to the Committee in my letter of 29 October 2012, any determination made by the Chief Executive Officer (CEO) under section 16H of the *Customs Administration Act 1985* is a disallowable instrument in accordance with the *Legislative Instruments Act 2003* and is subject to scrutiny by Parliament. Any determination made by the CEO will be therefore subject to oversight by Parliament.

Advice to me is that the benefits of providing a definition are outweighed by the evolving and changing nature of the drug environment. For example, The United Nations Office of Drugs and Crime reports in the 2012 World Drug Report:

> *new psychoactive synthetic substances that mimic the effects of controlled substances and are chemically engineered to remain outside international control continues to evolve rapidly, with new substances being identified in the market.*

and;

> *in recent years, the market for new psychoactive substances has evolved rapidly. Unprecedented numbers and varieties of new psychoactive substances... are appearing on the market.*

These examples highlight how new drugs and their variants are continually entering the market. Advice to me is that prescribing a definition of 'prohibited drug' in the *Customs Administration Act 1985* or Regulation will confine the ability of Customs and Border Protection to meet the challenges presented by new drugs and will undermine the ability of the Service to maintain a drug free workplace. Defining the term 'prohibited drug' by legislative instrument provides a lawful and flexible mechanism to allow the CEO of Customs and Border Protection to respond quickly to this ever-changing environment at the same time as maintaining an appropriate level of Parliamentary scrutiny.

The Committee raises a number of issues regarding 'information' relating to samples obtained from a drug test. Although the Regulation is consistent with existing legislation and policies, as set out below I will undertake to amend the Regulations to provide a greater level of reassurance.

(i) *Whether the term 'information' obtained from the analysis will be tightened to make it clear that only details relating to the presence of prohibited drugs or alcohol will be collected from samples?*

I note the committee's concern and I will undertake to amend the Regulation to make it clear that only information relating to prohibited drugs or alcohol will be collected from samples. This information will be limited to the name of the prohibited drug (or alcohol) detected, the quantity detected, details of any specimen integrity testing undertaken and whether the levels

were above the test cut-off concentrations as defined in the Australian Standard referenced in subsection 18 of the Regulation.

(ii) How the indefinite retention of information obtained from the analysis of a sample is a reasonable and proportionate limitation on the right to privacy, and whether any limits could be placed on the period of retention?

All Customs workers are subject to an Australian Government security clearance and an Organisational Suitability Assessment. Under both processes, applicants submit a range of information that is used to both establish an individual's suitability to access national security information and to assess whether an individual's character and background is suitable to work in The Australian Customs and Border Protection Service (the Service).

In the case of a positive drug test the information obtained from the analysis of a sample may be relevant to assessing whether the person has provided open and honest answers during the clearance process. This information will be stored on the individual's Personal Security File and Organisational Suitability File. The information contained on these files is stored in compliance with the *Archives Act 1983*.

The information may be used to assess an individual's ongoing suitability to hold a security clearance or an organisational suitability assessment for the Service, particularly if a worker attempts to reapply for a security clearance or suitability assessment after resignation from the Service. It is therefore not possible to place a limit on the period of retention.

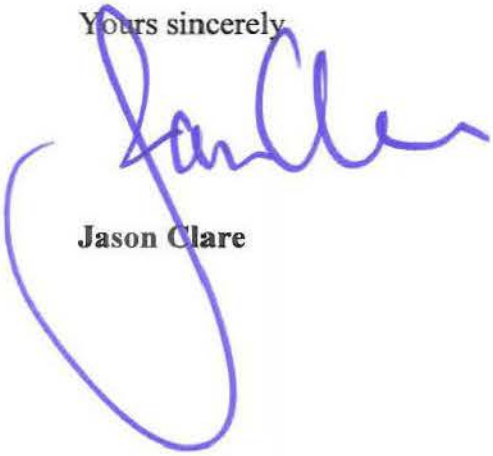
However, I note the committee's concerns and I will undertake to amend the Regulation and limit 'information' that can be retained indefinitely to:

- allow Customs and Border Protection to keep a record only of the fact a positive drug test has occurred and that the Customs worker has been the subject of disciplinary proceedings, any finding of a breach of the Code of Conduct and the outcome of any subsequent proceedings; and
- permit disclosure of that record only for the purpose of an Australian Government Security Clearance assessment.

(iii) *Whether section 9(g) will be amended to ensure that information obtained from a drug or alcohol test will only be provided for the Customs worker's medical treatment when the worker has consented or in circumstances where the worker lacks capacity to grant consent?*

I note the committee's concern and will undertake to amend the Regulation to make it clear that information obtained from a drug or alcohol test will only be provided for a Customs worker's medical treatment when the worker has consented or in circumstances where the worker lacks capacity to grant consent.

Yours sincerely



Jason Clare

Environment Protection and Biodiversity Conservation Amendment Bill 2013

Introduced into the House of Representatives on 13 March 2013; passed by both Houses on 19 June 2013
Portfolio: Sustainability, Environment, Water, Population and Communities
PJCHR comments: Report 4/13, tabled on 20 March 2013
Response dated: 17 June 2013

Background

3.60 This bill, which has now passed both Houses of the Parliament, amends the *Environment Protection and Biodiversity Conservation Act 1999* to:

- establish a matter of National Environmental Significance in relation to protection of water resources from coal seam gas or large coal mining development, to require environmental impact assessment and approval processes for actions relating to this development that may significantly impact on a water resource; and
- create civil penalty and offence provisions for taking actions involving coal seam gas or large coal mining development that may significantly impact on a water resource without approval (or without exemption from the need to obtain approval).

3.61 The committee wrote to the Minister for Sustainability, Environment, Water, Population and Communities to:

(a) ask how the imposition of an evidential burden on a defendant under proposed new sections 24D and 24E could be justified; and

(b) seek clarification as to why the proposed civil penalty provisions in the bill should not be considered 'criminal charges' for the purposes of articles 14 and 15 of the ICCPR in light of the significant penalties that may be imposed for breach of those provisions;

3.62 The Minister's response is attached.

Committee's response

3.63 The committee thanks the Minister for his response.

Imposition of an evidential burden

3.64 In light of the information provided by the Minister, the committee has no further comment to make on this aspect of the bill, and notes that it would have been helpful if this information had been included in the statement of compatibility.

Civil penalty provisions

3.65 The committee notes the explanation provided by the Minister, in particular that the civil penalty provisions operate in a regulatory context and have significant advantages for the regulator. The committee notes the Minister's explanation that the maximum amounts proposed as civil penalties reflect the potential extent and serious impact of violations, the scale of the projects involved and the economic capacity of the proponents of such developments.

3.66 Nonetheless, the committee remains concerned that the maximum civil penalty that may be imposed on individuals under new section 24D is 5,000 penalty units (currently $850,000), and that this may justify a classification of the penalty as criminal.

3.67 More generally, the committee refers the Minister to its recent interim *Practice Note 2* on civil penalties, which sets out the issues which the committee would wish to see addresses in future statements of compatibility relating to bills containing civil penalty provisions.

The Hon Tony Burke MP

Minister for Sustainability, Environment, Water, Population and Communities

Minister for the Arts

C13/24300

Mr Harry Jenkins MP
Chair, Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

17 JUN 2013

Harry

Dear Mr Jenkins

Thank you for your correspondence of 20 March 2013 concerning the Parliamentary Joint Committee on Human Rights' examination of the *Environment Protection and Biodiversity Conservation Amendment Bill 2013*. I regret the delay in responding.

As stated in the Parliamentary Joint Committee on Human Rights' (the committee) report, the *Environment Protection and Biodiversity Conservation Amendment Bill 2013* (the bill) seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) to:

- establish 'water resources' as a matter of national environmental significance in relation to coal seam gas or large coal mining developments; and
- to create civil penalty and offence provisions for taking actions involving coal seam gas or large coal mining development that may significantly impact on a water resource without approval (or without exemption from the need to obtain approval).

The Bill proposes inserting a new Subdivision FB into Division 1 of Part 3 of the EPBC Act, which creates a number of criminal offences and civil penalty provisions.

The committee is seeking clarification as to whether the proposed civil penalty provisions in the Bill could be considered to be 'criminal' charges' for the purposes of articles 14 and 15 of the International Covenant on Civil and Political Rights given the significant penalties that may be imposed under them, and seeks information about how the imposition of an evidential burden on a defendant is justifiable.

Clarification as to why the proposed civil penalty provisions in the bill should not be considered 'criminal charges' for the purposes of articles 14 and 15 of the International Covenant on Civil and Political Rights

The EPBC Act contains provisions for both civil penalties and criminal prosecution to ensure that the Commonwealth can respond to contraventions to environmental law in a manner that is in proportion, and appropriate to the contravention. Civil penalties offer a number of advantages in the enforcement of environmental legislation as they do not result in imprisonment or criminal convictions, however often comprise financial penalties that act as an economic deterrence to non-compliance. Civil financial penalties also seek to redress the harm done as a result of contraventions; that is, civil penalties in an environmental law context are not exclusively used as deterrents.

The civil financial penalties in the proposed provisions are proportionate to the potential extent and seriousness of impacts; the scale and value of coal seam gas and large coal mining developments; and the economic capacity of the proponents of such developments. Financial penalties are also discretionary, and the amounts provided in the bill are the maximum available penalty, not the prescribed amount for each contravention.

Justification of the imposition of an evidential burden on a defendant under proposed new sections 24D and 24E

The proposed amendments provide exemptions from civil penalties and criminal prosecution in relation to actions that have, or are likely to significantly impact on water resources. These exemption provisions place the evidentiary onus on the person seeking to show that an exception exists. This is because the matters which a person would have to show to rely on the exemption provisions are easily adduced by the person wishing to rely on those matters and the effort required for discovery would not place an onerous burden upon that person.

For example, if a coal seam gas or large coal mining development proponent were to receive advice that their action was not a 'controlled action' for the purposes of the EPBC Act, the proponent is best placed to provide evidence of such an approval. Conversely, it would be difficult for the regulator to prove the absence of an approval, and therefore the onus of proof is more practically placed with the proponent.

Thank you again for raising these matters with me.

Yours sincerely

Tony Burke

Tony Burke

Extradition (Convention for the Suppression of Acts of Nuclear Terrorism) Regulation 2012

FRLI: F2012L02434
Tabled in the House of Representatives and Senate on 5 February 2013
Portfolio: Attorney-General
PJCHR Comments: Report 1/2013, tabled on 6 February 2013, Report 3/2013, tabled on 13 March 2013 and Report 6/2013, tabled on 15 May 2013

Extradition (Cybercrime) Regulation 2013

FRLI: F2013L00214
Tabled in the House of Representatives on 12 March 2013 and Senate on 25 February 2013
Portfolio: Attorney-General

Extradition (Piracy against Ships in Asia) Regulation 2013

FRLI: F2013L00397
Tabled in the House of Representatives and Senate on 12 March 2013
Portfolio: Attorney-General

Mutual Assistance in Criminal Matters (Cybercrime) Regulation 2013

FRLI: F2013L00205
Tabled in the House of Representatives on 12 March 2013 and Senate on 25 February 2013
Portfolio: Attorney-General

PJCHR comments: Report 6/13, tabled on 15 May 2013
Response dated: 31 May 2013

Background

3.68 The three extradition regulations[13] expand the definition of an 'extradition country' in the *Extradition Act 1988* to countries that are party to certain treaties or agreements.[14]

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13 *Extradition (Convention for the Suppression of Acts of Nuclear Terrorism) Regulation 2012; Extradition (Cybercrime) Regulation 2013; and Extradition (Piracy against Ships in Asia) Regulations 2013.*

14 The International Convention for the Suppression of Acts of Nuclear Terrorism; Council of Europe Convention on Cybercrime; and Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia.

3.69 The committee noted that these instruments, in extending the operation of the Extradition Act to over 30 new countries – including countries that may not have the same standards of detention and trial that we would see in Australia – demonstrated the need to examine the adequacy of the human rights safeguards in the *Extradition Act 1988*.

3.70 The committee sought clarification as to whether the *Extradition Act 1988*:

- in not requiring the Attorney-General to consider if there are substantial grounds for believing there is a real risk that a person might be subjected to cruel, inhuman or degrading treatment or punishment if extradited, is consistent with the Australia's obligations under article 7 of the International Covenant on Civil and Political Rights (ICCPR) and article 3 of the Convention against Torture;
- in not requiring the Attorney-General to consider if there are substantial grounds for believing there is a real risk that a person might be subjected to the death penalty if extradited, is consistent with Australia's obligations with respect to the right to life under the ICCPR and the Second Optional Protocol to the ICCPR, and why the Act does not include a requirement for monitoring compliance with any assurances given
- in not allowing for an extradition objection if, on surrender, a person may suffer a flagrant denial of justice, is consistent with the right to a fair hearing and Australia's obligations under the ICCPR not to return a person to a jurisdiction where they may face a serious violation of rights guaranteed by article 14 and other provisions of the ICCPR ;
- in not requiring any evidence to be produced before a person can be extradited, and in preventing a person subject to extradition from producing evidence about the alleged offence, is consistent with the right to a fair hearing and the right to liberty;
- in providing for a presumption against bail except in special circumstances is consistent with the right to liberty;
- in not providing for a more expansive list of grounds for discrimination as an extradition objection is consistent with the right to equality.

3.71 The *Mutual Assistance in Criminal Mattes (Cybercrime) Regulation* 2013 provides that the *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act) applies to a foreign country that is a party to the Council of Europe Convention on Cybercrime, subject to that Convention.

3.72 The committee sought clarification as to whether the Mutual Assistance Act is compatible with human rights, in particular: the right to life; the prohibition against cruel, inhuman and degrading treatment or punishment; the right not be

tried or punished again for an offence for which the person has already been convicted or acquitted; the right to equality; and the right to privacy.

3.73 The Attorney-General's response is attached.

Committee's response

3.74 The committee thanks the Attorney-General for his response.

3.75 The committee appreciates that other parliamentary committees[15] have previously examined the issue of extradition and mutual assistance, and, as noted by the Attorney-General, that no recommendations have been made to alter the human rights to be considered by the Attorney-General in the extradition or mutual assistance program.[16] However, the committee notes these reviews were in relation to specific legislation before the Parliament and did not have a specific mandate to undertake a broader examination of the compatibility of the legislation with international human rights. In contrast, this committee's task is to examine bills, instruments and Acts for compatibility with the seven international human rights treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*. As the submissions to the other parliamentary committees has demonstrated, the human rights compatibility of the extradition and mutual assistance regimes is something that has long been of concern to a range of bodies.[17]

3.76 The committee agrees with the Attorney-General that having the necessary tools in place to ensure that Australia can meet its international criminal justice and co-operation obligations is extremely important, and the committee notes the Attorney General's commitment to ensuring that Australia meet these obligations, together with its human rights obligations.

Executive discretion and human rights compatibility

3.77 However, in examining legislation for compatibility with human rights under the seven treaties contained in the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee does not agree that a Ministerial discretion is, by itself, a human rights safeguard.

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15 In particular, the House Standing Committee on Social Policy and Legal Affairs in its *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, September 2011.

16 As noted by the Attorney-General in his letter to the committee, p. 2.

17 See, for example, the submissions to the House Standing Committee on Social Policy and Legal Affairs from Professor Ivan Shearer; the Law Council of Australia; the Australian Human Rights Commission; the Australian Lawyers Alliance; and the Human Rights Law Centre Ltd.

3.78 While the government may have an obligation to ensure that the law is applied in a manner that respects human rights, the law itself must also be consistent with human rights. As the UN Human Rights Committee has said:

> The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.[18]

3.79 As such, the committee emphasises that in undertaking its task it must necessarily determine if legislation is sufficiently confined to ensure that human rights will be adequately respected. While the committee does not doubt the Attorney-General or his Department's commitment to human rights, the committee must assess the compatibility of legislation as drafted, rather than how it may, or may not, be implemented. The committee notes that as the UN Human Rights Committee[19] has explained:

> The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[20]

Judicial review

3.80 In addition, the committee does not consider that access to judicial review of the Attorney-General's determination is sufficient to make an executive discretion into a safeguard. The committee notes the Attorney-General's comment:

> The grounds upon which a court may find a legal error in administrative decision-making offer sufficient human rights protections. For example, if a court found that I did not consider Australia's obligations under Article 7 of the ICCPR when they had been raised by the person in his or her

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18 Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 15.

19 Like the UN Human Rights Committee, the European Court of Human Rights has held that legislative provisions giving the executive absolute discretion will not constitute a limitation prescribed by law where it leads to an arbitrary interference with human rights. For example, in *Hasan and Chaush v Bulgaria* the court found that the interference with the applicants' freedom of religion in that case was not 'prescribed by law' because 'it was arbitrary and was based on legal provisions which allowed unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability' (2002) 34 EHRR 55 at para 86.

20 Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 13. See also the case of *Pinkney v Canada*, where the Human Rights Committee, when considering a legislative provision that enabled a prison warden, at his or her discretion, to read prisoners' letters, held that 'A legislative provision in the very general terms of this section did not, in the opinion of the Committee, in itself provide satisfactory legal safeguards against arbitrary application'. See *Pinkney v Canada* at para 34, HRC Communication No. 27/1977, UN Doc CCPR/C/14/D/27/1977 available at www.unhchr.ch/tbs/doc.nsf

> representations, this constitute a breach of procedural fairness and/or a failure to have regard to relevant considerations. If a court found that I had misunderstood the nature of Australia's obligations under Article 7 of the ICCPR, this could constitute an error of law.[21]

3.81 However, the committee notes that if a person had not raised this as an issue, or had the Attorney-General considered the matter but nonetheless decided on surrender, this would not constitute a failure to have regard to relevant considerations. It is also not clear to the committee that a court would rule that a failure to understand Australia's international human rights obligations would constitute an error of law if there is no explicit requirement in domestic law for the Attorney-General to comply with specific international human rights obligations.

3.82 As such, the committee remains concerned that there is no explicit requirement in the *Extradition Act 1988* requiring consideration be given as to whether a person to be extradited may be subject to cruel, inhuman or degrading treatment or punishment and where there are substantial grounds for believing there is a real risk that a person may be subject to the death penalty (even where undertakings have been given).

3.83 The committee also remains concerned that the *Mutual Assistance in Criminal Matters Act 1987* allows assistance to be given to a foreign country if there are 'special circumstances', even if the death penalty may apply, and there is no explicit obligation to consider whether a person may be subject to cruel, inhuman or degrading treatment or punishment.

Fair hearing rights

3.84 The committee notes with concern the Attorney-General's advice that it is the Australian government's view that article 14 of the ICCPR, which guarantees the right to a fair trial, does not contain an implied obligation not to extradite a person to a place where they face a substantial risk of a flagrant denial of justice. The committee notes that it does not consider it determinative that the UN Human Rights Committee has not yet decided this question. The committee notes that in the cases listed in the Attorney-General's letter as examples of where the UN Committee had 'consistently declined to rule on the question where raised by applicants',[22] each case was decided on other grounds, meaning the UN Committee was not required to decide this issue. The committee considers that the case-law of the European Court of Human Rights, in relation to substantively the same right to a fair trial as that contained in the ICCPR, is useful in this analysis. As that Court, and the UK courts,

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21 Letter from the Attorney-General to the PJCHR, 31 May 2013, at p. 3.

22 See footnote 4 and the cases listed therein to the letter from the Attorney-General to the PJCHR, 31 May 2013, at p. 3 of 11.

have held that fair trial rights may be relevant in decisions to extradite a person, the committee considers it remains open to it to query the lack of a requirement in the *Extradition Act 1988* to consider this when deciding whether to grant extradition.

Prima facie case and presumption against bail

3.85 The committee also notes that the Attorney-General's response, in relation to whether not requiring a prima facie case to be proved in an extradition proceeding is consistent with the right to a fair hearing and right to liberty and whether the presumption against bail is consistent with the right to liberty, contains no substantive discussion of the applicability of the relevant rights. It gives a justification as to why these provisions are necessary, but does not go on to analyse whether they are proportionate to the objective to be achieved.

Mutual Assistance and the right to privacy

3.86 The committee also notes the Attorney-General's response in relation to whether information obtained from a foreign country under the Mutual Assistance Act is consistent with the right to privacy and the prohibition on inhuman and degrading treatment. The committee considers that the response did not address the committee's concerns as it focused on the disclosure of information to a foreign country, rather than addressing the committee's concerns about receiving information from another country that may have been obtained in circumstances under which it could not have been lawfully or properly obtained in Australia.

Conclusion

3.87 The committee considers that the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987* raise serious human rights concerns.

3.88 The committee appreciates that in the time available to respond to the committee's concerns the Attorney-General has not been in a position to undertake a full review of these complex Acts.

3.89 The committee considers that this is an issue that may benefit from a full review of the human rights compatibility of the legislation and suggests that in the 44th Parliament the Parliamentary Joint Committee on Human Rights may wish to determine whether to undertake such a review.

Attorney-General
Minister For Emergency Management

MC13/06785 and MC13/06786

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

Thank you for your letters dated 15 May 2013 regarding the *Extradition (Convention for the Suppression of Acts of Nuclear Terrorism) Regulation 2012*, the *Extradition (Cybercrime) Regulation 2013*, the *Mutual Assistance in Criminal Matters (Cybercrime) Regulation 2013* and the *Extradition (Piracy against Ships in Asia) Regulation 2013*.

As the Minister responsible for the implementation of Australia's Human Rights Framework, I take Australia's human rights obligations very seriously. As the Minister responsible for the Extradition Act and the Mutual Assistance Act, I also have a duty to ensure that Australia meets its international criminal justice obligations, particularly the obligations under the numerous multilateral and bilateral treaties to which Australia is a party. It is important to emphasise that these two sets of obligations are given careful consideration when examining the human rights protections in Australia's extradition and mutual assistance regimes. If Australia is not able to meet its international crime cooperation obligations, while also meeting its international human rights obligations, there is a risk of significant damage to Australia's international reputation. There is also a significant danger that if Australia were not able to meet its international crime cooperation obligations, and therefore not extradite suspected criminals, we would risk becoming a safe haven for criminals seeking to evade justice.

Further, the human rights protections contained in Australia's extradition and mutual assistance regimes are already very similar to, and in many cases stronger than, like-minded countries such as the United Kingdom, Canada, the United States and New Zealand. I am confident that Australia's extradition and mutual assistance regimes meet both our human rights obligations and our international criminal justice obligations.

While I will respond to your specific concerns, there are some general comments I would like to make regarding statements in the Committee's report. The report at page 152 states:

> "a Ministerial discretion – that by its very nature means it may, or equally may not, be exercised, cannot be classified as a human rights safeguard"

I do not accept this assertion or the Committee's implication that in order for Australia's domestic system to be consistent with our human rights obligations there needs to be express statutory provisions implementing the obligation. Our obligations would only be breached if I exercised my powers in a way that was not consistent with Australia's international human rights obligations. As the Report points out, in both the Extradition Act and Mutual Assistance Act, I am able to exercise a general discretion not to extradite a person or provide assistance if I believe it is appropriate to do so in all the circumstances of the case. In exercising this discretion an assessment of Australia's human rights obligations is undertaken, while also maintaining the flexibility necessary to respond to requests on a case-by-case basis. In this way both Australia's human rights obligations and international criminal justice obligations are able to be met. As such, I consider that the general discretion provides an appropriate safeguard.

The report at page 152 states:

> "extending the operation of the Extradition Act to more countries – including countries that do not have the same standards of detention and trial that we would see in Australia – demonstrates the need to examine the adequacy of the human rights safeguards in the Extradition Act 1988."

The adequacy of the human rights safeguards in the Extradition Act were last examined when amendments to the Act passed the Parliament in 2012. At this time, both the amendments and the existing provisions of the Extradition Act were subject to significant scrutiny. This included three separate rounds of public consultation prior to introduction and scrutiny by the House Standing Committee on Social Policy and Legal Affairs and the Senate Standing Committee for the Scrutiny of Bills. Both of these Committees made recommendations which the Government responded to during debate of the Bill in Main Committee on 19 September 2011. The Government's response is on record. The Committees did not make any recommendations to alter the human rights that I am required to consider as part of the extradition process (or mutual assistance process). The House Committee did make the following recommendations which the Government accepted:

- the Attorney-General's Department will report any breach of undertakings to Parliament, and
- the Attorney-General's Department will initiate a review into the operation of the amendments within three years.

The Government agreed to report all breaches of undertakings that come to the attention of the Government. Any such breaches will be included in the Annual Report of the Attorney-General's Department. The appropriate Minister or Ministers will also be advised of any serious breach of an undertaking to allow the breach to be reported immediately to the Parliament and considered in any future requests for international crime cooperation from that country. A significant level of scrutiny has already been, and continues to be, applied and addressed in Australia's extradition regime.

The report at page 152 states:

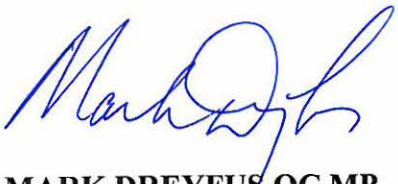
> "proceedings for judicial review of a decision can only address the questions of whether the magistrate or Attorney-General adequately considered the matters they were required to consider. If the Extradition Act does not require all human rights to be considered or complied with in the making of a decision whether or not to extradite, a person who believes that human rights concerns were not adequately considered in the extradition process will have limited ability to seek a remedy for this."

This statement in the report is not an accurate depiction of the judicial review rights available to people during the extradition process. If I determine that a person should be surrendered to the requesting country, that person may seek judicial review of my determination. The grounds upon which a court may find a legal error in administrative decision-making offer sufficient human rights protections. For example, if a court found that I did not consider Australia's obligations under Article 7 of the ICCPR when they had been raised by the person in his or her representations, this could constitute a breach of procedural fairness and/or a failure to have regard to relevant considerations. If a court found that I had misunderstood the nature of Australia's obligations under Article 7 of the ICCPR, this could constitute an error of law. Such findings would provide sufficient basis for a court to quash the surrender determination.

I am confident that Australia's extradition and mutual assistance regimes contain robust and appropriate human rights safeguards and are consistent with Australia's human rights obligations. In addressing the Committee's questions in a limited time, I have included specific responses to the issues and questions outlined in the Report in an attachment to this letter.

I trust this letter and the enclosed information is of assistance and will aid the Committee in its consideration of the Regulations. The action officer for this matter in the Attorney-General's Department is Claire Cocker who can be contacted on 02 6141 3732.

Yours sincerely



MARK DREYFUS QC MP

31/5/13

Encl: Response to the issues raised in the Sixth Report of 2013 by the Parliamentary Joint Committee on Human Rights.

EXTRADITION ACT 1988

1. **ISSUE: The committee seeks clarification as to whether the *Extradition Act 1988* in not requiring the Attorney-General to consider if there are substantial grounds for believing there is a real risk that a person might be subjected to cruel, inhuman or degrading treatment or punishment if extradited, is consistent with the Australia's obligations under article 7 of the International Covenant on Civil and Political Rights (ICCPR) and article 3 of the Convention against Torture;**

   a) **Why does section 22(3) of the *Extradition Act 1988* not explicitly require the Attorney-General to consider if there are substantial grounds for believing there is a real risk that a person might be subjected to cruel, inhuman or degrading treatment or punishment if extradited?**

Subsection 22(3) of the *Extradition Act 1988* (the Extradition Act) is consistent with Australia's obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). When determining whether an eligible person is to be surrendered to a foreign country, the Attorney-General must be satisfied, in accordance with paragraph 22(3)(b), that the person will not be subjected to torture on surrender of the kind falling within the scope of Article 1 of the CAT.

Subsection 22(3) does not require explicit reference to Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) in order to fulfil Australia's obligations under that Covenant. Under paragraph 22(3)(f) of the Extradition Act, the Attorney-General has a broad, general discretion whether to surrender a person to a foreign country. In accordance with the principle of procedural fairness, a person who is the subject of an extradition request may make submissions on any matter he or she wishes the Attorney-General to take into consideration when making a surrender determination. This can include submissions regarding compatibility of the person's surrender with Australia's obligations under Article 7 of the ICCPR. In addition, in the absence of such representations, if the Attorney-General's Department was aware of any issue or situation which might engage Australia's obligations under Article 7 of the ICCPR, the Department would bring this to the Attorney-General's attention.

If the Attorney-General determines that a person should be surrendered to the requesting country, that person may seek judicial review of the Attorney-General's determination. The grounds upon which a court may find a legal error in administrative decision-making offer sufficient human rights protections. For example, if a court found that the Attorney-General did not consider Australia's obligations under Article 7 of the ICCPR when they had been raised by the person in his or her representations, this could constitute a breach of procedural fairness and/or a failure to have regard to relevant considerations.

2. **ISSUE: The committee seeks clarification as to whether the *Extradition Act 1988* in not requiring the Attorney-General to consider if there are substantial grounds for believing there is a real risk that a person might be subjected to the death penalty if extradited, is consistent with Australia's obligations with respect to the right to life under the ICCPR and the Second Optional Protocol to the ICCPR, and why the Act does not include a requirement for monitoring compliance with any assurances given**

   a) **Why does section 22(3) of the *Extradition Act 1988* not require the Attorney-General to consider if there are substantial grounds for believing there is a real risk that a person might be subjected to the death penalty if extradited?**

In accordance with Australia's longstanding opposition to the death penalty, the Australian Government will not surrender a person to a foreign country in circumstances where the death penalty would be imposed.

Paragraph 22(3)(c) of the Extradition Act provides that where an offence is punishable by a penalty of death, Australia cannot extradite a person unless an undertaking is given by the requesting party that:

- the person will not be tried for the offence
- if the person is tried for the offence, the death penalty will not be imposed on the person, or
- if the death penalty is imposed on the person, it will not be carried out.

This is consistent with the right to life under the ICCPR and the Second Optional Protocol to the ICCPR.

There is no discretion in the Extradition Act that would allow a person to be surrendered in the absence of an undertaking from the requesting country that the death penalty will not be imposed. The assessment of risk that a person might be subjected to the death penalty occurs well prior to any request for an undertaking which would satisfy paragraph 22(3)(c). An extradition request raising potential death penalty issues is identified by the Attorney-General's Department at the earliest stages of the extradition process. If the Department held any concerns about the bona fides of a death penalty undertaking, the request would not be progressed to the stage at which the Attorney-General makes a determination whether to surrender a person. If a death penalty undertaking is requested, it would be requested and provided by a formal Government to Government communication (that is, by a third person note). The Federal Court decision in *McCrea v Minister for Justice and Customs* [2005] FCAFC 180 sets out the test for an acceptable death penalty undertaking. The test requires that the Attorney-General be satisfied that 'the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the death penalty would not be carried out'.

b) Why does the Act not include a requirement for monitoring compliance with any assurances given?

Current Australian Government procedures ensure that, wherever practically and legally possible, consular officials visit Australians who are imprisoned overseas at least annually, and normally more frequently than this. Australia does not monitor the status of foreign nationals who have been extradited by Australia, as Australia has no consular right of access to non-nationals. The decision to monitor a foreign national is a matter for that person's country of citizenship. With the consent of the person, Australia can inform consular authorities of their country of citizenship of their extradition to a third country.

If a mechanism to monitor the treatment of persons surrendered were to be implemented, this would significantly alter the basis on which extraditions are conducted in terms of Australian and international practice. Attempts to monitor foreign nationals may be seen as infringing on the foreign country's sovereignty and criminal justice processes.

It is the Attorney-General's Department's longstanding experience that death penalty undertakings are respected. The Department is not aware of any case in which the terms of a diplomatic undertaking issued to Australia by a country pursuant to paragraph 22(3)(c) of the Extradition Act have been breached. If the Department held real concerns that a death penalty undertaking would not be honoured, it would not progress the extradition request. Extradition between countries is based on reciprocity. As such, any conditions imposed are likely to be honoured by the receiving country. This is due to the Government to Government nature of extradition, and recognition by that country that undertakings must be respected to ensure future cooperation. In the event the Department became aware of a potential breach, this would be raised with the country at the highest diplomatic levels. The use of undertakings is an important practice that allows Australia to establish extradition partnerships with important partner countries that retain the death penalty, such as the United States and Indonesia.

3. **<u>ISSUE</u>: The committee seeks clarification as to whether the *Extradition Act 1988* in not allowing for an extradition objection if, on surrender, a person may suffer a flagrant denial of justice, is consistent with the right to a fair hearing and Australia's obligations under the ICCPR not to return a person to a jurisdiction where they may face a serious violation of rights guaranteed by article 14 and other provisions of the ICCPR.**

   a) **Why does the *Extradition Act 1988* not include an extradition objection if, on surrender, a person may suffer a flagrant denial of justice in contravention of article 14 of the ICCPR?**

The Attorney-General's broad discretion to refuse surrender under the Extradition Act provides a sufficient basis to refuse extradition in circumstances where there are legitimate concerns about the person's access to a fair trial, including trial in absentia. Expressly including fair trial as a ground for refusal may generate litigation about issues which are essentially attributable to differences between the bases of common law and civil legal systems. Allowing individuals to challenge extradition on this basis would also be incompatible with the international principle of comity.

As the Hon Jason Clare MP, Minister for Home Affairs, has already indicated,[1] in considering Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR), the general rule of treaty interpretation is that the terms of the treaty are interpreted in good faith in accordance with their ordinary meaning in their context and in light of the treaty's object and purpose.[2] Consideration may also be given to supplementary means of interpretation, including the preparatory work of the treaty, in order to confirm the meaning of a term if the meaning is ambiguous or obscure, or would lead to a result which is manifestly absurd or unreasonable.[3]

In interpreting its human rights obligations, Australia considers in good faith the views of treaty bodies established under the treaties. Although the views of the United Nations Committees, including those expressed in General Comments and Recommendations are not binding on States parties, they are generally treated as a persuasive source of guidance.

As Australia is not a party to the *European Convention on Human Rights 1950* (the Convention), it is not bound by the jurisprudence of the European Court of Human Rights (the Court), which interprets the provisions of the Convention. The Convention protects some rights that are analogous to those in the ICCPR and as such, the case law from the Court may be useful in considering how the United Nations Human Rights Committee may interpret similar provisions in the ICCPR. However, as the Minister for Home Affairs has previously stated, Article 6 of the Convention does not contain the same wording as Article 14 of the ICCPR.

The Committee has not pointed to any views or jurisprudence of the Human Rights Committee in which it has indicated that it considers that Article 14 of the ICCPR includes obligations of *non-refoulement*. I also note that the Human Rights Committee has consistently declined to rule on the question where raised by applicants in individual communications.[4]

However, Australia has accepted that *non-refoulement* obligations arise in relation to Articles 6 and 7 of the ICCPR. This is consistent with the views of the Human Rights Committee in General Comment 31 that:

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[1] Letter from the Hon Jason Clare MP, Minister for Home Affairs, to Mr Harry Jenkins MP, 22 February 2013, set out in the Parliamentary Joint Committee on Human Right's *Third Report of 2013*, March 2012, pages 121-122.

[2] Article 31, *Vienna Convention on the Law of Treaties* (VCLT) [1974] ATS 2, in force generally and for Australia, 27 January 1980.

[3] Article 32, *Vienna Convention on the Law of Treaties*.

[4] *A.R.J. v Australia*, Communication No 692/1996, Views of 28 July 1997, para 6.15; *Kwok v Australia*, Communication No 1442/2005, Views of 23 October 2009, para 9.8; *Judge v Canada*, Communication No 829/1998, Views of 5 August 2002; *Alzery v Sweden*, Communication No 1416/2005, Views of 25 October 2006, para. 11.9.

> the [obligations in Article 2 of the ICCPR] requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[5]

Accordingly, it is the Australian Government's view that Article 14 of the ICCPR does not contain an implied *non-refoulement* obligation. Additionally, in considering whether the *non-refoulement* principle should be extended to other articles of the ICCPR, the UN Working Group on Arbitrary Detention has stated

> …the reluctance of States and international human rights bodies to extend the application of the prohibition of refoulement to the rights protected by articles 9 and 14 of the Covenant is comprehensible. It would constitute a considerable obstacle to the legitimate faculty to deport or expel non-citizens if the sending State had to assess in every case whether the person concerned would be at risk of not being tried within a reasonable time if charged, or of not being compensated if unlawfully arrested, or of not having 'adequate time and facilities for the preparation of his defence' if charged and tried…[6]

4. <u>ISSUE</u>: The committee seeks clarification as to whether the *Extradition Act 1988* in not requiring any evidence to be produced before a person can be extradited, and in preventing a person subject to extradition from producing evidence about the alleged offence, is consistent with the right to a fair hearing and the right to liberty.

a) Is the Extradition Act 1988, in not requiring any evidence to be produced before a person can be extradited, and in preventing a person subject to extradition from producing evidence about the alleged offence, consistent with the right to a fair hearing under article 14 of the ICCPR?

Extradition is an administrative legal process whereby a person may be transferred from one country to another to face prosecution or to serve a prison sentence for offences against the law of the other country. The extradition process in Australia does not involve an assessment of guilt or innocence.

The purpose of an extradition hearing is to determine whether a person should be extradited; it is not to test evidence in the case against them. It is important that a person faces prosecution or serves a sentence in the country in which he or she has been accused or sentenced. The 'no evidence' standard is consistent with the right to a fair hearing under article 14 of the ICCPR. It has been Australia's preferred approach since 1985 and all of Australia's modern extradition treaties have been negotiated on this basis. This does not mean that no information is provided. Under this standard, requesting countries are required to provide information about the circumstances of the alleged offence, but are not required to provide sworn affidavits to support the request.

The 'no evidence' standard is in line with the international trend toward simplifying the extradition process and is consistent with the United Nations Model Treaty on Extradition. It has allowed Australia to enter into extradition relations with many civil law countries that would otherwise have been unable to conduct extradition with Australia. A return by Australia to a prima facie evidentiary standard would cause considerable disruption to our existing extradition relationships, and would be very counterproductive in terms of international law enforcement cooperation.

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[5] Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, paragraph 12.

[6] Report of the Working Group on Arbitrary Detention to the Human Rights Council, 9 January 2007, UN Doc A/HRC/4/40, para 46.

b) **As extradition invariably results in the detention of a person pending extradition and often lengthy detention in the foreign country while awaiting trial, is allowing the extradition and detention of someone without first testing the basic evidence against them, consistent with the right to liberty under article 9 of the ICCPR?**

The right to liberty is addressed at issue 5(a) below.

5. **<u>ISSUE</u>: The committee seeks clarification as to whether the *Extradition Act 1988* in providing for a presumption against bail except in special circumstances is consistent with the right to liberty.**

   a) **Are provisions of the *Extradition Act 1988*, which contain a presumption against bail except in special circumstances, consistent with the right to liberty?**

It is accepted international practice for a person to be held in administrative detention pending extradition proceedings. The remand of the person is not undertaken as a form of punishment and in no way relates to guilt or innocence of any offence. The validity of Australia's process of remanding a person during extradition proceedings has been confirmed by the High Court in *Vasiljković v Commonwealth* [2006] HCA 40.

The current presumption against bail for persons sought for extradition 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. Unfortunately, reporting and other bail conditions are not sufficient to prevent individuals who wish to evade extradition by absconding. In extradition cases there is an increased risk of persons absconding before they can be surrendered to the requesting foreign country. If a person who has been remanded on bail absconds during extradition proceedings, it jeopardises Australia's ability to extradite the person which in turn would impede Australia's treaty obligations to return a person to the requesting country. Ultimately, it can also lead to a state of impunity where a person can disappear and continue to evade law enforcement authorities.

The High Court in *United Mexican States v Cabal* [2001] HCA 60 has previously observed that to grant bail where a risk of flight exists would jeopardise Australia's relationship with the country seeking extradition and jeopardise our standing in the international community. Bail can be granted in special circumstances. The courts have shown their willingness to grant bail when these special circumstances arise. For these reasons the Government considers the current presumption that bail should only be granted in 'special circumstances' is appropriate, given the significant flight risk posed by people subject to extradition proceedings, and should be maintained.

6. **<u>ISSUE</u>: The committee seeks clarification as to whether the *Extradition Act 1988* in not providing for a more expansive list of grounds for discrimination as an extradition objection is consistent with the right to equality.**

   a) **Why is a more expansive list of grounds for discrimination not included in section 7 of the *Extradition Act 1988*?**

The Extradition Act includes grounds for refusing surrender if the person may be prejudiced by reason of his or her race, religion, nationality, political opinions, sex or sexual orientation. This provides a broad basis to refuse extradition where there may be adverse impacts because the person may be discriminated against. The Attorney-General's broad discretion to refuse surrender under the Extradition Act provides a sufficient basis to refuse extradition in circumstances where there are other concerns about discrimination against a person.

As the Committee points out in its report, the grounds in Article 26 of the International Covenant on Civil and Political Rights that are not contained in the Extradition Act are language, colour, other

opinion, national or social origin (although nationality is covered), property, birth or other status. Any concerns relating to these additional grounds are more appropriately considered as part of the Attorney-General's general discretion to refuse to extradite a person. Including further grounds would significantly widen the scope for appeals of extradition decisions. For example, 'other status' has no definite meaning and the inclusion of this ground as an extradition objection under the Extradition Act would make the list of discrimination grounds non-exhaustive. This would likely generate significant litigation.

7. How is section 45 in the *Extradition Act 1988*, in applying absolute liability to the offence, consistent with the right to be presumed innocent under article 14 of the ICCPR?

Section 45 of the Extradition Act is consistent with article 14 of the ICCPR. All persons prosecuted in Australia are presumed innocent until proven guilty. This fundamental right has not been removed by section 45. For Australia to facilitate prosecution in lieu of extradition for an offence committed overseas, a nominal offence under the Extradition Act is created. This nominal offence is committed if:

- a magistrate remands the person under section 15 of the Extradition Act, and
- the person engaged in conduct outside Australia which would have constituted an offence under Australian law if it had occurred in Australia at that time.

Where a person is prosecuted in lieu of extradition, all the elements of the underlying Australian offence still need to be proved beyond reasonable doubt, as would be the case for a normal prosecution for the offence had it occurred in Australia. Absolute liability only attaches to the two elements above, so that the prosecution will not need to prove that the person knew or was reckless as to the fact that their conduct would have constituted an offence in Australia. For example, if the extradition of a person was sought for murder, the absolute liability requirement ensures that it is not necessary to prove that the person knew their conduct would have constituted murder in Australia, so long as all the elements necessary to establish the offence of murder can be satisfied beyond reasonable doubt.

COUNCIL OF EUROPE CONVENTION ON CYBERCRIME

8. The Committee requests details of the procedures intended to ensure that the legislative and other arrangements for implementation of the provisions of the Cybercrime Convention provided for adequate protection of human rights and whether in fact they do so.

As the Committee noted, Article 15 of the Council of Europe Convention on Cybercrime (the Convention) provides that all of the Convention's Parties must provide adequate protection of human rights and liberties – with specific reference to relevant instruments. The Committee also noted that treaties to which Australia accedes do not automatically form part of Australian law – rather treaties need to be implemented in domestic legislation prior to accession. With this in mind, the *Cybercrime Legislation Amendment Act 2012* (the Cybercrime Act) made a range of changes to Australia's domestic law to ensure full compliance with the Convention's obligations, including changes to ensure full compliance with Article 15.

Importantly, the Cybercrime Act amended a number of Acts, including the *Telecommunications Act 1997,* the *Telecommunications (Interception and Access) Act 1979* (the TIA Act), the Mutual Assistance Act and the *Criminal Code Act 1995* to introduce a range of new safeguards to complement existing safeguards in each of those Acts. For example, the Cybercrime Act introduced new section 180F to the TIA Act to ensure the requirements of Article 15, specifically the principle of proportionality, are met in every circumstance where telecommunications data is disclosed for law enforcement purposes. Section 180F requires consideration to be given to whether any interference with the privacy of any person that may result from the disclosure is justifiable having regard to the likely relevance and usefulness of the information and the reason why the disclosure is proposed to be authorised. This includes domestic investigations, and access for, and disclosure to, foreign countries.

The Cybercrime Act also created new data confidentiality provisions and new reporting requirements. The confidentiality provisions reflect the sensitivity of material accessed under the legislation and ensure its appropriate handling by both law enforcement agencies and the telecommunications industry. Reporting requirements ensure that the public and relevant ministers are regularly made aware of statistics about the use of each power.

Consideration by Parliament

The Convention was first considered by Parliament during June 2010 in the House of Representatives Standing Committee on Communications report titled 'Hackers, Fraudsters and Botnets: Tackling the Problem of Cyber Crime'. The report examined the seriousness of the harm caused to Australians by cybercrime, reviewed Australian laws relevant to the protection of privacy and highlighted the importance of obligations under the International Covenant on Civil and Political Rights. The Committee recommended, *inter alia*, that the Attorney-General move expeditiously to accede to the Convention.

In April 2011, the Joint Standing Committee on Treaties (JSCOT) considered the Convention. JSCOT, prior to making its recommendation to pursue accession to the Convention, conducted public consultation and an analysis of relevant rights. Evidence presented to JSCOT included 'that the surveillance of computer-based communications and data storage by law enforcers raises fears about the invasion of privacy, with potential threat to human rights and civil liberties'. JSCOT also heard evidence that the established Acts 'have strong privacy safeguards and accountability mechanisms'. Ultimately, JSCOT concluded that the Convention contains guarantees for human rights protections and judicial review and went on to say that "[T]here is reason to be confident that these protections will be enforced: the framework of domestic law effected by Australia's accession to the *Council of Europe Convention on Cybercrime* provides robust privacy safeguards and accountability mechanisms."

Based on the recommendations of JSCOT, the *Cybercrime Legislation Amendment Bill 2011* was brought forward to make the necessary amendments to facilitate accession. The Bill was referred to the Joint Select Committee on Cyber-Safety for inquiry. The Committee took submissions and heard evidence about the Bill. Its report considered the specific safeguards, thresholds and conditions contained in the legislation as they related to each amendment. The Committee also considered specifics such as reporting and oversight requirements and data handling and privacy obligations. The Committee made 13 recommendations, of which 12 were addressed by the Government in the Senate either in the speech in reply or by moving amendments.

For instance, the Government agreed with recommendation 4 that requirements to assess privacy impacts be made clearer and more accessible. In response, an amendment to proposed section 180F of the TIA Act was moved and passed to ensure that the section provided more detailed guidance to authorised officers about the particulars of weighing and balancing privacy impacts for every disclosure of telecommunications data.

Legislative compliance

The Committee requested details about whether, in fact, the procedures and arrangements of the Convention, the Cybercrime Act and existing legislation provide adequate protections of human rights.

The Attorney-General's Department is not able to review the conduct of Commonwealth and State agencies. However, the Department works closely with a range of agencies and has encountered no evidence that requirements associated with the protection of rights and liberties are not being complied with or that requirements are proving inadequate in practice. Additionally, agencies authorised to exercise coercive powers by the TIA Act are subject a range of oversight mechanisms, including by relevant Ombudsmen. These oversight bodies have appropriate powers for conducting their roles and publish reports about compliance with obligations.

MUTUAL ASSISTANCE IN CRIMINAL MATTERS ACT 1987

9. ISSUE: The committee seeks clarification as to whether the *Mutual Assistance in Criminal Matters Act 1987* is compatible with human rights, in particular: the right to life; the prohibition against cruel, inhuman and degrading treatment or punishment; the right not be tried or punished again for an offence for which the person has already been convicted or acquitted; the right to equality; and the right to privacy.

a) How is the Mutual Assistance Act compatible with Australia's obligations with respect to the right to life under the ICCPR and the Second Optional Protocol to the ICCPR?

As is the case for extradition (outlined at issue 2(a)), section 8 of *Mutual Assistance in Criminal Matters Act 1987* (the Mutual Assistance Act) is already consistent with the right to life under the ICCPR and the Second Optional Protocol to the ICCPR. The death penalty grounds for refusal are consistent with Australia's strong opposition to the death penalty while affording appropriate flexibility to ensure assistance can be provided to combat serious criminal activity.

The death penalty grounds of refusal in the Mutual Assistance Act provide that:

1. a request for assistance relating to the investigation, prosecution or punishment of a person must be refused where the person has been charged with, or convicted of, a death penalty offence, unless there are special circumstances that warrant the provision of the assistance (subsection 8(1A)), and
2. a request for assistance may be refused where it may result in the death penalty being imposed on a person (for example, where the request is made at the investigation stage) (subsection 8(1B)).

Examples of 'special circumstances' include material that provides exculpatory evidence, or where the requesting country has provided an undertaking that the death penalty will not be imposed. The Federal Court in *McCrea v Minister for Justice and Customs* [2005] FCAFC 180 sets out the test for an acceptable death penalty undertaking. The test requires that the Attorney-General be satisfied that 'the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the death penalty would not be carried out'.

Further, the Mutual Assistance Act enables conditions to be placed on the provision of the assistance. This could include restricting the use of the material to investigation purposes, or requiring the country to seek the Minister's authorisation to use the material for the purposes of prosecuting a person.

b) Is the Mutual Assistance Act compatible with the prohibition against cruel, inhuman and degrading treatment or punishment?

As outlined above (at issue 1(a)) for the Extradition Act, the Mutual Assistance Act is already consistent with Australia's obligations under article 7 of the ICCPR and article 3 of the Convention against Torture and inclusion of an express ground is not necessary to meet Australia's obligations. Concerns about cruel, inhuman or degrading treatment or punishment are addressed through the Attorney-General's general discretion to refuse extradition under paragraph 8(2)(g) of the Mutual Assistance Act.

Serious forms of cruel, inhuman or degrading treatment or punishment are addressed through the statutory requirement for the Attorney-General to consider torture as a mandatory ground of refusal. There is no definition of 'torture' in the Mutual Assistance Act. This ensures that in making a decision on whether to provide assistance, the Attorney-General is able to take a broad approach and take into account a number of considerations in deciding whether there is a risk of torture.

c) Is the Mutual Assistance Act compatible with the right not to be tried or punished again for an offence for which the person has already been convicted or acquitted?

The Mutual Assistance Act is compatible with the right not to be tried or punished again for an offence that a person has already been convicted or acquitted for. While the Mutual Assistance Act provides that the double jeopardy ground for refusal is a discretionary ground, this reflects that there may be exceptional circumstances where it is appropriate to provide assistance notwithstanding double jeopardy concerns. This includes where there is fresh evidence that was not available at the original trial (such as new DNA evidence, or evidence obtained through technological developments), or where there are other circumstances accepted in Australia as being exceptions to the double jeopardy principle.

In recent years, most Australian jurisdictions have amended their criminal law to provide for exceptions to the double jeopardy rule in exceptional circumstances, such as where fresh and compelling evidence emerges. This provision in the Mutual Assistance Act ensures that Australia is able to provide assistance in these exceptional cases, and ensures Australia's mutual assistance regime is consistent with domestic double jeopardy requirements.

d) Why is a more expansive list of grounds for discrimination not included in the Mutual Assistance Act?

The Mutual Assistance Act includes grounds for refusing assistance if a person may be prejudiced by reason of his or her race, religion, nationality, political opinions, sex or sexual orientation. This provides a broad basis to refuse assistance where there may be adverse impacts because a person may be discriminated against. The Attorney-General's broad discretion to refuse assistance under the Mutual Assistance Act provides a sufficient basis to refuse assistance in circumstances where there are other concerns about discrimination against a person.

As the Committee points out in its report, the grounds in Article 26 of the International Covenant on Civil and Political Rights that are not contained in the *Mutual Assistance Act 1987* are language, colour, other opinion, national or social origin (although nationality is covered), property, birth or other status. As outlined above for the Extradition Act (at issue 6(a)), any concerns relating to these additional grounds are more appropriately considered as part of the Attorney-General's general discretion to refuse assistance.

e) How are the provisions of the Mutual Assistance Act consistent with the right to privacy and the prohibition on inhuman and degrading treatment, particularly insofar as it allows information obtained from a foreign country (including sensitive personal information) to be used regardless of how that information was obtained?

In a domestic context, the use or disclosure of personal information (including personal information provided by a foreign country pursuant to a mutual assistance request from Australia) for law enforcement purposes is not prohibited under Australia's privacy regime. The Information Privacy Principles have a general exception for the use or disclosure of information where it is reasonably necessary for the enforcement of the criminal law or where disclosure is required or authorised by or under law. Section 43D of the Mutual Assistance Act provides that the collection, use or disclosure of personal information is authorised by law for the purposes of *Privacy Act 1988* where it is reasonably necessary for the purposes of providing or obtaining international assistance in criminal matters, by the Attorney-General or an officer of the Attorney-General's Department.

In addition, section 43B of the MA Act prohibits the use (including disclosure) of material provided to Australian authorities by a foreign country, except for the purpose for which it was obtained, except with the approval of the Attorney-General. A breach of this provision attracts a criminal penalty.

Considerations about privacy take place before Australia provides assistance to a foreign country. Generally, a foreign country gives an undertaking that they will only use the material for the purpose for which it is sought, and will destroy the material when no longer needed. In addition, in providing any material obtained in Australia to the foreign country, the Department covers the material with a letter which includes the following text:

> *The enclosed material should not be used for any purpose other than that stated in the request without prior consultation with this Department. I confirm that the material was sought for the purpose of the [investigation/prosecution] of [name of suspect(s)/alleged offender(s)] for [offence type] offences.*

Further, the *Australian Federal Police Act 1979* (AFP Act) places controls on the disclosure of information by the AFP. Section 60A of the AFP Act restricts the disclosure of information to where it is necessary for the purposes of carrying out, performing or exercising a duty, function or power under the AFP Act.

Health Insurance Amendment (Medicare Funding for Certain Types of Abortion) Bill 2013

Introduced into the Senate on 19 March 2013
By: Senator Madigan
PJCHR comments: Report 6/13, tabled on 15 May 2013
Response dated: 16 June 2013

Background

3.90 This bill seeks to amend the *Health Insurance Act 1973* to provide that a Medicare benefit is not payable where a medical practitioner performs an abortion (or is a service relating or connected to performing an abortion) and the abortion is carried out 'solely because of the gender of the foetus'.

3.91 The committee sought further information about the prevalence of gender selective abortions in Australia and whether the limitations on the right to health and the right to social security contained in the bill seek to address a pressing social concern.

3.92 Senator Madigan's response is attached.

Committee's response

3.93 The committee thanks Senator Madigan for his response and notes the information contained within it.

3.94 The committee notes the importance of the right to non-discrimination and the elimination of traditional attitudes based on the superiority of one sex over another. It notes the concerns expressed by the UN Committee on the Elimination of Discrimination against Women about the practice in certain countries of sex-selective abortions and the coercion women may face in certain contexts to undergo abortions.

3.95 The committee notes that the elimination of this type of prejudice needs to be weighed against the importance of a woman's right to health, including the right to reproductive health, and the right to social security. In addition, the committee notes that the bill may have flow-on effects for a woman's right to privacy.

3.96 The committee notes that the Senate Standing Committee on Finance and Public Administration is currently conducting an inquiry into this bill and is due to report to the Senate on 25 June 2013.

16 June 2013

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins

Health Insurance Amendment (Medicare Funding for Certain Types of Abortion) Bill 2013

I am writing in response to your letter of 15 May 2013 requesting clarification on a number of matters set out in the Committees Sixth Report.

The Health Insurance Amendment (Medicare Funding for Certain Types of Abortion) Bill 2013 was moved in response to the international concern as evidenced by five UN Committees regarding the prevalence of gender selective abortion.

Prevalence of gender selective abortions: Senator Madigan has received evidence of the request for abortion on the grounds of gender selection abortions both from a Medical Practitioner and a sonographer. The sonographer stressed that this was a matter of concern across the practice in which they were employed. In both these cases the mother of the child was of an ethnic group in which such practices are prevalent in their country of origin and in countries where there are significant immigrant communities of these ethnic groups.

Absence of data leads to bad medicine: It is impossible to ascertain reasons for which abortions are performed due to the absence of any collection of data in relation to those items under the Medicare schedule which may pertain to

abortion. The absence of such figures is referred to by a range of submissions presented to the current enquiry from across the entire spectrum of opinions. Apart from making it difficult to correctly identify motives for abortion, poor statistical information in medical areas can lead to poor preventative medicine.

Law as a deterrent: Regardless of the numbers of gender selection abortions, the law serves as both an educator and a deterrent. Interestingly the government has taken this approach to female genital mutilation. In recognising that it is difficult to ascertain such practices legislation and related education packages are aimed at educating the negative effects of genital mutilation. There is no suggestion in this case that the legislative measures are unnecessary to demonstrate a commitment to eradication of this practice. The same approach should be applied to eradication gender-selection abortion.

Para 1.143 quotes a section of the explanatory memorandum that states recent reports suggest the practice of Gender Selection is being practiced in Western countries, namely the United States and Australia. Para 1.144 states that no reference is given regarding these reports.

The principle report on this is from the United Nations Population Fund (UNFPA) 2012 report "Sex Imbalances at Birth".
http://www.unfpa.org/webdav/site/global/shared/documents/publications/2012/Sex%20Imbalances%20at%20Birth.%20PDF%20UNFPA%20APRO%20publication%202012.pdf

In a section on page 23 the report states that *"A final matter of concern with respect to the extent of sex-selection concerns industrialized countries with large diasporas from South and East Asia. Among these subpopulations, made up mostly of recent migrants, surveys and in-depth studies of census samples have shown the existence of skewed levels of sex ratio at birth"*

it continues by stating "Combined with the existence of sex selection among native populations of Southeast Europe, the demographic behaviour of many immigrant communities indicates that sex selection is far from being restricted to a limited number of countries in South and East Asia and concerns Europe and North America also."

In 2010 the UNFPA issued a paper entitled " **UNFPA Guidance Note on Prenatal Sex Selection** *"*
http://www.unfpa.org/webdav/site/global/shared/documents/publications/2010/guidenote_prenatal_sexselection.pdf

On page 5
"according to the 2000 census of the US, immigrants from China, India and RoK to the US had SRB almost as skewed as in their countries of origin"
Furthermore in the Proceedings of the National Academy of Sciences, vol 105, pp. 5681 – 5682 a report entitled "Son-biased sex ratios in the 2000 United States census" by Douglas Almond and Lena Edlund of the department of economics at Columbia University, New Yors and the National Bureau of Economic Research, Cambridge Massachusetts, states:
"We document male-biased sex ratios among U.S.-born children of Chinese, Korean, and Asian Indian parents in the 2000 U.S. Census. This male bias is particularly evident for third children: If there was no previous son, sons outnumbered daughters by 50%.....We interpret the found deviation in favor of sons to be evidence of sex selection, most likely at the prenatal stage"

Among the references cited was the 2009 report by Dr Jason Abrevaya PhD, of the Massachusetts Institute of Technology, for the American Economic Journal: Applied Economics entitled "*Are There Missing Girls in the United States? Evidence from Birth Data."*
This report states: "We offer evidence of gender selection within the United States. Analysis of comprehensive birth data shows unusually high boy-birth percentages after 1980 among later children (most notably third and fourth children) born to Chinese and Asian Indian mothers. Based upon linked data from California, Asian Indian mothers are found to be significantly more likely to have a terminated pregnancy and to give birth to a boy when they have previously only given birth to girls."
There are numerous other reports on the evidence of gender selection abortion in western industrialised countries, such as the 2007 report for the Population and Development Review entitled: **An Increase in the Sex Ratio of Births to India-born Mothers in England and Wales: Evidence for Sex-Selective Abortion** : Dr Sylvie Dubuc and Prof David Coleman
http://onlinelibrary.wiley.com/doi/10.1111/j.1728-4457.2007.00173.x/pdf

Gender selection abortion is an abhorrent practice. In the case of gender-selection abortion, abortion is not undertaken for any danger to the physical or mental health of the mother – although she may be open to persecution from extended family for producing a child of the wrong gender.

Lastly it should be noted that on 16/06/2013 the Senate passed a motion **condemning** the practice of Gender biased sex selection in abortion or infanticide whether in Australia or overseas.

In doing so the Senate also recognised that the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Population Fund (UNFPA), the United Nations Children's Fund (UNICEF), The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and the World Health Organisation (WHO) have issued a combined report calling for urgent steps to be taken to address gender-biased sex selection including the collection of more reliable data on the extent of the problem; guidelines on the use of technology; supportive measures for girls and women; and other legal and awareness-raising actions.

The Senate further noted that:

- in its 2010 report the UNFPA states that according to the 2000 US Census immigrants to the US from China, India and the Republic of Korea had a Sex Ratio at Birth almost as skewed as in their countries of origin.

- that at the UN Conference on Population and Development (ICPD) (1994) in Cairo and at the 4th World Congress on Women (1995) in Beijing; Australia committed "to enact and enforce legislation protecting girls from all forms of violence…including prenatal sex selection".

The Senate voted to encourage the government to support the recommendations of the interagency statement of the five UN agencies and uphold its commitments to the ICPD 1994 and the 4th World Congress on Women.

Reference has been made to the possibility of women being denied Human Rights '*by denying them access to ….. safe abortion'*.
It should be noted that this Bill does not deny access to abortion; it denies access to Medicare Funding in the specific instance of abortions that are carried out 'solely' for gender selection reasons. The argument that some

‘human right’ to abortion is being denied is wholly incorrect unless the argument could be put that any cost associated with any abortion at any time is a ‘denial of human rights’ and a denial of ‘access to safe abortion’.

As the Senate has condemned the practice of Gender Selection abortion and accepted the recommendations of numerous international agencies, including the Office of the High Commissioner for Human Rights, and the UN Conference on Population and Development (ICPD) (1994) in Cairo, it should be concluded that the Senate does not see any denial of Human Rights in the legislative attempt to oppose Gender Selection abortion.

I believe the Committee should accept that there is no breach of Human Rights associated with this Bill.

Sincerely

Senator John Madigan
DLP Senator for Victoria

16/06/2013

Migration Amendment Regulation 2012 (No. 8)

FRLI ID: F2012L02381
Tabled in the House of Representatives and Senate on 5 February 2013
Portfolio: Immigration and Citizenship
PJCHR comments: Report 1/13, tabled on 6 February 2013
Response dated: 20 June 2013

Background

3.97 This regulation amended the *Migration Regulations 1994* to:

- clarify when a bridging visa held in association with an invalid merits review application ceases;
- increase the visa application charge for various visa subclasses; and
- enable the collection of personal identifiers (facial photographs and fingerprints) from visa applicants who are outside Australia by an officer who is located outside Australia or to a person in a class of persons specified by the Minister in an instrument in writing

3.98 The committee sought clarification in relation to:

- whether the increase in visa application charges for partner visas (by 30%) may impact on the right to a family life in articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR); and
- whether any safeguards apply to ensure that contractors, who are not immigration officers, exercising powers to collect personal identifiers offshore consistent with the right to privacy in article 17 of the ICCPR.

3.99 The Minister's response is attached.

Committee's response

3.100 The committee thanks the Minister for his response.

Increase in visa application charges for partner visas

3.101 The committee notes the Minister's advice that the increase in the partner visa fees by 30 per cent reflects the new 'user-pays visa pricing' system, and that 'it is fair and reasonable to expect the user of a service to pay for the service, rather than the tax payer at large'. In particular, the Minister advises that the increase in visa application charges reflects the fact that the holder of a partner visa is now entitled (on arrival in Australia) to work and has access to Medicare benefits.

3.102 The committee notes that articles 17 and 23 of the ICCPR recognise the right to a family life. The right can be legitimately limited provided that the limitation is (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved. While the committee accepts that the 'user-pays visa pricing' system to reflect immediate work and Medicare entitlements, may be a legitimate objective, it is not clear to the committee that the Minister has adequately explained that this measure is proportionate to achieving that objective. If a partner applicant cannot afford the visa application charge (which is up to $4,000 in some cases)[23] they will be unable to enjoy those benefits as they will be precluded from coming to Australia – and from joining their partner.

3.103 The committee notes the Minister's acknowledgement that the increased costs 'may place varying degrees of financial pressure on some families'. The committee considers that if the visa application charge is having the effect of denying partner reunions for those unable to afford the visa application charge, this could be incompatible with the right to a family life. The committee recommends that the Department of Immigration and Citizenship monitor the effect of the application charge to assess whether there is any evidence that it may be having such an impact.

Application of human rights

3.104 The committee notes the Minister's statement that Australia's obligations under the ICCPR generally apply only to persons within its territory and jurisdiction, and as such the right to a family life only applies to visa applicants who apply for a Partner visa in Australia and their partners. In addition, in relation to the committee's concerns in relation to powers to collect personal identifiers offshore, the committee notes the Minister's advice that '[t]he collection of personal identifiers offshore cannot be said to be within Australia's territory or its jurisdiction'.

3.105 The committee notes its mandate under the *Human Rights (Parliamentary Scrutiny) Act 2011* is to examine bills and instruments for compatibility with human rights as recognised or declared in the seven human rights treaties. As the *Migration Amendment Regulation 2012 (No. 8)* are Australian legislative instruments, the committee is empowered to examine its compatibility with human rights.

3.106 In addition, the exercise of powers such as the collection of information from visa applicants for the purposes of Australia's immigration laws, even if carried out overseas and in relation to non-citizens, is the type of action which is accepted under international law as falling 'within the jurisdiction' of a State under international law. The carrying out of this function is part of the exercise of Australia's sovereign

23 Partner Residence (Class BS) visa: application costs of $3,975; Partner (Migrant) (Class BC) and Prospective Marriage visas: application costs of $2,680.

powers. Any such actions will be subject to Australia's obligations under the UN human rights treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011.*

3.107 The committee considers that it is best practice that statements of compatibility and responses to the committee's concerns consider the compatibility of each legislative provision with human rights, regardless of whether the application of the right applies in Australia or elsewhere.

The Hon Brendan O'Connor MP
Minister for Immigration and Citizenship

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100, Parliament House
CANBERRA ACT 2600

Dear Mr Jenkins Harry,

Thank you for your letter of 6 February 2013 concerning the Committee's consideration of the *Migration Amendment Regulation 2012 (No. 8)* [F2012L02381]. I apologise for the delay in responding.

Increase in visa application charges for partner visas

The Committee's first request for clarification is in relation to whether the increase in visa application charges for partner visas (by 30 percent) may impact on the right to family life in articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR).

Australia's obligations under the ICCPR generally apply only to persons within its territory and jurisdiction. Therefore, while Partner visa applications may be lodged in or outside Australia, the rights articulated under articles 17 and 23 extend only to visa applicants who apply for a Partner visa in Australia and their partners.

Article 17(1) of the ICCPR states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23(1) of the ICCPR states:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The protection of the family unit under articles 17 and 23 does not amount to a right to enter or remain in Australia where there is no other right to do so. Avoiding interference with the family or protecting the family can be weighed against other countervailing considerations including the integrity of the migration system and the national interest. To the extent that these legislative amendments may be viewed as limiting the ability of families to reunify, those limitations are permissible when they are lawful, reasonable and proportionate.

Lawful

The visa application charge is legally authorised under an Act of Parliament, that being the *Migration (Visa Application) Charge Act 1997* (the VAC Act). The VAC Act authorises the imposition of a charge for a visa application and specifies the maximum amount that can be charged in that respect. The current Partner visa application charge complies with the requirements of the VAC Act, in that the amount charged, despite the increase, does not exceed the maximum amount that may be charged.

As the increase in the visa application charge is authorised by law, the Australian Government maintains that the amendments are lawful.

Reasonable and proportionate

The VAC amendments form part of the new 'user-pays visa pricing' system, which was introduced in January 2013. On 22 October 2012, Senator Kate Lundy announced the changes in her role as acting Minister for Immigration and Citizenship. Senator Lundy stated that the new system makes for a fairer approach of charging for visas by increasing visa charges in areas of significant demand. Partner visas make up the largest category of visas in the Family stream, making it one of the highest visas in demand within the migration program.

The Government's decision to increase the cost of visas in high demand is both reasonable and proportionate insofar as it takes into account the fact that those visas provide work opportunities for the visa holder. As such, the increase in the visa application charge is less likely to have a significant adverse impact on the visa applicant. From 24 November 2012, most Partner visa applicants in Australia automatically became entitled to work without restrictions. This allows them to immediately undertake full time employment to benefit from and contribute to Australia's strong economy. In addition, all Partner visa applicants in Australia have access to Medicare as soon as they make a valid visa application. The Government is of the view that the increase in the visa application charge recognises the immediate work and Medicare entitlements, and sees those entitlements as a way of offsetting any potential burden which the increase in the application fee may have.

Further, although it is recognised that the increase in the cost of the visa application may place varying degrees of financial pressure on some families, it is the Government's view that, under the 'user-pays' system, it is fair and reasonable to expect the user of a service to pay for the service, rather than the tax payer at large.

Despite the increase in the Partner visa application charge, the cost of making a Partner visa application remains significantly less than that for a Business or a Skilled visa. Again, this reflects the Government's commitment to keeping the threshold for family reunification lower than that applicable for other visas which are as equally in demand.

Furthermore, and in reference to article 23 of the ICCPR, my Department is of the view that the Partner visa program is consistent with article 23, in that it allows partners of eligible sponsors to apply for permanent residency in Australia, and in doing so, have the freedom to live as partners and form a family unit.

The Department maintains that the VAC increase is lawful, reasonable and proportionate and as such, is consistent with articles 17(1) and 23 of the ICCPR.

Offshore collection of personal identifiers by contractors

The Committee's second request for clarification is in relation to whether any safeguards apply to ensure that contractors, who are not immigration officers, exercise powers to collect personal identifiers offshore consistently with the right to privacy in article 17 of the ICCPR.

I wish to first provide some context to the offshore biometrics collection program.

Since the offshore biometrics collection program was established by the Government in 2010, service delivery partner contractors have been collecting personal identifiers from offshore visa applicants who fall within the scope of the program. Collection of digital photographs and fingerprint scans is undertaken at visa application centres operated by service delivery partners on behalf of the Department.

Contractors do not have the power to require a visa applicant to provide their personal identifiers. It is only immigration officers who can do so. In practice, most offshore visa applicants who fall within the scope of the program voluntarily provide their personal identifiers at visa application centres at the time they lodge their visa application. It is usually only when an applicant chooses an alternative application lodgement method, such as sending through the mail, that an immigration officer needs to issue a written requirement for the provision of personal identifiers.

The provisions introduced by the *Migration Amendment Regulation 2012 (No. 8)* are intended to provide greater flexibility in the way personal identifiers can be collected from offshore visa applicants. A provision was introduced to enable me or my delegate to specify in an instrument in writing classes of persons to whom personal identifiers can be provided. There are no immediate plans to make an instrument under this provision, but it was included in order to accommodate possible future operational needs where it may become necessary or desirable in some locations to seek the assistance of contractors to collect biometrics on the Department's behalf out "in the field", such as in refugee camps.

The provisions introduced by the *Migration Amendment Regulation 2012 (No. 8)* do not engage article 17 of the ICCPR. Australia's obligations arising under the ICCPR extend only so far as a visa applicant is within Australia's territory and jurisdiction (article 2 of the ICCPR). The collection of personal identifiers offshore cannot be said to be within Australia's territory or its jurisdiction.

Notwithstanding that article 17 of the ICCPR is not engaged in these circumstances, collection of personal identifiers by contractors must be done in accordance with confidentiality and privacy protection clauses included in the relevant service delivery contracts. These clauses require contractors to deal with and handle personal identifiers in accordance with the provisions of Australia's *Privacy Act 1988*. Service delivery partners are monitored to ensure compliance. Visa applicants are informed through their visa application forms or other information forms about how their personal information, including personal identifiers, will be treated by the Department.

I hope this helps to clarify matters for the Committee.

Yours sincerely

BRENDAN O'CONNOR

20 JUN 2013

Parliamentary Service Amendment Bill 2012

Introduced into the Senate on 28 November 2012; passed both Houses on 13 February 2013
Sponsor: President of the Senate
PJCHR comments: Report 1/13, tabled on 6 February 2013 and Report 6/13, tabled on 15 May 2013
Response dated: 17 June 2013

Background

3.108 This bill, now enacted by the Parliament, amends the *Parliamentary Service Act 1999* to reflect recent changes to the *Public Service Act 1999* as far as they are relevant to the Parliamentary Service.

3.109 In its *First Report of 2013*, the committee was initially concerned that some of the sanctions that could be imposed on parliamentary employees for misconduct (such as suspension or dismissal) might be classified as 'criminal' for the purposes of human rights law. However, in light of the information provided by the President to the committee on 21 March 2013, the committee concluded that they were unlikely to be considered 'criminal'. Nonetheless the committee noted that they may involve the determination of rights and obligations in a suit at law (especially in cases where termination of employment is involved). In such a case, article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) requires that a person affected by such sanctions has a right to bring a dispute over those matters before an independent and impartial court or tribunal which can consider all contested issues of fact or law.

3.110 In its *Sixth Report of 2013*, the committee to wrote to the President to seek clarification of how the right of a person under article 14(1) of the ICCPR to bring a dispute before an independent and impartial tribunal is protected where a dispute exists over a finding that there has been a contravention of the Code of Conduct or the sanction imposed for such a breach.

3.111 The committee also sought further information about the operation of the Act in relation to the right not to incriminate oneself and the interaction of provisions of the Act (in particular sections 65AC(3) and 65AD(3) with sections 40 and 41 of the Act) and various provisions of the *Auditor-General Act 1997*. The committee was concerned that, although the intention was not to abrogate the right not to incriminate oneself (and there was a presumption that this would not occur in the absence of express words to that effect), the interaction of the various provisions was unclear and might have the effect of limiting the right in certain circumstances.

3.112 The response of the President of the Senate is attached.

Committee's response

3.113 The committee thanks the President for his response.

3.114 The committee appreciates the clarification provided in relation to the procedures underpinning section 15(2A) of the Act and that they are designed with the purpose of ensuring that an affected person will be treated fairly during the administrative proceedings. The committee's concern was also directed to the question of whether an affected employee was able to have his or her dismissal or suspension or the imposition of other sanctions reviewed on the merits by a court or tribunal that is independent of the Parliament. This is required by article 14(1) of the ICCPR and also by the International Covenant on Economic, Social and Cultural Rights insofar as it guarantees access to a remedy, including where appropriate a judicial remedy, where a person claims that the person's right to work has been infringed.

3.115 The committee notes the reaffirmation that the Act is not intended to abrogate the right not to incriminate oneself. However, the committee continues to be concerned that the interaction of sections 65AC(3) and 65AD(3) with sections 40 and 41 of the Act and various provision of the *Auditor-General Act 1997*, as described in the committee's *Sixth Report of 2013*,[24] may have that effect in certain circumstances.

3.116 The committee is grateful for the assurance of the President that he has noted the committee's comments in this respect and that he has asked that they be carefully considered by departmental officers as part of the ongoing assessment of the day-to-day operation of the Act. The committee would appreciate further advice as to the results of this consideration and monitoring at an appropriate stage.

24 PJCHR, *Sixth Report of 2013*, paras 3.17 to 3.27.

RECEIVED
DATE 17/6/13 BY PJCHR

PRESIDENT OF THE SENATE

PARLIAMENT HOUSE
CANBERRA

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17 June 2013

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
Canberra ACT 2600

Dear Mr Jenkins

PARLIAMENTARY SERVICE AMENDMENT BILL 2012

Thank you for your letter dated 15 May 2013 asking me to clarify some further matters relating to the Parliamentary Service Amendment Bill 2012 (the bill) which were raised in the committee's Sixth Report of 2013 (the report). Though the bill was assented to on 1 March 2013, for ease of reference I have continued to refer it as the 'bill'.

The committee has sought clarification on two matters, and my comments on each are below.

(i) The right of a person under Article 14(1) of the ICCPR not affected

The committee has asked me how the right of a person under Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) to bring a dispute is protected, in the context of a finding of a contravention of the Code of Conduct or when a corresponding sanction has been imposed; that is, a dispute that arises when the head of a parliamentary department seeks to take relevant action under the Parliamentary Service Code of Conduct in respect of a person who has provided false and misleading information during his or her recruitment process.

I have carefully considered the committee's comments.

First, as I have noted previously, the bill does not provide a bar on the disclosure of 'protected information'. As you are aware, while subsections 65AA(7) and 65AB(7) provide that an entrusted person may not be compelled to disclose protected information in a court or other type of hearing, they do not prohibit the disclosure of 'protected information' entirely nor do they preclude the use of such information in court proceedings, provided that the

Parliamentary Service Commissioner or the Merit Protection Commissioner has authorised its disclosure and is satisfied that the disclosure is in the interests of a person or in the public interest.

Amongst other things in the course of making their decision, it is envisaged that the Parliamentary Service Commissioner, or the Merit Protection Commissioner, would take into account how the non-disclosure of such information might affect a person (including the litigant), particularly in respect of issues relating to the privacy of an individual. While these provisions may – in very limited circumstances – constrain a litigant's ability to adduce some relevant evidence in a matter before a court, it is considered that such instances would be very rare (if indeed, at all).

Second, the processes and procedures underpinning section 15(2A) are required to comply with basic procedural requirements to be set out in directions issued by the Parliamentary Service Commissioner. Such directions are legislative instruments (with the accompanying requirement to table in both Houses of Parliament etc.). Additionally, these processes and procedures will be developed in consultation with the Australian Public Service Commission, and, where possible, in alignment with analogous policies within the Australian Public Service (on whose Act these provisions are modelled). Consistent with usual human resources practice, it is expected that a copy of the procedure will be made known to officers through the usual parliamentary department mechanisms (e.g. internal internet etc.), and a copy of the procedure will be provided to the relevant officer at the beginning of a process to ensure that he or she is advised of the process to be followed.

In light of this, I am satisfied that the rights of a person under Article 14(1) are not unduly affected and, to the extent that the bill limits rights in this area, it does so in a reasonable, necessary and proportionate way.

(ii) Clarification of provisions as they relate to self-incrimination

As you would be aware, the privilege against self-incrimination is preserved in common law, and will protect a person who is complying with a requirement to disclose information or produce documents unless the privilege is overridden, either expressly or impliedly.[1]

In the bill, and indeed in the *Parliamentary Service Act 1999* more broadly, there is no intent to remove this privilege, and I can again advise that the

[1] The privilege against self-incrimination is deeply ingrained in the common law. The principle is that a statute will not be construed to take away a common law right, including the privilege against self-incrimination, unless a legislative intent to do so clearly emerges": *Sorby v Commonwealth* (1983) 152 CLR 281.

provisions in the bill are not intended to override the privilege against self-incrimination, and that the provisions are intended to provide protection against proceedings based on the content of any information or document provided.

Notwithstanding this, the committee has suggested that the wording of the bill be amended to make this intention more clear. I have noted the committee's comments in this respect, and have asked that they be carefully considered by departmental officers in the context of the customary on-going assessment of the day-to-day operation of the Act.

Please let me know if I can provide any further assistance to the committee.

Yours sincerely

(John Hogg)

Protection of Cultural Objects on Loan Bill 2012

Introduced into the House of Representatives on 28 November 2012; passed by both Houses on 28 February 2013
Portfolio: Public Service and Integrity
PJCHR comments: Report 1/13, tabled on 6 February 2013 and Report 3/13, tabled on 13 March 2013
Response dated: 13 June 2013

Background

3.117 This bill provided that where cultural objects are in Australia on temporary loan from overseas, certain legal proceedings cannot be brought against those objects. This includes protection against legal actions to recover property that may have been unlawfully obtained by the overseas lender, to seize property that may have been the subject of an order before an overseas court, or enforcement proceedings to seize the property in satisfaction of a debt or other liability.

3.118 In its *First Report of 2013*, the committee noted that excluding the jurisdiction of Australian courts represented a significant restriction on the right to access to justice under article 14 of the International Covenant on Civil and Political Rights (ICCPR) and sought clarification from the Minister as to why a less restrictive approach had not been adopted. The committee also asked how these measures were consistent with Australia's obligations under other international conventions relating to the return of cultural objects.

3.119 The former Minister for the Arts responded on 19 February 2013 and in its *Third Report of 2013* the committee decided to defer finalising its views on the human rights compatibility of the bill to enable closer examination of the issues in light of the information provided in the Minister's response. It also sought further information to assist it in making its decision about exhibitions that have been affected by the absence of legislation.

3.120 The Parliamentary Secretary's response is attached.

Committee's response

3.121 The committee thanks the Parliamentary Secretary for his response and for his offer for the Office for the Arts to provide the committee with a confidential verbal briefing on the examples of denied loans and exhibitions that required extensive negotiations to appease lender concerns.

3.122 The committee notes that the Parliamentary Secretary's letter making this offer of a briefing arrived in the final two sitting weeks of the 43rd Parliament and that this committee is unable to take up the offer of a briefing. As such, the

committee intends to defer final consideration of this matter for consideration by the next committee in the 44th Parliament should it decide to do so.

The Hon Michael Danby MP

Parliamentary Secretary for the Arts

C13/332

The Hon. Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
Canberra ACT 2600`

Dear Mr Jenkins Harry

Thank you for your letter of 13 March 2013 to the former Minister for the Arts, the Hon. Simon Crean MP, concerning the Protection of Cultural Objects on Loan Bill 2012. I regret the delay in responding.

I note that the *Protection of Cultural Objects on Loan Act 2013* received the Royal Assent on 14 March 2013, however I take this opportunity to respond to the Committee's letter. I understand that the Committee has requested further details and examples of recent exhibitions that have been affected by the absence of legislation providing protection of cultural objects on loan.

During consultations undertaken by the Office for the Arts over the last three years on the development of the *Protection of Cultural Objects on Loan Act 2013*, a number of major national and State cultural institutions provided examples of loans that had either been refused, or made more difficult and protracted, due to a lack of 'immunity from seizure' protections in Australian legislation. The information was provided by these institutions to the Office for the Arts on a commercial-in-confidence basis due to concerns that wider knowledge of denied loans to Australian institutions could affect their capacity to obtain future loans, as well as affect their relationships with international lenders. In addition, this information provides references to diplomatic sensitivities and was provided on the condition of confidentiality.

The Office for the Arts would be happy to provide the Committee with a confidential verbal briefing on the examples of denied loans and exhibitions that have required extensive negotiations by cultural institutions and, in some cases, government representatives to appease lender concerns. The officer responsible for this matter is Ms Lyn Allan, Assistant Secretary, Office for the Arts who can be contacted on 02 6210 2838.

I thank the Committee for your interest in this matter.

Yours sincerely

Michael Danby

Parliament House, Canberra ACT 2600 Telephone (02) 6277 4520 Fax (02) 6277 8480

Regulatory Powers (Standard Provisions) Bill 2012

Introduced into the House of Representatives on 10 October 2012; before Senate
Portfolio: Attorney-General
PJCHR comments: Report 6/12 tabled on 31 October 2012
Response dated: 18 June 2013

Background

3.123 This bill establishes a framework of standard regulatory powers exercised by Commonwealth agencies.

3.124 The new framework predominantly deals with monitoring and gathering evidence powers designed to determine compliance with provisions of a triggering Act or regulation. The bill also provides for the use of civil penalties, infringement notices and injunctions to enforce provisions and the acceptance and enforcement of undertakings relating to compliance with provisions.

3.125 To activate the bill's provisions, new or existing Commonwealth laws must expressly apply the relevant provisions and specify other requisite information such as persons who are authorised to exercise the applicable powers.

3.126 The committee noted that as the bill is one of general application, it would be difficult to reach a definitive view on its human rights compatibility and each application of its provisions would need to be assessed on a case by case basis. However, the overall likelihood of compatibility would be improved by the inclusion of adequate safeguards to ensure that the relevant powers are, as far as possible, appropriately targeted and circumscribed to minimise the risk that they could be exercised inconsistently with human rights.

3.127 The committee sought clarification from the Attorney-General on how the specific entry, monitoring, search, seizure and information gathering powers in the bill are likely to affect the enjoyment of the right to privacy guaranteed in article 17 of ICCPR, including the following matters:

- whether consideration had been given to including safeguards to ensure that the powers will be exercised in a manner that is proportionate to its purpose, in light of the fact the bill would appear to apply the full range of powers to each triggering law regardless of their necessity to the particular regulatory scheme.
- Whether consideration had been given to including safeguards for the storage, use and disclosure of any personal information collected through the exercise of these powers.

3.128 The Attorney-General's response is attached.

Committee's response

3.129 The committee thanks the Attorney-General for his response, and regrets that the Attorney-General did not respond to the committee's concerns in a timelier manner.

3.130 The committee notes that the nature of the legislation is that some or all of its provisions must be triggered by another bill applying selected provisions to the operation of that regulatory scheme. Accordingly, it shares the Attorney-General's view that a final assessment of the compatibility of a specific application of the standards provisions will need to be made in the context of a particular bill. This has been the committee's practice.[25]

3.131 The committee notes that the bill contains a number of provisions relating to civil penalties and their enforcement. Where a particular civil penalty is classified as 'criminal' for the purposes of human rights law, a number of provisions of the bill, if applied to a regulatory regime containing a 'criminal' civil penalty provision, may be inconsistent with the guarantees of articles 14 and 15 of the ICCPR. The committee recognises that this assessment can only be made in the context of the particular regulatory regime, and refers to its interim *Practice Note 2* on civil penalties and human rights.

25 See PJCHR, *First Report of 2013*, paras 1.201-1.215 (comments on the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012).

Attorney-General
Minister For Emergency Management

MC12/16076

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Harry

Dear ~~Mr Jenkins~~

I refer to your letter of 31 October 2012 concerning the Parliamentary Joint Committee on Human Right's report on the Regulatory Powers (Standard Provisions) Bill 2012 (the Bill).

In its Sixth Report of 2012, the Parliamentary Joint Committee on Human Rights sought clarification on how the specific entry, monitoring, search, seizure and information gathering powers in the Bill are likely to impact on the right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), including whether consideration had been given to including:

- safeguards to ensure that the powers will be exercised in a manner that is proportionate and that agencies won't be given more powers than they require to carry out their functions; and

- safeguards for the storage, use and disclosure of any personal information collected through the exercise of these powers.

I note that triggering legislation may trigger only some of the powers in the Bill with respect to an agency. For example triggering legislation in respect of agency may trigger all Parts of the Bill with the exception of Part 6 (Enforceable Undertakings) and Part 7 (Injunctions). If the Bill is passed and legislation comes before the Parliament that triggers provisions in the Bill the Parliament will have an opportunity to assess the mix of regulatory powers that an agency requires.

In respect of the Committee's concerns about providing safeguards for storage, use and disclosure of any personal information collected through the exercise of these powers, the Bill relies on the safeguards put in place by the *Privacy Act 1988.* I would also expect agencies to have in place appropriate security measures for the proper storage of confidential information.

Yours sincerely

MARK DREYFUS QC MP

18/6/13

Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013

Introduced into the House of Representatives on 21 March 2013; before Senate
Portfolio: Attorney-General
PJCHR comments: Report 6/13, tabled on 15 May 2013
Response dated: 14 June 2013

Background

3.132 This bill seeks to amend the *Sex Discrimination Act 1984* (SDA) to extend the protection from discrimination to include the grounds of sexual orientation, gender identity and intersex status. It also extends the existing ground of 'marital status' to 'marital or relationship status' to provide protection against discrimination for same-sex de facto couples.

3.133 The bill will prohibit discrimination on these new grounds in all areas of life currently covered by the SDA, including areas of work; education; goods, services and facilities; accommodation; land; clubs; and administration of Commonwealth laws and programs.

3.134 The committee sought further information on:

- whether extending the existing exemptions in the *Sex Discrimination Act 1984* relating to membership of voluntary bodies, competitive sporting activities and religious organisations to the new grounds of prohibited discrimination is compatible with human rights; and
- the nature of the impact of the exemption for requests for information and record-keeping on individuals who do not identify as either male or female

3.135 The Attorney General's response is attached.

Committee's response

3.136 The committee thanks the Attorney General for his response, in particular his advice that amendments would be moved to the bill to insert a qualification on the exemption for religious organisations for the provision of Commonwealth-funded aged care services.

3.137 The committee, however, remains concerned about the blanket exemptions to the SDA for religious organisations, membership of voluntary bodies and competitive sporting activities. The committee notes the Attorney-General's advice that these exemptions are intended to protect other rights, namely the rights to religion and freedom of association.

3.138 While the committee appreciates the importance of these competing rights, it notes that a human rights analysis requires a balancing of competing rights. The committee does not consider that limitation on one right can be justified solely on the basis that another right 'trumps' that right. The committee endorses the statement in the Attorney-General's Department's training material on human rights that:

> Blanket restrictions will often be considered disproportionate, as it has the effect of imposing limitations in circumstances where they are not really needed.[26]

3.139 The committee also notes the Attorney-General's advice that any changes to the structure of the exemptions 'will be carefully considered as one of the broader issues in finalising the [Human Rights and Anti-Discrimination Bill 2012]'. However, the committee notes that the Attorney-General has advised that the Australian Government will not proceed with this bill at this time. In these circumstances, and noting that this Parliament will not sit after 27 June 2013, it is not clear to the committee when this further consideration may take place.

3.140 The committee also notes the Attorney-General's response in relation to the exemption for requests for information and keeping of records where existing processes do not provide for a person to be identified as neither male nor female. The committee notes, however, that the response did not answer the committee's request for further information on the nature of the impact of the exemption on persons who do not identify as male or female. As such, the committee is unable to conclude its consideration of the human rights compatibility of this measure.

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26 See Flowchart, in 'Tool for assessing human rights compatibility', available on the Attorney-General's website: http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Toolforassessinghumanrightscompatibility.aspx#3flowchart

Attorney-General
Minister For Emergency Management

MC13/06787

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear ~~Mr Jenkins~~ Harry

Thank you for the opportunity to provide the Parliamentary Joint Committee on Human Rights with further information on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.

As you may be aware, the Bill was passed by the House of Representatives on 30 May 2013.

The Government's response to the Committee's questions is attached.

I thank the Committee for its important work.

Yours sincerely

MARK DREYFUS QC MP
14/6/13

Encl: Response to Parliamentary Joint Committee on Human Rights

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013

Response to Parliamentary Joint Committee on Human Rights

Religious Organisations

1.228 The committee intends to write to the Attorney-General to request an assessment of the compatibility of these provisions with the right to equality and non-discrimination. In particular, such an assessment should address whether the measures proposing to extend the religious exemptions in the SDA to these new grounds is aimed at a legitimate objective; whether there is a rational connection between the measures and the objective; and whether the measures are proportionate to that objective.

The exemptions for religious organisations in sections 37 and 38 of the *Sex Discrimination Act 1984* (SDA) pursue the legitimate objective of preserving the right to freedom of thought, conscience and religion or belief and have been in place for around 30 years.

The exemptions recognise that rights may be limited for the purpose of promoting other rights, with the right to equality and non-discrimination being limited in certain provisions to promote the right to freedom of thought, conscience and religion or belief.

The extension of these exemptions to the new grounds of discrimination in the Bill is necessary to achieve the objective of promoting religious freedom. The exemptions are proportionate as they include a threshold requirement that the discrimination must either conform to the doctrines, tenets or beliefs of the religion or be necessary to avoid injury to the religious susceptibilities of adherents of the religion.

During the public consultation on the Human Rights and Anti-Discrimination Bill 2012 (HRAD Bill), the issue of how the existing exemptions for religious bodies should be formulated was contentious. Any changes to the structure of the religious exemptions will be considered carefully as one of the broader issues in finalising the HRAD Bill.

1.229 The committee notes that the bill proposes to exclude intersex status from the exemptions granted to religious educational institutions on the basis of evidence elicited during consultations. The committee seeks clarification as to why the bill does not similarly extend the requirement for non-discrimination on the basis of intersex status to all services provided by religious organisations.

Section 37 of the SDA provides a general exemption for religious bodies for conduct done in accordance with the doctrines of that religion and applies to all attributes in the SDA, including potential pregnancy and breastfeeding. The structure of section 37 does not readily provide the means to exclude particular attributes from its operation, without a full redraft.

The purpose of this Bill is to fulfil the Government's election commitment to introduce protections on the basis of sexual orientation, gender identity and intersex status. It is not a general reform of the SDA or anti-discrimination law more broadly. Accordingly, this Bill does not include any broader policy changes or significant redrafting beyond introducing the

new grounds of protection. Any further changes are more appropriately implemented through the HRAD Bill.

In addition, religious organisations confirmed during consultations that no religious doctrines require discrimination on the ground of intersex status. Accordingly, in practical terms, the exemption in section 37 would not be enlivened in relation to intersex status.

1.230 The committee also seeks clarification as to why the proposal in the exposure draft Human Rights and Anti-Discrimination Bill to prohibit discrimination by religious organisations providing Commonwealth-funded aged care services was not included in this bill, given that the Attorney-General's Department has acknowledged that:

> **the benefits to older lesbian, gay, bisexual, transgender and intersex (LGBTI) people of improved wellbeing and emotional support by living as a same-sex couple outweighed any cost to aged-care institutions. ...[T]his would better balance the rights to freedom of religion and freedom from discrimination and provide greater accountability and transparency for the use of Commonwealth funding.**

As the Bill was developed and settled in a short time period, the Government did not include the limitation on the exemption for Commonwealth funded aged-care services until it could be considered how best to fit it into the SDA structure.

Following that consideration, on 30 May 2013, the Government announced that it would look to move amendments to the Bill to insert a qualification on the exemption for religious organisations for the provision of Commonwealth-funded aged care services.

Voluntary Organisations

1.233 The committee intends to write to the Attorney-General to request an assessment of whether the measures proposing to extend the exemption for voluntary bodies in the SDA to these new grounds is compatible with the right to freedom of association and the right to equality and non-discrimination.

The existing exemption for voluntary bodies, which applies to all grounds of discrimination in the SDA, will also include sexual orientation, gender identity and intersex status.

The exemption pursues the legitimate objective of preserving the right to freedom of association, which ensures all persons can group together voluntarily for a common goal and form an association. The extension of the exemption to the new grounds of discrimination is necessary to allow voluntary bodies to determine who they admit as members of the body and what benefits, facilities or services they provide to their members.

The exemption recognises that rights may be limited to pursue a legitimate objective, such as limiting the right to equality and non-discrimination in order to protect the right to freedom of association. While the right to freedom of association allows people to form their own associations, it does not automatically entitle a person to join an association formed by other people. However, nothing prevents other people from forming their own associations.

Competitive Sporting Activity

1.236 The committee intends to write to the Attorney-General to request an assessment of whether the measures proposing to extend the exemption for competitive sporting activity in the SDA to these new grounds is compatible with the right to equality and non-discrimination and the right to culture.

The Bill amends the existing exemption for competitive sport in the SDA to include gender identity and intersex status only. The exemption is not being extended to the ground of sexual orientation.

As noted in the Statement of Compatibility, the Government considers that it is legitimate to recognise that biological differences between men and women are relevant to competitive sporting activities. Accordingly, this extension is necessary to pursue the legitimate objective of ensuring fair competition in competitive sporting events. Limiting this exemption to situations where strength, stamina or physique is relevant is a proportionate means of achieving this objective.

The drafting in the Bill mirrors the approach taken in the HRAD Bill and State and Territory anti-discrimination laws. In practice, the Government considers that the exemption will often involve a case-by-case assessment of individual circumstances. That is, the exemption is not intended to operate to require sporting competitions to have policies which automatically exclude people who are intersex, or people with a gender identity which does not match their birth sex. Instead, it is to provide reassurance that organisers are able to make decisions to guarantee fair competition in sporting events.

The Government recognises that the exemption engages the right to culture, which includes the right to sport, and the right to equality and non-discrimination. However, as noted above, the Government believes that the limitation on these rights is necessary, reasonable and proportionate.

Provision of Information and Record Keeping

1.240 Before forming a view on the compatibility of these provisions with human rights, the committee intends to write to the Attorney-General to seek further information with regard to:

- **the nature of the impact of the exemption on persons who do not identify as male or female; and**
- **noting that administrative convenience is not in and of itself a legitimate reason to limit rights, the basis for concluding that the provision of an alternative category would have a 'significant regulatory impact for a wide range of organisations'.**

The exemption ensures that the new protections for gender identity and intersex status do not require a person or organisation to provide an alternative to male and female in any data collection or personal record, such as 'indeterminate' or 'unspecified'.

The Government believes this is appropriate to achieve the legitimate objective of minimising potentially significant regulatory impact on organisations. As noted in the Statement of Compatibility, mandating that all forms must be amended to offer an alternative category could have a significant regulatory impact for a wide range of organisations. This impact would be disproportionate to the small number of people who do identify as neither male nor

female. The Government believes that the limited nature of the exception is a proportionate means of achieving this objective.

As noted in the Explanatory Memorandum, the need for these exemptions may be reconsidered in the future, if organisations have revised their data collection and record keeping practices to allow for a person to identify as neither male nor female.

In the meantime, the Government has recently completed consultations on draft *Australian Government Guidelines on the Recognition of Sex and Gender* for Australian Government departments and agencies. The aim of the Guidelines is to ensure a consistent approach to the collection, use and amendment of sex and/or gender information in individual personal records across the Australian Government.

Under the draft Guidelines, where gender information is collected and recorded against an individual's personal Australian Government record, the person would be given the option to select Male, Female or X (indeterminate/intersex/unspecified).

The Guidelines would require a significant amount of work across Government to implement. All Australian Government departments and agencies would have three years from 1 July 2013 to align their existing and future business practices with the Guidelines. Departments and agencies would be required to review legislative, regulatory or policy requirements relating to the collection of sex and/or gender information and amend these as required to ensure compliance. Implementation would also require the redesign of paper and electronic forms and databases and is likely to require staff to be retrained in these areas.

The exemption will allow the Guidelines to be implemented progressively. The Government's experiences in implementing the Guidelines will be useful in determining the extent of the regulatory impact of removing the exemption for non-government organisations and the private sector.

Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013

Introduced into the House of Representatives on 20 March 2013; before Reps
Portfolio: Treasury
PJCHR comments: Report 6/13, tabled on 15 May 2013
Response dated: 30 May 2013

Background

3.141 This bill seeks to amend a range of taxation laws, including to:

- exempt from income tax certain ex-gratia payments made in relation to natural disasters during the 2011-12 and 2012-13 financial years (Schedule 2);
- require trustees of particular superannuation funds to establish and implement procedures in relation to the consolidation of multiple member accounts (Schedule 5);
- reduce the amount of superannuation co-contribution available from the 2012-13 financial year (Schedule 6);

3.142 The committee sought clarification as to:

- whether the differential treatment of New Zealand non-protected special category visa holders in Schedule 2 of the bill is justifiable and consistent with the rights to equality and non-discrimination;
- why the model proposed in Schedule 5 of the bill to consolidate multiple superannuation accounts is not predicated on the consent of the member (beneficial owner) of the accounts; and whether trustees will be subject to the *Privacy Act 1988*;
- whether the amendments in Schedule 6 of the bill to reduce the government's superannuation co-contribution rate are consistent with the rights to social security and an adequate standard of living; and
- whether the amendments in Schedule 7 of the bill to consolidate dependency tax offsets involve a reduction in the assistance provided via tax offsets for individuals to support their dependents and if so, what impact this might have on families and children; and why particular taxpayers will be quarantined from these changes

3.143 The Minister's response is attached.

Committee's response

3.144 The committee thanks the Minister for his response in relation to the exemption from income tax of ex-gratia disaster assistance payments to New Zealand non-protected special category visa holders and the consolidation of dependency tax offsets. In light of this information, the committee makes no further comment in relation to these aspects of the bill. The committee notes it would have been useful if this information had been included in the statement of compatibility.

3.145 The committee notes that the basis on which payments may be made to certain New Zealand non-protected special category visa holders is that these persons, 'often long-term residents, had been subject to the same effects of recent disasters as those individuals eligible for the [Australian Government Disaster Recovery Payments]'. In this regard the committee draws attention to its comments on the DisabilityCare Australia Fund Bill 2013 and other bills relating to the non-eligibility of New Zealand non-protected SCV holders under the National Disability Insurance Scheme.[27]

3.146 The committee notes that the Minister's response did not address the question as to why the model proposed in Schedule 5 of the bill to consolidate multiple superannuation accounts does not require the consent of the member (beneficial owner) of the accounts; and whether trustees will be subject to the *Privacy Act 1988*. It also did not address the committee's concerns as to whether the amendments in Schedule 6 of the bill, to reduce the government's superannuation co-contribution rate, are consistent with the rights to social security and an adequate standard of living.

3.147 Without this information, the committee is unable to conclude its assessment of the compatibility of this bill with human rights.

27 PJCHR, *Seventh Report of 2013*, p. 8.

The Hon David Bradbury MP
Assistant Treasurer
Minister Assisting for Deregulation

Mr Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

30 MAY 2013

Dear ~~Mr Jenkins~~ Harry,

Thank you for your letter of 15 May 2013 concerning the Tax and Superannuation Laws Amendment (2013 Measures No. 2) Bill 2013 (Bill) on behalf of the Parliamentary Joint Committee on Human Rights (Committee).

The Committee has sought clarification on whether the amendments contained in Schedules 2 and 7 to the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Tax exemption for ex-gratia payments for natural disasters

The Committee sought clarification as to whether the exemption from income tax of ex-gratia disaster assistance payments to New Zealand non-protected special category visa holders is consistent with the right to equality and non-discrimination, contained in article 26 of the International Covenant on Civil and Political Rights (ICCPR) and also article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 26 of the ICCPR states that: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

New Zealand citizens who arrived in Australia after 26 February 2001 are classified as non-protected special category visa holders and are not eligible for Australian Government Disaster Recovery Payments (AGDRP).

The AGDRP is a once-off payment that provides short-term financial assistance to individuals adversely affected by a major or widespread disaster, subject to certain eligibility criteria including being an Australian citizen or resident. These payments are exempted from income tax under the *Income Tax Assessment Act 1997* for each activation of the AGDRP.

PO Box 6022
Parliament House
Canberra ACT 2600

Telephone: 02 6277 7360
Facsimile: 02 6273 4125
http://assistant.treasurer.gov.au

In light of the hardship recent disasters may have caused New Zealand non-protected special category visa holders, the Government decided to make ex-gratia payments to affected eligible individuals.

The ex-gratia payment provides financial assistance to New Zealand citizens living in Australia who hold a non-protected special category visa (subclass 444), and is commensurate with the AGDRP rates of $1,000 for eligible adults and $400 for eligible children.

Ex-gratia payments are a form of discretionary Commonwealth assistance provided under the authority of section 61 of the Constitution that are able to deliver financial relief at short notice. For this reason, it is the most appropriate response for groups affected by a common set of circumstances, and for unexpected events.[1]

The Government determined that certain New Zealand non-protected special category visa holders, often long-term residents, had been subject to the same effects of recent disasters as those individuals eligible for the AGDRP. These determinations are made by the Emergency Management Minister.

For taxation purposes, these payments are equivalent to AGDRPs, and so are given an equivalent tax exemption to ensure that recipients of both payments receive the same benefit.

The exemption is therefore compatible with the right to equality and non-discrimination.

Consolidation of dependency tax offsets

Schedule 7 to the Bill consolidates the eight existing dependency tax offsets into a single offset — the Dependant (Invalid and Carer) Tax Offset — for most taxpayers. Taxpayers eligible for the zone, overseas forces and overseas civilian tax offsets will continue to have their eligibility for any of the eight dependency offsets determined under the existing law.

The Committee sought clarification as to whether this change is consistent with the right to social security and the right to an adequate standard of living under articles 9 and 11 of ICESCR.

The Committee also raised concerns in relation to the impact of the change on the net medical expenses tax offset (NMETO) and Medicare levy concessions and the right to health under article 12 of ICESCR.

The Committee also sought clarification as to why taxpayers who receive the zone tax offset, the overseas forces and overseas civilian tax offset will not be affected by these amendments.

Right to social security and an adequate standard of living

As stated in the statement of compatibility, this measure does not alter an individual's entitlement to direct assistance through the social security system and does not affect the right to social security.

The right to social security is contained in article 9 of ICESCR. In General Comment 19, the UN Committee on Economic, Social and Cultural Rights elaborates further on this right and states that the right to social security requires State parties to 'ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them

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[1] Paragraph 2.14 of the Submission to the Standing Committee on Legal and Constitutional Affairs by the Department of Finance and Deregulation - http://www.finance.gov.au/financial-framework/discretionary-compensation/finance-submission.html

to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.'[2]

The right to an adequate standard of living in article 11 of ICESCR is 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.'

The government is consolidating the eight existing dependency tax offsets to limit eligibility to taxpayers who contribute to the maintenance of a dependant who is unable to work due to invalidity or care obligations. The existing offsets are available based on a taxpayer maintaining the following classes of dependants: invalid spouse; carer spouse; housekeeper; housekeeper (with child); child-housekeeper; child-housekeeper (with child); invalid relative; and parent-in-law. Taxpayers may receive more than one amount of the Dependant (Invalid and Carer) Tax Offset when it is in respect of more than one dependant (other than the taxpayer's spouse) who is genuinely unable to work.

The consolidation of the dependency offsets better targets assistance to taxpayers supporting carers and relatives with a disability who are unable to work, and removes out-dated concessions from the personal income tax system. For example, the child-housekeeper offset was originally called the 'daughter housekeeper' offset, and introduced at a time when unmarried daughters might be expected to stay home and keep house rather than study or work. This reform builds on the 2011-12 Budget measure to phase out the dependent spouse tax offset, and reflects community attitudes by targeting assistance to taxpayers contributing to the maintenance of dependants who are genuinely unable to work.

In addition, the new Dependant (Invalid and Carer) Tax Offset is equal to the highest existing dependency tax offset, and will be indexed annually to the Consumer Price Index. This means that some taxpayers who maintain a dependant who is genuinely unable to work due to invalidity or carer obligations may receive additional assistance compared to what they may receive before the change.

Taxpayers contributing to the maintenance of a dependant who does not work but is able to will no longer be eligible to receive assistance through the personal income tax system. However, these dependants will still be able to access direct assistance that is more appropriate to their circumstances through Australia's social security system, such as Newstart Allowance, provided they meet the required eligibility criteria.

Right to health

The amendments do not limit an individual's access to Australia's health care system. Rather, they provide better targeting of the NMETO and Medicare levy concessions to those families who maintain dependants who are genuinely unable to work due to invalidity or care obligations.

The right to health is recognised in article 12 of ICESCR as right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

While ICESCR contains no definition of health, the United Nations Committee on Economic, Social and Cultural Rights has stated that the right to health is not to be understood as a right to be healthy.[3] The Committee has stated that the right to health contains both freedoms and

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[2] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 19, paragraph 59.
[3] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14, paragraph 8.

entitlements, and the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.[4]

In determining the amount of NMETO a taxpayer may receive with respect to the 2012-13 and future income years, a taxpayer will be able to include the net medical expenses incurred in relation to a dependant who is a relative, spouse's relative, parent or spouse's parent who is genuinely unable to work due to invalidity or care obligations. Similarly, a taxpayer may be entitled to a Medicare levy concession by accessing the family Medicate levy low income threshold if they have a spouse or a child.

Zone, overseas forces and overseas civilian tax offsets

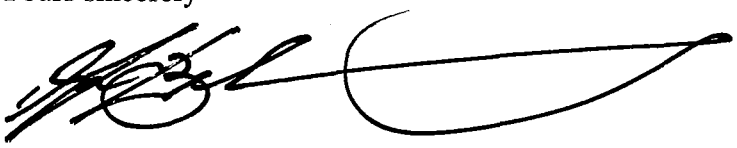
The Committee also sought clarification as to why taxpayers who receive the zone tax offset, the overseas forces and overseas civilian tax offset will not be affected by these amendments.

The exemption of recipients of the zone tax offset recognises the additional difficulties that dependants in rural and regional Australia face in finding work. Recipients of the zone tax offset are also exempt from the age restriction that determines eligibility for the dependant spouse tax offset, in recognition of these difficulties. Exempting recipients of the zone tax offset from these amendments ensures consistency in the government's policy.

The overseas defence forces tax offset is available to members of the Australian Defence Force serving in places where the nature of service is declared to be uncongenial and isolated. The overseas civilian offset is available to prescribed civilian personnel, such as Australian Federal Police personnel, contributed by Australia to an armed force of the United Nations overseas. The exemptions mean that they would still be able to receive an amount of dependency offset in respect of dependants who are not invalid, or who do not have carer obligations. The exemptions recognise the specific hardships that families of recipients face while the recipients are serving in particular places. Recipients of the overseas defence forces and overseas civilians tax offsets are also exempt from the age restriction that determines eligibility for the dependant spouse tax offset, in recognition of these difficulties. Exempting recipients of these tax offsets from the amendments to the dependency tax offsets ensures consistency in the government's policy.

I trust this information will be of assistance to you.

Yours sincerely



DAVID BRADBURY

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[4] See note 3.