

Protection of Cultural Objects on Loan Bill 2012

Introduced into the House of Representatives on 28 November 2012

Portfolio: Regional Australia, Local Government, Arts and Sport

Committee view

1.1 The committee notes that excluding the jurisdiction of Australian courts represents a significant restriction on the right to access to justice under article 14 of the International Covenant on Civil and Political Rights (ICCPR).

1.2 Before forming a view on the compatibility of the bill with human rights the committee seeks clarification from the Minister as to why less restrictive approaches have not been adopted and how these measures are consistent with Australia's obligations under other international conventions relating to the return of cultural objects.

Overview

1.3 The bill provides that where cultural objects are in Australia on temporary loan from overseas, certain legal proceedings cannot be brought against those objects. This provides protection in relation to legal actions brought to recover property that was alleged to 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, as well as other actions.

Compatibility with human rights

1.4 The bill is accompanied by a detailed statement of compatibility which identifies a number of rights which may be promoted or limited by its provisions, in particular the right to self-determination and the right to a fair hearing.

1.5 At present, pursuant to the *Foreign State Immunity Act 1985*, certain actions may not be brought before Australian courts in relation to cultural objects owned by foreign States which are in Australia on temporary loan or for other purposes. However, the bill significantly extends this protection by providing for immunity from suit in a wide range of cases in which overseas cultural objects are on loan in Australia.

Equality and non-discrimination

1.6 The bill proposes to create a category of persons who may not enforce their rights before Australian courts in relation to particular classes of moveable property. This engages the right to equal protection of the law and non-discrimination on the basis of other status guaranteed by article 26 of the ICCPR, equality and non-discrimination in the enjoyment of the right of access to the courts guaranteed by

article 14(1) of the ICCPR, as well as non-discrimination in the enjoyment of other rights. In order for the differential treatment of different categories of potential litigants to be consistent with these rights, the measures adopted must pursue a legitimate aim and have an objective and reasonable justification. These requirements overlap substantially with what must be shown if a restriction on the right of access to court under article 14(1) of the ICCPR is to be justified.

Right to a fair hearing in the determinations of rights and obligations in a suit at law

1.7 Under international human rights jurisprudence the guarantee of the right to a fair hearing in ‘the determination of one’s rights and obligations in a suit at law’ contained in article 14(1) of the ICCPR has been held to guarantee not just fair procedures when a case is before a court or tribunal, but also the right to bring proceedings before a court in relation to such rights (the so-called ‘right of access to court’). The rights which are encompassed by the guarantee include rights to property, and to enforce the judgment of a court by executing against the assets of a person.

1.8 Although article 14(1) does not expressly permit limitations on the enjoyment of the right, international jurisprudence accepts that some limitations may be placed on the enjoyment of the right of access to court. Any limitation must pursue a legitimate aim, must be reasonable and a proportionate measure to achieve the aim and must not impair the essence of the right.

1.9 The bill pursues what the statement of compatibility states is a legitimate aim, namely the facilitation of the loan of overseas cultural objects to Australian institutions for purposes which include exhibitions and research. The statement notes that this promotes the right of everyone to participate in cultural life guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹ The bill also seeks to support activities such as major international exhibitions that have economic benefits for the community.

1.10 The justification offered for the removal of the right to access court for a particular category of potential litigants appears in a number of statements in the explanatory memorandum (including the statement of compatibility) and in the Minister’s second reading speech, which states that it is necessary to ensure that overseas lenders continue to be prepared to lend objects to Australian institutions and that Australian institutions have been experiencing difficulties in this respect.

1.11 For example, the Minister, in his second reading speech listed a number of recent exhibitions with exhibits from overseas and noted:

1 See article 15(1)(a) of the ICESCR. Note, this is the subject of General comment No 21 adopted by the UN Committee on Economic, Social and Cultural Rights in 2009.

The ability to borrow these objects enriches the cultural experience for Australian audiences, draws visitors from far and wide, and delivers significant economic benefits.

...But, despite the popularity of these exhibitions, in the past 10 years it has become increasingly difficult for Australia's major galleries, libraries and museums to secure overseas loans. Australia, unlike numerous other countries, does not have comprehensive legislation providing protection for cultural objects on loan from overseas...

The introduction of this legislation will align Australia with an emerging international standard of providing protection for cultural objects on loan from overseas.

It will reassure foreign lenders that Australia is a secure destination for loans and enable our great cultural institutions to successfully compete for world-class exhibitions.²

1.12 The statement of compatibility states that the bill will enhance cultural life in Australia by addressing a significant obstacle Australia's major museums and galleries face in securing the loan of foreign cultural objects as 'the absence of more comprehensive legislation has made it increasingly difficult for institutions to secure loans as they are not able to provide assurances to lenders that objects will be returned at the end of the loan period'. It accepts that the bill provides a temporary limitation on the right of a person to commence legal action or enforce a judgment of a court, but states:

The degree of limitation on other objects is considered proportionate to the objective of the Bill as the limitation on the ability to take action while the object is in Australia is necessary to achieve the stated objective of enhancing access to cultural objects. The limitation on the ability to take action through the Australian legal system, for the limited period of the loan, has been balanced against the public interest of the significant social, economic and cultural benefits that can be delivered as a result of Australian institutions being able to secure loans.³

1.13 There is no further information provided by the supporting documentation about the extent of difficulties currently being experienced by Australian institutions and what existing arrangements are used to permit significant international exhibitions to be brought to Australia. There is also no further information about why these existing arrangements are inadequate for future exhibitions and no information about the number or extent of claims lodged in Australia or elsewhere in relation to cultural objects on loan before the courts of the borrowing jurisdiction.

2 House of Representatives, *Debates*, Wednesday, 28 November 2012, p. 13646.

3 Statement of compatibility, pp. 4-5.

1.14 There was a Discussion Paper on this subject issued by the Department of Prime Minister and Cabinet in 2011,⁴ however, there is no mention of this or the results of the ensuing consultations. The Minister's second reading speech noted that there was 'strong support for Commonwealth legislation on this issue' which extended 'from the collections sector to state and territory cultural ministers and to the tourism and hospitality sectors. It reflects an acknowledgement of the direct benefits that major international exhibitions deliver to the Australian economy.' There is no reference to any concerns being expressed by groups whose rights might be restricted by the proposed measure.

1.15 The 2011 Discussion Paper outlined a number of different models for providing protection of cultural objects on loan, including legislative schemes adopted by other countries which are less intrusive on the right to access the courts than the framework proposed in this bill. The model adopted by the bill is more restrictive of the rights of potential claimants than the legislation in Switzerland, Austria, Belgium, the United States, France, Germany, a number of Canadian provinces, and Israel – the majority of the jurisdictions referred to by way of comparison in the Discussion Paper.⁵

1.16 The model adopted is closest to that adopted in the United Kingdom, where loans are subject to a publication requirement, so that a museum or gallery must publish details of the object to be published online for a period before and after entry into the UK.⁶ Institutions are also required to provide information to persons who maintain, not unreasonably, they may have a claim to the object in question. These arrangements permit notice of claims to be given to the institutions concerned. Clause 21(3)(c) of the bill provides that that regulations may be made requiring borrowing institutions to publish information about objects proposed to be lent to them. This suggests that publication requirements similar to those which exist in the United Kingdom will be adopted in Australia; however, this is not explicitly stated in the explanatory memorandum.

1.17 Australia is a party to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. This Convention 'covers a broad range of issues aimed at protecting cultural objects, including obliging all parties to take appropriate steps to recover and

4 Department of Prime Minister and Cabinet, *Immunity from Seizure for Cultural Objects on Loan*, Discussion Paper, 2011.

5 Department of Prime Minister and Cabinet, *Immunity from Seizure for Cultural Objects on Loan*, Discussion Paper, Appendix B.

6 See Part 6 of the *Tribunals Evidence and Enforcement Act 2007* and regulations made under section 134(9) of that Act, the *Protection of Cultural Objects on Loan (Publication and Provision of Information) Regulations 2008*.

return stolen or illicitly exported objects, primarily through diplomatic channels.’⁷ The 2011 Discussion Paper also noted that Australia was considering possible accession to the to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 and noted that ‘[a]ny Australian immunity from seizure provisions would also need to be balanced with the UNIDROIT Convention, should Australia move to become a party to it.’⁸

1.18 The committee:

- (a) notes that the exclusion from the jurisdiction of the Australian courts of potential claims relating to the cultural objects in Australia represents a significant restriction on the right of persons to access courts and tribunals under article 14(1) of the ICCPR, and requires a clear demonstration of the need for and proportionality of the measures proposed in the pursuit of the legitimate objective of facilitating the loan of cultural objects to Australian institutions;**
- (b) notes that a number of overseas jurisdictions faced with the same issue have adopted legislation which appears to be less restrictive of the right of access to court than the system proposed by the bill;**
- (c) seeks clarification as to why one of these less restrictive approaches was not adopted; and**
- (d) seeks clarification of the consistency of the proposed measures with Australia’s obligations under other international conventions relating to the return of cultural objects, taking into account that the purpose of those conventions is also to promote the enjoyment of various human rights, including the rights of Indigenous peoples and national minorities, and the right to property.**

7 Department of Prime Minister and Cabinet, *Immunity from Seizure for Cultural Objects on Loan*, Discussion Paper, p. 8.

8 Ibid.