

International Organisations (Privileges and Immunities) Amendment Bill 2013

Introduced into the Senate on 13 March 2013

Portfolio: Foreign Affairs

Summary of committee view

1.55 The committee seeks clarification as to whether the government considers that Australia may not grant immunity to a former official of an international organisation or foreign state in relation to criminal proceedings concerning alleged acts of torture and if so, whether any legislative amendments are proposed to reflect this position.

Overview

1.56 This bill seeks to amend the *International Organisations (Privileges and Immunities) Act 1963* (the Act) to enable regulations to be made that would confer privileges and immunities on the International Committee for the Red Cross (ICRC) and the International Criminal Court (ICC).

1.57 Currently the Act allows privileges and immunities to be conferred on 'international organisations' and 'overseas organisations' – which is too narrow a definition to apply to the independent and non-intergovernmental character of the ICRC. The Act also currently allows privileges and immunities to be conferred on 'international tribunals', such as the International Criminal Court, however, it does not refer to victims participating in proceedings before such tribunals. This bill would amend the Act to confer privileges and immunities on the ICRC in accordance with an Agreement between Australia and the ICRC and on the ICC in accordance with the Agreement on Privileges and Immunities of the ICC.

Compatibility with human rights

1.58 The bill is accompanied by a self-contained statement of compatibility which explains the background to the bills and their effect. The statement does not refer to any specific human rights but concludes:

The Bill extends the operation of the IOPI Act to two further organisations without changing the nature of the regime established by the Act. The Bill is compatible with human rights as it does not raise human rights issues, has no adverse implications for the Government's compliance with its human rights obligations and does not adversely affect the human rights of individuals.²⁴

24 Statement of compatibility, p 5.

1.59 The bill will provide a basis for enhanced cooperation with the ICRC and ICC, both of which play significant roles in, among other things, promoting and implementing respect for human rights and the rule of law. To this extent, the bill should contribute to the advancement of human rights.

1.60 The committee acknowledges the important contribution that both the ICC and the ICRC have made in relation to the advancement of the rule of law, and to the provision of redress for those who have been subjected to international crimes and violations of international humanitarian law. To the extent that the bill enhances the ability of these two bodies to carry out their work, it may be viewed as promoting the enjoyment of many of the rights contained in the conventions which are listed in the *Human Rights (Parliamentary) Scrutiny Act 2011*.

1.61 At the same time the bill gives rise to a number of human rights issues that are not addressed in the explanatory memorandum or statement of compatibility. These relate in particular to the implications of the bill for the right to a fair hearing guaranteed by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and also for the positive obligations of Australia under other provisions of the ICCPR and the other human rights treaties. These obligations require Australia to ensure that individuals whose rights are violated by other individuals have access to a remedy before courts, tribunals or other appropriate authorities. They may also require that persons who commit serious violations of human rights are subject to criminal investigation and prosecution. Apart from these general obligations, under the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Australia has accepted specific obligations to investigate and prosecute (or extradite) alleged torturers who are in its territory.

1.62 While the changes proposed by the bill give rise to these issues, they are not specific to the two organisations covered by the bill. The points are of general application, both in relation to the privileges and immunities conferred on international organisations and their officials under the *International Organisations (Privileges and Immunities) Act 1963*, and to those conferred on States, and their officials and representatives (including diplomatic and consular officials) under various statutes.²⁵

Preliminary matter – the agreement with the ICRC

1.63 The explanatory memorandum states that the purpose of the amendments insofar as they relate to the ICRC is to give effect to a memorandum of understanding between Australia and the ICRC.²⁶ Although it appears from the bill that a copy of this Agreement will be included in the regulations to be made under

25 These include the *Foreign States Immunities Act 1985*, the *Diplomatic Privileges and Immunities Act 1967*, and the *Consular Privileges and Immunities Act 1972*.

26 Arrangement between the Government of Australia and the International Committee for the Red Cross on a Regional Headquarters in Australia.

the Act,²⁷ a copy of that agreement was not provided with the bill or the explanatory memorandum. Nor does there appear to be a readily accessible online text of the Agreement on departmental websites, or on the Australian Treaties Library on the Australasian Legal Information Institute (AUSTLII).

1.64 Without access to the text of the Agreement, the committee does not know the extent of the privileges and immunities proposed to be conferred on the ICRC. The extent and nature of those privileges and immunities to be conferred may affect the committee's assessment of whether the bill is compatible with human rights.

1.65 The committee notes that it would assist the committee in its examination of bills giving effect to international agreements, memoranda of understanding or other international instruments if a copy of the text of such documents were provided to the committee where the document is not readily accessible on the internet.

1.66 The committee intends to write to the Minister for Foreign Affairs to:

- (a) request a copy of the Agreement between Australia and the ICRC to which the bill gives effect; and**
- (b) recommend to the Minister that this document and other memoranda of understanding that may have relevance to human rights be made publicly available on the Internet, whether on the Department's website or in a separate section of the Australian Treaties Library on AUSTLII.**

Australia's obligations in relation to the conferral of privileges and immunities on international organisations and foreign States and their officials

1.67 The granting of privileges and immunities to international organisations such as the ICC is commonly accepted practice in international law. Australia is bound under a number of multilateral and bilateral treaties to confer privileges and immunities on various international organisations and their officials, as well as on foreign States and their diplomatic and consular representatives. The extent of the privileges and immunities conferred varies among the different categories of conferee (a diplomatic representative has more extensive immunities than a consular official, for example). Immunity may also apply in the case of a former official, though it will be normally be less extensive than the immunity enjoyed by a serving official. Under customary international law Australia is also under additional

27 The bill proposes the insertion of a definition of 'ICRC Arrangement' in subsection 3(1) of the *Intentional Organisations (Privileges and Immunities) Act 1963* in the following terms:

'ICRC Arrangement' means the Arrangement Between The Government of Australia and The International Committee of the Red Cross ("ICRC") On a Regional Headquarters in Australia, done at Canberra on 24 November 2005 (a copy of the text of which is set out in the regulations).'

obligations to afford immunity to certain types of high-level foreign officials, both while they are in office and, to a lesser extent, after they have left office.

1.68 While it is not clear exactly which privileges and immunities are to be conferred on the ICC and the ICRC, they will be drawn from standard lists in the Schedules to the *International Organisation (Privileges and Immunities) Act 1963*. They are likely to involve the exclusion of the jurisdiction of the courts in criminal matters and many civil matters, and may also limit the execution of Australian and overseas judgments against certain assets.

1.69 The granting of immunities to international organisations and officials and employees of such organisations, involves an exclusion of the jurisdiction of Australian courts in certain criminal and civil cases. It thus involves a significant encroachment on the enjoyment of the right of access to court guaranteed by article 14 of the ICCPR. The type of cases in which issues of immunity commonly arise are where a person who enjoys immunity invokes that immunity to prevent the bringing of a criminal charge, to resist the enforcement compulsive powers of courts, or to prevent a person from bringing a civil action against a State or international organisation in relation to alleged wrongs (such as violation of the terms of an employment contract). In addition, the restriction on the use of normal law enforcement powers may also impede the ability of public authorities to take positive measures to promote the enjoyment of rights (for example, in the investigation of alleged criminal acts).

Immunity as a permissible restriction on the right of access to court

1.70 Restrictions on the right of access to court are permissible under the ICCPR if these are a reasonable and proportionate measure adopted in the pursuit of a legitimate objective. The granting of immunity to State officials and international organisations under national law has been challenged without success on a number of occasions before international courts as inconsistent with the right of access to courts.²⁸ In recent years challenges have been based on the argument that there is a 'human rights exception' to the granting of immunity where a person is accused of a serious human rights violation (in particular an international crime such as torture).²⁹ While the issue is controversial and the law continues to evolve, it cannot be said that a 'human rights exception' to immunity has become part of international law.³⁰

28 See, eg, European Court of Human Rights, *Cudak v Lithuania*, App no 15869/02 [2010] ECHR 370 (23 March 2010).

29 See, eg the judgment of an evenly divided European Court of Human Rights holding that granting of immunity from suit in a civil torture case was not inconsistent with the right of access to court, *Al Adsani v United Kingdom*, App no 35763/97 [2001] ECHR 761 (21 November 2001).

30 See, eg, the rejection of this argument by the House of Lords in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another* [2007] 1 AC 270.

1.71 However, in one respect there appears to have been a significant inroad made into the immunity from criminal proceedings enjoyed by certain former officials of States (and by extension international organisations); these include heads of state and high officials, as well as diplomatic representatives. These officials are generally immune from criminal and civil process while in office,³¹ but enjoy more limited immunity after they step down from that position. At that stage they enjoy immunity before the courts of other countries only in relation to acts undertaken in their capacity as a high-level official or diplomatic representative. It is a matter of some debate whether this immunity does (or should) extend to human rights violations undertaken as a state policy.

Impact of the Convention against Torture on the immunity of a former official

1.72 In one respect, however, this immunity may have been limited as a result of the Convention against Torture. In the *Pinochet* case the House of Lords considered an extradition request for the surrender of the former President of Chile to face a number of charges of torture.³² As a former head of state, Pinochet enjoyed immunity for acts undertaken in his capacity as President of Chile. The House of Lords held that, even if the alleged acts of torture had been performed in his capacity as President, the effect of the Convention against Torture was that this immunity was abrogated in relation to alleged acts of torture as defined in that convention and to which the convention applied temporally.

1.73 The UN Committee against Torture was of a similar view in relation to the effect of the Torture Convention on the immunity of former foreign state officials in the *Pinochet* case³³ and in other cases.

1.74 As a State party to the Convention against Torture, Australia thus appears to have an obligation to investigate and prosecute such cases of torture as defined in the Convention if an alleged torturer is found in Australia. This is so, even in a case where the person may have enjoyed immunity from criminal proceedings in Australia and continues to enjoy immunity in relation to acts carried out in the person's official capacity.

31 See *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), International Court of Justice, Judgment of 14 February 2002 (immunity from criminal process of serving high-level official).

32 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No3)* [2000] 1 AC 147.

33 See the Committee's views expressed in its discussions with the UK government (CAT/C/SR.354, paras 39-40, 46) and in its concluding observations on the United Kingdom's third periodic report (CAT/C/SR.360, para 11 and CAT A/54/44, para 77(f) (1999)). A similar view is reflected in the Committee's decision in the case of *Guengueng v Senegal*, Comm. No 181/2001, A/61/44, at 160 (2006) (failure by Senegal to prosecute the former head of state of Chad involved violation of the Torture Convention).

1.75 The developments in the *Pinochet* case and other international developments have not been reflected in any amendment to the *International Organisations (Privileges and Immunities) Act 1963*, or the corresponding legislation relating to diplomatic and consular privileges and immunities. It is thus not clear whether under Australian law a person in respect of whom Australia has a Torture Convention obligation to investigate and prosecute allegations of torture may be able to rely on the provisions of existing legislation to plead immunity from such criminal investigation and prosecution.

1.76 The committee intends to write to the Minister for Foreign Affairs to seek clarification:

- (a) whether Australia considers that, in conformity with the views of the House of Lords and of the UN Committee against Torture, Australia may not grant immunity to a former official of an international organisation or foreign state in Australia in relation to criminal proceedings concerning alleged acts of torture as defined in the Convention against Torture; and**
- (b) if so, whether any legislative amendments are proposed to reflect this position, in particular to the *International Organisation (Privileges and Immunities) Act 1963*, the *Diplomatic Privileges and Immunities Act 1967*, and the *Consular Privileges and Immunities Act 1972*.**