

Foreign Affairs Portfolio Miscellaneous Measures Bill 2013

Introduced into the House of Representatives on 13 March 2013; passed both Houses on 16 May 2013

Portfolio: Foreign Affairs

PJCHR comments: [Report 4/13](#), tabled on 20 March 2013

Response dated: 12 May 2013

Summary of committee view

3.1 The committee thanks the Minister for his response and notes it is unable to conclude that this bill is compatible with human rights. The committee notes that this bill has already passed both Houses of Parliament.

Background

3.2 This bill sought to amend the *Intelligence Services Act 2001* and the *Work Health and Safety Act 2011* to:

- create a mechanism for Australian Secret Intelligence Service (ASIS) employees to move to an Australian Public Service (APS) agency in the same way that APS employees can voluntarily transfer from one APS agency to another under section 26 of the Public Service Act 1999 (the PS Act);
- enable the Director-General of ASIS, with Ministerial approval, to make a declaration that specified provisions of the *Work Health and Safety Act 2011* do not apply, or apply subject to modification in relation to persons carrying out work for the Director-General of ASIS.

3.3 The committee sought further information as to why it was necessary to enable the Director-General of the Australian Secret Intelligence Service (ASIS) to disapply any provision of the *Work Health and Safety Act 2011* and whether there would be any less restrictive means available to achieve the stated objective.

3.4 The Minister's response is attached. The committee has been provided with a redacted response for publication as the original response was provided to the committee in confidence as it made reference to operational matters.

Committee's response

3.5 The committee thanks the Minister for his response.

3.6 The committee notes the Minister's response that the existing provisions of the *Work Health and Safety Act 2011* (WHS Act) has an existing exemption for national security. However, the committee does not agree that this is determinative of the question whether the amendment is proportionate or reasonable. Existing legislation can also raise human rights concerns (and the committee is empowered

to consider Acts for compatibility with human rights), and any new legislation that applies or expands such powers will need to explain how this is compatible with human rights.

3.7 The committee accepts that there may be circumstances in which it may be necessary for parts of the WHS Act to be disappplied, and thanks the Minister for providing examples of this. However, the committee notes that whether a declaration made under section 12C is compatible with human rights will depend on the scope of the declaration itself. In that respect, the committee concurs with the concerns set out by the Scrutiny of Bills Committee,¹ that the declaration is not intended to be a legislative instrument and will not be subject to parliamentary scrutiny.

3.8 As Parliament is unable to assess whether a declaration disapplying part, or all, of the WHS Act is compatible with human rights, the committee is unable to conclude that this bill, giving the Director-General of ASIS the power to make such declaration, is compatible with human rights.

3.9 The committee notes that this bill has already passed both Houses of Parliament.

1 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 5/13*, pp 56-58.



12 MAY 2013

SENATOR THE HON BOB CARR
MINISTER FOR FOREIGN AFFAIRS
PARLIAMENT HOUSE
CANBERRA ACT 2600

Mr Harry Jenkins MP
Chairman
Parliamentary Joint Committee on Human Rights
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Parliament House
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Dear Mr Jenkins,

Thank you for your letter of 20 March 2013 seeking clarification on a number of matters concerning the Foreign Affairs Portfolio Miscellaneous Measures Bill 2013 (FAPMM Bill) set out in the Parliamentary Committee on Human Rights *Fourth Report of 2013*. I apologise for the delay in responding to your letter.

Section 12C of the WHS Act

As noted in the Statement of Compatibility with Human Rights, which accompanied the FAPMM Bill 2013, currently s.12C(1) provides that nothing in the *Work Health and Safety Act 2011* (WHS Act) requires or permits a person to take any action, or to refrain from taking any action, that would be, or could reasonably be expected to be, prejudicial to Australia's national security. Therefore under the existing WHS Act, an exemption for national security already exists. An identical provision existed in the predecessor to the WHS Act, the *Occupational Health and Safety Act 1991* (OHS Act).

This is important to an assessment of whether the amendment is a proportionate or reasonable response to the concerns raised in the Committee's Report about whether the proposed amendment is a reasonable and proportionate limitation. The proposed amendment does not introduce an entirely new limitation on the application of the WHS Act obligations. Rather it is principally intended to provide greater certainty for persons who work for ASIS as to when they do not need to comply with certain WHS Act obligations which would or could reasonably be expected to be prejudicial to Australia's national security. Also, given the challenging environment in which ASIS operates, the circumstances in which such legal clarity may become important can be expected to change over time as new and difficult situations arise. For these reasons, ASIS considers that it would be proportionate for there to be potential scope for a declaration to apply to any provision in the Act. In this respect, it is important to note that in practice there are a number of safeguards to ensure that a declaration will be limited to only those situations where it is reasonable for the purposes of maintaining

Australia's national security and having regard to the objects and purposes of the WHS Act to not apply or modify a provision in the Act.

The scope of the WHS Act is broader than the OHS Act, including expanding the criminal sanctions for non-compliance with the WHS Act. This has significantly increased the likelihood of situations arising where there will be potential inconsistency between WHS Act requirements and the requirements of national security.

The difficulty for ASIS is that this broad provision does not provide people who perform work for the Director-General of ASIS with sufficient certainty about when specific action should be taken (or not taken) on the basis that taking the action (or not taking the action) would be, or could be, prejudicial to Australia's national security. This legal uncertainty has the potential to cause particular issues for ASIS 'workers' who risk criminal sanction under the WHS Act if, among other things, they fail to take reasonable care for his or her own health and safety and take reasonable care that his or her acts or omissions do not adversely affect the health and safety of others (s.27).

To determine the current scope and application of s.12C to ASIS's functions, ASIS obtained advice from the Australian Government Solicitor (AGS). The AGS advised the application of s.12C(1) in relation to the activities of ASIS depends on the particular facts and circumstances of each case, and there will be cases where an application of s.12C(1) is unclear thereby creating scope for dispute. The AGS also advised that without an express exemption, s.12C does not currently provide a comprehensive, clear or flexible mechanism for exempting ASIS from the WHS Act or for modifying the application of the WHS Act to ASIS's operations; and ASIS's position under s.12C is in stark contrast to the Australian Security Intelligence Organisation (ASIO) (see s.12C(2)) and the Australian Defence Force (ADF) (see s.12D).

Safeguards in the proposed amendment to the WHS Act

Under the proposed amendment to s.12C, the Director-General of ASIS would only be able to make a declaration with the approval of the Minister responsible for the WHS Act. A declaration cannot be made unilaterally. In administering ASIS and in the exercise of the power to make a declaration, the Director-General of ASIS will also be required to take into account the need to promote the objects of the WHS Act to the greatest extent consistent with the maintenance of Australia's national security.

Other Safeguards - the IGIS and the PJCIS

The Inspector General of Security and Intelligence (IGIS) is an independent statutory office holder and is completely separate from the Australian Intelligence Community. The IGIS reviews the activities of the AIC agencies, including ASIS, to ensure that the agencies act legally and with propriety, comply with ministerial guidelines and directives and respect human rights. This will include the oversight of any declaration made by the Director-General of ASIS under the proposed change to s.12C.

ASIS would also provide a copy of any declarations made by the Director-General to the Parliamentary Joint Standing Committee on Intelligence and Security (PJCIS). This is in accordance with the PJCIS's oversight of ASIS's administration and expenditure under the ISA.

Staff Consultation

Membership of an external trade union is generally inconsistent with an ASIS staff member's obligations under Part 6 of the *Intelligence Services Act 2001* (ISA). It is an offence under s.41 of the ISA for an ASIS staff member to identify themselves as a staff member or former staff member of ASIS. It is also an offence under s.39 to communicate certain information about ASIS.

[REDACTED]

ASIS consulted with its Staff [REDACTED] Association during the development of the proposed amendment to the WHS Act. The Staff [REDACTED] Association was supportive of this amendment as it will provide legal certainty around the application of the WHS Act to people who perform work for the Director-General.

ASIS intends also to consult the Staff [REDACTED] Association on the scope of any proposed declaration.

Examples of why the amendment is required

As noted above, with respect to ASIS's functions, the proposed amendment to the WHS Act is primarily required because the broad scope of the WHS Act (in particular, the expanded definition of 'workers' to whom ASIS owes duties) has significantly increased the likelihood of situations arising where there will be potential inconsistency between WHS Act requirements and the requirements of national security.

Specific examples where the Director-General of ASIS may consider issuing a declaration with the agreement of the Minister responsible for the WHS Act are:

ASIS agents

The AGS has advised that the expanded definition of 'worker' in the WHS Act, in most cases, has the unintended consequence of extending ASIS's WHS duties to ASIS agents. ASIS agents are not staff members of ASIS. [REDACTED]

[REDACTED]

In most cases, it would [REDACTED] be inconsistent with, or prejudicial to, Australia's national security, for the Director-General to consult with ASIS agents about work health and safety issues under Part 5 of the WHS Act.

Preservation of incident sites

Another example is s.39 of the WHS Act which establishes the duty, as far as is reasonably practicable, to preserve the incident site until an inspector arrives or directs otherwise. When ASIS is conducting activities overseas in support of the ADF, such as in Afghanistan, there are likely to be situations where there is significant difficulty in preserving an incident site as 'management and control' of the site by a person performing work for the Director-General of ASIS is tenuous and transitory. Moreover any attempt to do so could put lives at risk,

[REDACTED]

Inconsistency with the secrecy provisions in the *Intelligence Services Act 2001*

While the intention is not to issue a declaration to generally exclude or modify the application of the WHS Act to cover ASIS activities and workplaces in Australia, there are some obligations in the WHS Act, which if applied in Australia, could be inconsistent with national security, namely the secrecy provisions in the ISA.

Access to ASIS premises in Australia is generally restricted to people who hold a relevant security clearance. Under Part 7 of the WHS Act, 'WHS entry permit holders' can enter a workplace with 24 hours notice in certain prescribed circumstances, or without notice, when they are inquiring into a suspected contravention of the WHS legislation. Under the WHS Act, even if there are no union members, a union member can enter the site if there are workers (1) who are eligible to become union members; and (2) whose industrial interests the relevant union is entitled to represent (s.116). While entry can be refused if there is a 'reasonable excuse' (s.144), the WHS Act does not provide guidance as to what a reasonable excuse is. To overcome this uncertainty, these sections of the WHS Act could be modified to ensure that only WHS entry permit holders with relevant security clearances would be allowed to access ASIS premises.

Furthermore, s.74 of the WHS Act requires, among other things, for a business or undertaking to display an up-to-date list of its health and safety representatives. This obligation in some circumstances could be inconsistent with s.41 of the ISA. Under s.41 it is an offence to identify an ASIS staff member other than in a few limited circumstances. Displaying lists at some ASIS work sites could have the unintended consequence of identifying ASIS staff members to people who visit those sites and who are not authorised to know the names of those ASIS staff members.

[REDACTED]

Workers Compensation and the WHS Act

The WHS Act sets out health and safety duties for persons conducting a business or undertaking as well as health and safety duties for 'officers' and 'workers' of persons conducting a business or undertaking. It does not concern workers compensation for Commonwealth employees.

The *Safety, Rehabilitation and Compensation Act 1991* (SRC Act) establishes the Commonwealth compensation scheme for Commonwealth employees. The AGS has advised that the SRC Act provides that an employee who suffers an injury that arises out of, or in the course of, their employment is entitled to certain benefits, including compensation for loss of earnings, medical expenses etc. The SRC Act applies to 'employees' of the Commonwealth. An employee's entitlement to benefits under the SRC Act is determined in accordance with the terms of that Act and the question of whether or not a particular injury suffered by an employee could have been a result of a failure on the part of an employer to properly discharge their duties under the WHS Act to ensure the employee's health and safety at work is irrelevant to those entitlements. Therefore, any decision by a person to take action or not to take action under the s.12C(1) and any decision of the Director-General of ASIS to declare under the proposed s.12C(2A) that specified provisions of the WHS Act do not apply or apply subject to modifications, have no effect on the ability of an employee who has suffered an

injury that arises out of, or in the course of, employment to make a claim for compensation in respect of such an injury under the SRC Act.

I trust this information is of assistance in your consideration of this important legislative change.

Yours sincerely,

A handwritten signature in blue ink, consisting of several fluid, connected strokes, positioned above the printed name Bob Carr.

Bob Carr