Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*

Bills introduced 9 – 12 December 2013

Legislative Instruments received
23 November 2013 – 31 January 2014

Second Report of the 44th Parliament

February 2014

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Functions of the committee

The Committee has the following functions:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FRLI	Federal Register of Legislative Instruments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination

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Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 9 December to 12 December 2013 and legislative instruments received during the period 23 November 2013 and 31 January 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 9 December to 12 December 2013

The committee considered twelve bills, all of which were introduced with a statement of compatibility. Of these twelve bills, six of the bills considered do not require further scrutiny as they do not appear to give rise to human rights concerns. The committee has identified six bills that it considers require further examination and for which it will seek further information.

The committee also commented on three bills deferred from its First Report of the 44th Parliament.

Legislative instruments received between 23 November 2013 and 31 January 2014

The committee considered 315 legislative instruments received between 23 November 2013 and 31 January 2014. The full list of instruments scrutinised by the committee can be found in Appendix 1 to this report.

Of these 315 instruments, 294 (or over 93 percent) do not appear to raise any human rights concerns and are accompanied by statements of compatibility that are adequate. A further six instruments do not appear to raise any human rights concerns but are not accompanied by statements of compatibility that fully meet the committee's expectations. As the instruments in question do not appear to raise human rights compatibility concerns, the committee has written to the relevant Ministers in a purely advisory capacity providing guidance on the preparation of statements of compatibility. The committee has decided to seek further information from the relevant Minister in relation to the remaining 12 instruments before forming a view about their compatibility with human rights.

The committee has deferred its consideration of three instruments. One of these raises issues in relation to Australia's sanctions and extradition regimes that our predecessor committee commented on in the 43rd Parliament.[1] The committee wrote to the former Minister for Foreign Affairs and Trade to request a review of the sanctions regime in light of Australia's international human rights obligations and to report back to the committee in the 44th Parliament. The former Minister responded

1 Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2013, pp 148-149 of this report.

stating that he had instructed the department to carefully consider the committee's recommendation. The committee has decided to draw the current Minister for Foreign Affairs' attention to the committee's request and defer consideration of this instrument until it has received the Minister's response.

The committee has decided to defer a further two instruments while it considers our predecessor committee's recommendation that a 12-month review of the Stronger Futures package of legislation be undertaken in the 44th Parliament to evaluate the latest evidence and consider the continuing necessity for the Stronger Futures measures.[2]

Responses

The committee has considered six responses, four of which were in response to the committee's comments its *First Report of the 44th Parliament* and two responses to comments made in previous reports by our predecessor committee in the 43rd Parliament. The committee has concluded its consideration of two bills and three instruments as the responses relating to them appear to have adequately addressed the committee's concerns.

The committee has decided to write to the relevant Ministers seeking further information, or suggesting the inclusion of safeguards, in relation to two bills.

The committee notes that a number of responses to comments in its *First Report of the 44th Parliament* were not received in time to be considered in this report. The committee will consider these responses in its next report.

In its *First Report of the 44th Parliament*, the committee highlighted the importance it places on statements of compatibility and observed that the quality of a number of statements of compatibility accompanying legislation considered in that report fell short of the committee's expectations. The committee set out its expectation that statements of compatibility should provide a clear justification for each limitation and demonstrate that it is aimed at a legitimate objective and that there is a rational and proportionate connection between the limitation and the policy objective.

In particular, the statement of compatibility should set out how the objectives being sought have been weighed against any limitations on rights. The statement should also set out the safeguards that will be applied to ensure that the implementation of any limitations is compatible with human rights.

Regrettably, the committee notes that the statements of compatibility accompanying some significant bills and instruments considered during this current reporting

2 Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013, pp 145-147 of this report and Social Security (Administration) (Recognised State/Territory Authority – Qld Family Responsibilities Commission) Determination 2013, pp 150-151 of this report.

period have fallen short of the committee's minimum expectations so as to restrict a full and proper examination of the human rights compatibility of the measures.

The committee is particularly concerned to note that some statements of compatibility provide assertions with no supporting evidence.[3] The committee emphasises that it is not enough for a statement of compatibility to merely claim that a measure will contribute to the achievement of a particular objective or that a measure is 'necessary, reasonable and proportionate'. The committee considers that the sponsor of a bill or instrument bears the onus of demonstrating that this is the case. Where the matter is capable of evaluation in the light of empirical evidence, the statement of compatibility should set this evidence out in sufficient detail to facilitate the committee's consideration of the compatibility of the measure with human rights.

The committee will continue to write to the sponsors of bills and instruments to draw attention to the committee's expectations for statements of compatibility when it considers that particular statements do not adequately meet these expectations.

At the same time, the committee notes that some statements of compatibility have assisted the committee in its work. The statement of compatibility that accompanied the Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013 is a case in point.[4]

Senator Dean Smith
Chair

3 See for example the committee's comments on the Building and Construction Industry (Improving Productivity) Bill 2013 and a related bill, pp 1-30 of this report; Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, pp 45-62; Migration Amendment (Bridging Visas-Code of Behaviour) Regulation 2013 and Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155, pp107-119; and Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013, pp 127-134.

4 Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013, pp 39-43.

Part 1

Bills introduced
9 – 12 December 2013

Bills requiring further information to determine human rights compatibility

Building and Construction Industry (Improving Productivity) Bill 2013

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

Portfolio: Employment
Introduced: House of Representatives, 14 November 2013

Summary of committee concerns

1.1 The committee seeks further information on various aspects of these bills to determine their compatibility with the right to equality and non-discrimination, the right to freedom of association and to engage in collective bargaining, the right to freedom of assembly, the right to freedom of expression, the right to privacy, the right to a fair hearing, and the prohibition against self-incrimination.

Overview

1.2 These two bills give effect to the government's election commitment to re-establish the Australian Building and Construction Commission (ABCC).

1.3 The bills replicate provisions which have previously been in force in legislation in Australia. Following the Royal Commission into the Building and Construction Industry conducted by the Hon Terence Cole QC, which reported in 2003, the then government introduced the *Building and Construction Industry Improvement Act 2005* (the 2005 Act).[1] The 2005 Act implemented many of the recommendations of the Royal Commission and established the Office of the Australian Building and Construction Commissioner. While the 2005 Act was aligned with the *Workplace Relations Act 1996* and mirrored certain of its provisions, the 2005 Act specifically targeted the building and construction industry. It made unlawful a range of actions which had been identified by the Royal Commission as prevalent in the industry, included the power to impose significant civil and criminal penalties, and conferred on the ABCC a range of coercive investigative and enforcement powers.

1 *Final Report of the Royal Commission into the Building and Construction Industry* (2003), 22 volumes plus confidential volume.

1.4 In 2012, the then government replaced the 2005 Act with the *Fair Work (Building Industry) Act 2012* (the 2012 Act).[2] This followed an inquiry by the Hon Murray Wilcox QC into the possible operation of a specialist building and construction division of the proposed new Fair Work Australia.[3] In doing so, Mr Wilcox considered the operation of various provisions of the 2005 Act, including their continued need, and additional safeguards that would be appropriate if such provisions were retained.

1.5 The 2012 Act abolished the ABCC and created a new agency, the Office of the Fair Work Building Industry Inspectorate, currently operating as Fair Work Building and Construction (FWBC). The role of this agency is to assist and monitor the implementation of workplace relations laws in the building and construction industry by providing education and advice and undertaking compliance activities. The 2012 Act also removed the provisions making certain industrial actions unlawful and imposing higher penalties on building industry participants and introduced a range of additional safeguards to support the investigative powers.

1.6 The current bills remove the changes made by the 2012 Act and re-introduce many of the provisions of the 2005 Act. According to the statement of compatibility accompanying the main bill, 'the Bill is intended to substantially replicate the *Building and Construction Industry Improvement Act 2005*'.[4]

Building and Construction Industry (Improving Productivity) Bill 2013

1.7 The Building and Construction Industry (Improving Productivity) Bill 2013 (the main bill) re-establishes the ABCC by replacing the existing Office of the Fair Work Building Industry Inspectorate (or FWBC). The bill:

- establishes the ABCC and appoints the Australian Building and Construction Commissioner (the ABC Commissioner), including the terms and conditions of the Commissioner, the staff of the Commission and the people who assist the Commissioner;[5]
- allows the Minister to issue a Building Code – a code of practice that persons working in the industry must comply with;[6]

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2 The amendments were affected by the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012*, which changed the title of the *Building and Construction Industry Improvement Act 2005* to the *Fair Work (Building Industry) Act 2012*.

3 The Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry Report*, March 2009.

4 Statement of compatibility, p 50.

5 Chapter 2 of the bill.

6 Chapter 3 of the bill.

- continues the role of the Federal Safety Commissioner and deals with the appointment and functions of the Commissioner;[7]
- prohibits 'unlawful industrial action' or 'unlawful picketing' (which includes bans on working, employees failing to attend work or employers locking out employees), subjects a person who engages in such conduct to a 'Grade A civil penalty', and provides for the ability of 'any person' to apply for injunctions to restrain unlawful industrial action or unlawful picketing;[8]
- prohibits actions relating to constitutionally-covered entities which involve the coercion of, or application of undue pressure on, persons in relation to the engagement of contractors and employees, choice of superannuation fund and enterprise bargaining;[9]
- confers on the ABCC powers to require persons to give information, produce documents or answer questions relating to the investigation of a suspected contravention of the bill or a designated building law by a building industry participant and creates an offence for non-compliance;[10]
- provides for the appointment and powers of Australian Building and Construction Inspectors and Federal Safety Officers, including powers to enter premises, to ask a person's name and address and to require production of records or documents and creates civil penalties for non-compliance;[11] and
- allows for the enforcement of requirements under the bill before a court (including the imposition of pecuniary penalties and injunctions and the rules relating to civil penalty proceedings) and enables the use of enforceable undertakings and compliance notices.[12]

7 Chapter 4 of the bill.

8 Chapter 5 of the bill.

9 Chapter 6 of the bill.

10 Chapter 7 of the bill.

11 Chapter 7 of the bill.

12 Chapter 8 of the bill.

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

1.8 The Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the consequential bill) seeks to repeal the 2012 Act. It continues appointments of officers and staff of the Office of the Fair Building Industry Inspectorate and related positions, under the Australian Building and Construction Commission. It also confirms the continuing validity of actions taken and notices issued, and investigations commenced, under the previous legislation.

1.9 The bill provides that in general, the bill is to operate prospectively.[13] However, the bill provides that the information gathering powers will have effect in relation to any (alleged) contravention of the 2005 or 2012 Acts that occurred before the commencement of this legislation.[14] It also provides that the ABC Commissioner or an inspector may begin or participate in a proceeding even if the proceeding relates to a matter that was settled before the commencement of the bill.[15]

Consideration by other committees

1.10 On 14 November 2013, the bills were referred to the Senate Education and Employment Legislation Committee. That committee called for submissions on 15 November with a deadline of 22 November 2013, and reported on 2 December 2013.[16] The report of the majority of the committee (comprising government senators) recommended that the bills be passed; dissenting reports by Labor Senators and the Australian Greens' Senators recommended that the bills not be passed.

1.11 On 4 December 2013, the bills were referred to the Senate Education and Employment References Committee, which is due to report on the last sitting day of the Autumn session (27 March 2014). The reference to that committee includes a number of specific questions about the government's proposed reintroduction of the ABCC, including whether the bills are consistent with Australia's obligations under international law.[17]

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13 Schedule 2, section 2(1).

14 Schedule 2, section 2(3).

15 Schedule 2, section 20.

16 Senate Education and Employment Legislation Committee, *Building and Construction Industry (Improving Productivity) Bill 2013 [Provisions] and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [Provisions],* 2 December 2013.

17 Senate Education and Employment References Committee, *Government's approach to re-establishing the Australian Building and Construction Commission*. The terms of reference for this inquiry can be found on the committee's website.

1.12 The Senate Committee for the Scrutiny of Bills considered the bills in its Alert Digest No 9 of 2013, published on 11 December 2013. That committee raised a number of concerns with the bills.[18]

Compatibility with human rights

Statement of compatibility

1.13 Each of the bills is accompanied by a statement of compatibility.

1.14 The statement of compatibility accompanying the main bill identifies that the bill engages the right to freedom of association,[19] the right to just and favourable conditions of work (including the right to safe and healthy working conditions),[20] the right to a fair trial,[21] the right to freedom of assembly,[22] the right to freedom of expression[23] and the right to privacy.[24] The statement of compatibility provides a detailed discussion of the rights engaged and argues that any limitations on those rights are justifiable. The statement concludes that the bill 'is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate'.[25]

1.15 The statement of compatibility accompanying the consequential bill states that the bill engages and limits the right to privacy (in relation to the protection and disclosure of personal information under the bill). It concludes that the bill 'is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate'.[26]

The committee considers that, in relation to the main bill, the statement of compatibility does not include information and data which is necessary for an assessment of the human rights compatibility of the bill. On various occasions, the statement of compatibility (and the explanatory memorandum) make assertions or statements of fact which are not demonstrated by reference to supporting data.

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18 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, pp 1-18.

19 Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

20 Article 7 of the ICESCR.

21 Article 14 of the ICCPR.

22 Article 21 of the ICCPR.

23 Article 19 of the ICCPR.

24 Article 17 of the ICCPR.

25 Statement of compatibility, p 65.

26 Statement of compatibility, p 11.

1.16 The committee considers that inclusion of relevant supporting information and data in the statement of compatibility would have assisted it in its assessment of the human rights compatibility of the main bill.

Committee view on compatibility

1.17 The committee recognises that many issues relating to industrial relations legislation have been and continue to be contentious. The committee acknowledges that there are a range of policy approaches that may be adopted in relation to the regulation of labour and employment relations. The committee's mandate is to ensure that, whatever policies are adopted, the legislation giving effect to those policies is consistent with Australia's international human rights obligations.

1.18 This committee, and its predecessor committee, have set out the principles and framework that guide its scrutiny of bills and legislative instruments in its previous reports, and in its practice notes (in particular, Practice Note 1). The committee's analysis of the bills proceeds on this basis.

1.19 The bills give rise to a number of human rights concerns. The introduction of a separate legislative regime applying only to some workers and employers raises issues of equality and non-discrimination, both in relation to equal protection under the law and the right to non-discrimination in relation to rights under the relevant Covenants.[27] These concerns arise in relation to the proposed scheme as a whole and also in relation to specific provisions of the bills. The bills also give rise to concerns relating to the substantive rights themselves, including the right to freedom of association,[28] the right to freedom of assembly,[29] the right to privacy[30] and the right not to incriminate oneself.[31] These concerns are addressed below.

Right to equality and non-discrimination

1.20 The bills are part of a legislative scheme which is targeted at a particular sector of the economy, namely those engaged in certain parts of the building and construction industry. It involves the introduction of prohibitions on specific forms of industrial activity that apply only to those engaged in that part of the industry, supported by significant investigative powers and civil and criminal penalties which are also applicable only to those workers and employers who fall within the scope of

27 Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR) and article 2(2) of the International Covenant on Economic Social and Cultural Rights (ICESCR).

28 Article 22 of the ICCPR.

29 Article 21 of the ICCPR.

30 Article 17 of the ICCPR.

31 Article 14(3)(g) of the ICCPR.

the legislation. The maximum penalties that may be imposed on building industry participants appear to more severe than those that may be imposed on participants in other industries for the same or substantially similar conduct.

1.21 The committee recognises that it is permissible to enact legislation relating to particular forms of economic or social activity. However, singling out a particular group of workers in a specific sector of the economy and subjecting them to a different range of prohibitions and an accompanying investigative and enforcement regime, may give rise to human rights concerns.

1.22 The right to equality and non-discrimination guarantees equal protection under the law.[32] This requires that legislative distinctions not discriminate between people on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'. Being a person engaged in the building industry would constitute an 'other status' within the meaning of this right. Similarly, the right to equality and non-discrimination guarantees persons the rights set out in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) without discrimination on the basis of grounds such as those mentioned above, including 'other status'.[33] For example, all workers are entitled to the same rights at work, including freedom of association and trade-union rights.

1.23 However, not every distinction based on a protected status is discriminatory. If a difference in treatment can be shown to be based on objective and reasonable criteria and to be a proportionate measure adopted in pursuit of a legitimate goal, then it will not violate the guarantee of equality and non-discrimination.

1.24 In relation to the present bills, the government must show that there are objective and reasonable grounds for adopting a specific legislative regime applicable only to the building and construction industry and that it is a proportionate measure in pursuit of a legitimate objective. The bills are based on the claim that the practices addressed are endemic to and widespread in the building industry as compared with other industries. Assessment of compatibility involves an assessment of whether the asserted factual basis for the differential treatment is supported by evidence, whether the measures in the bill are reasonably tailored to addressing those distinctive features of the sector in question, and whether the measures appear overall to be a proportionate measure.

32 Article 26 of the ICCPR.

33 Article 2(1) of the ICCPR and article 2(2) of the ICESCR.

Distinctiveness and the scheme as a whole

1.25 The explanatory materials accompanying the bill argue that the specific legislative regime is necessary on the ground that the building and construction industry is distinctive. This is because the extent of industrial disruption and lawlessness to be found in the building and construction industry, as well as the distinctive nature of some of the forms of industrial action to be found in that sector, are of a nature and dimension that set the industry apart from other industries and a separate more stringent regime of industrial regulation is therefore required. According to the explanatory memorandum, the 2003 Royal Commission 'established that building sites and construction projects were hotbeds of intimidation, lawlessness, thuggery and violence'.[34] The creation of the original ABCC under the 2005 Act was 'directed at the unique nature of the building industry, and addressed specific inappropriate and unlawful behaviour which the Royal Commission found was prevalent in the building industry'.[35]

1.26 The explanatory material also refers to the significance of the building and construction industry for the national economy. According to the Minister's second reading speech, the industry:

> is critical to a productive, prosperous and internationally competitive Australia. The Coalition Government recognises the importance of an industry that is vital to job creation and essential to Australia's economic and social well-being.[36]

1.27 On this basis, the government argues that stringent industrial laws are a permissible and effective way of pursuing the legitimate goal of reducing the disruption and lawlessness endemic in the industry and thereby increasing productivity in the industry and the broader economy. According to the explanatory memorandum:

> [w]hile the ABCC existed, the performance of the building and construction sector improved. For example, industry productivity improved, Australian consumers were better off and there was a significant reduction in days lost through industrial action.[37]

1.28 The explanatory materials state that since the abolition of the ABCC under the 2012 Act, 'standards of behaviour in the industry have declined. The industry has returned to the "bad old days" where disputes are violent and there exists thuggery and disregard for the rule of law'.[38] To demonstrate this, the explanatory material

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34 Explanatory memorandum, p 2.

35 Explanatory memorandum, p 2.

36 The Hon Christopher Pyne MP, Minister for Education, Second reading speech, *House of Representatives Hansard*, 14 November 2013, p 265.

37 Explanatory memorandum, p 2.

38 Explanatory memorandum, p 2.

and the Minister in his second reading speech describe a number of recent incidents as evidence that the 'lawlessness' has returned.[39]

1.29 In order for the committee to carry out its assessment, it must evaluate the factual basis of assertions regarding the distinctiveness of the building and construction industry and the effectiveness of the scheme proposed. The committee is concerned that in a number of respects the statement of compatibility and explanatory memorandum do not contain such material.

Distinctiveness and the need for certain specific measures

1.30 The distinctiveness argument is made both in relation to the proposed legislative regime generally, but is also relied on in support of specific legislative provisions. The explanatory memorandum maintains that there are certain forms of conduct that are peculiar to the building and construction industry or overwhelmingly to be found in that industry, justifying both specific prohibitions and the special investigative and penalty regime. However, the explanatory memorandum and statement of compatibility do not provide any supporting data.

1.31 For example, the main bill proposes the introduction of a new prohibition on certain forms of picketing, backed by extensive coercive powers and higher penalties than apply to other cases of such behaviour.

1.32 The statement of compatibility states that:

> This limitation pursues the legitimate aim of prohibiting picketing activity that is designed to cause economic loss to building industry participants for industrial purposes. Although infrequent, this type of activity is almost entirely unique to the building and construction industry and can have a severe impact on participants in this sector.[40]

1.33 The statement of compatibility does not indicate the material on which the claim that the use of picketing intending to cause economic loss as a means of exerting industrial pressure is exclusive to the building and construction industry is based. No study of the nature of industrial action across different industries is

39 For example, the CFMEU/Myer Emporium dispute in August 2012, see: Explanatory memorandum, p 2; statement of compatibility, p 58; and second reading speech, p 266. The committee is also aware of the recent allegations regarding corruption in the building industry which have been reported by the media.

40 Statement of compatibility, p 58.

referred to. Recent cases indicate that there are instances of picketing in a number of industries.[41]

1.34 In another example, the effect of the bills will be to subject building industry participants to higher penalties for conduct that is similar to that which is prohibited under the *Fair Work Act 2009* and subject to lower penalties under that Act. Under the Fair Work Act, the maximum civil penalty that may be imposed on an individual is 60 penalty units ($10,200) and on a corporation the maximum is 1,000 penalty units ($170,000). The proposed penalties under the current Bill will be 200 penalty units ($34,000) for an individual and 1,000 penalty units ($170,000) for a corporation.[42] Accordingly, in relation to actions which are prohibited under the current Bill and the Fair Work Act, building industry participants will be subject to civil penalties that are, so far as individuals are concerned, more than three times the maximum penalty that may be imposed on those who are not building industry participants.

1.35 The committee considers this issue also raises the question of whether there is an objective and reasonable justification for the differential treatment. The committee notes the comments made by the Hon Murray Wilcox QC:

> There is no justification for selecting a different maximum penalty, for the same contravention, simply because the offender is in a particular industry. Of course, both the circumstances of the contravention and the offender's previous contraventions (if any) will be taken into account by the court in determining the actual penalty in the particular case; but that will be so regardless of the offender's industry.[43]

1.36 The Senate Scrutiny of Bills Committee noted in its report on the main bill that '[a]lthough the explanatory memorandum argues, in general terms, that higher

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41 *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463 (picketing of grocery wholesaler and distributor); *Communications, Electrical, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Commissioner Laing of the Australian Industrial Relations Commission & Anor (includes corrigendum dated 13 November 1998)* [1998] FCA 1410 (picketing of power station premises); *Southcorp Australia Pty Limited v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2000] FCA 1480 (12 October 2000) (packaging industry); *The Age Company Limited and Fairfax Print Holdings Pty Limited - re Alleged industrial action at the Spencer Street and Tullamarine sites - PR944112* [2004] AIRC 183 (26 February 2004) (newspaper industry); *Shell Refining (Australia) Pty Ltd v Australian Workers' Union* [1999] VSC 297 (13 August 1999) (petrol refining and distribution industry); *Co-operative Bulk Handling Ltd v Maritime Union of Australia* [2013] FCA 940 (2 July 2013) (stevedoring industry); *Recall Information Management Pty Ltd v National Union of Workers* [2013] FCA 161 (1 March 2013) (document storage and management industry); *Toll Transport Pty Ltd (t/a Toll Customised Solutions) v National Union of Workers & Ors* [2012] VSC 316 (25 July 2012) (wholesale distribution industry).

42 Proposed new section 81 of the main bill.

43 The Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry Report*, March 2009, paras 1.18.

penalties are appropriate in the building industry context, there is no explanation of the large difference in penalties proposed by this particular clause.'[44]

1.37 Where the Minister maintains that differential legislative treatment of parts of the building and construction industry is based on the existence of facts or practices which are peculiar to that industry or are present to an extent not seen in other industries, the committee expects that appropriate empirical evidence of this will be included in the statement of compatibility.

1.38 In the present case the explanatory memorandum and statement of compatibility accompanying the bill rely primarily on the 2003 report of the Royal Commission into the Building and Construction Industry and on a number of recent incidents in the industry. No data comparing the nature and incidence of unlawful behaviour in other industries has been provided to the Parliament which would permit the committee to objectively assess whether there is currently a case to be made that the building and construction industry is affected by a higher level of unlawful behaviour than other industries or suffers from unlawful behaviour that is specific to that industry.

1.39 The committee notes that a number of laws have been adopted since 2003 to address the issues raised by the Royal Commission, the report of which is now a decade old. Neither the explanatory memorandum nor the statement of compatibility provides any empirical information as to the impact of these laws on the extent of practices which the current bills propose to prohibit.

1.40 On the basis of the material provided, it is not clear that an objective basis for the differential treatment has been clearly demonstrated. The committee accordingly has concerns about whether the proposed legislative scheme is consistent with the right to equality and non-discrimination.

1.41 The committee intends to write to the Minister for Employment to seek further information on the basis on which the Minister has concluded that the problems identified by the Royal Commission in its report of 2003 persist on a scale that would justify the adoption of a separate legislative regime for sectors of the building and construction industry. In particular, given that reforms similar to those proposed were adopted in 2005 and were in force until 2012, the committee seeks details of any assessment undertaken by government of the impact of those laws and subsequent laws on the practices which are addressed by the bill, as well as an analysis of the critiques made of the claims about the beneficial impact or otherwise of the legislation.

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44 Senate Scrutiny of Bills Committee, *Alert Digest No. 9 of 2013*, p 49.

1.42 The committee also seeks empirical data comparing the nature and incidence of unlawful behaviour in other industries. This will permit the committee to objectively assess whether there is currently a case to be made that the building and construction industry is affected by a higher level of unlawful behaviour than other industries or suffers from unlawful behaviour that is specific to that industry.

Right to freedom of association and right to form and join trade unions

1.43 Article 22 of the ICCPR guarantees the right to freedom of association generally, and also explicitly guarantees everyone 'the right to form trade unions for the protection of [their] interests.' Limitations on this right are only permissible where they are 'prescribed by law' and 'necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others'.[45] Article 22(3) provides that no limitations are permissible if they are inconsistent with the guarantees of freedom of association and the right to organise rights contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

1.44 Article 8 of the ICESCR also guarantees the right of everyone to form trade unions and to join the trade union of his or her choice. Limitations on this right are only permissible where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'.[46] Article 8 also sets out the rights of trade unions, including the right to function freely subject to no limitations other than those prescribed by law and which are necessary for the purposes set out above, and the right to strike. As with article 22 of the ICCPR, article 8 provides that no limitations on the rights are permissible if they are inconsistent with the rights contained in ILO Convention No. 87.[47]

1.45 A number of aspects of the legislation relating to the building and construction industry adopted since 2005 have been considered by expert bodies of the International Labour Organisation (ILO), as well as by UN human rights treaty bodies.[48] Those bodies have raised concerns about the compatibility of certain measures with the freedom of association and right to collective bargaining guaranteed by the ILO Constitution and ILO conventions to which Australia is party.

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45 Article 22(2) of the ICCPR.

46 Article 8(1)(a) of the ICESCR.

47 Article 8(3) of the ICESCR.

48 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Australia*, (2009) E/C.12/AUS/CO/4, para 19.

Some of the provisions which were the subject of concern reappear in the present bill in substantially similar form.

1.46 The *Human Rights (Parliamentary Scrutiny) Act 2011* does not include the ILO Constitution or ILO conventions on freedom of association and the right to bargain collectively in the list of treaties against which the human rights compatibility of legislation is to be assessed. Nonetheless, these ILO standards and jurisprudence are relevant to the mandate of the committee as they are the practice of the international organisation with recognised and long-established expertise in the interpretation and implementation of these rights. It is a specialised body of law which can inform the general guarantees set out in the human rights treaties. In the current case, ILO Convention No. 87 is directly relevant, in that both article 22 of the ICCPR and article 8 of the ICESCR expressly state that measures which are inconsistent with the guarantees provided for in ILO Convention No. 87 will not be consistent with those rights.

1.47 The committee notes that neither the explanatory memorandum nor the statement of compatibility for this bill include any reference to ILO commentary on the issues raised by these bills, either generally or specifically in relation to Australia.

1.48 The committee considers that it would assist its consideration of the human rights compatibility of bills if the statement of compatibility referred to the relevant practice of ILO supervisory bodies on issues raised by a bill, particularly where the bill raises issues relating to article 22 of the ICCPR and article 8 of the ICESCR and where ILO bodies have previously commented adversely on provisions which are substantially similar to those contained in a bill.

1.49 The committee intends to write to the Minister for Employment to request that, where a bill gives rise to issues that have been considered by ILO supervisory bodies (particularly where those bodies have made adverse comments about human rights compatibility in relation to current Australian legislation or similar provisions of previous Australian laws):

- **the committee's attention be drawn to those views in the statement of compatibility; and**
- **the statement of compatibility include the details of the government's formal response to those views (where available) as well as the government's position on whether it agrees or not with the ILO bodies' expert assessment.**

Right to organise and bargain collectively

1.50 The right to organise includes the right to bargain collectively, and is thus guaranteed by articles 22 of the ICCPR and article 8 of the ICESCR. The main bill seeks to introduce a new provision providing for the unenforceability of project

agreements. It provides that certain project agreements will be unenforceable to the extent that they are made with the intention of securing standard employment conditions for building employees working on multi-employer sites. According to the statement of compatibility:

> [t]he provision is intended to prevent the application of project or site-wide agreements (excluding agreements that are Commonwealth industrial agreements) to subcontractors and their employees who may already be covered by existing agreements or who may want to enter into their own agreements.[49]

1.51 This provision gives rise to concerns about compatibility with the right to organise and to bargain collectively. The statement of compatibility acknowledges that the provision limits the right to bargain collectively. The statement then refers to the findings of the 2003 Royal Commission, which concluded that site-wide agreements have the effect that the terms and conditions of the employment relationship between subcontractors and their employees are determined by processes in which they have not participated. According to the statement:

> the measure is appropriate to Australia's collective bargaining framework in that the provision is not intended to limit, nor does it prevent, collective bargaining at the level of particular enterprises. Rather, in implementing this recommendation of the Royal Commission, this provision supports the right to bargain collectively by protecting the rights of employees to negotiate their terms and conditions of employment with their employer and by ensuring that such terms and conditions contained in enterprise agreements cannot be undermined by site-wide agreements.[50]

1.52 The proposed provision is substantially similar to the now repealed section 64 of the 2005 Act. The ILO Committee on Freedom of Association and the ILO Committee on the Application of Conventions and Recommendations (CEACR) have each considered section 64 of the 2005 Act. The tripartite Committee on Freedom of Association commented:

> The Committee emphasizes that according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labour authority [see Digest, op. cit., para. 851]. … The Committee therefore requests the Government to take the necessary steps with a view to revising section 64 of the 2005 Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision

49 Statement of compatibility, p 52.

50 Statement of compatibility, p 52.

> of the administrative authority or the case law of the administrative labour authority. The Committee requests to be kept informed in this respect.'[51]

1.53 The independent expert ILO Committee on the Application of Conventions and Recommendations reiterated this concern in 2011, at a time when the then government indicated that it proposed to introduce into the Parliament a bill to repeal section 64 of the BCII Act, and 'expresse[d] once again the firm hope that the undertaken legislative reform in the building and construction industry will soon be completed in full conformity with the Convention.'[52]

1.54 The committee notes that two ILO supervisory bodies have taken the view that the predecessor provision was not consistent with the right to freedom of association and to bargain collectively. The committee also notes that the views of the ILO supervisory mechanisms in relation to Australia on this issue were not referred to in the explanatory memorandum or in the statement of compatibility.

1.55 The committee intends to write to the Minister for Employment to seek an explanation as to how, in light of the views expressed by the ILO Committee on Freedom of Association and the ILO Committee on the Application of Conventions and Recommendations, proposed new section 59 can be viewed as consistent with the right to freedom of association and to bargain collectively guaranteed by article 8 of the ICESCR, article 21 of the ICCPR and applicable ILO conventions.

Right to freedom of assembly and freedom of expression

1.56 The statement of compatibility notes that the proposed prohibition on unlawful picketing in clause 47 of the bill restricts the right to freedom of assembly.[53] The committee notes it would also limit freedom of expression. The committee notes the explanation provided in the statement of compatibility regarding how the measure is reasonable and proportionate to achieving a legitimate aim and has no further views on this point.

1.57 However, even if the proposed prohibition of certain types of picketing were justified as a legitimate restriction on the freedom of assembly and other relevant rights, that is not sufficient. If some groups are permitted to exercise a right to a greater extent than others, then issues of discrimination in relation to the right arise. As set out above, both the ICCPR and ICESCR guarantee the fulfilment of the rights in

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51 ILO Committee on Freedom of Association, *Case No 2326 (Australia), Report in which the committee requests to be kept informed of developments - Report No 338*, November 2005, para 448 (emphasis added).

52 Observation (CEACR) - adopted 2011, published 101st ILC session (2012 (Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973)).

53 Statement of compatibility, p 58.

the respective Covenants without discrimination, which would include discrimination on the basis of status as a worker in a particular industry. The statement of compatibility does not explicitly address the issue of discrimination in the fulfilment of rights, in relation to this right or other rights.

1.58 Two aspects of the issue arise in relation to unlawful picketing. First, to the extent that the type of picketing in question is prohibited only by building industry participants (if that is the case), no justification is offered why this should be so. If the picketing causes economic loss to others, it is not clear why that protection should be provided only to those in the building industry. Conversely, it appears that the picketing in question would be covered under the Fair Work Act, so that non-building industry workers and unions would be covered. However, they would not be subject to the same information-gathering regime or to the same penalties. This also gives rise to the issue of whether there is an objective and reasonable basis for distinguishing between the building and other industries.

1.59 The committee recognises that the restrictions on picketing pursue objectives that are legitimate, insofar as they are intended to protect the rights and interests of others. The committee considers that a case can be made that the restrictions bear a rational connection to the achievement of that objective, but that the severity of the penalties imposed may give rise to issues of proportionality.

1.60 In addition, the committee is of the view that the provisions give rise to issue of compatibility with the right to non-discrimination in the fulfilment of rights guaranteed by article 2(1) of the ICCPR and article 2(2) of the ICECSR, insofar as they apply more severe penalties and a more stringent enforcement regime to those engaged in such activities in the building industry.

1.61 The committee intends to write to the Minister for Employment to seek clarification as to:

- **how the application of the provisions relating to unlawful picketing only to building industry participants is compatible with article 2(1) of the ICCPR with respect to articles 19, 21 and 22 of the ICCPR and article 2(2) of the ICESCR with respect to article 8 of the ICECSR; and**
- **whether the picketing addressed by the bill would fall within prohibitions contained in the *Fair Work Act 2009* and, if so, why those provisions would not provide an adequate legislative response in relation to the building and construction industry as they do in relation to other industries.**

Right to privacy – coercive information-gathering powers

1.62 Proposed new chapter 7 of the main bill confers powers on the ABCC to require, by written notice (an examination notice), a person to produce information, documents or to attend before the ABC Commissioner to answer questions where the ABC Commissioner reasonably believes that the person has information or documents relevant to an investigation by an inspector into a suspected contravention, by a building industry participant, of the bill or a designated building law or is capable of giving evidence relevant to such an investigation.[54] Failure to comply with a notice constitutes a criminal offence, which carries a maximum penalty of imprisonment for six months.[55]

1.63 The proposed new information-gathering power is substantially similar to section 52 of the 2005 Act. The coercive investigatory powers of the 2005 Act (including section 52) and the desirability of continuing them were the subject of review by the Hon Murray Wilcox QC in his review of the 2005 Act. Mr Wilcox took the view that, notwithstanding the considerable criticism that these coercive powers had received, it was appropriate to continue to make these powers available to the regulator for a further period, subject to a sunset clause.[56] However, he considered it essential to include a number of safeguards in relation to the exercise of those powers.[57]

1.64 As a result, the current provisions in the 2012 Act provide for a two-stage process for the exercise of the power. Where the Director of the Fair Work Building Inspectorate believes on reasonable grounds that a person has information or documents, or is capable of giving evidence, that is relevant to an investigation, the Director may apply to a nominated AAT presidential member for the issue of an examination notice. Such an application must include certain information so as to enable the presidential AAT member to assess, among other matters, the necessity of issuing the notice. The AAT member must be satisfied, for example, that there are reasonable grounds to believe that the person has information, documents or evidence, or is capable of giving evidence, relevant to the investigation, that any other method of obtaining the information, documents or evidence (i) has been

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54 Proposed new section 61 of the main bill. A 'designated building law' is defined in section 5 as the *Independent Contractors Act 2006*, the *Fair Work Act 2009, Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, or* a Commonwealth industrial instrument.

55 Proposed new section 62 of the main bill.

56 The Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry Report*, March 2009, paras 1.24-1.26.

57 Wilcox, *Transition to Fair Work Australia for the Building and Construction Industry Report* , pp 6-7, Recommendations 3 and 4.

attempted and has been unsuccessful; or (ii) is not appropriate, and that the information, documents or evidence would be likely to be of assistance in the investigation.

1.65 The 2012 Act also requires notification of the issue of an examination notice, and the provision of a copy of the notice and supporting documentation to the Commonwealth Ombudsman.[58] It also requires the Ombudsman to review the exercise of the examination powers and to provide an annual report to Parliament about examinations conducted during the year, as well as any other reports about the results of reviews into the exercise of the examination powers that the Ombudsman considers appropriate.[59]

1.66 The FWBC reported in 2013 that in the year 2012-2013 it had successfully applied for the issue of two examination notices as part of one investigation (which was continuing as of 30 June 2013), and that it had not applied for the issue of any other examination notices during that period. FWBC did not conduct any examinations under section 45 of the FWBI Act during the reporting period.[60] In 2013 the Commonwealth Ombudsman reported on one examination.[61]

1.67 This bill proposes to continue some, but not all, of the additional protections that form part of the existing coercive information gathering powers under the 2012 Act.

1.68 These powers and associated provisions give rise to significant human rights concerns because of their breadth, the deployment of coercive powers in relation to civil wrongdoing rather than serious criminal offences, their application only to one part of the workforce, the limited procedural safeguards restricting and monitoring their use, the abrogation of the right of persons not to incriminate themselves, and the significant maximum penalty available for a failure to cooperate.

1.69 The right to privacy prohibits arbitrary or unlawful interference with a person's privacy, family, home or correspondence. Limitations must seek to achieve a legitimate objective, bear a rational connection between the limitation and the objective and be proportionate to the objective.

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58 *Fair Work (Building Industry) Act 2012*, section 47.

59 *Fair Work (Building Industry) Act 2012*, section 54A.

60 Fair Work Building and Construction, *Annual Report 2012-13*, p 36.

61 Commonwealth Ombudsman, *Annual report by the Commonwealth Ombudsman: review conducted under Division 3 of the Fair Work (Building Industry) Act 2012*, November 2013 (report on one examination carried out on 18 June 2012 with full documentation provided to the Ombudsman in July 2012).

Legitimate objective

1.70 The statement of compatibility justifies the inclusion of the provision by reference to recommendations arising out of the 2003 Royal Commission, which recommended that the ABCC should be given the same coercive powers as those possessed by the Australian Competition and Consumer Commission under the *Trade Practices Act 1974*.[62] According to the Royal Commissioner, the ABCC would need this power 'to penetrate the veil of silence behind which many decisions to take unlawful industrial action are hidden. Those who will be best placed to give information concerning breaches of the civil law will often, even usually, be complicit in those breaches.'[63]

1.71 Accordingly, it appears to the committee that, on the basis of the explanatory materials, the powers are deemed as necessary to enable information gathering that will lead to the identification of persons engaged in unlawful industrial action. Further, due to the prevalence of such conduct in the building and construction industry, such powers are deemed to be necessary to bring about greater harmony in the industry and higher levels of productivity.

1.72 The committee considers that the goal of seeking to ensure that participants in an industry observe the workplace relations laws that apply to that industry (assuming the substance of those laws are otherwise consistent with human rights including freedom of association and the right to bargain collectively) is a legitimate objective within the meaning of the ICCPR and ICESCR.

Rational connection

1.73 Assertions that a measure will contribute to the achievement of the objective are not sufficient to discharge the onus of demonstrating there is a rational connection where the matter is capable of evaluation in light of empirical evidence. While it may be difficult to predict the impact of particular legislative provisions, there is some experience under the similar provisions of the 2005 Act and the 2012 Act, as well as discussion in the industrial relations literature which assesses the relative impact of coercive power regimes and more collaborative regimes.[64] However, the statement of compatibility contains no reference to the experience under these statutory regimes of the use of the powers or any assessment of

62 Sections 155 and 156 of the *Trade Practices Act 1974*, now section 155 of the *Competition and Consumer Act 2010*.

63 Statement of compatibility, pp 62-63.

64 See C Allan, A Dungan and D Peetz, D, '"Anomalies", Damned "Anomalies" and Statistics: Construction Industry Productivity in Australia' (2010) 52(1) *Journal of Industrial Relations* 61, 63-64 and sources cited there.

whether they have had any significant impact in the achievement of the similar goals set out under the earlier legislation.

1.74 The committee considers that, on the basis of the material provided in the explanatory memorandum and statement of compatibility, it has not at this stage been clearly demonstrated that there is a rational connection between the conferral of coercive information-gathering powers on the ABCC and the achievement of the stated goals.

Reasonable and proportionate measure

1.75 The statement of compatibility merely reasserts the continuing need for these powers by referring to the report of the Royal Commission and points to the procedural requirements that must be followed and to the review of such examinations by the Commonwealth Ombudsman. It concludes on the basis of these factors that the restriction on the right to privacy involved is not arbitrary.

1.76 The committee considers there are a range of other factors which need to be addressed in order to assess whether the powers are reasonable and proportionate. These include:

- the fact that the coercive information-gathering powers relate to investigations of civil wrongdoing, not of suspected criminal conduct;
- the fact that only participants in the building and construction industry are subject to this legislative regime, while other workers and employers are subject to legislation with a less stringent enforcement mechanism;
- the relative level of penalties imposed under this legislative regime both in relation to the substantive civil penalty violations and for failure to comply with an examination notice, compared with violations under the Fair Work Act;[65]
- the fact that much, if not all, of the prohibited industrial action covered by the bills could be viewed as falling within prohibited conduct under the Fair Work Act;
- the removal of the privilege against self-incrimination (albeit with the provision of use and derivative use immunity);
- the limited safeguards that apply prior to the issue of an examination notice; and

65 The statement of compatibility (p 58) asserts, without further, 'the need for higher penalties to apply'.

- any significant improvement in the conditions the Royal Commission found existed in the building industry in light of the findings in the Wilcox report that there had been some progress in the period 2005 to 2009.

1.77 Of particular importance in this regard is the issue of whether there are adequate safeguards against abuse provided for under the legislation. Of relevance are the recommendations of the Wilcox inquiry about the need for further safeguards on the exercise of section 52 of the 2005 Act, which corresponds in many respects to proposed section 61 of the main bill. [66]

1.78 Part 2 of Chapter 7 of the bill contains none of the safeguards which the Wilcox review recommended should apply *prior* to the issue of an examination notice and which were adopted in the FWBI Act. In relation to the procedures to be adopted after the issue of an examination notice, the bill provides for a person to be represented by a lawyer when attending before the ABC Commissioner.[67] It also requires the ABC Commissioner to notify the Commonwealth Ombudsman of the issue of an examination notice and relevant documentation (including a report, a video recording and transcript of the examination[68]) and requires the Ombudsman to review the exercise of powers under Part 2 of Chapter 7 and to provide an annual report to Parliament about examinations conducted during the year, as well as any other reports about the results of reviews into the exercise of the examination powers that the Ombudsman considers appropriate.[69]

1.79 Further, as noted above, even if these provisions are considered to be compatible with the right to privacy, if some groups are permitted to exercise a right to a greater extent than others, then issues of discrimination arise. The issue arises

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66 The committee also notes that the coercive information gathering powers under the 2005 Act were criticised by the ILO Committee on Freedom of Association for the breadth of the powers conferred and the absence of adequate safeguards. See Committee on Freedom of Association, *Case No 2326 (Australia), Report in which the committee requests to be kept informed of development - Report No 338*, November 2005, paras 454-456; *Case No 2326 (Australia), Effect given to the recommendations of the committee and the Governing Body - Report No 353*, March 2009, paras 21-24. The Australian government indicated to the ILO 'the retention of these powers is balanced by the introduction of significant new safeguards, including a sunset provision three years after they come into effect'. *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries*, International Labour Conference, 102nd Session, 2013, p 537 (in the context of the Labour Inspection Convention, 1947 (No 81).

67 Proposed new section 61(4).

68 Proposed new section 65(2).

69 Proposed new section 65 (3), (6) and (7).

here insofar as building industry participants are subject to a regime of civil penalty provisions with higher penalties than apply under the generic provisions of the Fair Work Act, and are subject to a more stringent investigation and enforcement regime. To the extent that two different groups of workers or employers are subject to different penalties and procedures for substantially similar violations of industrial law, the question arises whether there is an objective and reasonable basis for distinguishing between building industry participants and others. The statement of compatibility does not explicitly address the issue of discrimination in relation to the right to privacy.

1.80 The committee notes that the power under proposed section 61 to compel attendance and the production of information and documents is unusual in the context of industrial relations laws in Australia, involves a significant encroachment on the right to privacy and needs to be clearly justified. As presently drafted, the provision raises human rights compatibility concerns.

1.81 The committee notes that neither the explanatory memorandum nor the statement of compatibility provides any information about the extent of the use of similar powers under the previous and existing laws, for the purpose of assessing whether they have been necessary for the achievement of the purposes of that legislation and whether there have been any instances of misuse of the powers.

1.82 The committee does not consider that the material provided clearly establishes that this is a reasonable and proportionate measure. The committee considers that, if the power to issue compulsory examination notices is to be retained, additional safeguards are required. The committee is concerned that the safeguards which were recommended by the Wilcox review and which were included in the 2012 Act have not been included in this bill.

1.83 The committee is of the view that, in any event, the provisions give rise to issues of compatibility with the right to non-discrimination guaranteed by article 2(1) of the ICCPR in conjunction with article 17 of the ICCPR, and article 2(2) of the ICESCR in conjunction with article 8 of the ICESCR, insofar as they apply heightened penalties and a more stringent enforcement regime to building industry participants than is applied to those who are not building industry participants for substantially the same industrial conduct.

1.84 The committee intends to write to the Minister to:

- **seek clarification as to why the application of a more stringent enforcement regime to building industry participants than is applied to those who are not building industry participants for substantially the same industrial conduct should not be considered discriminatory and incompatible with article 2(1) of the ICCPR in conjunction with article 17**

of the ICCPR, and article 2(2) of the ICECSR in conjunction with article 8 of the ICECSR; and

- **to recommend that, if the coercive investigative power is to be retained, Part 2 of Chapter 7 of the bill be amended so that the power to issue an examination notice does not lie within the sole discretion of the ABC Commissioner, but should be subject to independent review including the type of safeguards which were recommend by the Wilcox review and included in the FWBI Act.**

Right to privacy – disclosure of information

1.85 Proposed new section 61(7) of the main bill provides that the power of the ABCC to compel the disclosure of information or documents is 'not limited by any provision of any other law that prohibits the disclosure of information (whether the provision is enacted before or after the commencement of this section, except to the extent that the provision expressly excludes the operation of this section.' This provision is similar in scope to old section 52(7) of the 2005 Act and to section 57 of the 2012 Act.

1.86 The Wilcox inquiry described the substantially similar provision in section 52(7) of the 2005 Act as 'an extraordinary override provision'.[70] The committee considers that the provision appears to subordinate all previous legislative decisions about the protection of confidential personal information to the policy embodied in this particular piece of legislation which relates to the regulation of one sector of the economy. Simply to provide, as clause 61(7) does, that information the disclosure of which is protected under one law may be disclosed for the purpose of another law gives rise to concerns about the compatibility of the provision with the right to privacy guaranteed by article 17 of the ICCPR.

1.87 Previous non-disclosure or secrecy provisions reflect legislative decisions that seeks to ensure that the intrusion on personal privacy necessary for achieving the legislative purpose is not excessively broad. This is achieved by providing that information obtained through the use of coercive information-gathering powers may be disclosed only to those involved in the administration of the law in question or for the purposes of related legislation.

1.88 *Legitimate objective:* Neither the explanatory memorandum nor the statement of compatibility address this issue. However, the objective being pursued by the provision is to ensure that information that is relevant to the implementation of the legislation is available to the regulator. This would appear to be a legitimate

70 The Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry Report*, March 2009, p 31.

objective, to the extent that the substantive provisions being implemented are otherwise consistent with human rights.

1.89 *Rational connection*: The measure is arguably rationally connected to the achievement of the objective suggested above.

1.90 *Proportionality:* The statement of compatibility does not address the issue of whether the measure is a reasonable and proportionate measure in pursuit of the objective. Given that the clause proposes to disapply, for the purposes of this legislation, all existing non-disclosure provisions in Commonwealth law, without regard to the balance that may have been struck between privacy interests and other interests in particular circumstances, the provision appears disproportionate.

1.91 The committee considers that the limitations on the right to privacy proposed by clause 61(7) have not been demonstrated to be a proportionate measure.

1.92 Proposed new section 105 of the main bill allows for the disclosure of information acquired by a wide range of persons in the performance of a wide range of functions or powers. Such information may be disclosed by the ABC Commissioner or Federal Safety Commissioner where the Commissioner reasonably believes that it is necessary or appropriate to do so for the performance of the Commissioner's functions or the exercise of the Commissioner's power, or if the Commissioner reasonably believes that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

1.93 There is no limitation specified as to the nature of the law of the Commonwealth, State or Territory, the administration of enforcement of which may be assisted by such disclosure.

1.94 As the information that may be acquired by eleven different persons or categories of persons specified under proposed new section 105(1) includes personal information protected by article 17 of the ICCPR, the broadly defined power to disseminate the information gives rise to compatibility issues. There is no suggestion that it may be disseminated only in relation to laws relating to the regulation of the building industry or that a broader dissemination is justifiable.

1.95 The explanatory memorandum and the statement of compatibility provide a summary of the provisions but do not provide any further information.[71]

71 Statement of compatibility, pp 64-65.

1.96 The committee considers that the limitations on the right to privacy proposed by section 105 have not been demonstrated to be a proportionate measure.

Right to privacy – powers of entry into premises

1.97 Proposed new section 72 of the main bill confers on authorised officers powers to enter both business and residential premises for various compliance purposes. Proposed new section 74 authorises the exercise of a wide range of powers on those premises after entry. While forced entry is not permitted, the provisions authorise entry regardless of whether consent is given. There is no requirement for a warrant to be sought.

1.98 The provisions give rise to a number of human rights concerns, including whether the power can be justified as necessary and whether there are adequate safeguards against abuse, both prior to the exercise of the powers and subsequently. The statement of compatibility provides little other than description and general justification of the provisions.

1.99 The committee notes that the Senate Scrutiny of Bills Committee has raised concerns about these provisions and has noted that 'the explanatory material do not contain a compelling justification of departure from the general principle … that authorised entry to premises be founded upon consent or a warrant.'[72] The Scrutiny of Bills Committee has sought from the Minister justification for the approach adopted and also advice as to whether appropriate safeguards were considered (including the requirement of senior executive authorisation and the adoption of guidelines for the exercise of the powers).[73]

1.100 The committee considers that the powers of entry and related powers raise issues of compatibility with the right to privacy guaranteed by article 17 of the ICCPR.

1.101 The committee intends to write to the Minister to seek further information about the lack of requirements of consent or warrant and why procedural safeguards for the exercise of such powers have not been included.

Right to a fair hearing – imposition of a burden of proof on the defendant

1.102 Proposed new section 57 of the main bill provides for a reverse onus of proof in applications to a court in relation to a contravention of the prohibition of unlawful picketing (proposed new section 47) or in relation to any other civil remedy provision

72 Senate Scrutiny of Bills Committee, *Alert Digest No 9 of 2013*, p 14.

73 Senate Scrutiny of Bills Committee, *Alert Digest No 9 of 2013*, p 14.

in Chapter 6 of the bill. The provision provides that in such actions (other than proceedings for an interim injunction), where 'it is alleged that a person took, or is taking, action for a particular reason or with a particular intent' and 'taking that action with that intent would constitute a contravention of the section or provision',

> it is presumed in proceedings arising for the application, that the action was, or is being taken for that reason or with that intent, unless the person proves otherwise.[74]

1.103 As the statement of compatibility acknowledges, the effect of the provision is to require the defendant in such proceedings to discharge a legal burden, that is to prove on the balance of probabilities that he or she did not take the action in question for that reason or with that intent (including that if the person took the action for a number of reasons, that none of the reasons were one of the prohibited reasons).[75] The statement of compatibility refers to the similar provision in section 361 of the Fair Work Act.[76]

1.104 The imposition of a burden of proof on a defendant, even in civil proceedings, engages the right to a fair hearing under article 14(1) of the ICCPR. The imposition of a burden, and the nature of that burden (whether a legal burden or an evidential burden), must be justified as reasonable in the context of the right to a fair hearing, which guarantees equality of arms and respect for the principle of adversary proceedings. As a starting point, normally a person who wishes to rely on a particular fact in civil proceedings would be expected to bear the onus of proof in relation to that matter. In the present case, all that appears to be required is proof that certain actions have been taken, accompanied by an allegation by the plaintiff that the motivation for the actions was a prohibited one (whether or not that is an inference that might be reasonably drawn from the fact of the actions).

1.105 The effect of the provision is that a defendant is required to prove, on the balance of probabilities, a negative fact, namely that the defendant's actions were not motivated in part or whole by a prohibited motive. This will normally be done by the defendant seeking to demonstrate the reason for his or her actions.

1.106 The statement of compatibility justifies the reverse onus provision on the ground that it would be difficult, if not impossible, for a complainant to establish a person's intent because the reasons for the person's action are peculiarly within their knowledge. Further:

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74 Proposed new section 57(1).

75 Statement of compatibility, pp 55-56.

76 Similar provision is also made by section 783 of the *Fair Work Act 2009* in relation to the prohibitions on termination of employment on certain grounds contained in section 772 of that Act.

> [t]his presumption can be rebutted by the person on the basis that their conduct was motivated by another purpose. Whether the alternative motivation is accepted by the court will be determined on the balance of probabilities. It is therefore submitted that these restrictions are reasonable in the circumstances and are proportional, legitimate and necessary.[77]

1.107 The Senate Committee for the Scrutiny of Bills commented in relation to this provision:

> Although it may be accepted that a person's intent is a matter peculiarly known to the person, intentions and motivations (whether lawful or unlawful) may be difficult to prove as they will not necessarily be reflected in objective evidence. That is, although peculiarly within a person's knowledge, matters of intention may nonetheless remain difficult to prove. In this respect it is noted that the explanatory materials do not indicate why, in practice, it is considered that a person will, in this context, be able to produce evidence of a lawful intention. **As such the committee seeks the Minister's further advice as to the justification for, and fairness of, the proposed approach.**[78]

1.108 The committee shares the concerns of the Scrutiny of Bills Committee. The committee further notes that the statement of compatibility refers to the existence of similar provisions in the Fair Work Act, but provides no information on the operation of those provisions in practice. Such information would be of assistance to the committee in determining whether provisions similar to clause 57 have operated fairly in practice.

1.109 The committee intends to write to the Minister for Employment to seek further information about the practical operation of existing provisions in the *Fair Work Act 2009* that are similar to the proposed new section 57 (in particular sections 361 and 783) and in particular whether any difficulties have arisen for defendants on whom a legal burden has been placed that have affected their right to a fair hearing under article 14(1) of the ICCPR.

Prohibition against self-incrimination

1.110 Proposed new section 102(1) of the main bill provides that a person is not excused from providing information or documents in response to certain requests for that information or material, on the ground that to do so would contravene any other law or might tend to incriminate the person or otherwise expose the person to a penalty or other liability. These are:

- an examination notice issued under proposed new section 61
- a request made under proposed new section 74(1)(d) by an authorised Federal Safety Officer or inspector who has entered premises; or

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77 Statement of compatibility, p 56.

78 Senate Scrutiny of Bills Committee, *Alert Digest No 9 of 2013*, p 10 (emphasis in original).

- a notice under proposed new section 77(1) issued by an authorised officer to produce a record of document.

1.111 Proposed section 102(2) provides for use and derivative use immunity in relation to information or documents provided pursuant to an examination notice under proposed section 61. This protection applies to all proceedings (other than the common exceptions related to the failure to comply with an examination notice, provision of false information and the obstruction of Commonwealth officials). Proposed section 102(3) also provides for use and derivative use immunity in relation to information or documents provided under proposed sections 74(1)(d) and 77(1), but only in relation to criminal proceedings (other than the common exceptions mentioned above).

1.112 The statement of compatibility relies on the recommendation of the 2003 Royal Commission that the right of a person to refuse to comply on the basis that to do so might tend to incriminate the person be removed, subject to the provision of use and derivative use immunity in both criminal and civil matters. The statement of compatibility contains no information about the use of these powers under the previous or current laws that might provide the basis for an assessment of whether the removal of the protection is necessary.

1.113 The committee notes that clear justification must be provided for the abrogation of the right not to incriminate oneself, even where use and derivative use immunity is provided. The protection afforded by the provision of use and derivative use immunity does not constitute the full protection provided for by the privilege against self-incrimination. The committee considers the approach adopted by the Senate Standing Committee for the Scrutiny of Bills to be helpful in assessing whether the abrogation of the protection is permissible from a human rights perspective.[79] The committee notes that the Senate Scrutiny of Bills Committee has sought from the Minister for Employment 'a fuller explanation of the public interest and why the abrogation of the privilege is considered absolutely necessary.'[80]

1.114 The committee intends to write to the Minister for Employment to seek further information about the use that has been made of the compulsory evidence gathering powers under the 2005 Act and the *Fair Work Act 2009*, as well as further

79 'The committee does not, therefore, see the privilege against self-incrimination as absolute. In considering whether to accept legislation that includes a p rovision affecting this privilege the committee must be convinced that the public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights.' Senate Standing Committee for the Scrutiny of Bills, *The work of the committee during the 42nd Parliament February 2008 – June 2010* (2013), para 2.6.

80 Senate Scrutiny of Bills Committee, *Alert Digest No 9 of 2013*, p 17.

explanation of how, in light of that experience and the passage of over a decade since the Royal Commission report, the abrogation of the privilege is justifiable.

Civil penalty provisions

1.115 Part 2 of Chapter 8 of the main bill sets out the pecuniary penalties that may be imposed for violations of the civil penalty provisions in the bill, as well as the procedures that are to be followed. As noted above, the maximum pecuniary penalty that may be imposed on individuals for Grade A civil penalty violations is 200 penalty units ($34,000).[81]

1.116 Although the penalties are described as 'civil' under domestic law, for the purposes of human rights law, they may under certain circumstances be considered 'criminal', and attract the protections applying to criminal charges and criminal proceedings in the ICCPR.

1.117 The statement of compatibility addresses in some detail the question of whether the civil penalty provision should be characterised as 'criminal' for the purposes of human rights compatibility analysis.[82] Taking into account the committee's Interim Practice Note 2 on civil penalties, the statement of compatibility considers the classification of the penalty under Australian law, the nature of the penalties (which it argues are regulatory in nature), and the severity of the penalty.

1.118 The committee notes that proposed new section 81 of the main bill specifies separately the power of a court to impose a pecuniary penalty on a defendant and an order to pay compensation to a person for damage suffered by the person as a result of the contravention of a civil penalty provision. The pecuniary penalty, which may be sought by the regulator and any other person with an interest, may be ordered to be paid to the Commonwealth or some other person if the court so directs. This may suggest that the pecuniary penalty order is not compensatory and may provide a basis on which the provision should be characterised as criminal.

1.119 The committee also has concerns about the severity of the penalties that may be imposed on individuals of up to $34,000 (200 penalty units). The severity of a penalty may in itself be sufficient to justify the characterisation of a provision as 'criminal'. The statement of compatibility addresses the issue as follows:

> One of the primary drivers behind industry specific legislation for the building and construction industry is the need for higher penalties to apply. Despite this, the Courts act independently in determining the appropriate penalty to apply within the limits set out in

81 Proposed new section 81(2).

82 Statement of compatibility, pp 36-38.

> the legislation and are informed by considerations of proportionality. While the Courts will have the ability to apply high penalties, this will only be applied to the most severe cases.[83]

1.120 This does not provide any basis on which to assess the severity of the penalty, and the committee considers that the sum that may be imposed by way of a pecuniary penalty on an individual may be sufficiently large so as to constitute a criminal penalty.

1.121 The committee considers that the pecuniary penalty for Grade A civil penalty violations, which carries a maximum penalty of $34,000 (or 200 penalty units) for an individual, might reasonably be characterised as criminal for the purposes of human rights law. As a result, proceedings for their enforcement would be required to comply with the guarantees that apply to criminal proceedings under articles 14 and 15 of the ICCPR, including the right to be presumed innocent, the right not to be tried or punished twice for the same offence and the right to the privilege against self-incrimination.

83 Statement of compatibility, p 58.

Criminal Code Amendment (Harming Australians) Bill 2013

Sponsor: Senator Xenophon
Introduced: Senate, 11 December 2013

Summary of committee concerns

1.122 The committee seeks further information to determine whether the bill is compatible with the prohibition against retrospective criminal laws.

Overview

1.123 This bill proposes to extend the application of existing offences in the *Criminal Code Act 1995* relating to harming Australians overseas. These offences criminalise the murder or manslaughter of, or causing of serious harm to, Australian citizens or residents outside of Australia. The offences commenced on 1 October 2002 and therefore apply to acts committed after that date. The bill proposes to amend these offences so that they apply to acts which occur before, on or after the commencement of the offences.

Compatibility with human rights

Statement of compatibility

1.124 The bill is accompanied by a statement of compatibility that states that the bill engages the right to a fair trial,[1] including the presumption of innocence[2] and other minimum guarantees in criminal proceedings.[3] The statement states that the bill 'does not limit or constrain these rights in any way, as the provisions it amends do not directly relate to enforcement or the justice system'.[4] The statement also states that the bill engages the prohibition on retrospective criminal laws,[5] but that:

> [t]he provisions in the Bill relate to the crimes of murder, manslaughter and serious harm to another person, all of which already exist in other jurisdictions. As such, the Bill does not introduce retrospective crimes, but instead extends the capacity for involvement of Australian law enforcement that this Division already provides'.[6]

1.125 The statement concludes that the bill is compatible with human rights because it does not limit any existing rights or breach the prohibition on retrospective criminal laws.

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1 Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

2 Article 14(2) of the ICCPR.

3 Articles 14(3), (5), (6) and (7) of the ICCPR.

4 Statement of compatibility, p 1.

5 Article 15 of the ICCPR.

6 Statement of compatibility, p 1.

Committee view on compatibility

Prohibition against retrospective criminal laws

1.126 The offences which are the subject of this bill were introduced in 2002, through the *Criminal Code Amendment (Offences Against Australians) Act 2002* (the 2002 Act). The measures were implemented in the aftermath of the Bali bombing attack, which occurred on 12 October 2002. The attack killed 202 people, including 88 Australians. According to the explanatory memorandum accompanying the 2002 bill:

> [t]he offences will provide coverage for overseas attacks on Australian citizens and residents, and in appropriate circumstances enable the perpetrators of those attacks to be prosecuted in Australia. The new offences will complement the existing terrorism legislation, and will provide a prosecution option where perpetrators are unable to be prosecuted under the terrorism legislation.[7]

1.127 In introducing the offences, the then Attorney-General, Mr Daryl Williams MP, stated:

> The government is strongly committed to ensuring that Australia has every tool it needs to prosecute those who engage in heinous crimes overseas against Australian citizens and residents, such as those we experienced in Bali. … It will ensure there are no loopholes in terms of prosecuting terrorist acts involving murder overseas. And it further strengthens legislation in our new counter-terrorism package, which already has extraterritorial effect.[8]

1.128 While the 2002 Act received Royal Assent and commenced on 14 November 2002, Schedule 1 to the Act containing the new offences commenced retrospectively with effect from 1 October 2002, approximately six weeks prior to their enactment. Given the government's intention in introducing the offences, it appears that the offences were intended to be applicable to the Bali attack, which occurred approximately one month prior to the passage of the legislation.

1.129 According to the explanatory memorandum accompanying the 2002 bill:

> Whilst retrospective offences are generally not appropriate, retrospective application is justifiable in these circumstances because the conduct which is being criminalised – causing death or serious injury – is conduct which is universally known to be conduct which is criminal in nature. These types of offences are distinct from regulatory offences which may target conduct not widely perceived as criminal, but the conduct is criminalised to achieve a particular outcome.[9]

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7 Criminal Code Amendment (Offences Against Australians) Bill 2002, Explanatory memorandum, p 1.

8 Criminal Code Amendment (Offences Against Australians) Bill 2002, Second reading speech, Mr Daryl Williams MP, *Senate Hansard*, Tuesday 12 November 2002, p 8797.

9 Criminal Code Amendment (Offences Against Australians) Bill 2002, Explanatory memorandum, p 2.

1.130 The current bill seeks to extend the retrospective nature of the offences so that they would apply at any time before the commencement of the provisions. The committee does not consider that, as stated in the statement of compatibility, the bill merely 'extends the capacity for involvement of Australian law enforcement that this Division already provides'.[10] The bill expands the scope of the offences so that a person may be prosecuted under the offences for conduct which occurred at any time prior to the introduction of the offences, including before 1 October 2002.

1.131 Article 15 of the International Covenant on Civil and Political Rights (ICCPR) contains the prohibition against retrospective criminal laws and provides that no-one can be found guilty of an offence that was not a crime 'under national or international law' at the time it was committed. The prohibition supports long-recognised criminal law principles that there can be no crime or punishment without a prior provision by law. This is an absolute right which cannot be limited.

1.132 For an offence to be a crime under national law for the purposes of article 15(1), it must generally be based in statute or the common law. An offence under international treaty law may fulfil the requirement of a crime under 'international law' under article 15(1).[11]

1.133 A criminal offence may be considered to be based in either national or international law for the purposes of the prohibition (and as such not contrary to the prohibition) where it satisfies the requirements of accessibility and foreseeability.[12] In other words, a person should be able to reasonably foresee the consequences of their actions. This may be the case even where conduct is not expressly prohibited at the time which the conduct occurs, but which a person may reasonably be able to foresee may attract criminal sanction.

1.134 Article 15(2) of the ICCPR sets out an exception to the prohibition so that the prohibition will not apply if the relevant act was criminal at the time it was committed 'according to the general principles of law recognised by the community of nations'. Accordingly, the retrospective criminalisation of an act which is recognised as criminal under customary international law may not infringe the prohibition.[13]

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10 Statement of compatibility, p 1.

11 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), p 360.

12 See, for example, the jurisprudence of the European Court of Human Rights in: *SW v UK* (Application No. 20166/92, 22 November 1995), paras 35 and 43; *Kokkinakis v Greece* (Application No. 14307/88, 25 May 1993), para 52; and *G v France* (Application No. 15312/89, 27 September 1995), para 25. The UN Human Rights Committee has also stated that laws which are vague and not clearly prescribed will not satisfy the requirement that offences be established in law for the purposes of article 15: see Concluding Observations of the Human Rights Committee, Belgium, UN Doc. CCPR/CO/81/BEL (2004), para 24.

13 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), p 368.

1.135 As set out above, it appears to the committee that the purpose of these offences when they were originally introduced in 2002 was to strengthen Australia's counter-terrorism capabilities by enabling the prosecution in Australia of acts of international terrorism against Australians overseas. However, the committee notes that the offences themselves are not in fact limited to offences of terrorism, but apply to any murder, manslaughter or causing of serious harm to Australians overseas.

1.136 The committee intends to write to Senator Xenophon to seek further clarification on whether the offences which the bill seeks to apply prior to their commencement:

- **involve conduct which is based in international law for the purposes of article 15(1) of the ICCPR so as not to offend the prohibition;**
- **involve conduct which meets requirements of foreseeability for the purposes of article 15(1) of the ICCPR so as not to offend the prohibition; or**
- **involve conduct which is criminal according to the general principles of law recognised by the community of nations so as to fall within the exception to the prohibition in article 15(2) of the ICCPR.**

1.137 Further, the reasons behind why it was considered appropriate to commence the offences as they were originally introduced prior to their enactment and how the original offences were considered to be consistent with article 15 of the ICCPR may assist the committee in assessing the impact of the current proposal. Accordingly, the committee considers that it will also be useful to seek the views of the Attorney-General, as the Minister responsible for the *Criminal Code Act 1995*, on the above questions.

1.138 The committee would welcome the views of the Attorney-General, as the Minister responsible for the *Criminal Code Act 1995*, on the rationale behind the retrospective application of the existing offences and on the compatibility of the existing offences with the prohibition in article 15 of the ICCPR, to inform the committee's examination of the current proposal.

Right to be presumed innocent

1.139 Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. Absolute liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.140 However, absolute liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the

defendant's right to a defence. In other words, such offences must be reasonable, necessary and proportionate to that aim.

1.141 The offences which this bill seeks to expand apply absolute liability to the circumstance that the person who is harmed is an Australian citizen or resident.[14] Absolute liability is also applied to the circumstance of the offence of manslaughter that the conduct causes the death of another person.[15]

1.142 The committee considers that the application of absolute liability in the offences is likely to be compatible with the presumption of innocence. Notwithstanding the fact that the offences carry high maximum penalties (up to life imprisonment), absolute liability is only being applied to certain elements of the offence, elements which do not go to the core of the criminality being addressed.

1.143 The committee, however, emphasises its expectation, as set out in its Practice Note 1, that statements of compatibility should include sufficient detail of relevant provisions in a bill which impact on human rights to enable the committee to assess their compatibility. This includes identifying and providing a justification where absolute liability is applied, including where an existing application of absolute liability is expanded.

14 *Criminal Code Act 1995*, s 115.1(2), s 115.2(2), s 115.3(2) and s 115.4(2).

15 Criminal Code Act, s 115.2(2).

Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013

Sponsor: Senator Xenophon
Introduced: Senate, 12 December 2013

Summary of committee concerns

1.144 The committee notes that it has previously examined the measures contained in this bill and, following this examination, sought clarification from Senator Xenophon in relation to a number of concerns. The committee is yet to receive a response and again seeks clarification on the matters raised.

Overview

1.145 This bill seeks to amend the *Criminal Code Act 1995* to make it a criminal offence for a person over 18 years of age to intentionally misrepresent his or her age in online communications with a person they reasonably believe to be under 18 years of age:

(a) for the purpose of encouraging the recipient to physically meet with the sender (or any other person); or

(b) with the intention of committing an offence.

1.146 The bill re-introduces measures which were contained in an identical bill introduced during the 43rd Parliament which lapsed due to the proroguing of Parliament.[1]

Compatibility with human rights

Statement of compatibility

1.147 The bill is accompanied by a statement of compatibility that addresses a number of the human rights engaged by the bill. The statement refers to the criminal procedure rights guaranteed by the right to a fair trial,[2] the right to privacy[3] and the rights of the child.[4]

Committee view on compatibility

1.148 The committee notes that our predecessor committee examined the measures contained in this bill in the 43rd Parliament.[5] The committee considered

1 Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013, introduced into the Senate on 2 February 2013.

2 Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

3 Article 17 of the ICCPR.

4 Including article 19(1) of the Convention on the Rights of the Child.

5 See PJCHR comments on the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013, *Third Report of 2013*, p 5.

that the measures appeared to limit the right to freedom of expression,[6] the right to privacy,[7] and possibly the right to freedom of association,[8] but that these limitations were aimed at the legitimate objective of seeking to protect children.

1.149 However, in order for limitations to be permissible, they must be rationally related to achieving that objective and be a reasonable and proportionate means of pursuing that goal. The committee wrote to Senator Xenophon to seek further clarification as to why it was necessary (in addition to the offence of misrepresenting one's age with the intent of committing an offence) to have a separate offence of misrepresenting one's age to encourage a child to meet the defendant with no intention to commit an offence. The committee also sought clarification as to how imposing an evidential burden on the defendant under proposed section 474.41(2) of the bill was compatible with the right to be presumed innocent.[9]

1.150 The committee is yet to receive a response from Senator Xenophon addressing its concerns.

1.151 The committee intends to write to Senator Xenophon seeking clarification on the matters raised by the committee following its previous examination of the measures in the bill, including why it is necessary to have a separate offence of misrepresenting one's age without an intention to commit an offence and how the bill is compatible with the right to be presumed innocent.

6 Article 19 of the ICCPR.

7 Article 17 of the ICCPR.

8 Article 22 of the ICCPR.

9 Article 14(2) of the ICCPR.

Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013

Sponsor: Senator Farrell
Introduced: Senate, 12 December 2013

Summary of committee concerns

1.152 The committee thanks Senator Farrell for providing a comprehensive statement of compatibility, which has greatly assisted the committee in undertaking its scrutiny role.

1.153 The committee seeks further information as to why powers exercisable at defence access control points without consent are necessary. The committee also seeks further information as to how persons who are arrested without warrant by members of the Defence Force for the offence of trespass are dealt with prior to being brought before a law enforcement officer.

Overview

1.154 This bill seeks to establish a framework to enable and improve the ability of non-Defence users to access and use the Woomera Prohibited Area (WPA), an area which is primarily a prohibited area for defence purposes. The bill gives effect to the recommendations made in the Final Report of the Review of the Woomera Prohibited Area (the Review), which, according to the explanatory memorandum, found that the opening up of the WPA for resource exploration and mining 'would likely bring significant economic benefit to South Australia and the nation more broadly'.[1]

1.155 The bill proposes to amend the *Defence Act 1903* (Defence Act) to:

- authorise the Minister for Defence to make, by legislative instrument, the Woomera Prohibited Area Rules prescribing certain matters, including defining the WPA and the zones to be demarcated within that area;
- create a permit system for access and use by non-Defence users of the WPA;
- introduce offences and penalties for entering the WPA without permission and for failing to comply with a condition of a permit (including an infringement notice scheme and demerit point system for the latter);
- provide for compensation for any acquisition of property from a person otherwise than on just terms that results from the operation of the new regime;

1 Explanatory memorandum, p 2.

- provide that the Rules may limit the amounts of compensation payable by the Commonwealth for loss or damage in the WPA arising from a breach of common law or statutory duty of care in relation to the use of the area for the testing of war material; and
- include the WPA in the definition of defence premises in section 71A(1) of the Defence Act so that the powers of defence security officials set out in existing Part VIA of the Defence Act will be applicable in the WPA.

Compatibility with human rights

Statement of compatibility

1.156 The bill is accompanied by a detailed statement of compatibility that identifies that the bill engages a number of rights, including the right to life,[2] the right to liberty (including the prohibition against arbitrary detention),[3] the right to freedom of movement,[4] the right to be presumed innocent,[5] the right to privacy[6] and the right to culture.[7] The statement concludes that to the extent that the measures in the bill 'may limit human rights, those limitations are reasonable, necessary and proportionate'.[8]

1.157 The committee thanks Senator Farrell for providing such a comprehensive statement of compatibility, including an assessment of the existing powers in Part VIA of the Defence Act as applied to the WPA by the bill, as it has greatly assisted the committee in undertaking its scrutiny role.

1.158 The committee considers that, except in relation to those issues set out below, any limitations in the bill have been adequately explained in the statement of compatibility and as such do not appear to give rise to human rights concerns.

2 Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

3 Article 9 of the ICCPR.

4 Article 12 of the ICCPR.

5 Article 14(2) of the ICCPR.

6 Article 17 of the ICCPR.

7 Article 27 of the ICCPR and article 15 of the International Covenant on Economic, Social and Cultural Rights.

8 Statement of compatibility, p 18.

Committee view on compatibility

Right to privacy – powers exercisable without consent at defence access control points

1.159 The bill seeks to amend the definition of 'defence premises' in the Defence Act to include the WPA.[9] As a consequence, existing Part VIA of the Act (Security of defence premises) will apply to the WPA. Part VIA of the Act includes the powers exercisable by defence security officials at defence access control points and on defence premises.

1.160 Part VIA provides that a defence security official may, in relation to a person who is about to pass a defence access control point, request that that person provide identification information or undergo a limited search on the basis of consent.[10] It also provides for a power to request to search a vehicle, vessel or aircraft about to pass a defence access control point on the basis of consent.[11] If a person refuses such a request, the defence security official may refuse to allow a person to pass a defence access control point.[12] Part VIA also provides for the same powers to be exercised at defence access control points without consent by special defence officials.[13]

1.161 Powers to request information and to search a person without their consent engage and limit the right to privacy. Such limitations will only be permissible where they are necessary, reasonable and proportionate to achieving a legitimate objective.

1.162 It is not clear to the committee why it is necessary to have search and identification information request powers without consent at a defence access control point,[14] when defence security officials already have the power to refuse to allow a person to pass a defence access control point where a person refuses to consent to an information or search request.[15]

1.163 The committee intends to write to Senator Farrell to seek clarification as to why it is necessary to have non-consensual powers to search and request information from a person at defence access control points, for the purposes of preventing access to defence premises.

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9 Item 1 of Schedule 1 to the bill.

10 Section 71H of the *Defence Act 1903* (Defence Act).

11 Section 71J of the Defence Act.

12 Sections 71H(3)(a) and 71J(2)(a) of the Defence Act.

13 Sections 71R and 71S of the Defence Act.

14 Under sections 71R and 71S of the Defence Act.

15 Under sections 71H and 71J of the Defence Act.

Right to privacy – seizure powers

1.164 Existing Division 5 of Part VIA of the Defence Act provides for the power to seize things on defence premises. The power is exercisable by a special defence security official and allows an official to seize a thing if he or she believes on reasonable grounds that the thing may constitute a threat to the safety of a person on the premises or relate to a criminal offence committed, or that may be committed, on or in relation to the defence premises. Where the official believes on reasonable grounds that the thing has been used or otherwise involved in the commission of a criminal offence, the official must give the thing to police at the earliest practicable time.

1.165 Seizure powers engage and limit the right to privacy. The committee notes that the statement of compatibility did not address how the seizure powers in Part VIA are compatible with the right to privacy.

1.166 The committee considers that in this instance, the seizure powers applicable under the bill do not appear to raise issues of incompatibility with the right to privacy. The committee, however, emphasises its expectation, as set out in its Practice Note 1, that statements of compatibility should include sufficient detail of relevant provisions in a bill which may affect human rights to enable the committee to assess their compatibility. This includes identifying and justifying seizure powers which limit the right to privacy.

Prohibition against arbitrary arrest and detention

1.167 Part VIA of the Defence Act allows for the arrest without warrant of a person on defence premises by a member of the Defence Force if the member reasonably believes that the person has committed the offence of unauthorised entry on defence premises or defence accommodation.[16] If a member of the Defence Force arrests a person for this offence, he or she must, as soon as practicable after the arrest, bring the person, or cause the person to be brought, before a member or special member of the Australian Federal Police or a member of a State or Territory police force.[17]

1.168 Any person who is arrested or detained and charged with a criminal offence has the right to be brought promptly before a court.[18] The committee considers that the timeframe which is applicable to bringing a person before a law enforcement officer, that is 'as soon as practicable', is vague and may lead to delays in bringing a person before a court, given the nature and location of the WPA. The committee is concerned about the length of time a person may be detained before it may be 'practicable' to transfer a person to a law enforcement officer. Further, the

16 Section 72P of the Defence Act.

17 Section 72K of the Defence Act.

18 Article 9(3) of the ICCPR.

committee is concerned about where and under what conditions a person will be held, for example, whether a person will be able to contact a family member or friend, or have access to legal advice during the time they are held?

1.169 The committee intends to write to Senator Farrell to seek clarification in relation to:

- **how long a person who is arrested by a Defence Force member may likely be held before they are brought before a law enforcement officer and, in turn, before a court; and**
- **how such persons are to be dealt with until they are brought before both a law enforcement officer and a court.**

Rights of Indigenous persons

1.170 A key finding of the Review was that the economic benefits of developing the WPA were likely to be high. The Review report states that 'the South Australian Government assesses that over the next decade some $35 billion worth of developments, iron ore, gold and uranium projects, would be possible'.[19] The committee notes the measures in the bill are clearly aimed at maximising this potential through implementing a 'coexistence model' – that is, a model aimed at improving the coexistence of national security and economic interests in the WPA.

1.171 The committee is concerned about the potential impact on the rights of Indigenous persons of increased economic activity, including increased exploratory and mining activity, in the WPA. The statement of compatibility addresses the engagement of the bill with the rights of Indigenous peoples to enjoy and benefit from their culture, including cultural values and rights associated with their ancestral lands and their relationship with nature. It states that the bill 'has not altered the rights of Indigenous people to access their traditional lands in the Woomera Prohibited Area', in that the bill preserves the pre-existing rights under the *Defence Force Regulations 1952* for specified Indigenous persons to continue to access their traditional lands in the WPA.

1.172 The committee accepts that current rights of access will be preserved. However, it is unclear to the committee what kinds of impacts the increased economic activity in the WPA enabled by this bill, in particular mining and other developmental activities, will have on the rights of Indigenous persons.

1.173 The committee intends to write to Senator Farrell to seek further information as to whether the impacts on Indigenous persons of increased economic activity in the WPA enabled by this bill have been considered so as to ensure that the rights of Indigenous persons will be respected.

19 Australian Government, *Review of the Woomera Prohibited Area: Final Report,* 4 February 2011, p 5.

Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 4 December 2013

Summary of committee concerns

1.174 The committee seeks further information to determine whether the proposed repeal of existing complementary protection legislation with a view to reinstating discretionary administrative processes is compatible with human rights.

Overview

1.175 This bill seeks to repeal the complementary protection provisions in the *Migration Act 1958*. Those provisions were introduced by the *Migration Amendment (Complementary Protection) Act 2011*, with effect from 24 March 2012, to provide a statutory basis for implementing Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[1] Non-refoulement obligations under these treaties require Australia not to return people, including those who do not fall within the Refugee Convention definition of a 'refugee', to a country where there is a real risk that they would face torture or other serious forms of harm, such as arbitrary deprivation of life; the death penalty; or cruel, inhuman or degrading treatment or punishment. These are absolute rights and may not be subject to any limitations.

1.176 As a result of the 2012 changes, claims raising Australia's non-refoulement obligations under the ICCPR and the CAT are considered as part of the primary protection visa assessment framework. Therefore, a protection visa may be granted on the basis that the applicant is a refugee as defined in the Refugee Convention or on the basis that non-refoulement obligations under the CAT and the ICCPR are owed to the person.[2] This approach utilises a single, unified process for assessing protection claims, where applicants first have their claims considered against the Refugee Convention criteria and then, if not found to be refugees, against the complementary protection criteria. Applicants claiming complementary protection

1 The term 'complementary protection' refers to protection against refoulement (removal), which is additional to that provided by the 1951 Refugee Convention as amended by the 1967 Protocol (Refugee Convention).

2 The criteria for a protection visa are set out in s 36 of the *Migration Act 1958* and Part 866 of Schedule 2 to the *Migration Regulations 1994*. An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

have equivalent rights to independent merits review as those seeking protection under the Refugee Convention. A protection visa will be granted if the person is owed non-refoulement obligations and other visa requirements are met.[3] If a person is granted a protection visa on complementary protection grounds, their family members are also eligible to receive protection visas, if they are part of the same application.

1.177 Prior to the 2012 changes, the Minister's personal and non-compellable intervention powers to grant a visa, predominantly on humanitarian grounds under section 417 of the Migration Act, provided the only option for people who engaged Australia's non-refoulement obligations under the ICCPR or CAT but who did not meet the refugee criteria (and were therefore not eligible for a protection visa). The Minister's discretionary powers were enlivened only at the end of the refugee determination process and after the person had exhausted merits review.

1.178 This bill proposes to remove 'complementary protection' as a ground for the grant of a protection visa. The explanatory memorandum states that the amendments are intended 'to give effect to the government's position that it is not appropriate for complementary protection to be considered as part of a protection visa application'[4] and for 'Australia's non-refoulement obligations under the CAT and the ICCPR [to] be considered through an administrative process, as was the case prior to March 2012'.[5] The bill does not include guidance on the nature, scope or operation of the administrative process that is intended to replace the current statutory scheme.

1.179 The amendments proposed in the bill will apply prospectively to new protection visa applications as well as to current applications where a decision has not been finalised. This includes decisions which are under review or which have been reviewed and remitted to the original decision-maker.[6]

Consideration by other committees

1.180 On 5 December 2013 the bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry. The inquiry has received over 25 submissions from individuals and organisations. All the submissions, with the exception of the submission by the Department of Immigration and Border Protection, opposed the bill and expressed strong concerns at the proposal to revert to an administrative process for dealing with complementary protection claims. The Senate Legal and Constitutional Affairs Legislation Committee is due to report its findings on 3 March 2014.

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3 Statement of compatibility, p 1.

4 Explanatory memorandum, p 1.

5 Explanatory memorandum, p 1.

6 See items 20 and 21 of the bill and explanatory memorandum, pp 11-13.

1.181 The Senate Standing Committee for the Scrutiny of Bills considered the bill in its *Alert Digest No 9 of 2013*, published on 11 December 2013. That committee raised a number of concerns about the bill, which are discussed further below.[7]

Compatibility with human rights

Statement of compatibility

1.182 The bill is accompanied by a statement of compatibility that addresses the issue of whether the proposed repeal of the complementary protection provisions in the Migration Act is consistent with the Australia's non-refoulement obligations under the ICCPR and CAT.

1.183 The statement argues that the bill is compatible with these obligations because it 'does not seek to resile from or limit Australia's non-refoulement obligations'.[8] Instead, the bill 'seeks to move the assessment of these obligations from being considered as part of the protection visa assessment process under the [Migration] Act to a separate administrative process.'[9]

1.184 The statement contends that the bill is compatible with Australia's non-refoulement obligations on the basis of the following claims:

- The non-refoulement obligations under the ICCPR and the CAT do not need to be assessed as part of the protection visa assessment process and are a matter for the government 'to attend to in other ways';[10] and that the form of the administrative arrangements in place to support Australia in meeting its obligations is a matter for the government. [11]
- A similar administrative process to that which existed prior to March 2012 will be re-established to assess Australia's non-refoulement obligations, either as part of pre-removal procedures or through the Minister's personal and non-compellable public interest powers to grant a visa under the Migration Act; and accordingly, anyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations.[12]

1.185 The statement makes similar claims with regard to the compatibility of the bill with the rights of the family and children. The statement notes that the proposed amendments will mean that membership of the family unit of a person in respect of

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7 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, pp 27-32.

8 Statement of compatibility, p 2.

9 Statement of compatibility, p 2.

10 Statement of compatibility, p 1.

11 Statement of compatibility, p 2.

12 Statement of compatibility, p 2.

whom Australia has non-refoulement obligations will no longer expressly provide an avenue to visa grant for a family member to also remain in Australia. However, the statement argues that:

> as was the practice under the administrative process previously in existence, it is intended that family unity and the best interests of children will continue to be taken into account as part of the new administrative process that will be re-established when this bill is passed and members of the same family unit of a person in respect of whom Australia has non-refoulement obligations will continue to be permitted to remain in Australia.[13]

1.186 Neither the statement of compatibility nor the explanatory memorandum provides any further information or detail as to the administrative arrangements that are to be re-instated or how these administrative powers will operate. As noted above, the bill is also silent on these issues. Nor does the explanatory memorandum or statement of compatibility explain why some of those to whom Australia owes non-refoulement obligations have access to a procedure which includes merits review and judicial review, while others will not have access to such protections as a result of the bill. The statement of compatibility nevertheless concludes that the bill is compatible with human rights because 'Australia's human rights obligations will continue to be met through administrative processes'.[14]

1.187 While the committee welcomes the government's commitment to adhere to its human rights obligations, the information provided in the statement of compatibility does not demonstrate that these amendments are in fact compatible with human rights. The committee considers that the proposed amendments potentially involve serious limitations on human rights and regrets that the explanations provided in the statement of compatibility essentially comprise a series of unsupported assertions about the government's intentions to continue to meet its human rights obligations through administrative processes. The committee's concerns are set out below.

Committee view on compatibility

1.188 The committee considers that in addition to the rights mentioned in the statement of compatibility (non-refoulement and children/family rights), the proposal to repeal the statutory framework for granting complementary protection and to revert to a purely administrative process also engages the right to an effective remedy in article 2 of the ICCPR, the right not to be arbitrarily detained in article 9 of the ICCPR, and the right to a fair hearing in article 14(1) of the ICCPR.

13 Statement of compatibility, p 3.

14 Statement of compatibility, p 3.

Non-refoulement obligations and the right to an effective remedy

1.189 As noted in the statement of compatibility, Australia has obligations under the ICCPR and the CAT not to send a person to a country where there is a real or substantial risk that the person may be subject to particular forms of human rights violations. There are clear obligations under article 7 of the ICCPR and article 3 of the CAT, not to return or send a person to a country where there is a real risk that they will be subjected to torture or cruel, inhuman or degrading treatment. Obligations also arise under article 6 of the ICCPR to not return or send a person to a country where they are at real risk of the death penalty or arbitrary deprivation of life. The committee is not aware of any disagreement with the view that these obligations should always be met.

1.190 The ICCPR and the CAT do not impose an obligation to grant particular forms of visas to those to whom non-refoulement obligations are owed. However, the prohibitions on refoulement under these treaties, together with the general obligation on states to provide an effective remedy for human rights breaches under article 2 of the ICCPR, require the provision of procedural and substantive safeguards to ensure that a person is not removed in contravention of non-refoulement obligations. In short, the right to an effective remedy is required for compliance with non-refoulement obligations under the CAT and the ICCPR.

1.191 A vital safeguard that goes towards ensuring the right to an effective remedy in the context of giving effect to non-refoulement obligations is the availability of effective, independent and impartial review of removal decisions prior to the removal or deportation of a person. Rigorous scrutiny of decisions involving non-refoulement obligations is required because of the irreversible nature of the harm that might occur. As the UN Committee against Torture has stated:

> The nature of refoulement is such … that an allegation of breach of [article 3 of the CAT] relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires … an opportunity for effective, independent and impartial review of the decision to expel or remove... The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.[15]

1.192 The UN Human Rights Committee has similarly emphasised that the requirement to provide effective remedies in domestic law is an integral component

15 *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v. France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000), paras 11.5 and 12 and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14).

of satisfying non-refoulement obligations under the ICCPR.[16] In particular, there should be an opportunity for effective and independent review of a decision to remove prior to removal and the absence of such review may amount to a breach of non-refoulement obligations.[17] Further, under article 2 of the ICCPR, states parties undertake that such a remedy is 'determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.'[18]

1.193 International and comparative human rights jurisprudence has identified various elements which are necessary to ensure the right to an effective remedy for non-refoulement decisions, including that:

- It must be effective in practice as well as in law;
- It must take the form of a guarantee, and not a mere statement of intent or a practical arrangement;
- It must have automatic suspensive effect;
- The appeals process must include adequate procedural safeguards, such as sufficient time to lodge an appeal and access to legal representation and interpreters; and
- Decisions must be subject to substantive review by an independent and impartial body.

1.194 The leading commentary on the ICCPR states that 'decisions made solely by *political* and subordinate administrative *organs* (especially governments) do not constitute an effective remedy within the meaning of [article 2(3)(b)]; it follows that States parties are obligated to place priority on judicial remedies.'[19]

1.195 The committee notes that the Migration Act currently provides for a statutory right of independent merits review for a decision to refuse a protection visa on complementary protection grounds. This bill proposes to remove that right. This is because a consequence of removing the complementary protection criterion as a basis for a protection visa grant is that such review will no longer be available.[20]

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16 See, for example, Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

17 *Alzery v. Sweden*, 10 November 2006, No.1416/2005, para 11.8.

18 Article 2(3)(b) of the ICCPR. See also, HRC, *Judge v. Canada*, 20 October 2003, No. 829/1998, para. 10.9 and HRC comments on 4th report of France CCPR/C/FRA/CO/4 (2008).

19 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed 2005), p 64. (footnotes omitted, emphasis in original).

20 See items 17 and 18 of Schedule 1 to the bill.

1.196 The committee considers that the removal of an existing statutory right for independent merits review of non-refoulement decisions represents a limitation on the right to an effective remedy, which is a necessary aspect of satisfying Australia's non-refoulement obligations.

1.197 The committee notes that the enactment of the complementary protection provisions in the Migration Act ensured the availability of review by an independent and impartial tribunal for decisions relating to Australia's non-refoulement obligations, and, consequently, generally satisfied Australia's obligation under article 2(3) of the ICCPR to progressively develop judicial remedies.[21] The proposal to repeal the complementary protection provisions may therefore also be considered to be a retrogressive measure.

1.198 The committee notes that the amendments also constitute limitations on the rights of children and the family, the right not to be arbitrarily detained and the right to a fair hearing.

1.199 The committee has consistently taken the view that in order to justify retrogressive measures or limitations on rights the government must demonstrate that (i) the measures are aimed at achieving a legitimate objective; (ii) there is a rational connection between the measures and the objective; and (iii) the measures are proportionate to that objective.[22] Limitations on rights must also have a clear legal basis and satisfy the quality of law test. The committee notes that the statement of compatibility does not address these issues or explain if the administrative arrangements which are intended to replace the current statutory framework will include provision for independent and impartial review of non-refoulement decisions.

Legitimate objective

1.200 A legitimate objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting rights.

1.201 The statement of compatibility states that the purpose of the bill is to 'give effect to the government's position that it is not appropriate for complementary protection to be considered as part of a protection visa application'. However, neither the statement of compatibility nor the explanatory memorandum provide any indication of the basis for the government's position or explain why the government considers it necessary to attend to its non-refoulement obligations in other ways.

1.202 The Minister's second reading speech, however, put forward several reasons for the bill:

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21 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed 2005), p 64.

22 See Parliamentary Joint Committee on Human Rights, *Practice Note 1*.

- The current statutory framework for complementary protection is 'complicated, convoluted, difficult for decision-makers to apply, and is leading to inconsistent outcomes'.
- 'The court's [sic] interpretation of who should be provided complementary protection has transformed provisions intended to be exceptional into ones that are routine and extend well beyond what was intended by the human rights treaties'.
- The current process is a 'lengthy' and 'costly and inefficient way to approach the issue given the small number of people who meet the complementary protection criterion', given that 'only 57 applications have satisfied the requirements for the grant of a protection visa on complementary protection grounds' since the provisions commenced in March 2012.
- There is no obligation 'to follow a particular process or to grant a particular type of visa to those people for whom non-refoulement obligations are engaged', particularly 'where people are of security or serious character concern and they do not meet the criteria for grant of a protection visa' [sic].
- Implementing Australia's non-refoulement obligations through the protection visa framework 'creates another statutory product for people smugglers to sell'.

1.203 The Minister argued that dealing with complementary protection claims through administrative processes would enable him:

- to 'deal flexibly and constructively with genuine cases of individuals and families whose circumstances are invariably unique and complex, and who may be disadvantaged by a rigidly codified criterion'; and
- to grant the most appropriate visa dependent upon the individual circumstances of the case by taking into consideration not only Australia's non-refoulement obligations, but also Australia's broader humanitarian considerations.

1.204 The committee notes that the statement of compatibility and explanatory memorandum do not explain the rationale for the bill, and while the Minister's second reading speech outlines various reasons for repealing the legislation, these are made in the form of assertions without reference to any relevant supporting data or empirical evidence.

1.205 On the basis of the material provided, the committee considers that the government has not clearly demonstrated an objective basis for repealing the current provisions. The committee notes that the factors that were cited to support the introduction of the complementary protection provisions in the Migration Act are now being cited to inform its repeal.

1.206 Notably, during the passage of the complementary protection legislation, the Department of Immigration contended that the reforms were necessary because the then administrative arrangements were considered to be inefficient and lengthy:

> The use of the Ministerial intervention powers to meet non-refoulement obligations other than those contained in the Refugees Convention is administratively inefficient. The Minister's personal intervention power to grant a visa on humanitarian grounds under section 417 of the Migration Act cannot be engaged until a person has been refused a Protection visa both by a departmental delegate and on review by the Refugee Review Tribunal. This means that under current arrangements, people who are not refugees under the Refugees Convention, but who may engage Australia's other non-refoulement obligations must apply for a visa for which they are not eligible and exhaust merits review before their claim can be considered by the Minister personally. This results in slower case resolution as it delays the time at which a person owed an international obligation receives a visa and has access to family reunion. It also leads to a longer time in removing a person to whom there is no non-refoulement obligation as this would not be determined until the Ministerial intervention stage.[23]

1.207 The Department submitted that the introduction of complementary protection legislation would not take away from the Minister's ability to intervene in unique cases:

> Removing the necessity of considering complementary protection claims in the Ministerial intervention process will mean that the Minister's intervention power can be reserved for cases which raise unique and exceptional circumstances as originally contemplated when this power was created.[24]

1.208 The Department also suggested that it did not expect any 'significant increase' in visa grants as a result of the complementary protection legislation being implemented, stating that less than half of the 55 visas granted under the Humanitarian Program in the 2008-09 period may have involved cases which raised non-refoulement issues.[25]

1.209 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the bill's objectives, including how they are

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23 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, October 2009, para 1.11.

24 Department of Immigration and Citizenship, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry on the Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, 2009, p 3.

25 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, October 2009, para 3.44.

considered to be pressing and substantial. In particular, the committee requests the following information and would appreciate the provision of relevant and sufficient evidence in support of the answers:

- **The basis for considering that the current system is 'complicated, convoluted, difficult for decision-makers to apply, and are leading to inconsistent outcomes' and why any such difficulties could not be addressed through legislative refinement of the scheme.**
- **The basis for considering that the courts have expanded the scope of the legislation, how this has adversely affected the implementation of the legislation, and why any unintended consequences could not be addressed through legislative refinement of the scheme.**
- **How the argument that the scope of the legislation has been expanded by the courts is consistent with the statement that only a small number of protection visas on complementary protection grounds have been granted.**
- **The basis for considering that the process is inefficient because of the small number of protection visas that have been granted, when it would appear that comparably small numbers of humanitarian visas were granted under the previous administrative arrangements.**
- **The basis for considering that administrative arrangements would be more efficient when it appears that they were previously removed for being inefficient, including the overall timeframes for resolving complementary protection claims under the current system compared to the previous arrangements.**
- **Whether applicants who meet the complementary protection criterion have to satisfy additional criteria, such as character and security checks, before being granted a protection visa.**
- **The number of protection visas that have been granted on complementary protection grounds to applicants who arrived by boat.**
- **Whether the Minister is able to exercise his intervention powers to grant relief in unique cases under the present system.**

Rational connection

1.210 The key issue here is whether the measures in question are likely to be effective in achieving the objective being sought. It is not sufficient to put forward a legitimate objective if in fact the measure limiting the right will not make a real difference in achieving that aim. In other words, the objective might be legitimate but unless the proposed measure will actually go some way towards achieving that objective, the limitation of the right is likely to be impermissible.

1.211 The committee notes that it is unable to assess whether the measures proposed in the bill are rationally connected to a legitimate objective without first obtaining a clearer understanding of the objectives of the bill.

1.212 The committee intends to write to the Minister for Immigration and Border Protection to request that when providing the information on the objectives of the bill it would be appreciated if an assessment is included as to whether and how the objectives identified are likely to be furthered through this bill.

Proportionate response

1.213 Proportionality requires that even if the objective of the limitation is of sufficient importance and the measures in question are rationally connected to the objective, it may still not be justified, because of the severity of the effects of the measure on individuals or groups. The inclusion of adequate safeguards will be a key factor in determining whether the measures are proportionate, including whether there are procedures for monitoring the operation and impact of the measures, and avenues by which a person may seek review of an adverse decision.

1.214 As already noted above, the effect of these provisions is that there will no longer be any statutory right of appeal to an independent tribunal for non-refoulement decisions. The government's stated intention to reinstate similar administrative arrangements to that which existed prior to the enactment of the statutory framework means that claims for complementary protection will be assessed:

- by the Minister exercising his personal and non-compellable 'public interest' powers under the Migration Act; or
- by departmental officers as part of pre-removal processes.

1.215 It is not clear whether the administrative processes would include provision for an effective hearing to evaluate the merits of a particular case of non-refoulement and whether such decisions would be subject to independent and effective review, as required by human rights standards.

1.216 The committee notes that the Scrutiny of Bills Committee expressed similar concerns about whether:

> … a purely administrative process [could] satisfactorily ensure that a person affected by an assessment in relation to complementary protection will have adequate merits review available to them and, in particular, there are no details about how it is proposed that the availability of merits review will be addressed in the administrative scheme envisaged … (such as during the 'pre-removal assessment procedures').[26]

26 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, p 29.

1.217 The Scrutiny of Bills Committee also noted that the availability of judicial review under the High Court's original jurisdiction was likely to be of limited value for challenging decisions made pursuant to the Minister's discretionary and non-compellable intervention powers under the Migration Act:

> … Although the High Court's jurisdiction under section 75(v) of the Constitution would continue to be available in principle …, in practice the non-statutory nature of the decision-making process may diminish its effectiveness in ensuring legal accountability.
>
> If the new administrative process for decision-making … is linked to the exercise of the Minister's personal and non-compellable intervention powers to grant a person a visa under the Migration Act …, the scope for judicial review will depend on whether the Minister has made a decision to consider the exercise of these powers in a particular case. If the Minister refuses to even consider the exercise of these powers, the result is likely to be that judicial review would in practice be unavailable. Further, even if judicial review is available the Minister could not be compelled to exercise these powers and questions may arise as to the utility of declaratory relief.[27]

1.218 The Scrutiny of Bills Committee noted similar concerns in relation to the effectiveness of judicial review for decisions taken by departmental officers as part of a pre-removal process:

> … Assuming the ultimate source of power exercised is non-statutory Executive power, then questions may arise as to how effective judicial review of its exercise would be. The 'constitutional writs' (such as mandamus) are available only on the basis of jurisdictional errors and, typically, such errors are identified by reference to the statute under which a decision is made.[28]

1.219 In putting forward these amendments, the government has argued that there is no obligation imposed on Australia to follow a particular process or to grant a particular type of visa to those people for whom non-refoulement obligations are engaged. The committee agrees that international human rights law does not require Australia to grant particular forms of visas to those to whom non-refoulement obligations are owed (provided that the relevant visa conditions are consistent with human rights requirements).

1.220 However, human rights law does require Australia to meet its non-refoulement obligations and complying with those obligations requires adopting processes that contain appropriate procedural and substantive safeguards, in particular, effective remedies in the form of independent, effective and impartial

27 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, p 30.

28 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, p 31.

review of non-refoulement decisions. The committee notes the absence of such remedies may lead to violations of Australia's non-refoulement obligations.

1.221 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on the following issues:

- **The justification for expunging the statutory review rights in their entirety and a reasoned explanation of why a less restrictive alternative that retained some form of express, statutory right of review would not be available.**
- **Whether the envisaged administrative arrangements will include provisions for independent, effective and impartial review of non-refoulement decisions; and if not, how it is considered that the amendments are consistent with the right to an effective remedy for non-refoulement decisions.**
- **Whether the administrative arrangements and their implementation will include adequate oversight mechanisms.**

Legal basis for restrictions

1.222 Human rights standards require that interferences with rights must have a clear basis in law. This means not only that there must be a domestic rule adopted as part of the standard legislative process (or an accepted rule of the common law), but that the law or rule in question must satisfy what is known as the 'quality of law' test. The effect of this is that any measures which interfere with human rights must be sufficiently certain and accessible to allow people to understand when the interference will be justified. The provision of a legal basis for measures which impact on rights is also an important guarantee of the rule of law.

1.223 In general terms, human rights law considers interferences with fundamental rights that are based solely on unfettered administrative discretion to be inconsistent with this requirement.[29] For example, the UN Human Rights Committee has noted:

> The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[30]

1.224 The European Court of Human Rights has similarly stated that:

> In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion to be granted to the executive to be

29 See M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (2nd ed 2005), p 460, para 46.

30 Human Rights Committee, General Comment 27, (1999), para 15. See also Human Rights Committee, General Comment No 34 (2011), para 25.

> expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.[31]

1.225 The committee notes that various shortcomings have been expressed with regard to the discretionary nature of the administrative arrangements that preceded the current statutory scheme, including that:

- decisions could only be made by the Minister personally;
- no-one could compel the Minister to exercise the powers;
- there was no specific requirement to provide natural justice;
- there was no requirement to provide reasons if the Minister does not exercise the power; and
- there was no merits review of decisions by the Minister.[32]

1.226 For these reasons, a 2000 report by the Senate Legal and Constitutional Affairs References Committee into the adequacy of those arrangements to meet Australia's non-refoulement obligations concluded that the nature of the ministerial intervention powers under the Migration Act meant that the powers *could* be used to meet Australia's non-refoulement obligations, but they were not sufficient to *ensure* compliance.[33]

1.227 Similarly, a 2004 Senate Select Committee on Ministerial Discretion in Migration Matters expressed concern that the discretionary process was an inadequate mechanism for offering protection from refoulement and the committee was not satisfied that the Minister's discretionary powers always enabled Australia to meet those obligations in respect of individual applicants.[34]

1.228 In 2008, the UN Committee against Torture recommended that Australia adopt a system of complementary protection, to ensure that the Minister's discretionary powers were no longer solely relied on to meet Australia's non-refoulement obligations.[35]

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31 *Gillan and Quinton v UK* (Application No 415/05, 12 January 2010) at para 77.

32 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, October 2009, para 1.10.

33 Senate Legal and Constitutional Affairs References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes,* June 2000, para 2.77.

34 Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, March 2004, paras 8.86 and 8.88.

35 Committee against Torture, Concluding observations of the Committee against Torture - Australia, CAT/C/AUS/CO/3 (22 May 2008), para 15.

1.229 Noting that Australia's non-refoulement obligations are absolute and in light of the grave consequences for individuals that could result from removal of a person from Australia in violation of those obligations, the committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the government's intention to rely on purely discretionary administrative processes to uphold these obligations is adequate to satisfy the quality of law test.

Protection of the family/children's rights

1.230 Articles 17 and 23 of the ICCPR protect family rights. Article 17 of the ICCPR prohibits arbitrary interference with the family, while article 23 of the ICCPR affirms the right of families to protection by 'society and the State'.

1.231 Article 3(1) of the Convention on the Rights of the Child (CRC) requires that, 'in all actions concerning children ... the best interests of the child shall be a primary consideration.' The UN Committee on the Rights of the Child has stated that the best interests of the child principle requires:

> active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.[36]

1.232 The CRC also requires that:

- applications for family reunification are dealt with in a positive, humane and expeditious manner;[37]
- unaccompanied children are provided with special protection and assistance;[38] and
- child asylum-seekers receive appropriate protection and humanitarian assistance.[39]

1.233 Currently, family members of a person who is granted a protection visa on complementary protection grounds have equivalent rights to be granted a protection visa as family members of a protection visa holder who meets the refugee criteria. A consequence of removing the complementary protection criterion as a basis for a protection visa grant is that this express guarantee of family unity will no longer be available.

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36 UN Committee on the Rights of the Child, *General Comment No. 5 (2003)*, para 12; *General comment No. 14 (2013)*.

37 Article 10 of the CRC.

38 Article 20 of the CRC.

39 Article 22 of the CRC.

1.234 As noted above, the statement of compatibility argues that the proposed amendments are compatible because 'it is intended that family unity and the best interests of children will continue to be taken into account as part of the new administrative process' and accordingly, members of the same family unit of a person owed non-refoulement obligations 'will continue to be permitted to remain in Australia'.[40]

1.235 The committee considers that the proposed removal of an existing statutory right for family members to remain in Australia constitutes a limitation on the right to a family life under the ICCPR and the CRC. The committee acknowledges the government's stated intention to meet its human rights obligations through administrative processes. However, assurances of intent do not in and of themselves represent appropriate or sufficient justification for measures that limit rights. As the committee has already noted, limitations on rights must be demonstrably aimed at legitimate objectives and be shown to be rationally and proportionately connected to those objectives.

1.236 The committee notes that the right to a family life must also be guaranteed equally to all without discrimination, under article 2(1) (in conjunction with article 23) and article 26 of the ICCPR, and article 2(2) of the ICESCR in conjunction with article 10 of the ICESCR, as well as the CRC. The right to non-discrimination requires the demonstration of an objective and reasonable basis for any differential treatment of similarly situated persons, in this case between different categories of persons to whom Australia owes protection obligations (ie, under the Refugee Convention and the ICCPR/CAT).

1.237 The committee intends to write to the Minister for Immigration and Border Protection to seek further information as to:

- **whether removing the express guarantee for members of the family unit of a person who is owed non-refoulement obligations to remain in Australia is consistent with the right to equality and non-discrimination in article 2(1) of the ICCPR and article 26 of the ICCPR; and**
- **the manner in which the envisaged administrative arrangements will take into account family unity and the best interests of children, the prioritisation given to these matters and the likely timeframes involved.**

Prohibition against arbitrary detention

1.238 Article 9 of the ICCPR prohibits arbitrary arrest or detention. Detention must not only be lawful but reasonable and necessary in all the circumstances. The principle of arbitrariness includes elements of inappropriateness, injustice and lack of predictability. In other words, the detention must be aimed at a legitimate objective and must be reasonable, necessary and proportionate to that objective.

40 Statement of compatibility, p 3.

1.239 In order for detention not to be arbitrary, it must be necessary in the individual case (rather than the result of a mandatory, blanket policy); subject to initial and periodic review by an independent authority with the power to release detainees if detention cannot be objectively justified; be proportionate to the reason for the restriction; and be for the shortest time possible. Where the detention involves children, the CRC requires that children are detained only as a measure of last resort, and for the shortest appropriate period of time.[41] The CRC also requires that, 'in all actions concerning children ... the best interests of the child shall be a primary consideration.'[42]

1.240 The Australian Human Rights Commission has previously noted that the timeframes involved under the previous administrative arrangements meant that people could be detained for extended periods in order to request the Minister's intervention at the end of a refugee determination and review process:

> One of the effects of the current system of Ministerial discretion in these cases is the possibility of prolonged immigration detention, which may lead to breaches of article 9(1) of the ICCPR. To get to the stage at which exercise of the Minister's section 417 discretion may be considered, asylum seekers must first make an application for a refugee protection visa and apply for review of that decision. It is not until they have exhausted that process that they can be considered by the Minister under section 417. Once they reach the section 417 stage, the process can take months. Overall, the process can take years.[43]

1.241 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the envisaged administrative arrangements that are intended to replace the current statutory scheme are compatible with the prohibition against arbitrary detention.

Right to a fair hearing

1.242 The right to a fair hearing is a fundamental part of the rule of law and the proper administration of justice. Article 14(1) of the ICCPR provides that all persons are equal before courts and tribunals and are entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

1.243 The amendments in the bill will apply to both new and existing protection visa applications which have not been finalised prior to the commencement of the amendments. This includes decisions which are currently under review or have been reviewed and remitted. The Scrutiny of Bills Committee noted that:

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41 Article 37(b) of the CRC.

42 Article 3(1) of the CRC.

43 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry on the Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*, 30 March 2009, para 13.

> [A]n applicant for a protection visa may have succeeded in judicial review of such a decision (based on the old law), only to find that their claim will be defeated when remitted to the original decision-maker on the basis of the removal of visa criterion on which their original application relied.[44]

1.244 The committee notes that the right to a fair hearing in article 14(1) of the ICCPR may not generally apply to immigration decisions. However the issue here relates to the bill's impact on existing determinations which have arisen from the exercise of existing statutory rights of review. As such, the committee considers that the retrospective application of these provisions constitutes a limitation on article 14(1) of the ICCPR and requires adequate justification.

1.245 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the application of these amendments to decisions are either currently under review or which have been reviewed and remitted back to the department for finalisation is compatible with the right to a fair hearing.

44 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 9 of 2013*, p 32.

Migration Amendment Bill 2013

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 12 December 2013

Summary of committee concerns

1.246 The committee considers that the measures proposed by this bill potentially involve serious limitations on human rights. The committee seeks further information to determine whether the bill is compatible with human rights.

Overview

1.247 This bill proposes to make various amendments to the *Migration Act 1958* (Migration Act), including:

- specifying that a review decision by the Refugee Review Tribunal (RRT) or the Migration Review Tribunal (MRT) is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the review applicant (Schedule 1);
- specifying the operation of the statutory bar on making a further protection visa application (Schedule 2); and
- making it a criterion for the grant of a protection visa that the applicant is not assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (Schedule 3).

1.248 The amendments seek to address various recent Federal and High Court decisions which are considered to 'significantly affect the operations of the Department of Immigration and Border Protection'.[1]

Compatibility with human rights

Statement of compatibility

1.249 The bill is accompanied by a statement of compatibility that contains a separate human rights assessment for each schedule to the bill.

1.250 For the amendments contained in Schedule 1, the statement states that the proposed changes do not raise any human rights issues,[2] including in relation to the right to a fair hearing.[3]

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1 Department of Immigration and Border Protection, *Submission to the Legal and Constitutional Affairs Legislation Committee Inquiry on the Migration Amendment Bill 2013 [Provisions]*, 13 January 2014, p 3.

2 See statement of compatibility, pp 2-4.

3 Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).

1.251 For the amendments contained in Schedule 2, the statement concludes that the proposed changes are compatible with Australia's non-refoulement obligations under the ICCPR and the Convention against Torture (CAT) 'as the amendments do not seek to remove the opportunity of persons to make claims for protection as against these rights or to have those claims assessed'.[4]

1.252 For the amendments contained in Schedule 3, the statement[5] argues that the proposed changes are consistent with a range of rights, including the right not to be arbitrarily detained;[6] non-refoulement obligations;[7] the right to a fair hearing;[8] the right not to be expelled without due process;[9] and the right to humane treatment in detention.[10]

1.253 The committee's comments on each schedule of the bill and the adequacy of the explanations provided in the statement of compatibility are set out below.

Committee view on compatibility

Schedule 1– When decisions are made and finally determined

1.254 The Migration Act provides a scheme for the review of certain protection visa decisions by the RRT.[11] The RRT must prepare a written statement of reasons for its decision, and that decision on review is taken to have been made on the date of the written statement.[12]

1.255 The RRT is required to notify the applicant and the Secretary of the Department of Immigration and Border Protection (Immigration Department) of its decision on review, by giving the applicant and the Secretary a copy of the written statement within 14 days after the day on which the decision is deemed to have been made.[13] However, a failure to comply with the notification requirements does not affect the validity of the decision.[14]

1.256 A visa application under the Migration Act is 'finally determined' when a decision is no longer subject to any form of merits review (that is, by either the RRT

4 See statement of compatibility, pp 5-7.

5 See statement of compatibility, pp 8-12.

6 Article 9 of the ICCPR.

7 Articles 6 and 7 of the ICCPR; and article 3 of the CAT.

8 Article 14(1) of the ICCPR.

9 Article 13 of the ICCPR.

10 Article 10 of the ICCPR.

11 *Migration Act 1958*, Part 7.

12 *Migration Act 1958*, section 430.

13 *Migration Act 1958*, sections 430A(1) and 430A(2).

14 *Migration Act 1958*, section 430A(3).

or the MRT).[15] The concept of a visa application being 'finally determined' is a relevant trigger for the operation of various other provisions under the Migration Act, including being one of the preconditions for exercising the power to remove an 'unlawful non-citizen' from Australia.[16]

1.257 A 2012 decision of the full Federal Court of Australia found that the RRT's decision-making power in respect of a review is not exercised or 'spent' until its review decision is notified 'irrevocably and externally'.[17] In 2013, the full Federal Court held that an application is 'finally determined' only when the review decision is notified to both the review applicant and the Secretary of the Immigration Department.[18] Until then, the decision on the relevant application remains subject to review and is not 'finally determined' (that is, no longer subject to merits review).

1.258 The statement of compatibility explains that, prior to these judicial decisions, the Immigration Department had considered an application to be 'finally determined' at the point when a review decision had been made.[19] To address 'the administrative uncertainty and put the original policy intention beyond doubt',[20] the amendments in this bill propose to specify that:

- the MRT or the RRT's powers of review are 'spent' when a decision on review has been made, and that once a decision is made, it cannot be re-opened or varied (*functus officio*); and
- a visa application will be considered to be finally determined (that is, no longer subject to merits review) when the MRT or the RRT has made its decision (other than a decision to remit the case back to the Department for reconsideration).

1.259 The bill also proposes to specify that decisions by the Minister or his delegate to refuse, cancel or revoke a visa are taken to be made on the day and at the time when a record of the decision is made. As a result of these changes, finalisation will not be dependent on when the decision is notified or communicated to the review applicant, visa applicant or the former visa holder.

Right to a fair hearing

1.260 The statement of compatibility notes that article 14(1) of the ICCPR provides the right to a fair hearing by a competent, independent and impartial tribunal established by law. The statement states that:

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15 *Migration Act 1958*, section 5(9).

16 *Migration Act 1958*, section 198.

17 *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131.

18 *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2013] FCAFC 104.

19 Statement of compatibility, p 2.

20 Statement of compatibility, p 3.

> The amendments do not seek to remove, disturb or otherwise diminish a person's ability to seek merits review [by the RRT or MRT] in circumstances where the decision is merits reviewable. Rather, the amendments seek to restore administrative certainty over when the MRT or the RRT's decision making powers for the purpose of conducting review of a decision are exercised, as well as certainty over when an application is considered to be finally determined for the purpose of the Migration Act. As such, the amendments do not give rise to human rights implications.[21]

1.261 The committee considers that the proposed changes potentially give rise to access to justice issues, which is an aspect of the right to a fair hearing in article 14(1) of the ICCPR. For example, the committee notes that if a visa application can be 'finally determined' without the applicant being notified of it, the person might be removed from Australia without having an opportunity to commence judicial review proceedings in respect of the tribunal's decision.

1.262 The statement of compatibility does not explain the range of consequences that may arise from the proposed redefinition of the concept of 'finally determined' in the Migration Act or address whether the changes may restrict a person's right to access to justice. Further, the statement of compatibility makes no mention of the implications of extending these changes to decisions by the Minister or his delegate as well. Without this information, the committee is unable to assess whether the changes are compatible with human rights.

1.263 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the following issues:

- **whether these changes could adversely affect the ability of a person to seek judicial review of a decision by the RRT or the MRT;**
- **whether there are any consequences for failing to comply with the notification requirements in the Migration Act, including whether any time bar for exercising review rights may be lifted as a result; and**
- **the implications of deeming that a decision by the Minister or his delegate to refuse, cancel or revoke a visa is made on the day and time when a record of the decision is made (irrespective of whether that decision is notified to the person), and whether these changes may adversely affect the ability of a person to challenge the decision.**

Schedule 2 – bar on further applications for protection visa

1.264 The Migration Act prescribes the key criteria upon satisfaction of which an applicant may be eligible for the grant of a protection visa, namely, an applicant must be:

21 Statement of compatibility, p 3.

- a person who engages Australia's protection obligations under the 1951 Refugee Convention as amended by the 1967 Refugee Protocol (Refugee Convention); or
- a person who engages Australia's protection obligations on the basis of complementary protection grounds (this criterion was introduced on 24 March 2012);[22] or
- a person who is a member of the family unit of a person who meets either of the above criteria and who holds a protection visa.[23]

1.265 A person in the migration zone who has previously been refused a protection visa, or who has had their protection visa cancelled, is prohibited from making a further protection visa application,[24] unless the Minister chooses to exercise his personal, non-delegable and non-compellable power to lift the legislative bar in the public interest.[25]

1.266 In 2012, the Full Federal Court of Australia held that there were effectively different sets of criteria by which a protection visa can be applied for and granted. Accordingly, it concluded that the legislative bar on further applications did not prevent a person making a further protection visa application based on a criterion which did not form the basis of a previous unsuccessful protection visa application.[26] Therefore, if a person had applied for a protection visa prior to the insertion of the complementary protection criterion (that is, relying on claims under the Refugee Convention only) and that application was refused, they would not be prohibited from making a further protection visa application based on claims related to complementary protection.

1.267 The explanatory statement states that:

> This outcome is contrary to the policy intention of [the legislative bar on further applications], which is that a [person] should not be able to make a further protection visa application in the migration zone after a previous protection visa application has been refused or a protection visa held by the person has been cancelled, irrespective of the grounds on which their

22 The complementary protection provisions in the *Migration Act 1958* were introduced by the *Migration Amendment (Complementary Protection) Act 2011* to provide a statutory basis for implementing Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The term 'complementary protection' refers to protection against refoulement (removal), which is additional to that provided by the 1951 Refugee Convention as amended by the 1967 Protocol (Refugee Convention).

23 *Migration Act 1958*, section 36(2).

24 *Migration Act 1958*, section 48A.

25 *Migration Act 1958*, section 48B.

26 *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71 (3 July 2013).

> earlier protection visa application was refused or the grounds on which the cancelled visa was originally granted, and whether or not the grounds or criteria existed earlier.[27]

1.268 The statement of compatibility further explains that:

> The Full Federal Court decision in *SZGIZ* has led to an increase in the number of repeat applications from failed protection visa applicants who were refused the grant of a protection visa on Refugees Convention ground prior to the introduction of the complementary protection provisions. Some applicants have made further applications for protection visa despite not having any legitimate complementary protection claims and despite the lack of any real prospects of engaging Australia's protection obligations.[28]

1.269 To address these concerns, the bill proposes to amend the Migration Act to clarify that the legislative bar in section 48A of the Migration Act prevents a person who has been refused a protection visa (or has had a protection visa cancelled) from applying for a further protection visa while in the migration zone.

1.270 The amendments will affect persons who have made an application for and were refused a protection visa before the commencement of the complementary protection criterion on 24 March 2012.[29] Persons who make protection visa applications on or after 24 March 2012 are not affected by the amendments in relation to any complementary protection claims they may make, because if they are determined not to engage Australia's protection obligations under the Refugee Convention, their claims are automatically assessed under the complementary protection provisions of the Migration Act.[30]

Non-refoulement obligations

1.271 The statement of compatibility states that the proposed changes are consistent with Australia's non-refoulement obligations under the ICCPR and the Convention against Torture (CAT) because they 'do not substantively alter the rights and interests of [affected] persons'.[31] The statement bases this claim on the following reasons:[32]

- Consistent with the Immigration Department's practice prior to the introduction of [the complementary protection legislation], a person who is being removed from Australia will be assessed for any possible risks that

27 Explanatory statement, p 2.

28 Statement of compatibility, p 6.

29 Statement of compatibility, p 5.

30 Statement of compatibility, p 5.

31 Statement of compatibility, p 7.

32 Statement of compatibility, p 7.

might arise under the CAT and ICCPR as a consequence of their removal from Australia. Therefore, a failed protection visa applicant who may have claims going to complementary protection would not be denied the opportunity to have their claims assessed simply by virtue of these amendments.

- The Minister has a personal, non-compellable power under section 48B of the Migration Act to intervene to allow a person in the migration zone who has been refused a protection visa application to make a further protection visa application, in circumstances where it is in the public interest to do so. The Minister also has personal, non-compellable powers under other relevant provisions in the Migration Act to grant visas to a non-citizen in the public interest. In consideration of the public interest, the Minister may take into account Australia's protection obligations (under the Refugee Convention and complementary protection provisions in the Migration Act) as they relate to the individual in question.

1.272 The committee notes that this bill was introduced after the introduction of the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, which seeks to repeal the existing complementary protection provisions in the Migration Act. Neither the statement of compatibility nor the explanatory memorandum makes any mention of this earlier bill or explains the possible interaction of both these measures.

1.273 The committee has commented extensively on the human rights implications of the measures contained in the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013. Those comments are relevant to these amendments, in particular, whether resorting to a purely administrative process to test a person's protection claims is compatible with Australia's non-refoulement obligations.

1.274 The committee intends to write to the Minister for Immigration and Border Protection to draw his attention to the committee's comments in relation to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, and to seek clarification on the following issues:

- **the number of people who are likely to be affected by the proposed bar on further protection visa applications;**
- **whether the individuals in this cohort have been assessed by the Immigration Department for any complementary protection claims;**
- **whether anyone in this cohort has received an alternative visa to remain in Australia as a result of the Minister exercising his discretionary powers under the Migration Act; and**
- **the interaction between these measures and those proposed by the Migration Amendment (Regaining Control Over Australia's Protection**

Obligations) Bill 2013, and whether these measures are a consequence of the proposed repeal of the complementary protection legislation.

Schedule 3 – security assessments

1.275 A 2012 decision by the High Court of Australia declared invalid the prescription, by regulation, of a stand-alone, non-discretionary criterion for the grant of a protection visa which required that an applicant must not have received an adverse ASIO security assessment.[33] This regulation[34] was found to be contrary to the decision-making scheme in the Migration Act for refusing or cancelling protection visas on national security grounds, including circumventing certain merits review procedures for such decisions.

1.276 As noted above, the Migration Act sets out the key criteria upon satisfaction of which an applicant may be eligible for the grant of a protection visa.[35] To address this decision, the bill proposes to amend the Migration Act to include an additional criterion for a protection visa, namely, that the applicant is not assessed by ASIO to be directly or indirectly a risk to security.[36] The amendments mean that a person will be refused a protection visa if they receive an adverse security assessment by ASIO.

1.277 The bill also proposes to amend the Migration Act to provide that the RRT, the MRT and the Administrative Appeals Tribunal (AAT) will not have the power to review a protection visa refusal or protection visa cancellation decision made on the basis of the applicant having an adverse security assessment from ASIO.

Prohibition against arbitrary detention

1.278 Article 9 of the ICCPR provides that no one may be subjected to arbitrary arrest or detention; the guarantee applies to all deprivations of liberty and is not limited to criminal cases. Detention must not only be lawful but reasonable and necessary in all the circumstances. The principle of arbitrariness includes elements of inappropriateness, injustice and lack of predictability. In order for detention not to be arbitrary, it must be:

- necessary in the individual case (rather than the result of a mandatory, blanket policy);
- subject to initial and periodic review by an independent authority with the power to release detainees if detention cannot be objectively justified;
- proportionate to the reason for the restriction; and

33 *Plaintiff M47/2012 v Director-General of Security & Ors* [2012] HCA 46.

34 Public Interest Criterion 4002 of Part 1 of Schedule 4 to the *Migration Regulations 1994*.

35 *Migration Act 1958*, section 36(2).

36 Within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*.

- for the shortest time possible.[37]

1.279 These requirements were recently reaffirmed in a decision by the UN Human Rights Committee (HRC) specifically relating to refugees who were being held in detention in Australia because of adverse ASIO security assessments. The HRC stated:

> The Committee recalls that the notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.[38] Detention in the course of proceedings for the control of immigration is not arbitrary per se, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.[39]

1.280 In a submission to the Senate Legal and Constitutional Affairs Legislation Committee, which is conducting an inquiry into the bill, the Law Council of Australia expressed its concern that:

> [b]y seeking to circumvent [the High Court] decision, the amendments proposed in the bill could place men, women and children who have been found to be owed protection by Australia at risk of prolonged or indefinite immigration detention as a result of the issue of an adverse assessment by ASIO. If enacted, the Bill would leave these refugees unable to obtain a

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37 Where the detention involves children, article 37(b) of the CRC requires that children are detained only as a measure of last resort, and for the shortest appropriate period of time. Article 3(1) of the CRC also requires that, 'in all actions concerning children ... the best interests of the child shall be a primary consideration.'

38 See ccommunications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para 5.1; and No. 305/1988, *van Alphen v. Netherlands*, Views adopted on 23 July 1990, para 5.8.

39 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013), para 9.3. See also *M.M.M. et al. v Australia*, CCPR/C/108/D/2136/2012 (2013).

> protection visa in Australia and unable to return to their country of origin due to a genuine fear of persecution. Under current policy settings, such refugees are also ineligible for release into community detention arrangements or other forms of conditional release.[40]

1.281 The statement of compatibility acknowledges that a consequence of the amendments may be the indefinite detention of a protection visa applicant found to be a refugee but deemed a security risk by ASIO.[41] However, it argues that:

> It has been the long standing, clear and well publicised position of the Australian Government that persons who pose an unacceptable risk to the Australian community will remain in an immigration detention facility. …
>
> Detaining a person who unlawfully enters Australia or who becomes unlawful once in Australia is possible while that person's status is being resolved if there are particular reasons specific to the individual, such as a likelihood of absconding, a danger of crimes against others or a risk of acts against national security. In these circumstances, taking into account the protection of the Australian community, continued immigration detention arrangements for people who are assessed by ASIO to be directly or indirectly a risk to security … are considered reasonable, necessary and proportionate to the security risk that they are found to pose.[42]

1.282 The statement claims that such detention is consistent with article 9 of the ICCPR for the following reasons:[43]

- Where a person is detained as a result of their protection visa application being refused, or their protection visa being cancelled, because they have received an adverse security assessment from ASIO, their detention would not lack predictability.
- In some situations, persons who are not able to be removed can be managed in less intrusive forms of immigration detention; however, there may be a cohort of persons for whom, given health, security or character concerns, the less intrusive measures available under the Migration Act may not be appropriate.
- Arrangements are in place for independent review of the initial issue of and continuing need for an adverse security assessment. To the extent that the adverse security assessment is the basis for visa refusal and consequent detention, review of that basis may be available in individual cases.

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40 Law Council of Australia, *Submission to the Legal and Constitutional Affairs Legislation Committee Inquiry on the Migration Amendment Bill 2013 [Provisions]*, 9 January 2014, p 1.

41 Statement of compatibility, p 9.

42 Statement of compatibility, pp 9-10.

43 See statement of compatibility, pp 9-10.

1.283 The committee notes that the proposed amendments will essentially entrench the existing approach for dealing with people to whom Australia owes protection obligations but who are the subjects of adverse security assessments by ASIO. In this regard, the committee notes the recent HRC decision concerning the continued detention of 46 refugees subject to adverse ASIO security assessments. The HRC found that their indefinite detention on security grounds was arbitrary and amounted to cruel, inhuman or degrading treatment, contrary to articles 9(1), 9(4) and 7 of the ICCPR. The HRC considered the detention of the refugees to be in violation of article 9 of the ICCPR because the government:[44]

- had not demonstrated on an individual basis that their continuous indefinite detention was justified; or that other, less intrusive measures could not have achieved the same security objectives;
- had not informed them of the specific risk attributed to each of them and of the efforts undertaken to find solutions to allow them to be released from detention; and
- had deprived them of legal safeguards to enable them to challenge their indefinite detention, in particular, the absence of substantive review of the detention, which could lead to their release from arbitrary detention.

1.284 The committee notes that the statement of compatibility makes no express reference to this HRC decision, which is surprising given its direct relevance to the proposals contained in this bill. While the committee understands that the HRC's views are not binding on Australia as a matter of international law, they are nonetheless highly authoritative interpretations of binding obligations and should be given considerable weight by the government in its interpretation of Australia's obligations under the ICCPR. The committee expects the government to provide a reasoned and compelling justification where it proposes not to accept an interpretation of the ICCPR adopted by the HRC, particularly where the HRC has reached a view in a case involving Australia or made recommendations specific to Australia.

1.285 The committee considers that protecting the public from security risks is a legitimate objective for limiting a person's right to liberty. However, it is also necessary to show that the measures authorising a person's detention are reasonable, necessary and proportionate to that objective.

1.286 As the committee has previously noted, the provision of substantive review rights is an important safeguard that goes towards ensuring the necessity and proportionality of detaining the person. The committee is therefore concerned that the amendments will specifically exclude RRT, MRT or AAT review of a decision to refuse or cancel a protection visa on the grounds of an adverse ASIO security

44 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013).

assessment. Further, the committee notes that the AAT currently has the power to review adverse security assessments for Australian citizens and permanent residents only.

1.287 The committee notes that judicial review remains available for such decisions but considers that such review will only be adequate in accordance with the requirements of article 9 of the ICCPR if it includes the power to release a person from detention if the detention cannot be objectively justified. The statement of compatibility suggests that 'arrangements are in place for independent review of the initial issue of and continuing need for an adverse security assessment', but does not provide further elaboration.

1.288 It is also not apparent to the committee whether and what steps have been taken to consider and apply alternatives to continuing detention while durable solutions are explored for refugees with adverse ASIO security assessments. The statement of compatibility makes the assertion that 'in some situations, persons who are not able to be removed can be managed in less intrusive forms of immigration detention' but provides no information as to what this might entail.

1.289 The committee considers that without these key features and information, the amendments proposed in this bill have the potential to breach individuals' rights under article 9 of the ICCPR in similar ways to those identified by the HRC in its recent decision.

1.290 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on the following issues:

- **Whether the 'arrangements for independent review' mentioned in the statement of compatibility include the following features:**
  - **Meet the 'quality of law' test;**
  - **Permit review of the substantive grounds on which the person is held in order to determine whether the detention is arbitrary within the meaning of the ICCPR and not merely lawful under Australian law;**
  - **Result in binding outcomes, including the power to order release if the detention is not justified;**
  - **Include regular review of the continuing necessity of the detention, including the ability of the person to initiate a review, for example, in light of new information; and**
  - **Provide sufficient opportunity for the person to effectively challenge the basis for the adverse security assessment.**
- **Whether the bar on refugees accessing merits review by the AAT for their adverse security assessments is consistent with the right to equality and non-discrimination in article 26 of the ICCPR.**

- **Whether refugees with adverse security assessments receive an individualised assessment as to whether less restrictive alternatives to closed detention are available and appropriate for their specific circumstances (including, for example, community detention or conditional release with requirements such as to reside at a specified location, curfews, travel restrictions, regular reporting or possibly even electronic monitoring),[45] and, if not, clarification as to how the absence of such individualised assessment and/or options may be considered to be a proportionate response.**

Prohibition against torture, cruel, inhuman or degrading treatment

1.291 Article 7 of the ICCPR provides that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. As mentioned above, in addition to violations of article 9 of the ICCPR, the HRC also found that the indefinite detention of refugees with adverse security assessments was contrary to article 7 of the ICCPR. The HRC considered that:

> The force of the uncontested allegations regarding the negative impact that prolonged indefinite detention on grounds that the person cannot even be apprised of, can have on the mental health of detainees.
>
> The combination of the arbitrary character of the [detention], its protracted and/or indefinite duration, the refusal to provide information and procedural rights … and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.[46]

1.292 The HRC noted that Australia was under an obligation to take steps to prevent similar violations in the future and recommended that the government should review the migration legislation to ensure its conformity with the requirements of articles 7 and 9 of the ICCPR.[47]

1.293 The statement of compatibility does not address the issue of whether the proposed amendments are consistent with article 7 of the ICCPR.

1.294 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to:

- **whether the amendments in Schedule 3 to the bill are compatible with the prohibition against torture, cruel, inhuman or degrading treatment,**

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45 See, for example, the Australian Human Rights Commission, *Report of an inquiry into complaints by Sri Lankan refugees in immigration detention with adverse security assessments (* 2012) AusHRC 56, available at: http://www.humanrights.gov.au/publications/aushrc-56-sri-lankan-refugees-v-commonwealth-australia-department-immigration.

46 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013).

47 UN Human Rights Committee, *F.K.A.G. et al. v Australia*, CCPR/C/108/D/2094/2011 (2013).

given that they may result in the indefinite detention of a refugee who is deemed a security risk by ASIO; and

- **whether and what steps have been put in place to ensure that the circumstances that were the subject of consideration by the HRC will not arise again.**

Tax Bonus for Working Australians Repeal Bill 2013

Portfolio: Treasury
Introduced: House of Representatives, 12 December 2013

Summary of committee concerns

1.295 The committee seeks further information on the number of outstanding payments and on the compatibility of the bill with the right to social security and the right to an adequate standard of living.

Overview

1.296 This bill seeks to repeal the *Tax Bonus for Working Australians Act (No. 2) 2009* (the Tax Bonus Act). The Tax Bonus Act authorises the Commissioner of Taxation to pay a tax bonus to eligible tax payers. Eligible tax payers are those who paid tax in the 2007-08 income year and who had a taxable income of $100,000 or less. Those earning up to and including $80,000 are eligible for a payment of $950, those earning between $80,000 and $90,000 are eligible for a payment of $650 and those earning between $90,000 and $100,000 are eligible for a payment of $300.

1.297 According to the explanatory memorandum accompanying the bill, the purpose of the payments was 'to provide stimulus to the Australian economy at the height of the Global Financial Crisis'.[1] While most payments were made in 2009,

> a small number of payments continue to be made through either late banking of cheques (stale cheques that are re-issued by the Australian Taxation Office (ATO)) or the issue of an amended assessment for the 2007-08 income year where the taxpayer has an outstanding entitlement to the tax bonus.[2]

1.298 The bill seeks to ensure that no further tax bonus payments may be made by the Commissioner of Taxation.[3] In doing so, the bill displaces section 7(2) of the *Acts Interpretation Act 1901*, which provides a standard protection applying to any repeal of a law by Parliament, ensuring that the repeal does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the law prior to its repeal.[4]

Compatibility with human rights

Statement of compatibility

1.299 The bill is accompanied by a statement of compatibility that states that the bill does not engage any human rights.

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1 Explanatory memorandum, p 5.

2 Explanatory memorandum, p 5.

3 Item 1 of Schedule 1 repeals the *Tax Bonus for Working Australians Act (No. 2) 2009*.

4 Item 9 of Schedule 1.

Committee view on compatibility

Right to social security and an adequate standard of living

1.300 The committee notes that the bill may give rise to human rights concerns with regard to the right to social security[5] and the right to an adequate standard of living.[6] The stated purpose of the original bonus payment was to 'provide financial support to around 8.7 million tax payers'.[7] For many individuals, particularly those lower income earners eligible for the full $950 payment, the payment represents a significant addition to supplement their daily living needs. The removal of the entitlement to the tax bonus may be viewed as either retrogressive or a limitation on the rights to an adequate standard of living and the right to social security. It is therefore necessary for the government to demonstrate that the measure pursues a legitimate objective and has a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

1.301 The explanatory memorandum states '[g]iven that stimulus to the economy is no longer required, the Government considers that further payments are not warranted, and represent an opportunity to remove government waste'. The committee recognises that the need for the government to manage and prioritise its fiscal needs is a legitimate objective. The committee also notes the specific context in which the payments were intended to be made.

1.302 However, the committee seeks further information as to how the measure is reasonable and proportionate to this objective. In particular, whether the measure will have a particular impact on vulnerable and marginalised groups on low incomes. The explanatory memorandum states that the measure 'is expected to save $0.25 million on an underlying cash balance basis over the forward estimates'.[8] This would appear to constitute a relatively small number of payments (approximately 270 payments on the basis of payments of $950, not taking into account where payments may be $650 or $330 for higher income earners). The committee would be grateful for information on those persons who are likely to remain eligible for the payment and what income brackets they fall in.

1.303 The committee intends to write to the Treasurer to seek information on the income brackets within which those who remain eligible for the payment fall, including what proportion of persons would likely be low income earners.

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5 Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

6 Article 11 of the ICESCR.

7 Tax Bonus for Working Australians Bill 2009, Explanatory memorandum, p 5.

8 Explanatory memorandum, p 3.

Therapeutic Goods Amendment (2013 Measures No. 1) Bill 2013

Portfolio: Health
Introduced: House of Representatives, 12 December 2013

Summary of committee concerns

1.304 The committee considers that the bill engages fair trial rights. The committee seeks further information from the Minister for Health before forming a view on whether the bill is compatible with these rights.

Overview

1.305 This bill seeks to make a range of amendments to the *Therapeutic Goods Act 1989*. This includes amendments to:

- put beyond doubt that where regulatory action in relation to therapeutic goods is predicated on whether or not the goods comply with advertising requirements, those requirements include applicable provisions of the Therapeutic Goods Advertising Code (Schedule 1);
- introduce a new offence and civil penalty provision for providing false or misleading information in relation to a request to vary an existing entry on the Register for therapeutic goods and extend the application of existing offence and civil penalty provisions for providing false or misleading information in response to a request for information about registered therapeutic goods and devices (Schedules 2 and 11);
- allow the Minister to make a legislative instrument determining that goods are not therapeutic goods for the purposes of the Act and to introduce a power for the Secretary to remove products from the Register that are not therapeutic goods, for the purpose of ensuring greater clarity and certainty (Schedule 3);
- remove inconsistencies relating to advertising offences in Division 3A of Part 5-1 (Schedule 4);
- make clearer the process by which the Secretary makes decisions to either register or not register goods, including the source of the Secretary's power to approve product information for medicines accepted for registration (Schedule 5);
- allow changes made by the Secretary to conditions of registration, listing or inclusion of therapeutic goods in the Register, and changes to conditions of manufacturing licences and conformity assessment certificates, to take effect earlier than is currently possible under the Act in certain circumstances (for example, where the sponsor or certificate or licence holder agrees to the earlier commencement) (Schedule 6);

- include a new power for the Secretary to cancel the registration or listing of goods where the presentation of listed therapeutic goods is unacceptable (for example if the presentation of a good is misleading or confusing as to the goods' content) or the presentation of registered therapeutic goods is not acceptable (encompassing a range of factors such as the consumer medicine information for the goods) (Schedule 7);
- provide a right of merits review where, under section 15(1) of the Act, the Secretary imposes conditions on the granting of her consent to the importing into, supplying in, or exporting from, Australia therapeutic goods (other than medical devices) that do not comply with an applicable standard (Schedule 8);
- make clear when a substituted decision of the Minister should be treated as a decision of the Secretary (Schedule 9);
- modify the definition of a 'kit' under the Act (Schedule 10);
- provide a minimum notice period of at least 20 working days before a cancellation of therapeutic goods from the Register takes effect (Schedule 12);
- revise publication provisions, including: allowing the Secretary the discretion to publish information about various regulatory decisions in the Gazette or on the Department's website (currently all provisions require publication in the Gazette only) and a new requirement to publish the particulars of any cancellation of registered or listed therapeutic goods by the Secretary (to bring in line with comparable requirements for cancellation of biologicals and medical devices from the Register) (Schedule 13);
- revise the commencement date of the time period within which a person other than a sponsor of a therapeutic good must make a request for merits review of a decision under the Act from the current requirement of 90 days after the decision first comes to the person's notice to 90 days of the earlier of when the decision is published or when the decision comes to the person's attention (Schedule 13);
- support the recent reclassification of medical devices that are hip, knee and shoulder joint replacement implants from Class IIb to the higher risk Class III classification and allow the Therapeutic Goods Administration sufficient time to identify and address the large number of Class III applications likely to be made (Schedule 14);
- allow the cancellation of the registration or listing of a product when the sponsor of the goods has failed to respond to a notice to provide information or documents and include a new defence of reasonable excuse to the offence of failing to comply with a notice to provide

information or documents about biologicals or medical devices (Schedule 15); and

- enable the holders of manufacturing licences and conformity assessment certificates and sponsors of medical devices who asked the Secretary to cancel their devices to request the reversal of that cancellation and new requirements to publish the details of the overturning of certain kinds of regulatory decisions.

Compatibility with human rights

Statement of compatibility

1.306 The bill is accompanied by a statement of compatibility that states that the bill 'contains one measure that appears to engage article 14(2) of the International Covenant on Civil and Political Rights'[1]. This refers to the right to be presumed innocent. The bill introduces a new strict liability offence for the making of false or misleading statements in connection with a request to vary an entry for a therapeutic good on the Register, where the use of the goods would likely result in harm or injury to any person.[2] The offence carries a maximum penalty of 2,000 penalty units (or $340,000).

1.307 The statement of compatibility sets out the rationale and justification for the new offence and concludes that the offence is a reasonable, necessary and proportionate limitation on the right to be presumed innocent.

Committee view on compatibility

Right to a fair trial – presumption of innocence

1.308 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact will engage the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Similarly, strict liability offences engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.309 However, reverse burden and strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being

1 Statement of compatibility, p 5.

2 See item 1 of Schedule 11 to the bill.

sought and maintain the defendant's right to a defence. In other words, such offences must be reasonable, necessary and proportionate to that aim.

1.310 The statement of compatibility sets out the following reasons for why it is necessary to impose strict liability in relation to this offence:

- requests to vary an entry on the Register can relate to serious safety issues, such as adding a warning in connection with the use of medicine, and the provision of false or misleading information that is relied upon by the Secretary to make a decision could have serious consequences for public health;
- such requests can require a significant amount of data to satisfy the Secretary that the variation does not involve a reduction in the quality, safety or efficacy of the goods and there is a particular level of dependence on the accuracy of the information as the information is often only known to the sponsor; and
- the proposed offence will form part of a tiered approach under the Act to offending conduct relating to the provision of false or misleading information where the information is relied upon to inform regulatory decision-making and is likely to cause harm or injury, and it is considered appropriate and necessary for deterrence purposes to include a criminal sanction for non-compliance regardless of any mental element as part of this framework.[3]

1.311 The statement of compatibility also notes that there is no period of imprisonment applicable and that the maximum penalty of 2000 penalty units reflects the seriousness of the conduct addressed, namely in circumstances where use of the goods would likely result in harm or injury to a person.

1.312 The committee notes that the bill contains a number of other measures which also engage the right to be presumed innocent and which are not addressed in the statement of compatibility.[4]

1.313 Currently, the Act provides a strict liability offence for providing false or misleading information in response to a notice to provide information or documents regarding therapeutic goods by a person in relation to whom a medicine is listed under section 26A of the Act, where the use of the goods may lead to harm or injury to a person.[5] The offence carries a maximum penalty of 2000 penalty units (or $340,000). The bill expands the scope of the current offence to apply to any person issued a notice and who provides information or documents, not just persons in

3 Statement of compatibility, pp 6-7.

4 Items 5 and 6 of Schedule 2 to the bill and items 2 and 3 of Schedule 4 to the bill.

5 *Therapeutic Goods Act 1989*, s 31(5B).

relation to whom a medicine is listed under the Act.[6] According to the explanatory memorandum, such persons may include, for example, applicants or sponsors seeking to register their goods in the Register.[7]

1.314 The bill also amends an existing offence in the Act for publishing or broadcasting an advertisement about therapeutic goods that contain a prohibited representation,[8] by including an additional element so that the offence will only apply where the use of the prohibited representation has not been permitted under the Act.[9] The bill imposes strict liability in relation to this new element of the offence.[10]

1.315 The bill also extends the operation of a defence to an existing offence under the Act relating to publishing or broadcasting an advertisement containing a restricted representation which has not been approved, where the advertisement in question has been made by, or on behalf of, the Commonwealth.[11] According to the explanatory memorandum, this will ensure consistency with other like offences, in relation to which the defence currently applies.[12] A defendant will bear an evidential burden in relation to this defence.[13]

1.316 The committee considers that the application of strict liability and the use of a reverse burden as proposed by the bill are unlikely to raise issues of incompatibility with article 14(2) of the ICCPR. In particular, in relation to the new and expanded offences criminalising the provision of false and misleading information, the committee considers the offences apply in a regulatory context, in an area where activities can have serious consequences for public health and safety. While the penalties of 2000 penalty units are high, they may nevertheless be considered justifiable, given that the offences are directed at preventing the provision of information which would likely lead to harm or injury to a person and given the need for strong deterrent measures to protect the public from exposure to therapeutic goods that have been approved for continued supply on the basis of false or misleading information.

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6 Items 5 and 6 of Schedule 2 of the bill.

7 Explanatory memorandum, p 16.

8 *Therapeutic Goods Act 1989*, s 42DL(1)(a).

9 Item 1 of Schedule 4 of the bill. Under section 42DK(2) of the *Therapeutic Goods Act 1989*, the Secretary may permit the use of a prohibited representation, including on the label of goods or in information included in the package in which goods are contained.

10 Item 2 of Schedule 4 of the bill.

11 Section 42DL(3)(a) of the Therapeutic Goods Act, amended by item 3 of Schedule 4 of the bill.

12 Explanatory memorandum, pp 25-26.

13 See note accompanying section 42DM(3) of the *Therapeutic Goods Act 1989*.

1.317 However, the committee emphasises its expectation, as set out in its Practice Note 1, that statements of compatibility should include sufficient detail of relevant provisions in a bill which impact on human rights to enable the committee to assess their compatibility. This includes identifying and providing justification where the existing application of strict liability or the reversal of a burden of proof is expanded by a bill.

Right to a fair trial - civil penalties

1.318 The bill proposes to introduce a new civil penalty provision for false statements in connection with a request to vary an entry on the Register in relation to therapeutic goods.[14] The penalty provision carries a maximum penalty of 5000 penalty units ($850,000) for an individual and 50,000 penalty units ($8.5 million) for a body corporate. According to the explanatory memorandum, the purpose of the provision is to introduce a corresponding civil penalty provision to the new criminal offences for false statements in requests for variation of entries in the Register that are proposed by the bill (including the proposed new strict liability offence described above).[15]

1.319 The bill also expands the operation of an existing civil penalty provision. Currently, the Act sets out a civil penalty provision for providing false or misleading information in relation to medicines listed under section 26A of the Act.[16] The civil penalty provision carries a maximum penalty of 5000 penalty units ($850,000) for an individual and 50,000 penalty units ($8.5 million) for a body corporate. The bill seeks to expand the operation of this provision so that it applies to any person who is issued a notice and who provides information or documents, not just persons in relation to whom a medicine is listed under the Act.[17] According to the explanatory memorandum, this mirrors the change made by the bill to the corresponding criminal offence under the Act (as described above).[18]

1.320 As our predecessor committee has noted on multiple occasions, where a penalty is described as civil under national or domestic law, it may nonetheless be classified as 'criminal' for the purposes of Australia's human rights obligations because of its purpose, character or severity. As a consequence, the specific criminal process guarantees set out in article 14 of the ICCPR may apply to such penalties and proceedings to enforce them.

1.321 The committee set out in its Interim Practice Note 2 the expectation that statements of compatibility should provide an assessment as to whether civil penalty

14 New section 9H at item 1 of Schedule 11 to the bill.

15 Explanatory Memorandum, p 47.

16 *Therapeutic Goods Act 1989*, s 31AAA.

17 Item 9 of Schedule 2 to the bill.

18 Explanatory memorandum, p 16.

provisions in bills are likely to be 'criminal' for the purposes of article 14 of the ICCPR and if so, whether sufficient provision has been made to guarantee their compliance with the relevant criminal process rights provided for under the ICCPR. These issues are neither identified nor addressed in the statement of compatibility accompanying this bill. The committee notes that the civil penalties introduced or expanded on by the bill involve the application of quite significant pecuniary penalties to individuals.

1.322 The committee intends to write to the Minister for Health to seek clarification as to whether the proposed amendments to insert a new civil penalty provision and to expand the scope of an existing civil penalty provision are consistent with the right to a fair trial in article 14 of the ICCPR. In particular, the committee requests the following information:

- **an assessment of the provisions against the three criteria set out in its Interim Practice Note 2, relating to (i) the domestic classification; (ii) the nature or purpose of the penalty; and (iii) the severity of the penalty; and**
- **whether particular protections, such as the presumption of innocence, the prohibition against double jeopardy and the privilege against self-incrimination, would apply to the relevant enforcement proceedings.**

Bills unlikely to raise human rights concerns

High Speed Rail Planning Authority Bill 2013

Sponsor: Mr Albanese
Introduced: House of Representatives, 9 December 2013

1.323 This bill proposes to establish the High Speed Rail Planning Authority. The purpose of the Authority would be to advise on, plan and develop high speed rail on the east coast of Australia.

1.324 The bill is accompanied by a statement of compatibility that states that it does not engage any human rights.

1.325 The committee considers that the bill does not appear to give rise to human rights concerns.

Landholders' Right To Refuse (Gas And Coal) Bill 2013

Sponsor: Senator Waters
Introduced: Senate, 9 December 2013

1.326 This bill proposes to provide Australian landholders with the right to refuse the undertaking of gas and coal mining activities on food producing land. The purpose of the bill is to address the likely impacts of coal and gas mining activities on Australia's food security.

1.327 The bill is accompanied by a statement of compatibility that states that this bill has no negative human rights implications.

1.328 The committee notes that the bill is likely to promote the right to an adequate standard of living,[1] which includes the right to food and requires States to take steps to ensure the availability, adequacy and accessibility of food, and the right not to be subjected to arbitrary or unlawful interference with one's home.[2]

1.329 The committee considers that the bill does not appear to give rise to human rights concerns.

1 Article 11 of the International Covenant on Economic, Social and Cultural Rights.

2 Article 17 of the International Covenant on Civil and Political Rights.

Marriage Equality Amendment Bill 2013

Sponsor: Senator Hanson-Young
Introduced: Senate, 12 December 2013

1.330 This bill proposes to amend the definition of 'marriage' in the *Marriage Act 1961* (Marriage Act) to enable two people, regardless of their sex, sexual orientation or gender identity, to have the opportunity to marry. The bill also proposes to remove from the Marriage Act the prohibition on recognising a marriage between same-sex couples entered into in a foreign country.

1.331 The bill is accompanied by a statement of compatibility that states that the bill promotes a number of rights, including the right to marry,[3] the right to equality and non-discrimination[4] and the right to health.[5]

1.332 Our predecessor committee has already examined and set out its views in relation to a number of the human rights issues relevant to same-sex marriage in its consideration of two bills introduced in the 43rd Parliament containing measures identical to those in this bill.[6]

1.333 The committee considers that the bill does not appear to give rise to human rights concerns.

3 Article 23 of the International Covenant on Civil and Political Rights (ICCPR).

4 Article 26 of the ICCPR.

5 Article 12 of the International Covenant on Economic, Social and Cultural Rights.

6 See PJCHR comments on the Marriage Equality Amendment Bill 2013, *Third Report of 2013*, p 79 and the Marriage Act Amendment (Recognition of Foreign Marriage for Same-Sex Couples) Bill 2013, *Seventh Report of 2013*, p 31.

Migration Amendment (Visa Maximum Numbers Determinations) Bill 2013

Sponsor: Senator Hanson-Young
Introduced: Senate, 9 December 2013

1.334 This bill proposes to subject instruments made under section 85 of the *Migration Act 1958* to disallowance. Section 85 of the Migration Act allows the Minister to determine the maximum number of visas of a specified class or visas of specified classes that may be granted in a specified financial year.[7] The bill provides that the amendments made by the bill apply retrospectively to each legislative instrument made under section 85 on or after 2 December 2013.

1.335 The bill also seeks to disallow the instrument made by the Minister under section 85 on 2 December 2013, entitled *Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year – IMMI 13/156*. This instrument capped the maximum number of visas that may be granted in the financial year 1 July 2013 to 30 June 2014 for Protection (Class XA) visas at 1650.

1.336 The bill is accompanied by a statement of compatibility that states that the bill does not engage any human rights 'as it simply creates a mechanism for the Parliament to disallow legislative instruments determined [under] section 85 of the *Migration Act 1958*'.[8]

1.337 The committee notes that since this bill was introduced, the instrument sought to be disallowed by the bill (*Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year – IMMI 13/156*) has been revoked by the Minister.[9] Despite the fact that the instrument has been revoked, the committee has examined the instrument as part of this report, as legislation which has come before the Parliament.

1.338 The committee considers that the bill does not appear to give rise to human rights concerns.

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7 Instruments made under Part 2 of the *Migration Act 1958* are not subject to disallowance (see section 44(2) of the *Legislative Instruments Act 2003*).

8 Statement of compatibility, p 5.

9 *Revocation of IMMI13/156 'Granting of Protection Class XA Visas in 2013/2014 Financial Year' – IMMI 13/159*.

Private Health Insurance Legislation Amendment Bill 2013

Portfolio: Health
Introduced: House of Representatives, 12 December 2013

1.339 This bill proposes to amend the *Private Health Insurance Act 2007* (PHI Act) to make clear that a single rebate adjustment factor, to be determined in accordance with the *Private Health Insurance (Incentives) Rules*,[10] will be applied to all Australian government rebates on private health insurance.

1.340 According to the explanatory memorandum, previous amendments made to the PHI Act (the June 2013 amendments)[11] capped the rebate by

> setting a base premium for every type of insurance product on the market and then indexing the rebate payable for every type of private health insurance product subgroup by the lesser of the increase in the Consumer Price Index (CPI) or the increase in the commercial premium for each product subgroup.[12]

1.341 The purpose of this bill is to simplify implementation of the June 2013 amendments by applying a single rebate adjustment factor to all types of insurance products.

1.342 The bill is accompanied by a statement of compatibility stating that the proposed amendments are 'in the interests of reducing regulatory burden'.[13] The statement of compatibility refers to the right to health and states that there is no incompatibility with the right to health because the bill simplifies the process for consumers and insurers and is 'for the legitimate objective of reducing costs for insurers and consumers'.[14] The statement of compatibility also states that the process for purchasing health insurance and claiming the rebate will remain unchanged.[15]

1.343 The committee notes that our predecessor committee examined and set out its views in relation to the human rights issues relevant to the June 2013 amendments.[16] The statement of compatibility accompanying the June 2013

10 Made under section 333-20 of the *Private Health Insurance Act 2007*.

11 The *Private Health Insurance Legislation Amendment (Base Premium) Act 2013* received Royal Assent on 29 June 2013. The measure is due to take effect from 1 April 2014.

12 Explanatory memorandum, p 1.

13 Statement of compatibility, p 2.

14 Statement of compatibility, p 3.

15 Statement of compatibility, p 3.

16 See comments of the PJCHR on the Private Health Insurance Legislation Amendment (Base Premium) Bill 2013, *Seventh Report of 2013*, p 34.

amendments recognised that the amendments may have the effect of increasing the cost of obtaining private health insurance.[17]

1.344 The committee concluded that to the extent that the amendments led to an increase in the cost of private health insurance, the amendments constituted a limitation on the right to health. However, it considered that such a limitation may be justified under article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) because the purpose of the bill, to make the private health insurance rebate expenditure sustainable, was a legitimate objective.

1.345 It is not clear what will be the likely impact on consumers of this bill will be and whether the amendments may have a similar substantive effect to the June 2013 amendments. As with the June 2013 amendments, the committee notes that any such impact may be justified under article 4 of the ICESCR. However, the committee would have been aided in its scrutiny of this bill had the statement of compatibility more clearly explained the potential impact on consumers.

1.346 The committee considers that this bill does not appear to give rise to human rights concerns.

17 Statement of compatibility accompanying the Private Health Insurance Legislation Amendment (Base Premium) Bill 2013, p 4.

Veterans Affairs Legislation Amendment (Miscellaneous Measures) Bill 2013

Portfolio: Veteran's Affairs
Introduced: House of Representatives, 12 December 2013

1.347 This bill proposes to make a number of minor and technical amendments to veterans' affairs legislation and the *Social Security Act 1991*. The bill seeks to:

- clarify arrangements for the payment of travel expenses for treatment under the *Veterans' Entitlements Act 1986* and the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*;
- provide for the more timely provision of special assistance under the *Military Rehabilitation and Compensation Act 2004* by way of a legislative instrument in place of the current arrangement requiring a regulation;
- ensure that the debt recovery provisions will be applicable to all relevant provisions of the Veterans' Entitlements Act, the regulations and any legislative instrument made under the Veterans' Entitlements Act;
- make technical amendments to provisions in the Military Rehabilitation and Compensation Act that refer to legislative instruments to reflect the enactment of the *Legislative Instruments Act 2003*;
- amend the Military Rehabilitation and Compensation Act to replace obsolete references to pharmaceutical allowance and telephone allowance with references to the MRCA Supplement (which became payable from 20 September 2009 and replaced the telephone and pharmaceutical allowances that were payable under the Act prior to that date); and
- repeal redundant definitions and operative provisions relating to the maintenance income provisions of the Veterans' Entitlements Act and align the remaining definitions with those used in the Social Security Act.

1.348 The bill is accompanied by a statement of compatibility that states that most of the amendments do not engage any human rights but that the amendments to clarify the arrangements for the payment of travel expenses for persons receiving treatment under the Veterans' Entitlements Act and the Australian Participants in British Nuclear Tests (Treatment) Act advance the right to health as they ensure that eligible persons will be able to access the health services provided under the Acts.

1.349 The committee considers that the bill does not appear to give rise to human rights concerns.

Part 2

Legislative instruments received
23 November 2013 – 31 January 2014

The committee has sought further comment in relation to the following instruments

Commonwealth Scholarships Guidelines (Education) 2013

FRLI: F2013L02070
Portfolio: Education
Tabled: House of Representatives and Senate, 12 December 2013

Summary of committee concerns

2.1 The committee seeks further information on the impact of the proposed changes on the right to education and, to the extent that the instrument may involve a limitation on that right or a retrogressive measure, a clear statement of justification for the changes. The committee also seeks further information as to the compatibility of the instrument with the right to equality and non-discrimination.

Overview

2.2 Under the *Higher Education Support Act 2003*, the Minister may make Commonwealth Scholarship Guidelines to give effect to matters under the Act relating to Commonwealth Scholarships.[1]

2.3 This instrument revokes the *Commonwealth Scholarships Guidelines (Education) 2010* (the former Guidelines) and makes new guidelines to replace them. The new Guidelines implement the 'efficiency dividend' to university funding of 2 per cent in 2014 and 1.25 percent in 2015 announced by the previous government on 13 April 2013 and included in the 2013-14 Budget. The new Guidelines also set out Indigenous Commonwealth Scholarships separately from other Commonwealth Scholarships.

Compatibility with human rights

Statement of compatibility

2.4 The statement of compatibility accompanying the instrument states that the instrument engages and promotes the right to education.[2]

2.5 The statement of compatibility also states that the instrument 'engages the right to equality and non-discrimination as it specifies the Indigenous Commonwealth Scholarships Program and the Indigenous Staff Scholarships Program'.[3]

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1 *Higher Education Support Act 2003*, section 238-10 at item 3.

2 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

3 See article 2(2) of the ICESCR and articles 2, 16 and 26 of the International Covenant on Civil and Political Rights.

2.6 The statement concludes that the instrument is compatible with human rights.

Committee view on compatibility

Right to education

2.7 The statement of compatibility states that:

> [t]he Guidelines provide for Scholarships to support students and staff while they are undertaking study. To the extent that the right to education is engaged this is promoted as it increases access to education.[4]

2.8 The committee agrees that, overall, the Commonwealth Scholarships program under the Higher Education Support Act promotes the right to education. The committee also agrees that, to the extent that the instrument furthers the implementation of this program, the instrument also promotes the right to education. However, the committee notes that one of the purposes of this instrument is to implement the 'efficiency dividend' for higher education funding, which involves overall cuts in funding to that sector.

2.9 According to the statement of compatibility, 'the changes are not expected to have any impact on individuals' access to education'.[5] The statement also states that:

> [t]he effect of the efficiency dividend will not effectively reduce the numbers of Indigenous staff and students accessing these scholarships as funding will continue to rise, albeit at a slower rate.[6]

2.10 According to the explanatory statement accompanying the bill, the 'efficiency dividend' will be applied to the amount of the grant and the reduced amount will then be indexed.[7]

2.11 It is not clear whether the implementation of the efficiency dividend under the instrument will result in a reduction in the overall funding available for Commonwealth scholarships and the number of scholarships. To the extent that this instrument may result in a reduction of funding or numbers of scholarships, the measure may be either a limitation on the right to education or a retrogressive measure.

2.12 Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the rights guaranteed in the Covenant, such as the right to education, may be limited but only by:

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4 Statement of compatibility, p 2.

5 Statement of compatibility, p 2.

6 Statement of compatibility, p 2.

7 Explanatory statement, p 2.

> such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

2.13 Our predecessor committee noted that retrogressive measures affecting economic, social and cultural rights have to be clearly justified:

> A deliberate retrogressive measure has been described to mean any measure which implies a backwards step in the level of protection of ICESCR as a consequence of an intentional decision by the state and includes an unjustified reduction in public expenditure in the absence of adequate compensatory measures aimed to protect the affected individuals. Deliberate retrogressive measures are not prohibited per se under international human rights law but will require close justification, even during times of severe resource constraints, whether caused by a process of adjustment, economic recession, or by other factors.[8]

2.14 If the application of the efficiency dividend under the instrument will result in a reduction of funding available for Commonwealth scholarships, it is necessary for the government to demonstrate that the measure pursues a legitimate objective and there is a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

2.15 The statement of compatibility does not address these matters. The committee expects that where funding cuts are made, the statement of compatibility should provide an assessment of the practical impact on the rights in question, including relevant justification where such rights will be limited.

2.16 The committee intends to write to the Minister for Education to seek further information as to:

- **whether the implementation of the efficiency dividend will result in a reduction of funding for Commonwealth scholarships or a reduction in the number of scholarships available; and**
- **if so, how any reduction is reasonable, necessary and proportionate to achieving a legitimate objective.**

Right to equality and non-discrimination

2.17 As set out above, the statement of compatibility notes that the separation of Indigenous Commonwealth Scholarships from other Commonwealth Scholarships engages the right to equality and non-discrimination. The statement states that:

8 PJCHR, *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012, Final Report, Fifth Report of 2013*, pp 16-17.

> [t]o the extent that the right is engaged, it promotes the right to self-determination as Indigenous staff and students are provided with funding which will assist them to participate in higher education.[9]

2.18 The committee agrees that, overall, the provision of funding to Indigenous staff and students under the Indigenous Commonwealth Scholarships program promotes the rights of Indigenous persons. However, the purpose of this instrument is to 'separate out Indigenous Commonwealth Scholarships from other Commonwealth Scholarships'.[10]

2.19 This measure engages the right to equality and non-discrimination because it constitutes a difference in treatment between persons or groups on the basis of a prohibited ground, namely race. However, such a difference in treatment will not constitute prohibited discrimination where its purpose is legitimate, based on reasonable and objective criteria and proportionate to the objective to be achieved.

2.20 The statement of compatibility does not address whether the measure constitutes legitimate differential treatment. In particular, the statement of compatibility does not address why it is necessary to separate out Indigenous scholarships from other types of scholarships. Without knowing what the objective of the measure is, the committee cannot assess whether the measure is legitimate differential treatment.

2.21 The committee intends to write to the Minister for Education to seek further information as to:

- **what the purpose of separating out Indigenous scholarships and other scholarships in the new Guidelines is; and**
- **whether the separation is reasonable and proportionate to achieving a legitimate objective and therefore constitutes legitimate differential treatment consistent with the right to equality and non-discrimination.**

9 Statement of compatibility, p 2.

10 Explanatory statement, p 1.

Customs Amendment (Record Keeping Requirements and Other Measures) Regulation 2013

FRLI: F2013L01968
Portfolio: Immigration and Border Protection
Tabled: House of Representatives and Senate, 2 December 2013

Summary of committee concerns

2.22 The committee seeks further information as to the steps proposed to ensure the right to privacy of a person who provides personal information to a Cargo Terminal Operator who is not subject to the private sector provisions of the *Privacy Act 1988*.

Overview

2.23 This regulation prescribes the particulars that must be kept by Cargo Terminal Operators (CTOs) under subsection 102CE of the *Customs Act 1901* with regard to persons who enter cargo terminals. This requirement was inserted by the *Customs and Auscheck Legislation Amendment (Organised Crime and Other Measures) Act 2013.*

Compatibility with human rights

Statement of compatibility

2.24 The regulation is accompanied by a short statement of compatibility that states that the regulation engages the right to privacy. The statement states that the requirement to collect and store personal information is consistent with current obligations imposed on other entities involved in the cargo supply chain and does not seek to affect or disapply any of the existing protections under Australian Law.

Committee view on compatibility

2.25 Our predecessor committee considered the Customs and Auscheck Legislation Amendment (Organised Crime and Other Measures) Bill 2013 in its *Sixth Report of 2013* and *Tenth Report of 2013*.[1] The committee wrote to the then Minister for Home Affairs seeking information as to the type of personal information to be collected, the proposed use and storage of such information, and the steps proposed to ensure the right to privacy of a person who provides personal information to container terminal operators not covered by the *Privacy Act 1988* (the Privacy Act).[2]

2.26 In his response, the then Minister advised that:

1 PJCHR, *Sixth Report of 2013*, pp 25-35, and *Tenth Report of 2013*, p 124 and pp 144-147.

2 PJCHR, *Sixth Report of 2013*, p27.

- the information to be collected is consistent with obligations already in place for customs depot and warehouse licence holders and that in many cases, CTOs already collect this information when persons other than employees seek to enter the cargo terminal;
- the private sector provisions in the Privacy Act would apply to CTOs and that very few if any CTOs would fall within the small business exception to these requirements; and
- it was not currently proposed that any additional regulatory controls be imposed on those small businesses operating as CTOs who are not subject to the Privacy Act.[3]

2.27 The statement of compatibility that accompanies the regulation makes no explicit reference to the private sector provisions in the Privacy Act or to the extent to which CTOs may fall within the scope of the exception for small business.

2.28 The committee intends to write to the Minister for Immigration and Border Protection to seek information as to the number of Cargo Terminal Operators that are not subject to the private sector provisions of the *Privacy Act 1988* and the steps proposed to ensure the right to privacy of a person who provides personal information to a Cargo Terminal Operator who is not subject to the private sector provisions.

3 PJCHR, *Tenth Report of 2013*, p 144-145.

Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year – IMMI 13/156

FRLI: F2013L02038
Portfolio: Immigration and Border Protection
Tabled: House of Representatives and Senate, 5 December 2013

Summary of committee concerns

2.29 The committee notes that this instrument has now been revoked by the Minister. The committee has still considered the instrument and identified its concerns about human rights compatibility as the instrument is legislation which has come before the Parliament. However, the committee does not intend to seek any further information from the Minister at this stage.

Overview

2.30 This instrument determined that the maximum number of visas that may be granted in the financial year 1 July 2013 to 30 June 2014 for Protection (Class XA) visas is 1650.[1] The instrument applied to all applicants who have applied for a Protection (Class XA) visa, including applicants who have applied before the implementation of this cap. This instrument has now been revoked by the Minister.[2]

Compatibility with human rights

Statement of compatibility

2.31 The committee notes that this instrument is exempt from the requirement to provide a statement of compatibility as it is not defined as a disallowable legislative instrument within the meaning of section 42 of the *Legislative Instruments Act 2003*.[3]

2.32 As a matter of best practice, however, the committee considers that legislative instruments which have the potential to affect human rights should be accompanied by a statement of compatibility.

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1 Section 85 of the *Migration Act 1958* provides that the Minister may determine by instrument in writing the maximum number of the visas of a specified class that may be granted in a specified financial year.

2 *Revocation of IMMI13/156 'Granting of Protection Class XA Visas in 2013/2014 Financial Year' – IMMI 13/159*.

3 Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires statements of compatibility only for legislative instruments within the meaning of section 42 of the *Legislative Instruments Act 2003*. The committee's scrutiny mandate, however, is not limited by the section 42 definition and extends to all legislative instruments: see section 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Committee view on compatibility

2.33 The committee understands that there are approximately 33,000 people who have arrived in Australia by boat and whose claims for protection have yet to be processed.[4] Approximately 5,800 persons are held in immigration detention, 3,300 are in community detention, 22,900 are in the community on bridging visas and 1,800 are in offshore processing centres.[5] The committee also understands that the cap of 1650 determined by this instrument for this financial year has already been reached.[6] The effect of this instrument would therefore appear be to freeze the processing of the claims of those 33,000 persons who have arrived in Australia.

2.34 The committee considers that further information on the effect of this instrument would be necessary to assess its compatibility with human rights. However, the committee considers that to the extent that the instrument results in a freeze on processing, it may give rise to issues of compatibility with a number of human rights.

2.35 The committee considers that this instrument raises several areas of concern, including:

- **whether a freeze on the issuing of protection visas to those held in immigration detention onshore and offshore is compatible with the prohibition on arbitrary detention, the right to humane treatment, the right to health, and children's rights;**

- **whether a freeze on the issuing of protection visas to those who arrived in Australia after 13 August 2012 who are in the community on bridging visas is compatible with the right to work, the right to social security, and the right to an adequate standard of living; and**

- **whether a freeze on the issuing of protection visas is compatible with rights relating to the protection of the family.**

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4 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Government acts swiftly to deny people smugglers' promise of permanent visas', Media release, 4 December 2013.

5 Mr Martin Bowles PSM, Secretary, Department of Immigration and Border Protection, Supplementary Budget Estimates Hansard, 19 November 2013, p 37.

6 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Government acts swiftly to deny people smugglers' promise of permanent visas', Media release, 4 December 2013, in which the Minister stated '[t]he government has acted swiftly to ensure that none of the 33,000 people who arrived in Australia illegally by boat under Labor's watch and were yet to be processed will be granted a permanent visa'.

Higher Education (Maximum Amounts for Other Grants) Determination 2013

FRLI: F2013L02165
Portfolio: Education
Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.36 The committee seeks further information on the impact of the proposed changes on the right to education and, to the extent that the instrument may involve a limitation or a retrogressive measure, a statement of justification for the changes.

Overview

2.37 The *Higher Education Support Act 2003* provides for the payment of 'other grants' to higher education providers and other eligible bodies for a variety of purposes.[1] Such purposes include, for example, the promotion of equality and opportunity in higher education. The Act sets out the maximum total payments for 'other grants' in respect of a year.[2] In relation to each of the years 2013-2016, the Act sets out an amount or provides that, in the alternative, the Minister may determine an amount by legislative instrument. In relation to the year 2017 and each later year, the Act provides that the Minister must determine the amount by legislative instrument.

2.38 This instrument sets out the maximum amounts of all grants for 'other grants' for the 2013-2017 calendar years.

Compatibility with human rights

Statement of compatibility

2.39 The statement of compatibility accompanying the instrument states that the instrument engages the right to education.[3] The statement states that, given the purposes of the 'other grants' payments, the instrument 'enables access to education and therefore will be compatible with human rights'.[4] Further, that:

1 *Higher Education Support Act 2003*, Part 2-3.

2 Higher Education Support Act, section 41-45.

3 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

4 Statement of compatibility, p 1.

> To the extent that the right to education is engaged, this right is promoted by the Instrument as the Instrument aims to improve the integrity of the higher education sector.[5]

2.40 The statement concludes that the instrument is compatible with human rights because it advances the protection of human rights.

Committee view on compatibility

Right to education

2.41 The committee agrees that, overall, the payment of 'other grants' under the Higher Education Support Act appears to promote the right to education. However, the committee notes that the purpose of this particular instrument is to prescribe the maximum amounts payable in respect of a given year. The committee also notes that the amounts specified in the instrument for the years 2013-2017 are all lesser amounts than those currently specified in the Act.[6]

2.42 The statement of compatibility does not address why the amounts specified in the instrument are lower than those specified in the Act. To the extent that this instrument reduces the level of funding available, the measure may be either a limitation on the right to education or a retrogressive measure.

2.43 Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the rights guaranteed in the Covenant, such as the right to education, may be limited but only by:

> such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

2.44 Our predecessor committee also noted that retrogressive measures affecting economic, social and cultural rights have to be clearly justified:

> A deliberate retrogressive measure has been described to mean any measure which implies a backwards step in the level of protection of ICESCR as a consequence of an intentional decision by the state and includes an unjustified reduction in public expenditure in the absence of adequate compensatory measures aimed to protect the affected individuals. Deliberate retrogressive measures are not prohibited per se under international human rights law but will require close justification,

5 Statement of compatibility, p 1.

6 See section 41-45 of the Higher Education Support Act.

> even during times of severe resource constraints, whether caused by a process of adjustment, economic recession, or by other factors.[7]

2.45 If the effect of the instrument is to reduce the amount of funding available, it is necessary for the Minister to demonstrate that the measure pursues a legitimate objective and has a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

2.46 The statement of compatibility does not address these matters. The committee expects that where funding cuts are made, the statement of compatibility should provide an assessment of the practical impact on the relevant rights, including, where the enjoyment of such rights will be affected, an appropriate justification.

2.47 The committee notes that relevant to this analysis will be whether such funding has been directed elsewhere due to the identification of different needs and priorities in the education sector. For example, the committee notes that another recent legislative instrument appears to have the effect of increasing the amount of funding currently specified in the Higher Education Support Act for other types of payments under the Act.[8]

2.48 The committee intends to write to the Minister for Education to seek further information about:

- **whether the provision of lesser amounts for certain grants under the Higher Education Support Act than the amounts presently specified under the Act may constitute a limitation on the right to education or a retrogressive measure; and**
- **how the reduction in funding is considered to be reasonable, necessary and proportionate to achieving a legitimate objective.**

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7 PJCHR, *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012, Final Report, Fifth Report of 2013*, pp 16-17.

8 Higher Education Support (Maximum Amounts for Commonwealth Scholarships) Determination 2013.

Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013

FRLI: F2013L02102
Portfolio: Immigration and Border Protection
Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155

FRLI: F2013L02105
Portfolio: Immigration and Border Protection
Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.49 The committee has not been able to ascertain the necessity for these measures on the basis of the information provided and considers that the explanations provided in the statement of compatibility have failed to demonstrate that they are reasonable and proportionate. In the absence of this information, the committee considers that the amendments risk authorising serious breaches of human rights.

2.50 The committee seeks the Minister's clarification on the various issues set out below as a matter of urgency so that it may finalise its consideration of these instruments while they are still before the Parliament.

Overview

2.51 The Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 and the Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 commenced on 14 December 2013. The committee has considered both these instruments together, given their interrelated nature.

Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013

2.52 The Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 amends the *Migration Regulations 1994* to establish an enforceable code of behaviour for certain Bridging E (Class WE) visa (BVE) holders.

2.53 A BVE is a temporary visa that is ordinarily granted to 'unlawful non-citizens' to enable them to lawfully live in the community while their immigration status is finalised or while they make arrangements to leave Australia. As of 19 November

2013, there were some 22,900 asylum seekers who had arrived by boat who were living in the community on BVEs pending determination of their protection claims.[1]

2.54 The BVE cohort may also include unauthorised boat and air arrivals who have had their status determined and have been found to engage Australia's protection obligations. This is because of recent amendments introduced by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013, which also came into effect on 14 December 2013. As a result of those latter changes, unauthorised arrivals will be ineligible for grant of a protection visa and are expected to continue to remain on BVEs, even after being found to be refugees or to otherwise engage Australia's protection obligations.[2]

2.55 This regulation creates a Public Interest Criterion (PIC) that requires certain persons who hold or have held a BVE to sign a code of behaviour before a further BVE will be granted to them. The PIC applies to BVE applicants who are over 18 years old. Where the BVE holder has signed a code of behaviour, the regulation creates a visa condition that requires the BVE holder to abide by the code of behaviour that they have signed.[3] Further, the regulation prevents a person whose BVE has been cancelled due to criminal conduct or a breach of the code of behaviour from applying for a further BVE. The regulation also prevents a person who previously held a BVE that has been cancelled on specified grounds from applying for a further BVE.[4]

2.56 The regulation requires the code of behaviour to be specified by the Minister in writing but the instrument specifying the code itself is not subject to disallowance.[5]

Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155

2.57 The Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 operates to specify the required wording of the code of behaviour for applicants seeking to satisfy the criteria for the grant of a BVE.

2.58 The code sets out various directives as to what a signatory must and must not do while living in the community on a BVE. A person who breaches the code may

1 Mr Martin Bowles, Secretary, Department of Immigration and Border Protection, *Estimates Hansard*, 19 November 2013, p 54.

2 See further, PJCHR, Comments on the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013.

3 Visa Condition 8566, inserted by item 6 of Schedule 1 to the bill.

4 Namely, where the BVE holder (a) has been convicted of, or charged with, an offence in Australia or another country; (b) is the subject of an Interpol notice relating to criminal conduct or public safety threats; or (c) is under investigation by an agency responsible for the regulation of law enforcement or security.

5 Item 5 of Schedule 1 to the bill.

be returned to immigration detention, transferred to an offshore processing centre, or have their income support reduced or terminated.

2.59 The code, which is reproduced here in full, specifically provides as follows:

Code of Behaviour

This Code of Behaviour contains a list of expectations about how you will behave at all times while in Australia. It does not contain all your rights and duties under Australian law. If you are found to have breached the Code of Behaviour, you could have your income support reduced, or your visa may be cancelled. If your visa is cancelled, you will be returned to immigration detention and may be transferred to an offshore processing centre.

While you are living in the Australian community:

- You **must not** disobey any Australian laws including Australian road laws; you **must** cooperate with all lawful instructions given to you by police and other government officials;
- You **must not** make sexual contact with another person without that person's consent, regardless of their age; you must never make sexual contact with someone under the age of consent;
- You **must not** take part in, or get involved in any kind of criminal behaviour in Australia, including violence against any person, including your family or government officials; deliberately damage property; give false identity documents or lie to a government official;
- You **must not** harass, intimidate or bully any other person or group of people or engage in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community;
- You **must not** refuse to comply with any health undertaking provided by the Department of Immigration and Border Protection or direction issued by the Chief Medical Officer (Immigration) to undertake treatment for a health condition for public health purposes;
- You **must** co-operate with all reasonable requests from the department or its agents in regard to the resolution of your status, including requests to attend interviews or to provide or obtain identity and/or travel documents.

I, [name to be written] agree to abide by this Code of Behaviour while I am living in Australia on a Bridging E visa. I understand that if do not abide by the Code of Behaviour my income support may be reduced or ceased, or my visa may be cancelled and I will be returned to immigration detention.

Signature: _____

Date: _____

Compatibility with human rights

Statement of compatibility

2.60 The Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 is accompanied by a statement of compatibility that states that the regulation engages a range of rights, including the right to equality and non-discrimination;[6] the right to freedom of expression;[7] the right to be presumed innocent until proven guilty;[8] the right to freedom of movement;[9] the right to be free from arbitrary detention;[10] family and children's rights;[11] the right not to be refouled;[12] the right to social security;[13] and the right to an adequate standard of living.[14] The statement's overall assessment is that 'the regulation is compatible with human rights because, to the extent that it may limit human rights, the government considers those limitations are reasonable, necessary and proportionate.'

2.61 The Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 is not accompanied by a statement of compatibility, as it is not a 'disallowable legislative instrument' subject to the statement requirement.[15] However, the statement of compatibility for the enabling regulation contains some discussion of the relevant human rights issues.

2.62 While the committee welcomes the inclusion of a discussion of the human rights implications of the code of behaviour in the statement of compatibility for the amending regulation, the committee nevertheless notes that the instrument specifying the wording of the code itself is not subject to disallowance. Therefore, any modification to the standards expressed in the code will be subject to limited parliamentary scrutiny. As the committee has previously noted, it would be good practice for all legislative instruments, particularly where they limit human rights,

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6 Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

7 Article 19 of the ICCPR.

8 Article 14(2) of the ICCPR.

9 Article 12 of the ICCPR.

10 Article 9 of the ICCPR.

11 Articles 17(1), 23 and 24 of the ICCPR; and article 3 of the Convention on the Rights of the Child (CRC).

12 Article 3 of the Convention against Torture (CAT); and articles 6 and 7 of the ICCPR.

13 Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

14 Article 11(1) of the ICESCR.

15 This instrument does not come within the definition of a disallowable legislative instrument under section 42 of the Legislative Instruments Act 2003 (LI Act). Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires statements for legislative instruments within the meaning of section 42 of the LI Act. The committee's mandate to examine legislative instruments, however, is not tied to the section 42 definition.

to be accompanied by a statement of compatibility, irrespective of whether such a statement is technically required under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Committee view on compatibility

2.63 The committee notes that these measures potentially involve serious limitations on human rights, not least as they could result in the:

- continued detention of a person (since they are not granted a BVE if they fail to sign the code);
- separation of the family unit where a family member refuses to sign the code and remains in detention, whilst other family members sign the code, or are under 18 years of age, and are granted BVEs;
- re-detention of a person following cancellation of their BVE for a breach of the code;
- separation of the family unit where a family member breaches the code and is re-detained, whilst other family unit members continue to hold BVEs;
- reduction or termination of the person's income support for a breach of the code; or
- possible transfer of the person to a regional processing country as a result of their re-detention for a breach of the code.

2.64 The committee has consistently taken the view that in order to justify whether limitations on rights are permissible the government must demonstrate that:[16]

- the measure is aimed at achieving a legitimate objective;
- the measure is rationally connected to the objective; and
- the measure is proportionate to that objective.

2.65 Limitations on rights must also have a clear legal basis and satisfy the quality of law test.

2.66 The committee considers that the statement of compatibility accurately identifies the key rights that are engaged by these measures. However, it does not adequately demonstrate the compatibility of the measures with the identified rights. The committee's concerns are set out below.

16 See Parliamentary Joint Committee on Human Rights, *Practice Note 1*.

Legitimate objective

2.67 The statement of compatibility asserts that the amendments are aimed at securing public safety. The statement says that:

> The Government has become increasingly concerned about non-citizens who engage in conduct that is not in line with the expectations of the Australian community. The Australian community expects that non-citizens being released into the community on Bridging E (Class WE) visas (BVE) while they wait for their claims for protection to be assessed, follow the laws and values considered important in Australian society.
>
> There is limited ability to cancel the BVE of persons who hold or have had a BVE granted under section 195A where they have engaged in behaviour not considered acceptable by the Australian community, that is, unless the behaviour falls within the scope of existing cancellations powers within sections 116 or 501 of the Migration Act 1958 (the Act). There is also limited ability to prevent persons who have had their BVE cancelled under section 116(1)(b) or section 116(1)(g) from applying for a further BVE, including an 'associated' BVE application.

2.68 The statement of compatibility does not explain the basis for the government's concerns or its reasons for singling out BVE holders for the application of these measures. Neither does the statement explain why the existing visa cancellation framework in migration legislation is considered inadequate, nor why it is necessary to set a bar on future BVE applications if a person has their BVE cancelled.

2.69 The committee notes that the government bears the onus of demonstrating that limitations on rights are justifiable. Among other things, this involves providing a reasoned and evidence-supported explanation of why the measures in question are considered necessary. As the committee has already noted, limitations on rights must be aimed at a legitimate objective. A legitimate objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting rights:

> The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain … protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[17]

2.70 Objectives such as the protection of public safety are obviously legitimate. However, the committee is not satisfied that the government has provided relevant and sufficient reasons to demonstrate the necessity for these measures or their

17 *R v Oakes*, [1986] 1 S.C.R. 103, 69.

relationship to a legitimate objective. While the statement of compatibility cites public safety objectives on various occasions, the overall thrust of the discussion in the statement and related explanatory materials appear to focus instead on the objectives of ensuring that BVE holders comply with 'community expectations'.

2.71 Even if it can be demonstrated that the amendments seek to achieve a public safety outcome, it must still be shown that there is a real need for them. The committee notes that, in addition to the general law enforcement system, there are already expansive powers in migration legislation to deal with any public safety concerns posed by BVE holders. The BVE regime was amended in 2013 to introduce enhanced powers to cancel a BVE on a broad range of grounds, including public safety reasons.[18] Further changes have just been introduced to permit information about BVE holders to be shared with police authorities, to enable the 'prompt consideration of visa cancellation' if BVE holders are charged with or convicted of an offence.[19] It is therefore not apparent why these additional measures are considered to be necessary to secure public safety. The committee notes that the Department of Immigration has suggested elsewhere that a high rate of compliance is already currently achieved under the BVE regime:

> The increased use of BVEs to manage people in the community has not led to a greater non-compliance. The percentage of people complying with their BVE conditions has remained around 90 per cent.[20]

2.72 The committee intends to write to the Minister for Immigration and Border Protection to seek further information on the following issues:

- **Whether the amendments seek to achieve a public safety objective or if their primary purpose is to ensure that BVE holders comply with 'community expectations'.**
- **If the amendments are pursuing a public safety objective, the basis on which the Minister has concluded that BVE holders present a particular risk to public safety and whether any identified risk exists on a scale that would justify the adoption of a behavioural code for all BVE holders.**
- **The basis on which the Minster has concluded that the current BVE regime, which includes newly enhanced powers to cancel a BVE, is deficient , so as to necessitate these further bases for cancellation.**

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18 Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (F2013L01218). The committee examined these amendments in its last report and outlined a series of human rights concerns in relation to these powers: see, PJCHR, *First Report of the 44th Parliament*, 10 December 2013, pp 103-108.

19 Migration Amendment (Disclosure of Information) Regulation 2013 (F2013L02101). See the committee's comments on this regulation elsewhere in this report.

20 Mr Martin Bowles, Secretary, Department of Immigration and Border Protection, *Estimates* Hansard, 19 November 2013, p 54.

Rational connection

2.73 Even if the measures are pursuing a legitimate objective such as public safety, it must still be shown that they are likely to be effective in achieving that objective. It is not sufficient to put forward a legitimate objective if in fact the measure limiting the right will not make a real difference in achieving that aim. In other words, the objective might be legitimate but unless the proposed measure will actually go some way towards achieving that objective, the limitation of the right is likely to be impermissible.

2.74 The committee is unable to conclusively assess whether the measures are rationally connected to a legitimate objective without first obtaining a clearer understanding of the objectives of the amendments.

2.75 The committee notes that the code of behaviour contains directives on an assortment of issues, ranging from expectations relating to compliance with the laws of Australia; to values that are important to Australian society; and co-operation with the Immigration Department in regard to the resolution of a BVE holder's status. It is not immediately apparent that all of these matters have a direct connection to a public safety outcome, if that is indeed the objective of these amendments.

2.76 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to whether and how the specific directives contained in the code of behaviour are rationally connected to achieving public safety.

Proportionate response

2.77 Proportionality requires that even if the objective of the limitation is of sufficient importance and the measures in question are rationally connected to the objective, it may still not be justified, because of the severity of the effects of the measure on individuals or groups. The inclusion of adequate safeguards will be a key factor in determining whether the measures are proportionate, including whether there are procedures for monitoring the operation and impact of the measures, and avenues by which a person may seek review of an adverse impact.

2.78 The requirement for BVE holders to comply with the code of behaviour, covering a very broad range of conduct, in all their activities has the potential to limit a range of human rights and, as noted above, the consequences of breaching the code are severe. The amending regulation and the instrument specifying the code, however, provide no guidance on how the behavioural standards contained in the code are meant to be interpreted or applied. It is not clear, for example, when a breach might result in a BVE being cancelled and the person re-detained or when it might result in the person's income support being reduced or removed.

2.79 The statement of compatibility acknowledges that the code captures 'a wide range of criminal offences or general conduct'.[21] It argues that the measures are, nevertheless, proportionate on the basis of the following reasons:

- In relation to the option to cancel a person's BVE, the statement argues that the discretionary nature of the cancellation allows individual circumstances to be taken into account and that comprehensive policy guidance will be provided to decision-makers to ensure that the discretion is exercised in a reasonable and proportionate matter.[22]
  - The statement suggests that the discretion not to cancel may be used, for example, should there be grounds to consider that a charge has been improperly brought by the state. In addition, the Minister can use his power under the Migration Act to grant a BVE to a person if charges are subsequently dropped or discontinued post visa cancellation.[23]
  - The statement also states that a person who has their BVE cancelled will have access to both merits and judicial review.[24]
- In relation to any adverse impact on family and children's rights arising from the separation of family members, the statement argues that the Minister has the ability to consider granting the person a visa under his personal powers if he considers it is appropriate.[25] In addition, family rights and the best interests of the child would be taken into account as part of the decision as to whether to exercise the discretion to cancel the visa.[26]
- In relation to the option to reduce a person's income support, the statement argues that there will be strong policy guidance on the circumstances in which a reduction in income support may be appropriate and that the impact that such a reduction would have on the persons' standard of living would be considered in determining whether a reduction was appropriate.[27]

2.80 The committee notes that the case for proportionality put forward in the statement of compatibility broadly rests on the arguments that (i) the power to

21 Statement of compatibility, p 6.

22 Statement of compatibility, p 8.

23 Statement of compatibility, p 6.

24 Statement of compatibility, p 8.

25 Statement of compatibility, p 9.

26 Statement of compatibility, p 9.

27 Statement of compatibility, p 10.

sanction a BVE holder for breach of the code is discretionary and (ii) that appropriate policy guidance will be developed for the exercise of the powers.

2.81 The committee does not consider that these assurances are sufficient to guarantee that the powers will be exercised consistently with human rights. The committee notes that interferences with fundamental rights which are based solely on administrative discretion are likely to be impermissible under human rights law:

> The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[28]

2.82 The European Court of Human Rights has similarly stated that:

> In matters affecting fundamental rights it would be contrary … for a legal discretion to be granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.[29]

2.83 The committee has consistently emphasised that in undertaking its task it must necessarily determine if legislation is sufficiently confined to ensure that human rights will be adequately respected in practice. In this instance, the committee is not convinced that the amendments as drafted are suitably circumscribed to provide sufficient protection of a BVE holder's human rights, including the right not to be arbitrarily detained.

2.84 The committee does not consider that the government's reliance on (i) policy guidance, (ii) the option not to exercise the powers, and (iii) recourse to the Minister's personal and non-compellable powers is a satisfactory response, as Parliament has the opportunity to define the test appropriately on the face of the legislation. The committee considers that the power to cancel a BVE holder's visa or otherwise sanction the person for breach of the code should only be possible when the relevant decision-maker is satisfied:

- that the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power;
- that the exercise of the power is no more restrictive than is required in the circumstances; and
- where the sanction involves the reduction or removal of income support, that such action does not result in the destitution of the person or their family.

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28 Human Rights Committee, General Comment 27, (1999), para 15. See also Human Rights Committee, General Comment No 34 (2011), para 25.

29 *Gillan and Quinton v UK* (Application No 415/05, 12 January 2010) at para 77.

2.85 The committee notes the claim in the statement of compatibility that the grant of a BVE is a 'privilege and not an entitlement' (because its holder would otherwise be subject to immigration detention under the Migration Act) and the suggestion that this therefore permits greater latitude for cancelling a BVE. The committee observes that Australia's human rights obligations require the government as a matter of law to ensure that individuals are not detained arbitrarily. To that end, releasing people on bridging visas while they await their protection claims to be assessed is a way of meeting those obligations by ensuring that they are not detained beyond a period that is strictly necessary and justifiable, consistent with article 9 of the ICCPR.

2.86 The committee notes that the statement of compatibility suggests that the cancellation decisions will be subject to merits and judicial review. The committee, however, queries whether this claim is fully accurate. As a result of the changes introduced by the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (F2013L01218), merits review will not be available if the cancellation decision is subject to a conclusive certificate by the Minister. The committee reported on these provisions in its last report.[30] It is also not clear whether any independent review would be available for decisions to reduce or stop a person's income support. The committee notes that the statement of compatibility only discusses the option of reducing a person's income support but the code itself presents both options.

2.87 Finally, the committee notes the absence of information with regard to the manner in which the code is to be enforced and whether appropriate safeguards are provided to ensure that its operation does not inadvertently result in the stigmatisation of BVE holders in the community.

2.88 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on the following issues:

- **Whether BVE cancellation decisions for breach of the code may be subject to a conclusive certificate by the Minister, resulting in the exclusion of merits review of such decisions.**
- **Whether a person's income support may be reduced or terminated ('ceased') as a consequence of a breach of the code and whether such decisions are subject to independent review. The committee also requests information as to the specific amount of income support currently provided to BVE holders and whether BVE holders have work rights, so that it can assess the reasonableness of the option to reduce or stop the person's income support.**

30 See, PJCHR, *First Report of the 44th Parliament*, 10 December 2013, pp 103-108.

- **Whether consideration has been given to allowing the person to apply for a further BVE where new information comes to light (for example, if the original cancellation was based on unfounded grounds), rather than simply relying on the Minister's discretion to grant a further visa.**
- **The agencies which will be tasked with enforcing the code, including how it is intended that evidence will be gathered with regard to any allegation of a breach of the code.**
- **Whether the recently enhanced information-sharing powers between the Immigration Department and the federal, state and territory police with regard to BVE holders are intended to be utilised for the purposes of policing the code.**
- **Whether the treatment of BVE holders in the community will be monitored and steps taken to address any adverse impacts arising from the implementation of these measures.**

Legal basis for restrictions

2.89 Human rights standards require that interferences with rights must have a clear basis in law. This means not only that there must be a domestic rule adopted as part of the standard legislative process (or an accepted rule of the common law), but that the law or rule in question must satisfy what is known as the 'quality of law' test. The effect of this is that any measures which interfere with human rights must be sufficiently certain and accessible to allow people to understand when the interference will be justified. The provision of a legal basis for measures which impact on rights is also an important guarantee of the rule of law.

2.90 The prohibitions and requirements contained in the code of behaviour use broad and imprecise definitions. For example, it is not clear what is intended to be covered by the term 'antisocial or disruptive activities', or when behaviour may be considered 'inconsiderate' or 'disrespectful', or what threshold must be crossed for 'the peaceful enjoyment of other members of the community' to be disrupted.

2.91 The general and open-ended nature of the directives, which cover a very wide range of behaviour, raises concerns as to whether they are sufficiently precise to enable BVE holders to understand what is expected of them. There is also the risk that they may be interpreted and applied inconsistently by the relevant agencies tasked with enforcing the code.

2.92 The statement of compatibility, however, claims that:

> Legislative amendments that contemplate cancellation of a visa and subsequent detention add to a number of existing laws that are well-

established, generally applicable and predictable. This will be the case also for these amendments.[31]

2.93 The committee considers that the code as currently drafted does not appear to satisfy the requirement of legal certainty as required by human rights law (and the common law). The committee notes that the statement of compatibility suggests that there will be 'comprehensive policy guidelines on matters to be taken into account when exercising the discretion to cancel a BVE'.[32] However, the committee is not satisfied that this meets the requirement for legal certainty as the quality of the law authorising the making of such decisions must satisfy minimum standards of foreseeability.

2.94 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on whether and how the code as currently drafted satisfies the requirements of legal certainty.

2.95 The committee also seeks information as to how standards such as 'disrespectful' and 'inconsiderate' may be considered to be appropriate thresholds for restricting the right to freedom of expression.

31 Statement of compatibility, p 4.

32 Statement of compatibility, p 4.

Migration Amendment (Disclosure of Information) Regulation 2013

FRLI: F2013L02101
Portfolio: Immigration and Border Protection
Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.96 The committee seeks further information to determine whether this regulation is compatible with the right to privacy and the right to non-discrimination.

Overview

2.97 This regulation amends the *Migration Regulations 1994* to enable the Minister for Immigration and Border Protection to authorise the disclosure of personal information about the holders of Bridging E (Class WE) visas (BVE) to the Australian Federal Police or the police force of any Australian state or territory. The information that may be disclosed is the BVE holder's name, address, sex, date of birth and immigration status.

2.98 The purpose of the regulation is to support existing powers which authorise the cancellation of a BVE where the holder of the visa has been charged with or convicted of an offence. A related regulation, which strengthened powers to cancel such visas, was reported on by the committee in its last report.[1] A BVE may be cancelled if:[2]

- the person has been charged or convicted of a criminal offence in Australia or another country;
- the person is subject to an Interpol notice relating to criminal conduct or a threat to public safety or for the purpose of locating and arresting the person; or
- the head of an Australian law enforcement or a security agency has advised that a BVE holder is under investigation and should not hold that visa.

2.99 According to the explanatory statement, the disclosure of information would help federal, state and territory police services to inform the Immigration Department, as soon as reasonably practicable, that a BVE holder has been charged with a criminal offence, which would support and facilitate the department's

1 PJCHR, Comments on the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (F2013L01218), *First Report of the 44th Parliament*, 10 December 2013, pp 103-108.

2 See *Migration Act 1958*, section 116(1)(g) and Migration Regulation 1994, Regulations 2.43(1)(p) and (q).

compliance activities, specifically by allowing prompt consideration of visa cancellation.

2.100 In order to implement these changes, it is understood that the Immigration Department:

> … intends to put in place formal arrangements through Memoranda of Understanding with federal, state and territory police services to cover the disclosure of the specific information and the Minister's expectations about how they will use it.

Compatibility with human rights

Statement of compatibility

2.101 The instrument is accompanied by a statement of compatibility which states that the instrument engages the right to privacy,[3] and the right not to be arbitrarily detained.[4]

2.102 The statement concludes that the instrument is compatible with human rights because, to the extent that it limits these rights, the limitation is reasonable and necessary, as it is required to assist the police to maintain public order and to support the department's compliance activities. It states that the release of information to the police about BVE holders is proportionate as the information is limited to name, address, date of birth, sex and immigration status and only applies to current BVE holders and not the holders of other visas (or to non-visa holders).

Committee view on compatibility

2.103 The committee agrees that the instrument engages the right to privacy. The committee notes that the amendments may also engage the right not to be arbitrarily detained, in so far, as the amendments enable the 'prompt consideration of visa cancellation and, therefore the possible re-detention of the BVE holder'.[5] In addition, the committee considers that the right to non-discrimination is also engaged.[6]

2.104 The committee notes that it would appear that many of the key safeguards and procedures for implementing these disclosure powers are likely to be contained in the relevant Memoranda of Understanding with the Federal, State and Territory police. The committee notes that it is difficult to assess whether these amendments are compatible with human rights in the absence of further information about the specific content of those memoranda.

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3 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

4 Article 9 of the ICCPR.

5 Statement of compatibility, p 5.

6 Article 26 of the ICCPR.

2.105 The committee notes that the statement of compatibility contains a detailed discussion of the recommendations of the Privacy Commissioner with regard to these proposals. The statement says that the amendments are considered to be consistent with those recommendations.[7] The committee also notes that the Privacy Commissioner has provided feedback on the proposed Memoranda of Understanding with the Federal, State and Territory police to support the operation of these amendments and that the Immigration Department will take this feedback into account when the Memoranda are drafted with the relevant police services and police forces.[8]

2.106 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether the Privacy Commissioner was satisfied that the amendments as drafted are consistent with his recommendations. The committee also requests that the Minister keep the committee apprised of progress in relation to the finalisation of the relevant Memoranda of Understanding and that the committee is provided with the final documents for its information and assessment.

Right to privacy

2.107 Article 17 of the ICCPR provides for the right not to have one's private life arbitrarily or unlawfully interfered with. The right to privacy is not absolute and may be limited if it can be demonstrated that the limitation is aimed at a legitimate objective and is reasonable, necessary and proportionate to that objective.

2.108 In this case the instrument seeks to achieve the objective of supporting the Immigrations Department's compliance activities, in that it will allow 'prompt consideration of visa cancellation',[9] as BVE holders charged with or convicted of an offence can be quickly identified by the police and notified to the department. This appears to seek to achieve greater administrative convenience, as sharing the information of all BVE holders with the police may enable the department to more readily identify if BVE holders are charged with or convicted of an offence. Mere administrative convenience, however, may not, in and of itself, be a legitimate objective for limiting rights.[10] A legitimate objective requires the demonstration of a sufficiently pressing and substantial concern.

2.109 The committee notes that the power to cancel a visa if the holder has been charged with or convicted of an offence has existed for some time in the Migration

7 Statement of compatibility, p 4.

8 Statement of compatibility, p 4.

9 Statement of compatibility, p 2.

10 See, for example, *Gueye v. France,* Communication No. 196/1985, CCPR/C/35/D/196/1985 (3 April 1989), para 9.5; and *Olsson v Sweden*, European Court of Human Rights, Application No. 10465/83 (24 March 1988), para 82.

Act and Regulations. There has been no information provided to indicate how this power has previously been exercised when these information-sharing powers were not available.

2.110 The committee also notes that even if it can be demonstrated that the disclosure powers are considered necessary and seek to achieve a legitimate objective, it must also be demonstrated that the information-sharing and data retention is proportionate to that objective.

2.111 In this regard, the committee notes that the Minister may authorise the disclosure of information if he reasonably believes such disclosure is 'necessary or appropriate for the performance of functions or the exercise of powers' under the Migration Act (emphasis added). The committee notes that the standard of 'appropriateness' would appear to be a lower standard that the requirement under international human rights law that restrictions on rights be 'necessary'. The committee also notes that the Privacy Commissioner had 'advised that the authorised use and disclosure of personal information is clearly limited to that *necessary* to achieve the policy objective of the proposal'.[11]

2.112 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on the following issues:

- **The basis upon which information about whether a visa holder had been charged with or convicted of an offence had previously been shared with the Department and why this approach was considered deficient, necessitating the introduction of measures which permit the sharing of all BVE holders' information.**
- **The number of BVE holders who have been charged or convicted, for example, the rate per 1000 BVE holders.**
- **Information about the types of safeguards that have been provided or will be provided via the Memoranda of Understanding for using, storing and disclosing the information, including whether the police authorities may disclose the information to the public or other authorities and the duration of time that the information may be retained.**
- **How the standard of 'appropriateness' is consistent with the human rights requirement of demonstrating that a limitation on a right must be 'necessary'.**

Right to non-discrimination

2.113 Article 26 of the ICCPR recognises the right to non-discrimination and equal protection of the law. It prohibits discrimination in law or in practice. The grounds of

11 Statement of compatibility, p 4.

prohibited discrimination are not closed, and include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. A clearly definable group of people linked by their common status is likely to fall within the category of 'other status'. A difference in treatment on prohibited grounds, however, will not be directly or indirectly discriminatory provided that it 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.

2.114 The committee considers that the amendments may give rise to issues of compatibility with the right to equality and non-discrimination as the disclosure powers pertain to information about BVE holders only and not to other visa classes.

2.115 The statement of compatibility suggests that restricting the powers in this way demonstrates that the powers are proportionate. However, it does not explain the basis for the differential treatment or whether these differences are based on reasonable and objective criteria. For example, it is not clear whether the government considers that the BVE cohort poses a higher public safety threat than other visa cohorts and, if so, the basis for such a view.

2.116 The statement also suggests that there is a heightened expectation that the Minister and department act in a timely manner in relation to any risks posed by a BVE holder because:

> the person has been granted a BVE by the Minister using his personal powers, and in such cases, the grant of a BVE is a privilege and not an entitlement, as the BVE holder has not met the eligibility criteria that would otherwise be required by the migration legislation.

2.117 The committee observes that Australia's human rights obligations require the government to ensure that individuals are not detained arbitrarily. To that end, releasing people on bridging visas while they await the determination of their protection claims is a way of meeting those obligations by ensuring that they are not detained beyond a period that is strictly necessary and justifiable, consistent with article 9 of the ICCPR.

2.118 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification whether these amendments are consistent with the right to equality and non-discrimination.

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

FRLI: F2013L02104
Portfolio: Immigration and Border Protection
Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.119 The committee considers that this regulation potentially involves serious limitations of human rights. Regrettably, the explanations provided in the statement of compatibility are deficient and the committee requires further information to determine this instrument's compatibility with human rights.

2.120 The committee seeks the Minister's clarification on the various issues set out below as a matter of urgency so that it may finalise its consideration of this regulation while it is still before the Parliament.

Overview

2.121 The Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (UMA Regulation) amends the *Migration Regulations 1994* to reverse the outcomes brought about by the disallowance of the *Migration Amendment (Temporary Protection Visa) Regulation 2013* (TPV Regulation). The TPV Regulation sought to reintroduce temporary protection visas as the only protection visa available to persons who entered Australia without a valid visa. The TPV Regulation commenced on 18 October 2013, but was disallowed in full by the Senate on 2 December 2013. As a result of its disallowance, '[permanent] protection visas could again be granted to both people who arrived in Australia with visas and people who arrived in Australia without visas'.[1]

2.122 To implement 'the government's intention to ensure that persons who arrive in Australia without visas are not granted permanent protection visas',[2] the UMA Regulation amends the Migration Regulations to introduce a new visa criterion for protection visas.

2.123 The core criteria for a protection visa are found in the *Migration Act 1958*. They require the decision maker to be satisfied that the applicant is a non-citizen in Australia and is:

1 Explanatory statement, p 1.

2 Explanatory statement, p 1.

- a person in respect of whom Australia has protection obligations under the 1951 Refugee Convention as amended by the 1967 Protocol (the refugee criterion);[3] or
- a person in respect of whom Australia has protection obligations on complementary protection grounds (the complementary protection criterion);[4] or
- a member of the same family unit as a person in respect of whom Australia has protection obligations and who holds a protection visa.[5]

2.124 In addition to core protection criteria set out in the Migration Act, there are a number of other requirements, relating to health, public interest and national interest, which must be met at the time of decision. These criteria are found in the Migration Regulations.[6]

2.125 The UMA Regulation introduces an additional criterion which must be satisfied at the time of decision, namely that the applicant:

- held a valid visa on their last entry into Australia;
- is not an unauthorised maritime arrival;[7] and
- was immigration cleared on their last entry into Australia.

2.126 These amendments apply in relation to a protection visa application:

- made on or after the regulation commenced on 14 December 2013; or
- made, but not finally determined, before 14 December 2013.

2.127 The changes apply to unauthorised boat and air arrivals alike. Protection visas remain available to people from outside this cohort, that is, those who enter Australia with a valid visa.

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3 *Migration Act 1958*, s 36(2)(a).

4 *Migration Act 1958*, s 36(2)(aa).

5 *Migration Act 1958*, ss 36(2)(b) and (c).

6 *Migration Regulations 1994*, Part 866 of Schedule 2.

7 An 'unauthorised maritime arrival' is defined in section 5AA of the *Migration Act 1958* to be a person who (i) entered Australia by sea at an excised offshore place (such as Christmas Island) at any time after the excision time for that place or at any other place at any time on or after 1 June 2013; and (ii) became an unlawful non-citizen because of that entry; and (iii) is not an excluded maritime arrival.

Compatibility with human rights

Statement of compatibility

2.128 The UMA Regulation is accompanied by a short statement of compatibility that states that the amendments engage the right not to be refouled,[8] the right to non-discrimination,[9] and the children's rights.[10]

2.129 Having noted these rights, the statement goes on to make several brief assertions regarding:

- The government's intention to abide by its non-refoulement obligations;
- The government's view that any differential treatment accorded to unauthorised arrivals is 'based on reasonable and objective criteria and is aimed at a legitimate purpose, being the need to maintain the integrity of Australia's migration system and protecting the national interest'; and
- The government's position that these objectives, along with the need to discourage minors from undertaking dangerous journeys, outweigh the best interests of the child to be reunited with their family.

2.130 On the basis of these claims, the statement concludes that the amendments are compatible with human rights.

Committee view on compatibility

Deficient statement of compatibility

2.131 Given the human rights implications of these amendments, the committee is troubled by the meagreness of the explanations provided in the statement of compatibility. The committee considers the statement of compatibility to be an important reflection of the manner in which human rights are taken into account in the legislative development process.

2.132 The statement of compatibility is also an important starting point for the committee's scrutiny tasks. This is particularly the case for amendments arising in the migration portfolio. As the committee has previously noted, amendments to migration legislation often involve complex and technical interactions with the Migration Act and a range of secondary legislation. Without clear explanations of their precise impact and scope, it is often difficult to grasp their full effect, particularly in the time available to the committee to undertake its scrutiny tasks.

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8 Article 3 of the Convention against Torture (CAT); and articles 6 and 7 of the ICCPR.

9 Article 26 of the ICCPR.

10 Article 3 of the Convention on the Rights of the Child (CRC).

2.133 The committee expects statements to clearly set out the full range of implications arising from legislative changes and to explain in appropriate and sufficient detail the justification for any limitations of rights. Unfortunately in this instance, the statement of compatibility does not elucidate the relevant human rights implications of the amendments. It simply recycles pro-forma statements about the rights that are engaged (without explaining how or why they are engaged), reiterates the government's intentions to abide by its non-refoulement obligations via administrative processes, and restates assertions that any limitations on rights are reasonable, necessary and proportionate.

2.134 The committee intends to write to the Minister for Immigration and Border Protection to reiterate its expectation that statements of compatibility should clearly set out the nature and operation of amendments and their human rights implications. In particular, given the complexity of migration legislation, the committee expects statements to identify and properly explain how a particular amendment may relate to other relevant aspects of the scheme in question.

2.135 The committee also reiterates its expectation that any limitations on rights should be justified by providing reasoned and evidence-based explanations as to whether the limitation is (i) aimed at a legitimate objective; (ii) rationally connected to that objective; and (iii) proportionate, including why less restrictive options would not be available.

Substantially the same in effect as the TPV Regulation

2.136 The committee notes that the stated purpose of the UMA Regulation is to reinstate the outcome that was sought to be achieved by the now disallowed TPV Regulation: that is, to prevent unauthorised arrivals from accessing the permanent protection visa regime under the Migration Act. In this regard, the committee observes that the *Legislative Instruments Act 2003* imposes a six-month bar on the making of a legislative instrument that produces substantially the same effect as the disallowed instrument.[11] The committee notes the potential inconsistency of the UMA Regulation with the requirements of that Act.

Human rights implications

2.137 Given the similarities in outcomes between the UMA and TPV regulations, the committee considers that the amendments give rise to many of the same human rights concerns as did under the TPV scheme, including in relation to the right to health,[12] the right to social security,[13] the right to an adequate standard of living,[14]

11 *Legislative Instruments Act 2003*, section 48.

12 Article 12 of the International Covenant on Economic, Social and Cultural Rights and article 24 of the CRC.

13 Article 9 of the ICESCR.

14 Article 11 of the ICESCR.

the right to education,[15] and the right to work.[16]. The committee commented extensively on the human rights implications of the TPV regime in its last report.[17] It is therefore disappointing that the statement of compatibility has not referred to or addressed those concerns in the context of these amendments. The committee does not propose to repeat those comments here, but intends to draw them to the attention of the Minister for Immigration and Border Protection.

2.138 These amendments are also likely to give rise to fresh human rights concerns. The committee considers that in addition to the rights noted in the statement of compatibility, the amendments engage the right to an effective remedy,[18] and may also involve further restrictions, over and above those contained under the TPV regime, on the rights of children and families,[19] the right to health, the right to social security, the right to an adequate standard of living, the right to education, and the right to work.[20]

2.139 These heightened concerns arise because of the government's intention to deal with all unauthorised arrivals, even where they have been found to be refugees, through the bridging visa regime. According to the statement of compatibility:

> [Unauthorised arrivals] who are found to engage Australia's protection obligations but who are affected by these amendments will continue to hold a Bridging visa with the same work rights and travel conditions that they currently hold.[21]

2.140 No further explanation about the bridging visa regime is provided in any of the explanatory materials and it is not apparent how such a scheme, which is intended as a temporary solution for people awaiting an immigration outcome or removal from Australia, is likely to be suitable for those who have been found to be refugees or to be otherwise owed protection.

2.141 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification about the bridging visa scheme that is to be utilised for unauthorised arrivals who engage Australia's protection obligations: In particular, the committee requests information about:

- **The duration of a BVE visa and what criteria need to be met for renewal.**

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15 Article 13 of the ICESCR.

16 Article 6 of the ICESCR.

17 See ,PJCHR, First Report of the 44th Parliament, 10 December 2013, pp 109-120.

18 Article 2 of the ICCPR.

19 Article 17 and 23 of the ICCPR; and the CRC.

20 Article 6 of the ICESCR.

21 Statement of compatibility, p 1.

- **Whether the BVE regime places any restrictions on work rights, and if so what these are and how they are consistent with article 6 of the ICESCR, particularly in light of refugees' right to work under the Refugee Convention.**
- **Whether the BVE regime places any restrictions on travel rights, and if so what these are, and how they are consistent with article 12 of the ICCPR.**
- **A description of available supports and benefits available under the BVE regime, including amounts; and whether the combination of these supports is sufficient to ensure minimum essential levels of social security as guaranteed in article 9 of the ICESCR and the minimum requirements of the right to an adequate standard of living in Australia as guaranteed in article 11 of the ICESCR. The committee also seeks information as to whether BVE holders would be expected to satisfy a 'mandatory mutual obligation requirement' in exchange for income support.**
- **Whether BVE holders and their children have access to adequate and accessible education, without discrimination, consistent with article 13 of the ICESCR. In particular, the committee seeks clarification as to which States and/or Territories have yet to finalise arrangements for the provision of education for this group.**
- **Whether the BVE regime provides for any option of family reunion, and if not, whether and how the denial of family reunion without any consideration of individual circumstances is a reasonable and proportionate measure, particularly in light of the obligation to make the best interests of the child a primary consideration.**
- **Whether the BVE regime is consistent with the right to health in article 12 of the ICESCR.**

Interaction with related migration instruments

2.142 The committee notes that the UMA Regulation commenced on the same day as two other related migration instruments, namely the Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013,[22] and the Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155. These instruments establish an enforceable code of behaviour for certain BVE holders.[23] A breach of the code could result in the BVE holder being returned to immigration detention, transferred to a regional processing country, or having their income support ceased or reduced. The committee has set out its concerns with regard to these two instruments elsewhere

22 FRLI No: F2013L02102.

23 FRLI No: F2013L02105.

in this report. Notably, the statement of compatibility for the UMA Regulation makes no mention of those changes or their interaction with these amendments.

2.143 Neither does the statement of compatibility mention other relevant changes that have recently been made to the BVE regime, specifically by the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013,[24] and the Migration Amendment (Disclosure of Information) Regulation 2013.[25] The former introduced broad grounds for cancelling a BVE, while the latter permits information about a BVE holder to be disclosed to the federal and state police authorities.

2.144 The committee intends to write to the Minister for Immigration and Border Protection to seek an explanation as to how the UMA Regulation interacts with these instruments:

- **Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 (F2013L02102);**
- **Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 (F2013L02105);**
- **Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (F2013L01218); and**
- **Migration Amendment (Disclosure of Information) Regulation 2013 (F2013L02101).**

In particular, the committee seeks the following information with reference to the above instruments:

- **Whether unauthorised arrivals who are owed protection obligations but who remain on BVEs will be required to sign a code of behaviour, and if so if they will be subject to the same consequences for breaching the code, including potentially being sent to an regional processing country.**
- **Whether their personal information will be shared with the federal and state police authorities.**
- **Whether their visas may be cancelled on the same grounds that currently apply to other BVE holders who are awaiting resolution of their immigration status.**

24 FRLI No: F2013L01218. The committee's comments on this instrument are contained in its last report; see PJCHR, *First Report of the 44th Parliament*, 10 December 2013, pp 103-108.

25 FRLI No: F2013L02101. The committee's comments on this instrument are contained elsewhere in this report.

Non-refoulement obligations and the right to an effective remedy

2.145 The committee notes that the statement of compatibility mentions the right to non-refoulement and the government's intention to fulfil its obligations in this respect through (unspecified) administrative arrangements:

> The amendment does not substantively alter the rights and interests of persons whom this amendment would affect as all of Australia's non-refoulement obligations will be assessed, ensuring that no person who engages non-refoulement obligations will be returned to the country from which they have sought protection. The form of administrative arrangements in place to support Australia meeting its non-refoulement obligations is a matter for the Government.[26]

2.146 Elsewhere in this report, the committee has detailed its concerns with regard to the proposed repeal of the complementary protection provisions in the Migration Act and the intention to reinstate administrative arrangements to deal with such claims. It is not clear whether a consequence of the UMA Regulation is that all protection claims by unauthorised arrivals, including those arising under the Refugee Convention, will be dealt with administratively.

2.147 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification of the refugee determination processes that would apply to unauthorised arrivals, as a result of these changes, in particular whether they will have access to merits review at the Refugee Review Tribunal.

26 Statement of compatibility, p 2.

MRCA Pharmaceutical Benefits Scheme (No. MRCC 44/2013)

FRLI: F2013L02012
Portfolio: Veterans Affairs
Tabled: House of Representatives and Senate, 4 December 2013

Summary of committee concerns

2.148 The committee seeks clarification of the objective of the pharmaceutical reimbursement measure and further information on the impact the amendment will have on those affected by the amendment.

Overview

2.149 This instrument sets out the circumstances in which the Military Rehabilitation and Compensation Commission may arrange for pharmaceutical benefits to be provided to members of the Defence Force, including former members, or their dependants, at the concessional rate. It replaces the MRCA Pharmaceutical Benefits Scheme (2004 No. M22).

Compatibility with human rights

Statement of compatibility

2.150 The statement of compatibility states that the initiatives introduced by the instrument could promote the right to health by ensuring that relevant veterans or their dependants pay less for pharmaceuticals, receive certain medications more quickly and are more likely to receive the correct medications through better medication management. The statement goes on to state that '[s]ome measures in the attached instrument could be considered as not totally favouring the people in question' and that the:

> [r]efinements to the pharmaceutical reimbursement provisions could mean a person receives no pharmaceutical reimbursement compared to the situation under the revoked Scheme. But this change was necessary to protect the public revenue by preventing unintended payments.[1]

Committee view on compatibility

2.151 The committee notes the discussion of the pharmaceutical reimbursement measure in the explanatory statement to the instrument. In particular the committee notes the statement that:

> [t]he "public revenue amendment" covers the scenario of a couple where both members of the couple are eligible for the pharmaceutical reimbursement, whether under the [*Military Rehabilitation and*

1 Statement of compatibility, p 5.

> *Compensation Act 2004*] or the *Veterans' Entitlements Act 1986*. The amendment ensures, in line with the policy intention for the pharmaceutical reimbursement, that only one member of the couple receive the pharmaceutical reimbursement.[2]

2.152 It is not clear to the committee what specific circumstances the amendment is intended to address (in particular, it is not clear what is meant by the statement 'in line with the policy intention for the pharmaceutical reimbursement') or what impact this amendment will have on couples where both members of the couple are eligible for pharmaceutical reimbursement.

2.153 The committee intends to write to the Minister for Veterans' Affairs to seek further clarification as to the objective of the amendment to the pharmaceutical reimbursement measure and the impact the amendment will have on those affected.

2 Explanatory statement, p 4.

Native Title (Assistance from Attorney-General) Amendment Guideline 2013

FRLI: F2013L02084
Portfolio: Attorney-General
Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.154 The committee seeks clarification as to the possible impact of the changes on the ability of native title claimants to have their claims resolved.

Overview

2.155 The *Native Title Act 1993* allows for the provision of assistance by the Attorney-General to a person who is a party to an inquiry, mediation or proceeding related to native title.[1] The instrument amends the *Native Title (Assistance from Attorney-General) Guideline 2012* to broaden the eligibility test for assistance for native title respondents' legal representation costs. According to the explanatory statement, native title respondents are organisations with an interest that may be impacted on by a claim of native title over a particular area and typically include pastoralists, local governments, commercial fishers and small mining companies.[2]

2.156 As a result of the instrument, legal representation costs may be available where a respondent's interest is likely to be adversely affected in a significant way if a native title claim is recognised or a respondent would likely derive a significant benefit from negotiating an agreement or resolving a dispute. According to the explanatory statement, the instrument re-instates the broader eligibility test for legal representation costs for respondents that was operative prior to 1 January 2013 and will enable more native title respondents to be eligible for assistance.[3]

Compatibility with human rights

Statement of compatibility

2.157 The instrument is accompanied by a statement of compatibility which states that the instrument promotes native title respondents' access to courts and tribunals by contributing to the cost of legal representation. The statement concludes that the instrument does not negatively engage any human rights.

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1 *Native Title Act 1993*, section 213A.

2 Explanatory statement, p 1.

3 Explanatory statement, p 1.

Committee view on compatibility

2.158 The committee notes that our predecessor committee considered the instrument which previously narrowed the availability of financial assistance for native title respondents' legal representation costs so that such assistance would only be available in exceptional circumstances (the 2012 instrument).[4] Such circumstances were limited to where new or novel questions of law directly related to a respondent's interests are considered or where a court requires a respondent's participation beyond participation in standard procedural processes.

2.159 The committee sought further information from the former Attorney-General as to the possible impact of the 2012 instrument on fair trial and fair hearing rights. The Attorney-General's response stated that, in the past, the broader criteria led to the provision of financial assistance for legal representation to respondents in the majority of native title matters. According to the response:

> [t]he free availability of funding in the past has led to respondents becoming a party to matters where their interests may already have been protected. The current interests of native title respondents are in most cases protected by either the common law or the Native Title Act, largely because much of the law in respect of co-existing interests has been settled.[5]

2.160 The response also stated that:

> [t]he vast majority of native title respondents are commercial entities or local councils. As such the native title activities should form part of respondents' ordinary business costs. Such costs are likely to be tax deductable.[6]

2.161 The response noted that the 2012 instrument, in particular the narrower eligibility test, was developed following an independent review of the native title respondent funding scheme by Mr Anthony Neal SC. The review noted that in relation to other schemes of financial legal assistance, legal representation costs are generally only paid in exceptional circumstances. Accordingly, the purpose of the instrument was to bring the native title respondent scheme in line with other such schemes and to 'ensure that funding for such assistance is consistent with the principles of access to justice by ensuring that assistance is provided to those most in need'.[7] The committee concluded that in light of this information it had no further comment on that instrument.

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4 *Native Title (Assistance from Attorney-General) Guideline 2012*, see PJCHR, *Third Report of 2013*, p 90 and *Sixth Report of 2013*, p 289.

5 The Attorney-General's response is set out in the PJCHR's *Sixth Report of 2013*, p 290.

6 PJCHR, *Sixth Report of 2013*, p 290.

7 PJCHR, *Sixth Report of 2013*, p 290.

2.162 The committee understands that the effect of the current instrument will be to increase the number of native title respondents who will be eligible for assistance and therefore able to participate in proceedings. It is not clear to the committee what the impact of this change will be on native title *claimants* and their ability to have native title claims resolved.

2.163 The right to culture includes the right of all persons to take part in cultural life and protects the cultural rights of individuals belonging to minority groups.[8] This right includes the need to ensure that Indigenous peoples' cultural values and rights associated with their land are respected and protected. These rights are also central to the right of self-determination.[9]

2.164 Further, the right to a fair hearing guarantees equality of access to courts and tribunals. This requires recognition of the interests of all parties to a proceeding and respect for the principle of 'equality of arms' – that is, all parties to a proceeding must have a reasonable opportunity to present their case under conditions that do not disadvantage them as against other parties to the proceedings.

2.165 According to the statement of compatibility accompanying the instrument, the government 'continues to provide assistance for native title claimants through a separate scheme administered by the Department of the Prime Minister and Cabinet'.[10] However, the committee is concerned that the broader eligibility criteria may result in the participation of more parties (in cases where their participation may not always be necessary) and lead to additional length and complexity in proceedings, thus presenting additional barriers to native title claimants in resolving their claims.

2.166 The committee intends to write to the Attorney-General to seek further information on the impact of re-instating the broadened eligibility criteria for the provision of support to native title respondents on the ability of native title *claimants* to have their claims heard and resolved.

8 Article 15 of the International Covenant on Economic, Social and Cultural Rights and article 27 of the International Covenant on Civil and Political Rights.

9 Article 1 of the ICESCR and article 1 of the ICCPR.

10 Statement of compatibility, p 1.

Repatriation Pharmaceutical Benefits Scheme (No. R43/2013)

FRLI: F2013L02009
Portfolio: Veterans' Affairs
Tabled: House of Representatives and Senate, 4 December 2013

Summary of committee concerns

2.167 The committee seeks clarification of the objective of the amendments in the instrument relating to pharmaceutical reimbursement provisions and further information on the impact the amendments will have on those affected by them.

Overview

2.168 This instrument sets out the circumstances in which the Repatriation Commission may arrange for pharmaceutical benefits to be provided to veterans or their dependents at a concessional rate. The instrument replaces the Repatriation Pharmaceutical Benefits Scheme (1995 No. 12).

Compatibility with human rights

Statement of compatibility

2.169 The statement of compatibility states that the instrument promotes the right to health by ensuring that veterans or their dependants could receive certain medications more quickly and are more likely to receive the correct medications through better medication management.

2.170 Without explicit reference to a particular measure or measures, the statement of compatibility also states that some measures in the instrument could be considered 'as not totally favouring the people in question' and that:

> [r]efinements to the method of calculating the pharmaceutical allowance could mean a person receives less pharmaceutical reimbursement than before the new Scheme. But this change was necessary to protect the public revenue by preventing unintended payments.[1]

2.171 The statement discusses the five year limit to be imposed in relation to the consideration of co-payments and the limitations that will apply to authorised nurse practitioners and authorised midwives in regard to the prescribing of medicines under the Repatriation Pharmaceutical Benefits Scheme.

2.172 The statement of compatibility concludes that the instrument is compatible with the right to health 'because it promotes that right and the conditions it imposes on the payment of the pharmaceutical reimbursement and prescribing of medicines

1 Statement of compatibility, p 6.

under authorised nurse practitioners and authorised midwives are considered reasonable in the circumstances.'[2]

Committee view on compatibility

2.173 The committee notes that the refinements to the method of calculating the pharmaceutical allowance appear to have the potential to reduce the level of benefit available to previously eligible persons. However, the statement of compatibility does not set out any further explanation as to the specific objective of the measure, including why this change is necessary, other than to protect the public revenue by preventing unintended payments. Further, the statement of compatibility does not identify what impact the amendments will have on previously eligible persons. Nor does the explanatory statement contain this material. As a result, the committee is unable to assess the compatibility of the changes with human rights.

2.174 The committee intends to write to the Minister for Veterans' Affairs to seek further clarification as to the objective of the changes to the method of calculating the pharmaceutical allowance and the impact the changes will have on those affected.

2 Statement of compatibility, p 2.

Treatment Principles (Australian Participants in British Nuclear Tests) 2006

FRLI: F2013L02031
Portfolio: Veterans' Affairs
Tabled: House of Representatives and Senate, 4 December 2013

Summary of committee concerns

2.175 The committee seeks further information on the measure which addresses 'double-dipping' and how it is consistent with the right to health.

Overview

2.176 This instrument modifies the Treatment Principles (No. R52/2013) made under the *Veterans' Entitlements Act 1986* in the application of the principles to persons eligible for treatment under the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*.

Compatibility with human rights

Statement of compatibility

2.177 The statement of compatibility that accompanies the instrument states that the instrument engages the right to health. The statement states that the instrument remakes an earlier instrument and that 'the only change to existing arrangements is that an authorised nurse practitioner will be able to refer an eligible person to a [Department of Veterans' Affairs]-contracted community nursing provider.'[1] This measure is said to promote the right to health as it could enable an eligible person to receive community nursing services more quickly.

2.178 The statement of compatibility also refers to a 'negative measure' aimed at preventing 'double-dipping' by recipients of rehabilitation appliances.[2] The statement does not identify the specific provisions in the instrument that address 'double dipping'[3] or explain the specific circumstances in which 'double dipping' might arise. The statement concludes that the measure is a legitimate limitation on the right to health and does not detract from the right but prevents it from being abused.

2.179 The committee intends the write to the Minister for Veterans' Affairs to seek further information on the measure addressing double-dipping and how it is compatible with the right to health.

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1 Explanatory statement, p. 3.

2 Explanatory statement, p. 4.

3 It appears that items 34, 37 and 44 of the instrument may relate to preventing 'double-dipping'.

The committee has deferred its consideration of the following legislative instruments

Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013

FRLI: F2013L02122
Portfolio: Prime Minister and Cabinet
Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.180 The committee draws the Minister's attention to the committee's consideration of special measures in its *Eleventh Report of 2013* and seeks clarification of the categorisation of this regulation, related regulations and the enabling Act as 'special measures'. The committee has deferred its consideration of this regulation while it considers our predecessor committee's recommendation for a review of the human rights compatibility of the Stronger Futures legislation.

Overview

2.181 This regulation amends the Aboriginal Land Rights (Northern Territory) Regulations 2007 to prescribe certain requirements and time periods in relation to an application by an Aboriginal and Torres Strait Islander corporation for a delegation of Land Council functions or powers.

2.182 The explanatory statement accompanying the regulation clarifies that subsection 28A(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Act) provides that an Aboriginal and Torres Strait Islander corporation may apply to a Land Council for a delegation of certain Land Council functions or powers. This provision was inserted by the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* with the objective of enabling Northern Territory Aboriginal people to have more control over development decisions by allowing for the devolution of decision-making to local Aboriginal communities. To date, there have been no instances of a Land Council making a delegation to a corporation under section 28A of the Act.

Compatibility with human rights

Statement of compatibility

2.183 The statement of compatibility accompanying the regulation states that the regulation will create a more certain pathway for Aboriginal and Torres Strait Islander corporations to seek a delegation of Land Council functions or powers under section 28A of the Act, which will support greater local-level decision-making and support earlier amendments to the Act.

2.184 The statement's overall assessment is that the regulation is compatible with human rights because it is a special measure within the meaning of article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), as it is designed to secure to Aboriginal people the full and equal enjoyment of human rights and fundamental freedoms.

2.185 The statement argues that the principal Act 'is discriminatory in nature as it confers rights and privileges upon Aboriginal Australians, which are discriminatory as against non-Aboriginal Australians.'[1] However, it maintains that 'the beneficial nature of this discrimination enables the Act, the Regulations and the Regulation to be each classified as a 'special measure' within the meaning of paragraph 4 of article 1 of the ICERD (and subsection 8(1) of the *Racial Discrimination Act 1975*.'[2]

Committee view on compatibility

2.186 In its *Eleventh Report of 2013* our predecessor committee considered the *Stronger Futures in the Northern Territory Act 2012* and related legislation. In its report the committee considered the classification of measures as 'special measures' within the meaning of the ICERD.

2.187 The committee's consideration of the criteria to be satisfied in order for a measure to be characterised as a 'special measure' is set out at pages 21 to 31 of that report. In particular, the committee noted that, as a matter of international law (including under the ICERD), measures based on race or ethnicity do not invariably amount to discrimination that can only be considered legitimate if they can be justified as 'special measures'. The relevant question is whether there is an objective and reasonable justification for the differential treatment. Under international law, the recognition of the traditional land rights of Indigenous peoples and legislative structures to give effect to those rights are generally considered to be non-discriminatory; such measures are not 'special measures' within the meaning of the ICERD. The committee noted that there was a difference between international law and Australian law in this regard, as represented by the High Court's interpretation of the Racial Discrimination Act.[3]

2.188 The committee expressed concern 'at the tendency for explanatory memoranda to invoke the category of "special measures" as a justification for legislation that involves differential treatment based on race or ethnic origin, without sufficient analysis of whether the differential treatment may be justified as legitimate differential treatment based on reasonable and objective criteria.'[4]

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1 Statement of compatibility, p 7.

2 Statement of compatibility, p 7.

3 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013*, pp 29-31.

4 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013*, p 28.

2.189 The committee wrote to the former Minister on 26 June 2013 inviting a response to the report. A response has not yet been received.

2.190 Before concluding its consideration of this regulation, the committee would welcome further clarification from the Minister regarding the categorisation of this regulation and related legislation as special measures.

2.191 The committee intends to defer its detailed consideration of this regulation, while it considers our predecessor committee's recommendation that a review be undertaken of the human rights compatibility of the *Stronger Futures in the Northern Territory in the Northern Territory Act 2012* and related legislation.

2.192 In the meantime, the committee intends to write to the Minister for Indigenous Affairs to draw his attention to the committee's consideration of special measures in its *Eleventh Report of 2013* and request clarification of the categorisation of the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* and related regulations, including this regulation as special measures in light of the committee's comments in that report.

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People's Republic of Korea) Amendment List 2013

FRLI: F2013L02049
Portfolio: Foreign Affairs and Trade
Tabled: House of Representatives and Senate, 9 December 2013

Summary of committee concerns

2.193 The committee reiterates the comments of its predecessor committee in relation to the Autonomous Sanctions regime and has deferred consideration of these instruments in greater detail until it has received the government's response to its request that a review of the sanctions regime be undertaken.

Overview

2.194 The predecessor to this committee discussed the autonomous sanctions regime in its *Sixth* and *Tenth Reports of 2013*.[1]

2.195 The Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) List 2012 sets out a list of persons and entities proscribed by the Minister under the Regulations. The new sanctions include financial and travel restrictions on additional persons and entities associated with the Democratic People's Republic of Korea's (DPRK) weapons of mass destruction proliferation activities.

Compatibility with human rights

Statement of compatibility

2.196 The statement of compatibility accompanying the instrument does not state the objective of the instrument (however, this is set out in the explanatory statement) or identify the human rights engaged by it. Nonetheless, the statement of compatibility concludes that the instrument is compatible with human rights.

2.197 The explanatory statement states that the imposition of further Australian autonomous sanctions is designed to increase pressure on the DPRK to comply with its nuclear non-proliferation obligations and with United Nations Security Council resolutions and to engage in serious negotiations on its nuclear and missile programs.

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1 Refer to the committee's comments in the *Sixth Report of 2013*, tabled on 15 May 2013 for background on the operation of the *Autonomous Sanctions Act 2011* and the *Autonomous Sanctions Regulations 2011*.

2.198 The statement of compatibility states that a person or entity subject to designation or declaration under the Regulations may apply to the Minister for revocation of that decision and that such decisions are judicially reviewable. The statement explains the effect of designation on the person or entity's ability to access their assets.

2.199 In its consideration of the autonomous sanctions regime in its *Sixth Report of 2013* and *Tenth Report of 2013*, the committee noted that:

> 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.[2]

2.200 The committee noted the complexity of this policy area and the need for careful consideration of competing interests. The committee also noted the Minister's preparedness to discuss the broader concerns about human rights compatibility to which autonomous sanctions regimes give rise and wrote to the Minister asking 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 committee in the 44th Parliament. In his response, the former Minister stated that he had instructed the Department of Foreign Affairs and Trade to carefully consider the committee's recommendation.

2.201 The committee wrote to the Minister for Foreign Affairs and Trade following the tabling of its *First Report of the 44th Parliament* to draw her attention to the committee's consideration of these matters and its request for a review of the human rights compatibility of the sanctions regime and to request advice on the progress of this matter.[3]

2.202 The committee intends to defer more detailed consideration of this instrument until it has received the Minister's response to its request for advice on the progress of the Department of Foreign Affairs and Trade's consideration of the committee's request for a comprehensive review of the sanctions regime in light of Australia's international human rights obligations.

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2 Parliamentary Joint Committee on Human Rights (PJCHR), *Tenth Report of 2013*, p 14.

3 PJCHR, *First Report of the 44th Parliament*, pp 165 – 167.

Social Security (Administration) (Recognised State/Territory Authority – Qld Family Responsibilities Commission Determination 2013

FRLI: F2013L02153
Portfolio: Social Services
Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.203 The committee has deferred its consideration of this instrument while it considers its predecessor committee's recommendation that a 12-month review be undertaken in the 44th Parliament to evaluate the latest evidence in order to test the continuing necessity for the Stronger Futures measures.

Overview

2.204 This instrument determines that the Queensland Family Responsibilities Commission is a recognised State or Territory authority for the purposes of Part 3B of the Social Security (Administration) Act 1999.

2.205 The determination also determines that Queensland is a recognised State or Territory, such that a Queensland authority may be recognised under section 123TGAA of the Act, and determines that the deductible portion of an instalment of a category I welfare payment is 60, 75 or 90 per cent, in order to match deductions from welfare payments that would otherwise apply under the Cape York measure of income management.

2.206 The explanatory statement states that Cape York welfare reform is a partnership between the communities of Aurukun, Coen, Hope Vale and Mossman Gorge, the Australian government, the Queensland government and the Cape York Institute for Policy and Leadership.

2.207 The explanatory statement clarifies that:

> Currently, a person can be subject to income management under Cape York Welfare Reform only until 1 January 2014 after a decision by the Commission. Legislative amendments proposed in the Social Services and Other Legislation Amendment Bill 2013 currently before parliament propose extending this timeframe to 1 January 2016. However, pending passage of that measure, income management under the Cape York welfare reform measure of income management provided for by section 123UF of the Act must cease from 1 January 2014, including under the Commission's decision, a person would otherwise have continued to be subject to income management beyond this date.[1]

1 Explanatory statement, p 2.

2.208 The purpose of the instrument is to avoid ending the income management of a number of persons by providing an alternative basis for income management. The explanatory statement states that

> [I]t is possible for a person to be subject to the income management regime where a State or Territory authority recognised by the relevant Minister gives a written notice to the Secretary requiring that the person be subject to income management under section 123UFAA of the Act.

Compatibility with human rights

Statement of compatibility

2.209 The instrument is accompanied by a statement of compatibility that states that the instrument engages the right to social security[2], the right to an adequate standard of living[3], the rights of children[4], the right to self-determination[5], the right to privacy[6], and the right to non-discrimination of persons of a particular race or ethnic origin[7]. The statement concludes that the instrument 'only limits a person's freedom of expenditure where it is reasonable, necessary and proportionate to achieving a legitimate objective'[8].

Committee view on compatibility

2.210 In its *Eleventh Report of 2013* the predecessor to this committee considered the *Stronger Futures in the Northern Territory Act 2012* and related legislation. The committee wrote to the then Minister on 26 June 2013 inviting a response to the report. The committee notes that a Ministerial response has not yet been received.

2.211 The former committee concluded its report by noting the importance of continuing close evaluation of measures within the legislation. The committee considered that the PJCHR could usefully perform an ongoing oversight role in this regard and recommended that in the 44th Parliament the committee should undertake a 12-month review to evaluate the latest evidence in order to test the continuing necessity for the Stronger Futures measures.

2.212 The committee intends to defer its detailed consideration of this regulation, while it considers its predecessor committee's recommendation.

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2 Article 9 of the ICESCR.

3 Article 11 of the ICESCR.

4 Article 24(1) and article 14(4) of the ICCPR.

5 Article 1 of the ICESCR.

6 Article 17 of the ICCPR.

7 Article 1 of the International Convention on the Elimination of all Forms of Racial Discrimination.

8 Statement of compatibility, p 9.

Part 3

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

Consideration of responses

Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1)

FRLI: F2013L01443
Portfolio: Health
Tabled: House of Representatives and Senate, 12 November 2013
PJCHR comments: First Report of 44th Parliament, tabled 10 December 2013
Response dated: 9 January 2014

Information sought by the committee

3.1 Under the regulation, the Australian Sports Anti-Doping Authority (ASADA) Chief Executive Officer (CEO) will be able to issue a disclosure notice requiring a person to attend an interview to answer questions, give information and/or produce documents or things. The committee recommended amendments to provide that the CEO must consider any harm to the person or their family relationship before issuing a disclosure notice to ensure compatibility with the right to respect for family life.

3.2 The committee also sought further information to assess whether the requirement to produce documents or things, which could be relied upon to find the person guilty of an anti-doping violation, is consistent with the right to a fair hearing and the right to work.

3.3 The Minister's response is attached.

Committee's response

3.4 The committee thanks the Minister for his response.

Right to respect for family life

3.5 The committee notes the Minister's response to its suggestion that the regulation be amended to provide that the CEO must consider any harm to the person or their family relationship before issuing a disclosure notice to a family member.

3.6 The committee notes the fact that, as stated by the Minister in his response, 'it is not common practice for Commonwealth law to require an official who is exercising powers of compulsion to take into account the harm to the person or their family relationship before issuing a notice'.[1] The committee considers that, consistent with the position taken by our predecessor committee, the fact that a

1 Minister's response, p 2.

provision or approach is consistent with general practice that may have been previously adopted will not be a sufficient reason to justify limitations on rights.[2]

3.7 The committee also wishes to clarify the Minister's view in relation to the rules applying under the Commonwealth, State and Territory Evidence Acts. The Minister states that:

> I am advised that the Evidence Acts in each jurisdiction (the Commonwealth and each of the states and territories) do not give a witness the right to refuse to give evidence – even where it may incriminate their spouse, child, parent or someone with whom they have a de-facto relationship.

3.8 The committee notes that the Evidence Acts in the Commonwealth and in the majority of states and territories do, in the context of criminal proceedings, give a person who is a family member of a defendant the right to object to being required to give evidence against the defendant.[3] Generally, where such an objection is made, the court must not require the person to give evidence if the court finds there is a likelihood that harm may be caused to the person, or to the relationship between the person and the defendant, if the person gives the evidence and the nature and extent of that harm outweighs the desirability of having the evidence given.[4]

3.9 While the proceedings which may result from the information gathering powers in question (either the application of a civil penalty for failure to comply with a notice or a potential period of suspension for the athlete in question) are not criminal proceedings under domestic law, they do result in serious consequences for the persons involved.

3.10 The committee retains its concern that the lack of any requirement for the CEO to consider any harm to a person or to their family relationship before issuing a disclosure notice to a family member may inadequately protect an individual's right to respect for family life in article 17 of the International Covenant on Civil and Political Rights.

3.11 The committee notes the Minister's indication that the *Australian Sports Anti-Doping Authority Act 2006* 'does not currently authorise the making of regulations to insert additional factors that the CEO must take into account before

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2 Mr Harry Jenkins MP, Chair's statement to the House of Representatives, First Report of 2012, 22 August 2012.

3 See, for example: *Evidence Act 1995* (Cth), section 18; *Evidence Act 1995* (NSW), section 18; *Evidence Act 2008* (Vic), section 18; *Evidence Act 1929* (SA), section 21; *Evidence Act 2011* (ACT), section 18; *Evidence (National Uniform Legislation) Act*, section 18. In the majority of jurisdictions, the protection applies to the spouse, de factor partner, parent or child of a defendant.

4 See, for example, section 18(6) of the *Evidence Act 1995* (Cth).

issuing a disclosure notice'.[5] The committee notes that section 79 of the Act appears to set out a general regulation making power allowing the making of regulations prescribing matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

3.12 The committee re-iterates its view that consideration be given to progressing amendments to enable consideration of any harm to family relationships before issuing a disclosure notice.

Right to a fair hearing and right to work

3.13 The committee thanks the Minister for his response in relation to whether and how the ability to rely on documents or things produced by a person to find that person guilty of an anti-doping violation is compatible with the right to a fair hearing and the right to work.

3.14 Despite the information provided, the committee retains its concerns regarding the consistency of the ability to rely on such material in anti-doping violation proceedings against a person with the right to a fair hearing and the right to work.

5 Minister's response, p 2.

THE HON PETER DUTTON MP
MINISTER FOR HEALTH
MINISTER FOR SPORT

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Dean,

Thank you for your letter of 10 December 2013 in relation the Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1) (the Regulation).

Australia's anti-doping legislation is structured so that the *Australian Sports Anti-Doping Authority Act 2006* principally provides the authority for the making of Regulations that give effect to our commitments under the UNESCO International Convention Against Doping in Sport and to implement arrangements that are consistent with the principles of the World Anti-Doping Code (the Code).

The Regulation gives effect to the amendments contained in the *Australian Sports Anti-Doping Authority Amendment Act 2013*, which received passage through the 43rd Parliament and commenced operation on 1 August 2013. These amendments have enhanced the capacity of the Australian Sports Anti-Doping Authority (ASADA) to investigate possible anti-doping rule violations in sport. The ASADA Chief Executive Officer (CEO) has been using these extended powers to issue disclosure notices requiring people to assist in its current investigations by attending an interview, providing information and producing documents or things.

Since the Regulation was lodged on the Federal Register of Legislative Instruments in July 2013, the World Anti-Doping Agency (WADA) has amended the Code to recognise the increasing importance of investigations and intelligence gathering in the fight against doping. WADA recognises that many of the most high-profile successes in the fight against doping have been based largely on evidence obtained through the investigations process.

In reference to the specific comments in the Committee' report, I note the following:

2.10 The committee intends to write to the Minister for Sport to recommend that consideration be given to amending the regulation to provide that the CEO must consider any harm to the person or their family relationship before issuing a disclosure notice to a family member.

The Act and ASADA Regulations have a number of protections around the issuing of a disclosure notice that ensure these powers are used appropriately. For a family member to be issued with a disclosure notice, the ASADA CEO would need to have sufficient information to demonstrate that they have a reasonable belief the family member could assist with an investigation. Moreover, this reasonable belief has to be tested with three members of the independent, expert Anti-Doping Rule Violation Panel (the Panel).

With respect to the Committee's recommendation, I understand that it is not common practice for Commonwealth law to require an official who is exercising powers of compulsion to take into account the harm to the person or their family relationship before issuing a notice. I am advised that the Evidence Acts in each jurisdiction (the Commonwealth and each of the states and territories) do not give a witness the right to refuse to give evidence – even where it may incriminate their spouse, child, parent or someone with whom they have a de-facto relationship.

It is also unlikely the CEO would be in a position to confidently assess what harm might come to a family relationship from issuing a disclosure notice.

Australia's anti-doping arrangements are not however, intended to impinge adversely upon family relationships. The matters that the CEO is required to take into account before issuing a disclosure notice are set out in the Act. The Act does not currently authorise the making of regulations to insert additional factors that the CEO must take into account before issuing a disclosure notice. Given this, I am prepared to consider the Committee's concerns when the Government is next considering amendments to the Act.

2.17 The committee intends to write to the Minister for Sport to seek further information as to whether requiring a person to provide documents or things that can be used against that person in proceedings that may lead to the suspension of the person's eligibility to engage in paid employment is consistent with the right to a fair hearing under article 14(1) of the ICCPR or the right to work under article 6 of the ICESCR.

Right to a Fair Hearing

The Committee's concern appears to relate to the fairness of the proceedings when the person had been compelled to provide documents or things that could be used against him or her and this is the sole basis for a finding of guilt leading to a significant period of suspension.

The issuing of a disclosure notice to provide documents is only one method of sourcing information that ASADA employs in its investigations. ASADA investigations are undertaken in accordance with the requirements of the Australian Government Investigations Standards. ASADA investigators collect all the information they need to show that the person has a potential case to answer. This information is passed to the Panel who makes a determination on whether it is possible the person has committed an anti-doping rule violation (ADRV).

At this point, the information is forwarded to the responsible national sporting organisation which arranges a hearing (unless the athlete accepts that they had committed an ADRV). The matter is heard either by a Tribunal established by the sport or the Court of Arbitration for Sport. There are also mechanisms within the sport's anti-doping policy to ensure decisions made at these hearings are appealable. The Act also provides for a person to appeal the Panel's decision in relation to a possible violation to the Administrative Appeals Tribunal.

Right to Work

Under Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), "state parties recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right".

Athletes and support personnel, through their sport membership, generally sign up to contractual provisions that require them not to use, possess, administer or traffic (as the case may be) substances prohibited in sport. Possible sanctions are contained in those provisions. Breaches of anti-doping rules effectively amount to breaches of:

- codes of conduct applicable to the sport (which are often incorporated into the employment arrangements of professional athletes and support personnel);
- obligations to work with care and diligence; follow all lawful and reasonable orders of the employer; duty of fidelity, etc.

Most athletes and support persons are not able to earn a living solely through their sport. While they spend a substantive amount of time preparing and competing, they are often employed in other professions. A suspension for a doping violation would not directly prevent them from working in these or other professions.

Moreover, a professional sports person who is doping is denying a clean athlete the opportunity to work in that sport. The prospect of being ineligible to be involved in the sport also acts as a significant deterrent against doping.

I would add that Article 7 of the ICESCR requires employers to provide healthy and safe work environments. It would be inconsistent with Article 7 to allow people to be employed by a sporting organisation if they are involved in doping, particularly if they are in a position where they are able to influence the training, development and management of younger members of that organisation.

I trust this information addresses the concerns of the Committee in relation to the Regulation. Please advise if I can be of further assistance.

Yours sincerely

Peter Dutton

09/01/14.

PETER DUTTON

Social Services and Other Legislation Amendment Bill 2013

Portfolio: Social Services
Introduced: House of Representatives, 20 November 2013
Status: Before Senate
PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013
Response dated: 21 January 2014

Information sought by the committee

3.15 The committee sought further information on:

- whether the effect of the amendments to the *National Gambling Reform Act 2012* is to remove measures that promote human rights and if so, whether they have been replaced by other measures which address the problems targeted by the National Gambling Reform Act (Schedule 1);
- how the amendments to limit the family tax benefit Part A to children aged under 16, or teenagers aged 16 to 19 who are in full-time secondary study (or equivalent), are consistent with the right to social security (Schedule 3);
- how the amendments to increase the period of Australian working life residence requirement from 25 to 35 years in order to receive the full age (and certain other pensions) outside of Australia, and the changes to the way pensions are paid to couples outside Australia, are compatible with the right to social security (Schedule 4);
- how the amendments ceasing student start-up scholarships from 1 January 2014 for new recipients of student payments participating in higher education and replacing them with income-contingent loans are compatible with the right to social security (Schedule 6);
- how the amendments to reduce the allowed period of temporary residence from Australia for accessing certain family and parental payments from three years to 56 weeks are compatible with the right to social security (Schedule 10);

3.16 The Minister's response is attached.

Committee's response

3.17 The committee thanks the Minister for his response.

Schedule 1 – Encouraging responsible gambling

3.18 The committee sought further information on whether the repeal of certain measures under the National Gambling Reform Act which appeared to be directed at promoting certain human rights would be replaced by measures that would ensure a similar level of fulfilment and, if not, how any limitation or retrogression can be justified.

3.19 According to the Minister's response, the government intends to adopt a different policy approach to problem gambling to that of the previous government. The bill is intended to constitute the first step through expressing the Government's commitment to developing and implementing appropriate measures in the near future. The government's approach includes restoring state and territory control over the regulation of ATM cash withdrawals and relying on restrictions imposed by existing state and territory laws. It also replaces existing provisions relating to the state linked pre-commitment measures with a commitment to work with state and territory governments and relevant stakeholders to develop and implement a voluntary pre-commitment system in venues nationally, including development of a realistic implementation timeframe.

3.20 The committee recognises that there is debate as to the best way to address problem gambling and acknowledges that there are a range of policy approaches that may be adopted. The committee emphasises that where one policy approach is chosen over another based on the view that it will better achieve the objectives sought, which includes, in this case, ensuring rights to health and to an adequate standard of living are promoted, appropriate mechanisms must be established to monitor the effectiveness of the measures.

3.21 The committee recommends that, as part of the government's commitment to work with state and territory governments and relevant stakeholders to develop appropriate measures, the government's actions be accompanied by appropriate mechanisms to monitor the effectiveness of the replacement measures in promoting human rights, in particular rights to health and to an adequate standard of living.

Schedule 3 – Family tax benefit and eligibility rules

3.22 The amendments restrict eligibility criteria for Family Tax Benefit (FTB) Part A, with the result that teenagers aged 16 and 17 who have completed Year 12 will no longer be eligible. According to the Minister's response, the purpose is:

> to reprioritise family assistance and social security expenditure in line with the fiscal constraints faced by government and to introduce stronger requirements for those who have completed Year 12 to participate in work, job search, study or training.

3.23 Accordingly, it appears that the government is directing FTB Part A at families with children in primary or secondary school to assist families in putting their children through school. According to the Minister, youth allowance is a more appropriate payment for young people who have not attained Year 12 or equivalent and who are not studying full-time and for young people who have completed their secondary education. The committee agrees this appears to constitute a legitimate objective.

3.24 The Minister considers that the changes are reasonable and proportionate because: FTB Part A will continue to provide benefits to families with children attending school; the changes will not affect the current assistance provided to low and middle income families through income support payments; and teenagers who cease to be eligible for the FTB Part A as a result of the changes will be able to apply for Youth Allowance.

3.25 The committee sought further information about the financial factors that the government has taken into account in introducing this change. The response did not address the financial implications of the changes, in particular the impact of the changes on both young people and on their families. The committee remains unaware of what the impact of transitioning certain categories of young people to youth allowance may be and whether it will result in a detrimental impact.

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

Schedule 4 – Period of Australian working life residence

3.27 The first measure in Schedule 4 relates to increasing the Australian Working Life Residence (AWLR) requirement for the payment of a full pension outside of Australia from 25 to 35 years.

3.28 The committee accepts that the measure seeks to achieve a legitimate objective. That is, to strengthen the residence basis of Australia's pension system and to ensure the sustainability of the pension system. The purpose of the residence based scheme is to ensure that a person must have a substantial connection to Australia in order to receive the full pension outside Australia. The response notes that the maximum AWLR that a person can accrue is currently 49 years (to rise to 51 years when the Age Pension age increases to 67 in 2023). The current AWLR represents roughly half of the relevant maximum period. The response also notes that most countries with residence-based systems do not export those systems. Of those that do, Canada and New Zealand set periods of 40 years and 45 years respectively.

3.29 The committee recognises that Australia's approach of allowing the export of benefits overseas, as a residence-based and not a contributions-based social security

system, is both rare and generous relative to other countries. The committee also accepts that a requirement of 35 years AWLR may be reasonable. However, where a legislated benefit is removed so that a person's entitlements are reduced, the government bears the burden of demonstrating that the measure is a reasonable and proportionate way of achieving its objective. The committee is not satisfied that the response has adequately explained how the means adopted is proportionate to achieving the objective sought.

3.30 The committee notes that pensioners already overseas when the measures commence will be grandfathered so that no individuals currently receiving the pension overseas will have a reduction in their pension rate. However, the committee retains its concern that there will be a cohort of people who currently have a reasonable expectation that they will be eligible to receive the full pension overseas on the basis of 25 years AWLR. According to the Minister's response:

> [s]taggering implementation was not proposed as it would increase complexity, create inequities, reduce savings and delay the achievement of the objective which is to establish a more appropriate basis for payment of full rate pensions outside Australia.

3.31 The committee understands that the purpose of the measure is to ensure the long-term sustainability of the system, and so, by implication, to make savings (though no details of the anticipated savings were provided in the explanatory materials). However, the fact that allowing for the phasing-in of the requirement would reduce savings is not on its own a sufficient reason to justify a measure where the measure itself may have a disproportionate effect on individuals.

3.32 The Minister has asserted that phasing-in arrangements would increase complexity and create inequities, but has not provided information as to what alternatives were considered and how they would have increased complexity and created inequities.

3.33 On the basis of the information provided, the committee is unable to conclude that the measure is proportionate and as such that it is compatible with the right to social security.

3.34 According to the Minister's response, the effect of the second measure in Schedule 4 will be that:

> members of a couple paid under a social security agreement outside Australia will be paid on their own AWLR rather than the higher Australian working life residence duration of either partner. This policy is already being applied to those paid under domestic legislation. This measure will therefore address an anomaly and equity issue by ensuring that social security agreement pensioners paid outside Australia are no longer paid a more generous rate of Australian pension than other pensioners.

3.35 The committee is generally supportive of a pension system that is based on individual eligibility for payments, as opposed to dependency based eligibility, as this

reduces the risk of discrimination. However, the effect of this measure is not clear from the material provided. According to the explanatory memorandum accompanying the bill, recipients of partnered age and disability support pensioners (or former members of such couples) paid under the *Social Security (International Agreements) Act 1999* are currently paid based on the higher AWLR of either partner. Recipients of the carer payment and wife pension under the *Social Security (International Agreements) Act 1999* are currently deemed to have the same AWLR as their partner (even if this is less than their own).[1]

3.36 The committee notes that this will have the effect of increasing payments for recipients of the carer payment and wife pension where a person's AWLR is higher than their partner's. However, it appears to the committee that this measure will also result in a reduction in payments for recipients of partnered age and disability support pensions and carer and wife pensions where a person's AWLR is lower than their partner's.

3.37 The committee intends to write to the Minister for Social Services to seek further clarification as to the purpose and impact of the measure enabling a person who is a member of a couple paid outside Australia to have their pension calculated on the basis of their own AWLR, rather than the higher AWLR of either partner.

Schedule 6 – Student start-up loans

3.38 The response explains that the shift from Student Start-up Scholarships to Student Start-up Loans 'is a fiscally responsible alternative to grant payments for increasing participation in higher education' and enables the government to ensure that higher education is accessible to all Australians. It explains how the shift is reasonable and proportionate to achieving this objective.

3.39 In light of the information provided the committee makes no further comment on this measure. The committee notes it would have been useful for the information provided in the response to have been included in the statement of compatibility.

Schedule 10 – Reduction of period for temporary absence from Australia

3.40 According to the Minister's response, the amendments reducing the period of allowed temporary absence for FTB Part A and Paid Parental Leave from three years to 56 weeks aim to reprioritise these payments in line with the fiscal restraints faced by government. They are said to be reasonable and proportionate because payments will continue to be made to eligible families overseas for a period of 56

1 Explanatory memorandum, p 14.

weeks, which is more generous compared to the maximum six-week period allowed for other payments overseas, and will ensure that individuals overseas for one year employment contracts will have time to return to Australia before ceasing to be eligible. Further, exemptions will apply for some individuals to allow access for up to three years, including members of the Australian Defence Force or Australian Federal Police deployed overseas, persons receiving assistance under the Medical Treatment Overseas Program, and persons unable to return to Australia with the 56 week period because of a specified event.

3.41 The bill provides that the amendments only affect an individual's eligibility for FTB Part A on and from 1 July 2014 and for Paid Parental Leave for a child born on or after 1 July 2014.[2] However, the amendments will apply in relation to any absence from Australia, whether this begins before, on or after 1 July 2014.[3] It is not clear how many people this may affect who are overseas and who will no longer be eligible for these payments from 1 July 2014.

3.42 The committee intends to write to the Minister for Social Services to seek further information as to how many people who are already overseas will be affected by the changes and may have their payments removed.

2 Items 8 and 14 of Schedule 10 to the bill.

3 Items 8 and 14 of Schedule 10 to the bill.

The Hon Kevin Andrews MP
Minister for Social Services

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MN13-002286

21 JAN 2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Smith Dean,

Thank you for your letter of 10 December 2013 on behalf of the Parliamentary Joint Committee on Human Rights in relation to the Social Services and Other Legislation Amendment Bill 2013.

The Committee requested further information on several Schedules to the Bill, including those related to encouraging responsible gambling (Schedule 1), family tax benefit and eligibility rules (Schedule 3), the period of Australian working life residence (Schedule 4), student start-up loans (Schedule 6) and the reduction of the period for temporary absence from Australia (Schedule 10).

Additional information on each of these schedules to assist the Committee to form a view is set out in the attached information.

Thank you again for writing.

Yours sincerely

KEVIN ANDREWS MP

Encl.

Schedule 1 – Encouraging responsible gambling

Schedule 1 to the Bill amends the *National Gambling Reform Act 2012* (Act), which includes a number of measures with the objective of reducing the risk and harm associated with problem gambling. The Committee has sought further information as to whether the effect of Schedule 1 is to remove measures that promote human rights, in particular the right to an adequate standard of living and the right to health, and, if so, whether they have been replaced by measures that address the problems targeted by the Act.

As the Committee has noted, the Government intends to adopt a different policy approach to help problem gamblers from that of the previous government. The Bill is considered the most appropriate first stage to addressing problem gambling and express the Government's commitment to develop and implement appropriate measures in the near future.

To the extent the Bill removes measures intended to reduce the harms that result from problem gambling, it is noted the Bill makes provision for alternative measures to address these issues and will cause less interference with certain human rights, as identified in the statement of compatibility. As such, the Bill will not give rise to breaches of human rights in practice, consistent with the principles of the Committee.

In relation to the national withdrawal limit on automatic teller machines (ATMs), the Bill proposes to repeal this measure to restore state and territory control over the regulation of ATM cash withdrawals. Existing state and territory laws provide adequate restrictions on ATMs, for example, in all Australian jurisdictions ATMs are banned from gaming areas. In many jurisdictions additional restrictions apply to ATMs and other cash dispensing facilities, such as electronic funds transfer at point of sale (EFTPOS), beyond the gaming area.

In relation to the proposed repeal of a state linked pre-commitment measure, the Bill replaces this with a commitment to work with stakeholders on venue based pre-commitment. It is the Government's policy that venue based pre-commitment is a more appropriate legislative response to problem gambling given its impact on industry and recreational gambling. This amendment provides the certainty required to work effectively with stakeholders on venue based pre-commitment, while recognising the role of state and territory governments.

Further, replacing a state linked system with a venue based system is likely to minimise the risk of arbitrary and unlawful interference with a person's privacy under Commonwealth law, given a venue based system is only required to monitor gaming activity within a venue rather than across a state.

Schedule 1 of the Bill represents one part of a different policy approach to helping problem gamblers. It is the Government's intention to determine the most effective package of measures for addressing problem gambling, balancing the benefits of recreational gambling against the harm it may cause. As noted by the Committee, government responses to problem gambling are a matter of continuing policy debate.

The measures form a part of a broader plan to assist problem gamblers, consisting of a combination of preventative, treatment and counselling services. The Government's approach places a greater emphasis on non-legislative measures given the existing role of state and territory governments in addressing problem gambling. The Government's intention is to complement and enhance existing arrangements to reduce duplication and complexity while encouraging responsible gambling.

Schedule 3 – Family tax benefit and eligibility rules

Schedule 3 makes amendments to restrict Family Tax Benefit (FTB) Part A to children aged under 16, or teenagers aged 16 to 19 (end of the calendar year they turn 19) who are in full-time secondary study (or equivalent). Teenagers aged 16 and 17 who have completed Year 12 will no longer be eligible. The Committee has sought further information about the objective being pursued by the measures and an explanation as to whether the limitations on the right to social security are a rational, reasonable and proportionate measure for the achievement of that objective.

The amendment aims to reprioritise family assistance and social security expenditure in line with the fiscal constraints faced by government and to introduce stronger requirements for those who have completed Year 12 to participate in work, job search, study or training.

To the extent that Schedule 3 limits the right to social security, it is reasonable and proportionate, as FTB Part A will continue to provide benefits to eligible families with children under age 16 and for teenagers while they are completing secondary school. This measure will not affect current assistance to eligible low to middle income families, including the most disadvantaged, that is provided through fortnightly income support payments.

Existing participation requirements for FTB already exclude teenagers aged 16 to 17 who have not attained Year 12 or equivalent and who are not studying full-time. Teenagers with a secondary qualification who cease to be eligible for FTB Part A due to the amendments in Schedule 3 will be able to apply for Youth Allowance. Youth Allowance is an activity tested payment, and requires young people to participate in work, job search, study or training. It will remain available as the more appropriate payment to help young people transition from school into work or post-secondary study.

Schedule 4 – Period of Australian working life residence

Schedule 4 to the Bill contains provisions to increase the period of Australian Working Life Residence (AWLR) required for payment of a full pension outside Australia from 25 to 35 years, and to assess people paid under social security agreements on their own AWLR and not that of their partners. The Committee has sought further information about the objective being pursued by the measures and an explanation as to whether the limitations on the right to social security are a rational, reasonable and proportionate measure for the achievement of that objective.

The purpose of these amendments is to provide a more appropriate basis for calculating pensions paid outside Australia and to support the sustainability and targeting of Australia's pension system now and into the future.

The Age Pension is a payment made from general tax revenue to support aged Australian residents who have no other means of support. In recognition of Australia's multicultural background, governments have allowed residents who have been granted pension to take their pension overseas, but have made a deliberate decision in such circumstances to vary the pension rate to reflect actual years of residence in Australia during working life.

While in Australia, a person's rate of pension is not linked to their length of residence. However, once they are outside Australia for more than 26 weeks their rate of pension reflects their past links to Australia during their working life (AWLR is defined as residence between the ages of 16 and Age Pension Age).

Australia's social security system differs markedly from the contributory systems that operate overseas. A person need not have worked or paid contributions or taxes to be eligible to receive a pension; they need only satisfy residency requirements.

As a residence based, non-contributory system, there is no acquired right to social security payments in the same sense as may apply to "earned" benefits or property. Aged pensions are granted according to the current laws of the Australian Government and are provisional on a person claiming and being entitled according to legislation at that time. For example, a person who was born in Australia and lived here for 60 years, but then leaves to live outside Australia, cannot claim and receive a pension at 65, unless they are living in a country that has a bilateral social security agreement with Australia.

It is rare for countries with residence based systems to export their benefits at all. Countries with contributory systems commonly impose restrictions on payment of their "earned" benefits outside their territory.

Currently pensioners with 25 years AWLR are paid the full rate of Age Pension outside Australia. Pensioners with less than 25 years are paid a proportional rate. For example, a person with 17 years AWLR will receive 17/25th of the rate paid in Australia after they have been absent from Australia for longer than 26 weeks.

The maximum AWLR period a person can currently accrue is 49 years (this will be 51 years after the Age Pension age increases to 67 in 2023). The 25 year AWLR requirement represents only about half of the relevant maximum period.

Given that Australia's social security system does not require a person to have worked or paid taxes to accrue periods of AWLR, the current formula to pay full pension to a person with only 25 years AWLR is considered overly generous and inappropriate.

Increasing the requirement to 35 years AWLR strengthens the residence basis of our system and means that a person must have a substantial connection to Australia to get a full pension outside Australia. It also reflects the principle of shared responsibility and the idea that each country should pay a benefit which reflects a person's association with that country.

As noted previously, most countries that have residence-based systems do not export those benefits. Aside from Australia, notable exceptions are Canada and New Zealand, which pay based on 40 years and 45 years respectively.

Staggering implementation was not proposed as it would increase complexity, create inequities, reduce savings and delay the achievement of the objective which is to establish a more appropriate basis for payment of full rate pensions outside Australia.

Pensioners already overseas when the measure commences will be grandfathered. The measure will only apply to people who leave Australia on or after the start date and to pensioners granted under social security agreements on or after the start date. In this sense no individuals will have a reduction in their pension rate.

Phasing in the measure would complicate implementation, make it more difficult to explain to pensioners and considerably increase administrative costs for Government.

As already mentioned the objective is to strengthen the residence-based nature of our system and increase the sustainability of the pension system. The measure proposed is reasonable having regard to the nature of Australia's system and by any comparison to international practices.

The second measure will mean that members of a couple paid under a social security agreement outside Australia will be paid on their own AWLR rather than the higher Australian working life residence duration of either partner. This policy is already being applied to those paid under domestic legislation.

This measure will therefore address an anomaly and equity issue by ensuring that social security agreement pensioners paid outside Australia are no longer paid a more generous rate of Australian pension than other pensioners.

This measure is appropriate because the Australian Social Security system is residence based and individuals generally qualify based on their own connection to Australia. As a result, dependency based payments, like Wife and Widows Pension, were closed to new claimants many years ago. As all residents can qualify for payments in their own right the pension system is gender neutral (positive discrimination for women ended when Age Pension age for men and women became equal from July 2013).

This measure will also mean that some recipients may receive an increase in their payment. This is because Carer Payment and Wife Pension recipients are currently paid on the basis of their partner's AWLR, regardless of whether it is more, or less, than their own AWLR. Therefore, this measure will benefit those recipients whose AWLR is higher than that of their partner's AWLR.

Grandfathering provisions will protect existing entitlements.

Schedule 6 – Student start-up loans

Schedule 6 to the Bill establishes, from 1 January 2014, Student Start-up Loans to replace the Student Start-up Scholarships for higher education students in receipt of student income support payments. The Committee has sought further information about the objective being pursued by the measures and an explanation as to whether the restrictions on the enjoyment of the right to social security are a rational, reasonable and proportionate measure for the achievement of that objective.

The Government is committed to giving all Australians an opportunity to gain a first class education. It acknowledges the financial difficulties which some students and their families may experience in undertaking education and training and has a number of measures in place to assist people financially. Student payments are directed to students and families on the basis of a shared responsibility for financial support between families, the Australian Government and students themselves.

It is well established that higher education graduates gain substantial private benefits from their studies including higher lifetime earnings than non-graduates, more job satisfaction, higher social status and better health. Because the community substantially pays the costs of these benefits through a range of services and supports for students, it is reasonable and proportionate that the students be expected to repay a proportion of those costs when they are financially able. This is the basis for the existing Higher Education Loan Program (HELP) for tuition fees.

Converting the Student Start-up Scholarship into an income contingent loan recognises the benefits students receive from higher education, while still ensuring that higher education is accessible to all socio-economic groups. Students from low SES backgrounds will continue to receive fortnightly income support payments of Youth Allowance or Austudy.

The Student Start-up Loan debts will be free of any real interest charge although they will be subject to CPI indexation to maintain their real value. As with the HELP scheme, students will only be required to begin repaying the Loan once their income has reached the relevant income threshold ($51,308 in 2013-14 consistent with HELP).

Income contingent loans do not place an onerous burden on debtors, as repayments are proportional to a person's income, meaning that those on lower incomes do not have to repay large amounts, unlike other types of loans (such as bank loans). Furthermore, students who never reach the minimum threshold, because they do not obtain the financial benefits of their studies in higher education, will not be required to repay the loan.

Various studies, including analysis conducted by Professor Bruce Chapman and Jane Nicholls (*Bruce Chapman and Jane Nicholls (2013), 'Higher Education Contribution Scheme (HECS)', Asia and the Pacific Policy Studies, Working Paper Series 02/2013, Canberra*) have concluded that income contingent loans are not a deterrent to study. These studies have identified no significant effects on university enrolments, including from low socioeconomic students, from either the introduction of, or changes to, HELP.

The Student Start-up Loan is a fiscally responsible alternative to grant payments for increasing participation in higher education, including by low SES, regional, remote and Indigenous students, by assisting them with the costs of commencing study including the purchase of text books, computers and internet access.

Schedule 10 – Reduction of the period for temporary absence from Australia

Amendments contained in Schedule 10 of the Bill will reduce the period of allowed temporary absence for FTB Part A and Paid Parental Leave from three years to 56 weeks. The Committee has sought further information about the objective being pursued by the measures and an explanation as to whether the restrictions on the enjoyment of the right to social security are a rational, reasonable and proportionate measure for the achievement of that objective.

The amendment aims to reprioritise FTB Part A and Paid Parental Leave in line with the fiscal constraints faced by government. To the extent that Schedule 10 limits the right to social security, it is reasonable and proportionate, as payments will continue to be made to eligible families for a period of 56 weeks while overseas. The 56 week time period is more generous than the maximum six week period allowed for other payments of government assistance when a person is overseas.

The measure ensures that individuals who may be overseas for one year employment contracts will have time to return to Australia before ceasing to be eligible for family assistance or parental payments. Exemptions will apply to allow some individuals to access payments while overseas for up to three years, such as individuals who are a member of the Australian Defence Force or Australian Federal Police and who are deployed overseas, assisted by the Medical treatment Overseas Program, or unable to return to Australia for a specified reason (such as a serious accident or natural disaster).

Responses requiring no further comment

Customs Amendment (Anti-Dumping Commissioner Transfer) Bill 2013

Portfolio: Infrastructure and Regional Development
Introduced: House of Representatives, 14 November 2013
Status: Act, received Royal Assent 13 December 2013
PJCHR comments: First Report of 44th Parliament, tabled 10 December 2013
Response dated: 24 December 2013

Information sought by the committee

3.43 The committee sought clarification as to whether the power to disclose personal information to officers of the Australian Customs and Border protection Service was consistent with the right to privacy.

3.44 The Minister's response is attached.

Committee's response

3.45 The committee thanks the Minister for his response.

3.46 In light of the information provided the committee makes no further comments on this bill.

3.47 The committee notes it would have been useful had the information provided in this response been included in the statement of compatibility.

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY

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C13/2817

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

24 DEC 2013

Dear Senator Smith Dean

Thank you for your letter of 10 December 2013 concerning the Customs Amendment (Anti-Dumping Commission Transfer) Bill 2013. This Bill has received royal assent making it the *Customs Amendment (Anti-Dumping Commission Transfer) Act 2013* (the Act). You sought clarification as to whether the provisions of the Act dealing with disclosure of personal information between the Anti-Dumping Commission (the Commission) and the Australian Customs and Border Protection Service (Customs), were consistent with provisions regarding the right to privacy.

The purpose of the Act is to allow the Commission to transfer from Customs to the Department of Industry. After the transfer has been completed, Customs will retain certain functions and powers associated with anti-dumping administration, such as duty collection and compliance assurance. The Commission currently exchanges information, including personal information, with those in Customs who are outside the Commission and who perform those functions and powers. The need to exchange information necessary for the performance of those functions and powers will continue after the transfer of the Commission to the Department.

Items 12 and 93 of the Act provide for the disclosure of information obtained under Parts XVB and XVC of the *Customs Act 1901* (the Customs Act) from the Commission to Customs for the purposes of the Customs Act. The purpose of these provisions is to make it clear that the Commission can continue to exchange information with Customs once the Commission transfers to the Department, but only for proper purposes. In this respect, the Act is compatible with human rights because, to the extent that it may be deemed to engage and limit the right to privacy, those limitations are reasonable, necessary and proportionate.

Yours sincerely

Ian Macfarlane

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Infrastructure Australia Amendment Bill 2013

Portfolio: Infrastructure and Regional Development
Introduced: House of Representatives, 20 November 2013
Status: Before Senate
PJCHR comments: First Report of 44th Parliament, tabled 10 December 2013
Response dated: 23 December 2013

Information sought by the committee

3.48 The committee sought further information on how the power to terminate the appointment of the Chief Executive Officer of Infrastructure Australia was compatible with the right to work.

3.49 The Minister's response is attached.

Committee's response

3.50 The committee thanks the Minister for his response.

3.51 In light of the information provided, the committee makes no further comments on this bill.

3.52 The committee notes it would have been useful had the information provided in this response been included in the statement of compatibility.

The Hon Warren Truss MP
Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

23 DEC 2013

Reference: 06146-2013

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
PO BOX 6100
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Dear Senator ~~Smith~~ Dean

Thank you for your letter dated 10 December 2013 regarding the Infrastructure Australia Amendment Bill 2013 (the Bill).

On behalf of the Parliamentary Joint Committee on Human Rights (the committee), you seek clarification on matters concerning the Bill set out in the committee's report, *First Report of the 44th Parliament*.

The committee seeks further information on how the power to terminate the appointment of the Chief Executive Officer (CEO) of Infrastructure Australia is compatible with the right to work.

The bill proposes to replace the existing provision in section 38 of the Infrastructure Australia Act 2008 relating to the termination of the appointment of the Infrastructure Coordinator. The new provision will allow the Board to terminate the appointment of the CEO at any time, by instrument in writing.

The purpose of the provision is to ensure the effective governance and operation of Infrastructure Australia. The ability of the Board to terminate the CEO's appointment at any time is reasonable and necessary to ensure that the CEO retains the confidence of the Board and is accountable to the Board.

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The ability of the Board to terminate is proportionate, given:

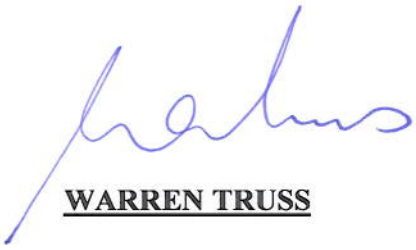
- the high level nature of the position, analogous to the CEO of a corporation. Only the CEO's position is open to termination by the Board at any time;
- the decision to terminate the CEO's appointment would be subject to procedural fairness requirements, and the CEO would be able to seek judicial review of any decision;
- if the CEO's appointment is prematurely terminated other than for misbehaviour, unsatisfactory performance or incapacity, the CEO would be entitled to compensation for early loss of office in accordance with the Remuneration Tribunal's Determination 2012/10.

The provision is also consistent with termination of appointment arrangements that apply to other very senior public sector appointments including a number of senior appointments to Commonwealth statutory bodies.

Hence, my view is that proposed section 38 is not incompatible with human rights.

I thank you again for taking the time to write and inform me of your concerns on this matter.

Yours sincerely



WARREN TRUSS

Migration Regulations 1994 – Revocation under paragraph 5.36(1A)(a) – Instrument of Revocation – May 2013

FRLI: F2013L00888
Portfolio: Immigration and Border Protection

Migration Regulations 1994 – Revocation under paragraph 5.36(1A)(a) and 5.36(1)(b) – Instrument of Revocation – May 2013

FRLI: F2013L00889
Portfolio: Immigration and Border Protection
Tabled: House of Representatives, 5 June 2013 and Senate, 17 June 2013
PJCHR comments: Tenth Report of 2013, tabled 26 June 2013
Response dated: 15 January 2014

Information sought by the committee

3.53 The committee sought further information in relation to:

- the impact of these instruments on the ability of individuals in Iran to lodge visa applications (including the process by which individuals in Iran will now need to follow in order to lodge a valid visa application);
- a list of the other countries where the same process applies; and
- the rationale for revoking instruments IMMI 12/134 and IMMI 12/135.

3.54 The Minister's response is attached.

Committee's response

3.55 The committee thanks the Minister for his response.

3.56 The committee notes that these instruments are exempt from the requirement to provide a statement of compatibility. In light of the information provided, the committee makes no further comment on the instruments.

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

The Chairperson
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chairperson

Revocation of Instruments under the Migration Regulation 1994

I refer to the letter to the former Minister from the former Chair of the Parliamentary Joint Committee on Human Rights Mr Harry Jenkins MP of 26 June 2013 concerning the compatibility with human rights of the Migration Regulations 1994 – Revocation under paragraph 5.36(1A)(a) – Instrument of Revocation – May 2013 [F2013L00888] and Migration Regulations 1994 – Revocation under paragraph 5.36(1)(a) and 5.36(1)(b) – Instrument of Revocation – May 2013 [F2013L00889].

The letter requested information relating to the following issues:

- the impact of these instruments on the ability of individuals in Iran to lodge valid visa applications (including the process by which individuals in Iran will now need to follow in order to lodge a valid visa application);
- a list of the other countries where the process applies; and
- the rationale for revoking instruments IMMI 12/134 and IMMI 12/135.

The impact of revoking instruments IMMI 12/134 and IMMI 12/135 is that potential visa applicants from Iran are no longer able to pay for visa application charges using the Iranian rial (Iranian currency). The department has gazetted both the Euro and the Australian dollar for the payment of visa application charges in Iran. In addition, clients can lodge visa applications electronically and make payment in Australian dollars by credit card.

The department accepts visa applications but does not accept payment in local currencies from the following countries:

- Cambodia;
- Ghana;
- Laos;
- Lebanon;
- Myanmar (Burma); and
- Serbia.

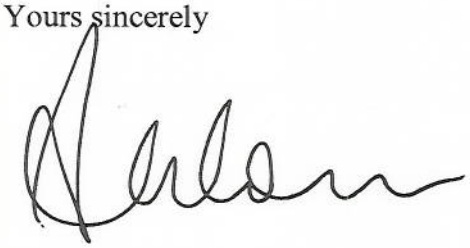
The department does not accept local currencies in certain countries because:

- foreign currency restrictions do not allow the revenues collected in those countries to be repatriated to Australia; and
- the Department of Foreign Affairs and Trade and AUSTRADE are not able to utilise the local currencies for local operations.

The rationale for revoking the instruments noted above is due to the depreciation of the Iranian rial in the past twelve months and the inability for the department to repatriate the funds to Australia or utilise the funds for local operations in Iran.

Thank you for bringing the concerns of the Parliamentary Joint Committee on Human Rights to my attention. I trust this information is of assistance.

Yours sincerely



The Hon Scott Morrison MP
Minister for Immigration and Border Protection
15 /1 /2014

Therapeutic Goods Order No. 88 - Standards for donor selection, testing, and minimising infectious disease transmission via therapeutic goods that are human blood and blood components, human tissues and human cellular therapy products

FRLI: F2013L00854
Portfolio: Health
Tabled: House of Representatives, 30 May 2013 and Senate, 17 June 2013
PJCHR comments: Tenth Report of 2013, tabled 26 June 2013
Response dated: 18 December 2013

Information sought by the committee

3.57 The committee sought further information in relation to:

- how the confidentiality of information collected as part of the donor screening process (including the results of any physical assessment or testing) is to be protected and how (and for how long) the information collected will be stored, and whether this is consistent with the right to privacy; and
- further information as to how the differential treatment of individuals who meet one of the 'donor medical and social history criteria' in column 1 of table 1 is justifiable and consistent with the right to equality and non-discrimination.

3.58 The Assistant Minister's response is attached.

Committee's response

3.59 The committee thanks the Assistant Minister for her response.

3.60 In light of the information provided, the committee makes no further comments on this bill.

3.61 The committee notes it would have been useful had the information provided in this response been included in the statement of compatibility.

Senator the Hon Fiona Nash
Assistant Minister for Health
Senator for New South Wales
Deputy Leader of the Nationals in the Senate

Ref No: M13009090

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to correspondence of 26 June 2013 from the then Chair, Parliamentary Joint Committee on Human Rights, Mr Harry Jenkins MP, to the then Parliamentary Secretary of Health and Ageing, the Hon Shayne Neumann MP, seeking clarification about the operation of Therapeutic Goods Order No. 88 – *Standards for donor selection, testing and minimising infectious disease transmission via therapeutic goods that are human blood and blood components, human tissues and human cellular therapy products* (TGO 88). The letter has been referred to me as Assistant Minister for Health with portfolio responsibility for this matter.

I congratulate you on your appointment as Chair of this important committee.

In its Tenth Report of 2013, the Committee indicated it would seek further information about:

- how the confidentiality of information collected from blood and tissue donors who donate their blood, cells or tissues for use in the manufacture of products covered by TGO 88 is to be protected and how (and for how long) the information collected will be stored, and whether this is consistent with the rights to privacy, and
- how the differential treatment of individuals who meet one of the 'donor medical and social history criteria' in Table 1 in TGO 88 is justifiable and consistent with the rights to equality and non-discrimination.

As you are aware, TGO 88 specifies minimum donor screening and testing requirements for the safe collection and manufacturing of blood, cells and tissues for use in recipients.

These requirements are designed to minimise the risk of contaminated blood or tissues being used in a recipient, and to minimise the risks of such products being contaminated during their manufacture, processing and transportation.

TGO 88 sets out requirements for collecting a donor's social and medical history before (or, in the case of a deceased donor, not more than seven days after) blood, cells or tissues are extracted or collected (refer to subsections 9(1) and (2) of TGO 88). TGO 88 itself does not set out requirements relating to the confidentiality of such information.

However, the entities involved in the collection, use and disclosure of such information in Australia must comply with applicable laws dealing with the protection of individual privacy.

These entities include organisations such as the Australian Red Cross Blood Service and the Australian Bone Marrow Donor Registry, which are 'organisations' within the meaning of that term in the Commonwealth *Privacy Act 1988* and are subject to the National Privacy Principles in that Act regarding personal and health information. State and territory government bodies, such as the Donor Tissue Bank of Victoria and the Queensland Bone Bank (within Queensland Health), are also involved in this collection, use and disclosure.

As state and territory authorities are not 'organisations' for the purposes of the *Privacy Act 1988* (subsection 6C(1) of that Act refers), those state and territory bodies engaged in the collection of donor information are not subject to the requirements set out in that Act. However, the state and territories have their own legislation, administrative requirements or policies relating to privacy or the protection of health information.

For example, the Donor Tissue Bank of Victoria (within the Victorian Institute of Forensic Medicine) is subject to Victorian legislation dealing with personal and health information, including the *Victorian Institute of Forensic Medicine Act 1985* (Vic), the *Human Tissue Act 1982* (Vic), the *Information Privacy Act 2000* (Vic) and the *Health Records Act 2001* (Vic).

For bodies required to comply with the *Privacy Act 1988*, there are a number of important requirements in relation to their treatment of donor information. These include, for example, that under National Privacy Principle 2, an organisation can generally only use or disclose personal information for the purpose for which it was collected, subject to certain exceptions, e.g. where the individual has consented to the use or disclosure or where the use or disclosure is required or authorised by law. Under National Privacy Principle 4, an organisation must take reasonable steps to protect the personal information it holds from misuse, loss and unauthorised access, modification and disclosure, and must destroy personal information or make it impossible to identify the person it relates to if it is no longer needed for any purpose.

The collection of a donor's social and medical history is a critical part of assessing whether it will be safe to use the donor's blood, tissues or cells in a recipient, and for this reason it is considered that the collection of this information is justified in relation to Article 17 of the International Covenant on Civil and Political Rights (the ICCPR).

Under subsection 9(4) of TGO 88, a person who meets any of the criteria listed in Table 1 of section 9 of the Order is ineligible to be a donor for the period specified in that table. For example:

- donors infected with Human Immunodeficiency Virus (HIV) or Hepatitis C virus, or who are at risk of prion disease (e.g. Creutzfeldt-Jakob Disease, a neurodegenerative disorder which is always fatal) are permanently ineligible to be donors;
- donors who have been injected with a drug for a non-medical reason are ineligible for a period of five years from their last such injection;
- donors whose sexual practices put them at increased risk of acquiring infectious diseases that can be transmitted by blood, cells or tissues are ineligible for a period of 12 months from last contact;
- donors with a history of malaria are ineligible unless a validated immunological test, taken at least four months after the last visit to a malaria endemic area, is negative; and
- donors with an unexplained fever or infectious illness are ineligible for at least two weeks from the date they fully recovered from that event.

When the 'donor medical and social history' criteria are assessed, it can be seen that they do not discriminate on the basis of any non-health related status of the donor. In cases such as a person who was a prison inmate or has a tattoo or body piercing, the criteria and period of ineligibility are related to the increased risk of acquiring a blood borne transmissible infection for people in these situations. The criteria and the ineligibility periods are solely designed to ensure the safety of the supply of blood, blood components, tissues and cellular therapy products that are manufactured from donated blood and to minimise the risk of serious illnesses being transmitted to recipients through such products.

The criteria in TGO 88 are consistent with international practice including the requirements for the collection of human blood, cells and tissues in Europe, America and Canada, though exclusion periods can vary significantly.

A review of blood donor deferrals relating to sexual activity commissioned by the Australian Red Cross Blood Service, which reported in May 2012, referred to the fact that three legal challenges in Australia, in which it was argued that the policy of the Blood Service of deferral of donors engaging in male-to-male sex was discriminatory on the grounds of sexuality and lawful sexual activity, were unsuccessful, and that the findings in these cases were consistent with international legal challenges.[1]

For the important public health reasons set out above, the treatment of potential donors under TGO 88 would appear to be justifiable, and consistent with the rights to equality and non-discrimination in Articles 2.1 and 26 of the ICCPR. If you would like to discuss this matter further, I invite you to contact Mr Bill Turner from the Office of Scientific Evaluation, Therapeutic Goods Administration, by telephone on (02) 6232 8187.

Yours sincerely

18 DEC 2013

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1 Pitt. V. (Ed) (2012). *Review of Australian blood donor deferrals relating to sexual activity*. p4. <http://www.bloodrulesreview.com.au/files/upload/blood_review_report_may_2012_electronic_version.pdf.

Appendix 1

Full list of Legislative Instruments received between 23 November 2013 – 31 January 2014

Appendix 1: Full list of Legislative Instruments received by the committee between 23 November 2013 and 31 January 2014

The committee considers all legislative instruments that come before either House of Parliament for compatibility with human rights. This report considers instruments received by the committee between 23 November 2013 to 31 January 2014, which usually correlates with the instruments that were made or registered during that period.

Where the committee considers that an instrument does not appear to raise any human rights concerns and is accompanied by a statement of compatibility that is adequate, this is referenced in the table with a '-'.

Where the committee considers that an instrument does not appear to raise human rights concerns, but is accompanied by a statement of compatibility that does not fully meet the committee's expectations,[1] it will write to the relevant Minister in a purely advisory capacity providing guidance on the preparation of statements of compatibility. This is referenced in the table with an '**A**' to indicate an advisory letter was sent to the relevant Minister.

Where an instrument is not accompanied by a statement of compatibility in circumstances where it was required, the committee will write to the Minister in an advisory capacity. This is referenced in the table with an '**A***' to indicate an advisory letter was sent to the relevant Minister.

Where an instrument is exempt from the requirement for a statement of compatibility this is referenced in the table with an '**E**'.

Where the committee has commented in this report on an instrument, this is referenced in the table with a '**C**'.

Where the committee has deferred its consideration of an instrument, this is referenced in the table with a '**D**'.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.[2] Instruments may be located on FRLI by entering the relevant FRLI

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1 The committee has set out its expectations with regard to information that should be provided in statements of compatibility in its Practice Note 1, available at: www.aph.gov.au/joint_humanrights

2 FRLI is found online at www.comlaw.gov.au

number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

In relation to determinations made under the *Defence Act 1903*, the legislative instrument may be consulted at www.defence.gov.au.

Instruments received week ending 29 November 2013

Aged Care Act 1997	
Aged Care (Residential Care Subsidy - Homeless Supplement Amount) Determination 2013 [F2013L01984]	-
Residential Care Subsidy Amendment (Homeless Supplement) Principle 2013 [F2013L01981]	-
Australian Meat and Live-stock Industry Act 1997	
Australian Meat and Live-stock Industry (Beef Export to the USA-Quota Year 2014) Order 2013 [F2013L01966]	-
Australian Meat and Live-stock Industry (Sheepmeat and Goatmeat Export to the European Union—Quota Year 2014) Order 2013 [F2013L01965]	-
Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 22 of 2013 [F2013L01983]	-
Charter of the United Nations Act 1945	
Charter of the United Nations (Sanctions—Somalia) Amendment Regulation 2013 (No. 1) [Select Legislative Instrument 2013 No. 246] [F2013L01974]	-
Civil Aviation Act 1988	
AD/CESSNA 400/86 Amdt 2 - Powerplant Fire Detection System – Installation [F2013L01958]	-
AD/PZL/5 Amdt 2 - Centre Wing to Outboard Wing Attachment Joints [F2013L01967]	-
CASA ADCX 024/13 - Revocation of Airworthiness Directive [F2013L01957]	-
Civil Aviation Legislation Amendment (Flight Crew Licensing Suite) Regulation 2013 [Select Legislative Instrument 2013 No. 254] [F2013L01976]	-
Clean Energy Act 2011	
Clean Energy Legislation Amendment (Jobs and Competitiveness Program) Regulation 2013 [Select Legislative Instrument 2013 No. 243] [F2013L01975]	-
Corporations Act 2001	
ASIC Class Order [CO 13/1406] [F2013L01986]	-
ASIC Class Order [CO 13/1409] [F2013L01987]	-
ASIC Class Order [CO 13/1410] [F2013L01988]	-
ASIC Class Order [CO 13/1411] [F2013L01989]	-
ASIC Class Order [CO 13/1412] [F2013L01990]	-

ASIC Class Order [CO 13/1413] [F2013L01991]	-
ASIC Class Order [CO 13/1473] [F2013L01992]	-
ASIC Class Rule Waiver [CW 13/1448] [F2013L01961]	-
ASIC Class Rule Waiver [CW 13/1479] [F2013L01959]	-
Criminal Code Act 1995	
Criminal Code (Terrorist Organisation—Al-Qa'ida in the Arabian Peninsula) Regulation 2013 [Select Legislative Instrument 2013 No. 241] [F2013L01969]	-
Currency Act 1965	
Currency (Royal Australian Mint) Determination 2013 (No. 5) [F2013L01960]	-
Customs Act 1901	
Customs Amendment (Record Keeping Requirements and Other Measures) Regulation 2013 [Select Legislative Instrument 2013 No. 251] [F2013L01968]	C
Environment Protection and Biodiversity Conservation Act 1999	
Amendment of List of Exempt Native Specimens - Torres Strait Tropical Rock Lobster Fishery 13/11/2013 [EPBC303DC/SFS/2013/57] [F2013L01956]	-
Fair Work Act 2009	
Fair Work and Other Legislation Amendment (AusAID) Regulation 2013 [Select Legislative Instrument 2013 No. 242] [F2013L01972]	-
Federal Court of Australia Act 1976	
Federal Court Amendment (Electronic Court File Measures No. 1) Rules 2013 [Select Legislative Instrument 2013 No. 256] [F2013L01970]	-
Fisheries Management Act 1991	
Heard Island and McDonald Islands Fishery Total Allowable Catch Determination 2013 [F2013L01996]	-
Great Barrier Reef Marine Park Act 1975	
Great Barrier Reef Marine Park Amendment (Public Moorings and Infrastructure) Regulation 2013 [Select Legislative Instrument 2013 No. 244] [F2013L01973]	-
Health Insurance Act 1973	
Health Insurance Legislation Amendment (Various Measures) Regulation 2013 [Select Legislative Instrument 2013 No. 250] [F2013L01982]	-
Health Insurance (Diagnostic Imaging Services Table) Regulation 2013 [Select Legislative Instrument 2013 No. 247] [F2013L01979]	-
Health Insurance (General Medical Services Table) Regulation 2013 [Select Legislative Instrument 2013 No. 248] [F2013L01980]	-
Health Insurance (Pathology Services Table) Regulation 2013 [Select Legislative Instrument 2013 No. 249] [F2013L01978]	-
Higher Education Support Act 2003	
Higher Education Provider Approval No. 6 of 2013 [F2013L01985]	-

Higher Education Support Act 2003 - VET Provider Approval (No. 70 of 2013) [F2013L01993]	-
Migration Act 1958	
Migration Amendment (Internet Applications and Related Matters) Regulation 2013 [Select Legislative Instrument 2013 No. 252] [F2013L01962]	-
Migration Amendment (Visa Application Charge and Related Matters No. 2) Regulation 2013 [Select Legislative Instrument 2013 No. 253] [F2013L01963]	-
National Health Act 1953	
National Health (Concession or entitlement card fee) Amendment Determination 2013 (No. 1) (No. PB 86 of 2013) [F2013L01955]	-
Radiocommunications Act 1992	
Radiocommunications (Spectrum Access Charges - 2.3 GHz Band) Determination 2013 [F2013L01994]	-
Radiocommunications (Spectrum Access Charges — 1800 MHz Band) Determination 2013 (No. 2) [F2013L01995]	-
Social Security Act 1991	
Social Security (Disaster Recovery Allowance) (Rate calculator) Determination 2013 [F2013L01971]	-
Social Security (Disaster Recovery Allowance) (Prescribed payments) Determination 2013 [F2013L01964]	E -
Water Act 2007	
Water Amendment (Interactions with State Laws and Water Information) Regulation 2013 [Select Legislative Instrument 2013 No. 245] [F2013L01977]	-

Instruments received week ending 6 December 2013

Agricultural and Veterinary Chemicals Code Act 1994	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2013 (No. 10) [F2013L02030]	E -
Australian Participants in British Nuclear Tests (Treatment) Act 2006	
Repatriation Pharmaceutical Benefits Scheme (Australian Participants in British Nuclear Tests) 2006 (No. R45/2013) [F2013L02027]	-
Treatment Principles (Australian Participants in British Nuclear Tests) 2006 (No. R54/2013) [F2013L02031]	C
Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 21 of 2013 [F2013L02032]	-
Autonomous Sanctions Act 2011	
Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Libya) Amendment List 2013 [F2013L02044]	-

Broadcasting Services Act 1992	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 17 of 2013) [F2013L02042]	-
Broadcasting Services (Primary Commercial Television Broadcasting Service) Amendment Declaration 2013 (No. 3) [F2013L01999]	-
Carbon Credits (Carbon Farming Initiative) Act 2011	
Carbon Credits (Carbon Farming Initiative) (Native Forest from Managed Regrowth) Methodology Determination 2013 [F2013L02036]	-
Civil Aviation Act 1988	
CASA 254/13 - Direction — number of cabin attendants (Sunstate Airlines) [F2013L02019]	-
CASA 260/13 - Direction under subregulation 235(2) relating to landing weight and landing distance required [F2013L02020]	-
CASA ADCX 025/13 - Revocation of Airworthiness Directives [F2013L02035]	-
CASA EX127/13 - Exemption — instrument rating flight tests in a synthetic flight training device [F2013L02034]	-
Disability Services Act 1986	
Disability Services Act (Administration of Part II of the Act) Guidelines 2013 [F2013L02002]	-
Environment Protection and Biodiversity Conservation Act 1999	
Amendment of List of Exempt Native Specimens - Hippopus hippopus (horse's hoof clam) (19/11/2013) [EPBC303DC/SFS/2013/58] [F2013L01998]	-
Amendment of List of Exempt Native Specimens - Pilbara Fish Trawl Interim Managed Fishery (19/11/2013) [EPBC303DC/SFS/2013/56] [F2013L01997]	-
Amendment of List of Exempt Native Specimens - Queensland East Coast Otter Trawl Fishery (26/11/2013) (deletion) [EPBC303DC/SFS/2013/53] [F2013L02003]	-
Amendment of List of Exempt Native Specimens - Queensland East Coast Otter Trawl Fishery (26/11/2013) (inclusion) [EPBC303DC/SFS/2013/61] [F2013L02004]	-
Amendment of List of Exempt Native Specimens - Queensland Gulf of Carpentaria Line Fishery (26/11/2013) (deletion) [EPBC303DC/SFS/2013/60] [F2013L02000]	-
Amendment of List of Exempt Native Specimens - Queensland Gulf of Carpentaria Line Fishery (26/11/2013) (inclusion) [EPBC303DC/SFS/2013/48] [F2013L02001]	-
Financial Management and Accountability Act 1997	
Financial Management and Accountability Act 1997 Determination 2013/15 — Section 32 (Transfer of Functions from DRALGAS to Health and PM&C) [F2013L02021]	E -
Financial Management and Accountability Act 1997 Determination 2013/16 – Section 32 (Transfer of Functions from PM&C to Social Services) [F2013L02022]	E -
Financial Management and Accountability Act 1997 Determination 2013/17 — Section 32 (Transfer of Functions from Health to Social Services) [F2013L02024]	E -
Financial Management and Accountability Act 1997 Determination 2013/18 — Section 32 (Transfer of Functions from Industry to Education) [F2013L02025]	E -

Financial Management and Accountability Act 1997 Determination 2013/19 — Section 32 (Transfer of Functions from DEEWR to PM&C) [F2013L02026]	E -
Food Standards Australia New Zealand Act 1991	
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 7, 2013 [F2013L02028]	E -
Food Standards (Application A1075 – Quillaia Extract (Quillaja Extract) as a Food Additive (Emulsifier)) Variation [F2013L02037]	E -
Food Standards (Proposal P1019 – Carbon Monoxide as a Processing Aid for Fish) Variation [F2013L02039]	E -
Health Insurance Act 1973	
Health Insurance (Accredited Pathology Laboratories - Approval) Amendment Principles 2013 (No. 1) [F2013L02017]	-
Health Insurance (Pharmacogenetic Testing) Determination 2013 (No. 1) [F2013L02018]	-
Higher Education Support Act 2003	
Higher Education Provider Approval No. 7 of 2013 [F2013L02041]	-
Higher Education Support Act 2003 - VET Provider Approval (No. 71 of 2013) [F2013L02040]	-
Higher Education Support Act 2003 - VET Provider Approval (No. 72 of 2013) [F2013L02005]	-
Migration Act 1958	
Migration Act 1958 - Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year - IMMI 13/156 [F2013L02038]	E C
Military Rehabilitation and Compensation Act 2004	
MRCA Pharmaceutical Benefits Scheme (No. MRCC 44/2013) [F2013L02012]	C
MRCA Treatment Principles (No. MRCC 53/2013) [F2013L02016]	-
National Health Act 1953	
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2013 (No. 11) (No. PB 79 of 2013) [F2013L02023]	-
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2013 (No. 8) (No. PB 78 of 2013) [F2013L02011]	-
National Health (Listed drugs on F1 or F2) Amendment Determination 2013 (No. 7) (No. PB 76 of 2013) [F2013L02008]	-
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2013 (No. 13) (No. PB 74 of 2013) [F2013L02013]	-
National Health (Pharmaceutical Benefits - Therapeutic Groups) Amendment Determination 2013 (No. 4) (No. PB 77 of 2013) [F2013L02010]	-
National Health (Price and Special Patient Contribution) Amendment Determination 2013 (No. 7) (No. PB 75 of 2013) [F2013L02007]	-
National Health Act (Pharmaceutical Benefits - Early Supply) Amendment December 2013 -	-

specification under subsection 84AAA(2) (No. PB 83 of 2013) [F2013L02014]	
National Health Act 1953 - Amendment determination under paragraph 98C(1)(b) (No. PB 80 of 2013) [F2013L02015]	-
Radiocommunications Act 1992	
Radiocommunications (Spectrum Access Charges — 1800 MHz Band) Determination 2013 (No. 1) [F2013L02006]	-
Research Involving Human Embryos Act 2002	
Declaration of 'corresponding State laws' [F2013L02043]	A
Therapeutic Goods Act 1989	
Therapeutic Goods (Listing) Notice 2013 (No. 7) [F2013L02033]	-
Veterans' Entitlements Act 1986	
Repatriation Pharmaceutical Benefits Scheme (No. R43/2013) [F2013L02009]	C
Treatment Principles (No. R52/2013) [F2013L02029]	-

Instruments received week ending 13 December 2013

Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 25 of 2013 [F2013L02065]	-
Australian Prudential Regulation Authority (confidentiality) determination No. 26 of 2013 [F2013L02066]	-
Autonomous Sanctions Act 2011	
Autonomous Sanctions (Designated Persons and Entities - Democratic People's Republic of Korea) Amendment List 2013 [F2013L02049]	D
Civil Aviation Act 1988	
Civil Aviation Order 100.5 Amendment Instrument 2013 (No. 3) [F2013L02068]	-
CASA 267/13 - Approval — means of providing surface wind information - Exemption — provision of a wind direction indicator [F2013L02069]	-
CASA EX121/13 - Exemption - from standard take-off and landing minima - Japan Airlines [F2013L02072]	-
CASA EX123/13 - Exemption — solo flight training at Archerfield Aerodrome using ultralight aeroplanes registered with Recreational Aviation Australia [F2013L02061]	-
CASA EX124/13 - Exemption - from standard take-off and landing minima - Philippine Airlines [F2013L02071]	-
Commonwealth Places (Mirror Taxes) Act 1998	
Commonwealth Places (Mirror Taxes) (Modification of Applied Law - Victoria) Notice 2013 [F2013L02055]	-
Corporations Act 2001	
ASIC Class Rule Waiver [CW 13/1543] [F2013L02062]	-

Customs Act 1901	
Customs By-law No. 1339704 [F2013L02056]	E -
Revocation of Customs By-law - Instrument of Revocation No. 3 (2013) [F2013L02057]	E -
Defence Act 1903	
Defence Determination 2013/55, Means of travel – amendment	-
Defence Determination 2013/56, Interdependent partner, recreation leave and travel costs - amendment	-
Defence Determination 2013/57, Education assistance - amendment	-
Defence Determination 2013/58, Higher duties allowance - amendment	-
Defence Determination 2013/59, Dependents with special needs, Maternity leave and travel - amendment	-
Defence Determination 2013/60, Post indexes - price review	-
Defence Honours and Awards Appeals Tribunal Amendment Procedural Rule 2013 (No. 1) [F2013L02047]	-
Environment Protection and Biodiversity Conservation Act 1999	
Amendment - List of Specimens Taken to be Suitable for Live Import (17/11/2013) (1) [EPBC/s.303EC/SSLI/Amend/065] [F2013L02051]	-
Amendment - List of Specimens Taken to be Suitable for Live Import (17/11/2013) (2) [EPBC/s.303EC/SSLI/Amend/066] [F2013L02052]	-
Environment Protection and Biodiversity Conservation Act 1999 - Conservation Themes for Prioritising Nominations for Listing Threatened Species, Threatened Ecological Communities and Key Threatening Processes for the Assessment Period Commencing 1 October 2014 (21/11/2013) (155) [F2013L02074]	E -
Fair Work Act 2009	
Fair Work Commission Rules 2013 [F2013L02054]	-
Financial Sector (Collection of Data) Act 2001	
Financial Sector (Collection of Data) (reporting standard) determination No. 100 of 2013 - SRS 703.0 - Fees Disclosed [F2013L02064]	-
High Court of Australia Act 1979	
High Court Amendment Rules 2013 (No. 2) [Select Legislative Instrument 2013 No. 257] [F2013L02048]	-
Higher Education Support Act 2003	
Commonwealth Scholarships Guidelines (Education) 2013 [F2013L02070]	C
Higher Education Support Act 2003 – Tax file number guidelines for higher education providers and Open Universities Australia Revocation 2013 [F2013L02067]	-
Higher Education Support Act 2003 - VET Provider Approval (No. 73 of 2013) [F2013L02045]	-
Higher Education Support Act 2003 - VET Provider Approval (No. 74 of 2013) [F2013L02059]	-

Migration Act 1958	
Migration Agents Regulations 1998 - Specification of Class of Persons - IMMI 13/153 [F2013L02053]	-
Migration Regulations 1994 - Specification of Post Office Box and Courier Addresses - IMMI 13/144 [F2013L02046]	E -
Parliamentary Service Act 1999	
Parliamentary Service Amendment Determination 2013 (No. 1) [F2013L02060]	-
Remuneration Tribunal Act 1973	
Remuneration Tribunal Determination 2013/24 - Remuneration and Allowances for Holders of Public Office [F2013L02073]	-
Social Security (Administration) Act 1999	
Social Security (Administration) (Specified vulnerable and declared voluntary income management areas) Amendment Determination 2013 [F2013L02058]	-
Superannuation Act 2005	
Tenth Amendment of the Superannuation (PSSAP) Trust Deed [F2013L02063]	-
Taxation Administration Act 1953	
Taxation Administration Act 1953 (Meaning of End Benefit) Instrument 2013 [F2013L02050]	-

Instruments received week ending 20 December 2013

Aboriginal Land Rights (Northern Territory) Act 1976	
Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013 [SLI 2013 No. 272] [F2013L02122]	D
Australian Broadcasting Corporation Act 1983	
Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013 [F2013L02091]	-
Australian Citizenship Act 2007	
Australian Citizenship Amendment (Foreign Currency) Regulation 2013 [SLI 2013 No. 267] [F2013L02120]	-
Australian Education Act 2013	
Australian Education (SES Scores) Determination 2013 [F2013L02136]	-
Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 24 of 2013 [F2013L02086]	-
Australian Prudential Regulation Authority(confidentiality) determination No. 23 of 2013 [F2013L02088]	-
Civil Aviation Act 1988	

Civil Aviation Legislation Amendment (Flight Crew Licensing and Other Matters) Regulation 2013 [SLI 2013 No. 274[[F2013L02129]	A
Civil Aviation Legislation Amendment (Maintenance and Other Matters) Regulation 2013 [SLI 2013 No. 275[[F2013L02128]	-
Civil Aviation Regulations 1988	
CASA 239/13 - Direction under regulation 209 - conduct of parachute training operations [F2013L02111]	-
CASA EX131/13 - Exemption — Jetstar Boeing 787-8 aircraft passive participation in land and hold short operations [F2013L02082]	-
Competition and Consumer Act 2010	
Competition and Consumer Amendment Regulation 2013 (No. 4) [SLI 2013 No. 277[[F2013L02092]	-
Corporations Act 2001	
ASIC Class Order [CO 13/1534] [F2013L02077]	-
Court Security Act 2013	
Court Security Regulation 2013 [SLI 2013 No. 260] [F2013L02112]	-
Criminal Code Act 1995	
Criminal Code (Terrorist Organisation—Islamic State of Iraq and the Levant) Regulation 2013 [SLI 2013 No. 261] [F2013L02097]	-
Customs Act 1901	
Customs Amendment (Infringement Notices) Regulation 2013 [SLI 2013 No. 271] [F2013L02125]	-
Environment Protection and Biodiversity Conservation Act 1999	
Amendment - List of Specimens taken to be Suitable for Live Import (26/11/2013) (1) [F2013L02079]	-
Amendment - List of Specimens taken to be Suitable for Live Import (26/11/2013) (2) [F2013L02080]	-
Amendment of List of Exempt Native Specimens - Western Australian Pearl Oyster Fishery (12/12/2013) [F2013L02087]	-
Amendment to the list of migratory species under section 209 of the Environment Protection and Biodiversity Conservation Act 1999 (26/11/2013) [F2013L02109]	-
Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (145) (21/11/2013) [F2013L02075]	-
Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (146) (04/11/2013) [F2013L02106]	-
Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (150) (03/12/2013) [F2013L02107]	-
Environment Protection and Biodiversity Conservation (Commonwealth Marine Reserves) Proclamation 2013 [F2013L02108]	E -

Fair Work Act 2009	
Fair Work Amendment (Anti-Bullying) Regulation 2013 [SLI 2013 No. 263] [F2013L02094]	-
Fair Work (State Declarations - employer not to be a national system employer) Endorsement 2013 (No. 3) [F2013L02116]	E -
Family Law Act 1975	
Family Law Amendment (Scale of Costs) Rules 2013 [SLI 2013 No. 282] [F2013L02132]	-
Financial Management and Accountability Act 1997	
Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013 [SLI 2013 No. 281] [F2013L02089]	-
Financial Management and Accountability Act 1997 Determination 2013/20 – Section 32 (Transfer of Functions from DEEWR to Education and Employment) [F2013L02110]	E -
Fisheries Levy Act 1984	
Fisheries Levy (Torres Strait Prawn Fishery) Amendment Regulation 2013 (No. 1) [SLI 2013 No. 259] [F2013L02099]	-
Fisheries Management Act 1991	
Logbook Determination (Particular Fisheries) 2013 No. 2 [F2013L02114]	-
Fisheries Management Act 1991 and Fishing Levy Act 1991	
Fishing Levy Regulation 2013 [SLI 2013 No. 258] [F2013L02127]	-
Food Standards Australia New Zealand Act 1991	
Australia New Zealand Food Standards Code - Standard 1.4.2 - Maximum Residue Limits Amendment Instrument No. APVMA 8, 2013 [F2013L02130]	E -
Great Barrier Reef Marine Park Act 1975	
Great Barrier Reef Marine Park Amendment (Outlook Report and Other Measures) Regulation 2013 [SLI 2013 No. 264] [F2013L02137]	-
Health Insurance Act 1973	
Health Insurance (Allied Health Services) Determination 2014 [F2013L02134]	-
Health Insurance (Pharmacogenetic Testing - Epidermal Growth Factor Receptor) Determination 2013 [F2013L02131]	-
Higher Education Support Act 2003	
Amendment No. 1 to the Commonwealth Grant Scheme Guidelines 2012 [F2013L02078]	-
Insurance Act 1973	
Insurance (exemption) determination No. 2 of 2013 - Audit requirements relating to certain yearly statutory accounts [F2013L02141]	-
Insurance (prudential standard) determination No. 1 of 2013 - Prudential Standard GPS 230 - Reinsurance Management [F2013L02139]	-
Insurance (prudential standard) determination No. 2 of 2013 - Prudential Standard GPS 310 - Audit and Related Matters [F2013L02140]	-
Migration Act 1958	

Migration Amendment (AusAID) Regulation 2013 [SLI 2013 No. 268] [F2013L02103]	-
Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 SLI 2013 No. 269 [F2013L02102]	C
Migration Amendment (Disclosure of Information) Regulation 2013 [SLI 2013 No. 270] [F2013L02101]	C
Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 [SLI 2013 No. 280] [F2013L02104]	C
Migration Regulations 1994	
Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 [F2013L02105]	E C
Migration Regulations 1994 - Specification of Payment of Visa Application Charges and Fees in Foreign Currencies (Conversion Instrument) - IMMI 13/126 [F2013L02085]	E-
Migration Regulations 1994 - Specification of Places and Currencies for Paying of Fees - Places and Currencies Instrument - IMMI 13/127 [F2013L02115]	E -
National Health Act 1953	
National Health (Supplies of out-patient medication) Determination 2013 [F2013L02133]	-
National Health (Weighted average disclosed price - main disclosure cycle) Determination 2013 (No. 2) (PB 82 of 2013) [F2013L02124]	-
Native Title Act 1993	
Native Title (Assistance from Attorney-General) Amendment Guideline 2013 [F2013L02084]	C
Navigation Act 2012	
Marine Order 18 (Measures to enhance maritime safety) 2013 [F2013L02096]	-
Marine Order 21 (Safety of navigation and emergency procedures) Modification 2013 (No. 1) [F2013L02095]	-
Navigation Act 2012 and Protection of the Sea (Prevention of Pollution from Ships) Act 1983	
Marine Order 96 (Marine pollution prevention — sewage) 2013 [F2013L02098]	-
Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003	
Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Safety Case and Environment Plan Levies) Regulation 2013 [SLI 2013 No. 273] [F2013L02117]	-
Ozone Protection and Synthetic Greenhouse Gas Management Act 1989	
Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Various Matters) Regulation 2013 [SLI 2013 No. 265] [F2013L02135]	-
Privacy Act 1988	
Privacy Regulation 2013 [SLI 2013 No. 262] [F2013L02126]	-
Private Health Insurance Act 2007	
Private Health Insurance (Benefit Requirements) Amendment Rules 2013 (No. 7) [F2013L02113]	-

Programs and Awards Statute 2013	
Assessment Rules (No. 4) 2013 [F2013L02138]	E -
Coursework Handbook Rules 2013 [F2013L02083]	E -
Protection of the Sea (Prevention of Pollution from Ships) Act 1983, Protection of the Sea (Harmful Anti-fouling Systems) Act 2006 and Navigation Act 2012	
Marine Order 1 (Administration) 2013 [F2013L02093]	-
Public Service Act 1999	
Public Service Amendment (Public Interest Disclosure and Other Matters) Regulation 2013 [SLI 2013 No. 276] [F2013L02121]	-
Public Works Committee Act 1969	
Public Works Committee Amendment Regulation 2013 (No. 2) [SLI 2013 No. 266] [F2013L02119]	-
Radiocommunications Act 1992	
Radiocommunications (26.5–31.3 GHz Band) Reform Instrument 2013 [F2013L02100]	-
Retirement Savings Accounts Regulations 1997 and Superannuation Industry (Supervision) Act 1993 and Superannuation Contributions Tax (Assessment and Collection) Act 1997	
Superannuation Legislation Amendment (2013 Measures No. 2) Regulation 2013 [SLI 2013 No. 278] [F2013L02118]	-
Social Security Act 1991	
Social Security Foreign Currency Exchange Rate Determination 2013 (No. 2) [F2013L02076]	-
Special Broadcasting Service Act 1991	
Special Broadcasting Service Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013 [F2013L02090]	-
Student Assistance Act 1973	
Student Assistance (Education Institutions and Courses) Amendment Determination 2013 (No. 1) [F2013L02081]	-
Taxation Administration Act 1953 and Income Tax Assessment Act 1936 and A New Tax System (Goods and Services Tax) Act 1999 and Income Tax Assessment Act 1997	
Tax Laws Amendment (2013 Measures No. 1) Regulation 2013 [SLI 2013 No. 279] [F2013L02123]	-

Instruments received week ending 27 December 2013

Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 27 of 2013 [F2013L02158]	-
Currency Act 1965	
Currency (Perth Mint) Determination 2013 (No. 5) [F2013L02142]	-

Customs Act 1901	
Customs (Definition of “compliance period”) Determination 2013 [F2013L02172]	-
Customs (Definition of “small-medium enterprise”) Determination 2013 [F2013L02171]	-
Environment Protection and Biodiversity Conservation Act 1999	
Amendment of List of Exempt Native Specimens - Tasmanian Scalefish Fishery (16/12/2013) [F2013L02156]	-
Fair Work Act 2009	
Fair Work Commission Amendment (Anti-Bullying and Other Measures) Rules 2013 [F2013L02160]	-
Fees Statute 2006	
Tuition Fees Order (No. 2) 2013 [F2013L02154]	E -
Financial Sector (Collection of Data) Act 2001	
Financial Sector (Collection of Data) (reporting standard) determination No. 101 of 2013 - GRS 460.0 - Reinsurance Assets by Counterparty [F2013L02147]	-
Financial Sector (Collection of Data) (reporting standard) determination No. 102 of 2013 - GRS 460.1 - Exposure Analysis by Reinsurance Counterparty [F2013L02148]	-
Financial Sector (Collection of Data) (reporting standard) determination No. 103 of 2013 - GRS 460.0_G - Reinsurance Assets by Counterparty (Level 2 Insurance Group) [F2013L02149]	-
Financial Sector (Collection of Data) (reporting standard) determination No. 104 of 2013 - GRS 460.1_G - Exposure Analysis by Reinsurance Counterparty (Level 2 Insurance Group) [F2013L02151]	-
Higher Education Support Act 2003	
Higher Education (Maximum Amounts for Commonwealth Scholarships) Determination 2013 [F2013L02164]	-
Higher Education (Maximum Amounts for Other Grants) Determination 2013 [F2013L02165]	C
Higher Education Support (Maximum Grant Amounts) List Variation 2013 [F2013L02145]	-
Higher Education Support Act 2003 - List of Grants under Division 41 for 2014 [F2013L02144]	-
Migration Act 1958	
Migration Act 1958 - Revocation of IMMI 13/156 'Granting of Protection Class XA Visas in 2013/2014 Financial Year' - IMMI 13/159 [F2013L02163]	E -
National Health Act 1953	
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2013 (No. 14) (No. PB 88 of 2013) [F2013L02170]	-
National Health (Prescriber bag supplies) Amendment Determination 2013 (No. 2) (No. PB 90 of 2013) [F2013L02168]	-
National Health (Price and Special Patient Contribution) Amendment Determination 2013	-

(No. 8) (No. PB 89 of 2013) [F2013L02169]	
National Health Act 1953 - Amendment determination under paragraph 98C(1)(b) (No. PB 91 of 2013 [F2013L02167]	-
Private Health Insurance Act 2007	
Private Health Insurance (Data Provision) Rules 2013 [F2013L02161]	-
Private Health Insurance (Health Insurance Business) Rules 2013 [F2013L02159]	-
Public Interest Disclosure Act 2013	
Public Interest Disclosure Standard 2013 [F2013L02146]	-
Radiocommunications Act 1992	
Radiocommunications (Unacceptable Levels of Interference — 2.3 GHz Band) Determination 2013 [F2013L02155]	A
Radiocommunications Advisory Guidelines (Managing Interference from Spectrum Licensed Transmitters — 2.3 GHz Band) 2013 [F2013L02143]	A
Radiocommunications Advisory Guidelines (Managing Interference to Spectrum Licensed Receivers — 2.3 GHz Band) 2013 [F2013L02150]	A
Social Security (Administration) Act 1999	
Social Security (Administration) (Recognised State/Territory Authority - Qld Family Responsibilities Commission) Determination 2013 [F2013L02153]	D
Social Security Act 1991	
Social Security (Personal Care Support) (NSW Government Individual Budgets: Direct Payments) Determination 2013 [F2013L02152]	-
Tertiary Education Quality and Standards Agency Act 2011	
Tertiary Education Quality and Standards Agency Act 2011 - Determination of Fees No. 3 of 2013 [F2013L02162]	-
Tertiary Education Quality and Standards Agency Act 2011 - Notice of revocation of Ministerial Direction No. 1 of 2013 [F2013L02157]	-
Work Health and Safety Act 2011	
Work Health and Safety (Operation Sovereign Borders) Declaration 2013 [F2013L02166]	-

Instruments received week ending 3 January 2014

No instruments were received.

Instruments received week ending 10 January 2014

No instruments were received.

Instruments received week ending 17 January 2014

Aged Care Act 1997	
Accountability Amendment (Quality Agency) Principle 2013 [F2013L02179]	-
Complaints Amendment (Quality Agency) Principle 2013 [F2013L02181]	-
Residential Care Subsidy Amendment (Leave from Care) Determination 2013 [F2013L02182]	-
Information Amendment (Quality Agency) Principle 2013 [F2013L02183]	-
Residential Care Subsidy Amendment (Quality Agency) Principle 2013 [F2013L02184]	-
Committee Amendment (Aged Care Financing Authority) Principle 2013 [F2013L02185]	-
User Rights Amendment (Investment of Accommodation Bonds) Principle 2013 [F2013L02186]	-
Quality Agency Reporting Principles 2013 [F2013L02189]	-
Auditor-General Act 1997	
Australian National Audit Office (ANAO) Auditing Standards (19/12/2013) [F2014L00027]	-
Australian Aged Care Quality Agency (Transitional Provisions) Act 2013	
Australian Aged Care Quality Agency (Transitional Provisions) Regulation 2013 [SLI 2013 No. 255] [F2013L02190]	-
Australian Aged Care Quality Agency Act 2013	
Quality Agency Principles 2013 [F2013L02188]	-
Banking Act 1959	
Banking (prudential standard) determination No. 3 of 2013 - Prudential Standard APS 210 – Liquidity [F2013L02187]	-
Broadcasting Services Act 1992 Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 18 of 2013) [F2014L00029]	-
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 19 of 2013) [F2014L00030]	-
Licence Area Plan - Sydney Radio - Variation No. 1 of 2013 [F2014L00057]	-
Charities Act 2013	
Charities (Definition of Government Entity) Instrument 2013 [F2013L02173]	-
Civil Aviation Act 1988 and Civil Aviation Safety Regulations 1998	
Manual of Standards Part 172 Amendment Instrument 2013 (No. 1) [F2013L02178]	-
Civil Aviation Act 1988, Civil Aviation Safety Regulations 1998 and Civil Aviation Regulations 1988	
Civil Aviation Order 48.1 Amendment Instrument 2013 (No. 1) [F2013L02192]	-
Civil Aviation Regulations 1988	
CASA 294/13 - Direction under subregulation 235(2) relating to landing weight and landing distance required [F2014L00003]	-

CASA EX135/13 - Exemption – carriage of flight data recorder – Pel-Air Aviation [F2013L02174]	-
CASA EX134/13 - Exemption — operations by hang-gliders in the Corryong Cup [F2013L02197]	-
CASA EX129/13 - Exemption – recency requirements for night flying – Regional Express Pty Ltd [F2014L00002]	-
CASA ADCX 026/13 - Revocation of Airworthiness Directives [F2014L00041]	-
CASA ADCX 001/14 - Revocation of Airworthiness Directives [F2014L00048]	-
Civil Aviation Safety Regulations 1998 and Acts Interpretation Act 1901	
CASA ADCX 027/13 - Revocation of Airworthiness Directives [F2014L00042]	-
Corporations Act 2001 ASIC Class Order [CO 13/1621] [F2014L00039]	-
Customs Act 1901	
Customs Act 1901 - Specified Percentage of Total Factory Costs Determination No. 1 of 2013 [F2013L02198]	A
Disability Services Act 1986	
Disability Services Act (National Standards for Disability Services) Determination 2013 [F2013L02180]	-
Education Services for Overseas Students (TPS Levies) Act 2012	
Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Determination 2013 [F2013L02176]	-
Environment Protection and Biodiversity Conservation Act 1999	
Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (147) (04/12/2013) [F2013L02175]	-
Amendment to the list of threatened species, ecological communities and key threatening processes under section 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (153) (11/11/2013) [F2013L02177]	-
Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (148) (12/12/2013) [F2014L00004]	-
Amendment of List of Exempt Native Specimens - Northern Prawn Fishery (20/12/2013) (inclusion) [F2014L00046]	-
Amendment of List of Exempt Native Specimens - Northern Prawn Fishery (20/12/2013) (deletion) [F2014L00047]	-
Fair Work (Building Industry) Act 2012	
Amendment No. 1 to the Building Code 2013 [F2013L02196]	-
Federal Court of Australia Act 1976	
Federal Court Amendment (Costs and Other Measures) Rules 2013 [SLI 2013 No. 283] [F2014L00001]	-
Financial Management and Accountability Act 1997	
Financial Management and Accountability Act 1997 Determination 2013/21 – Section 32	E -

(Transfer of Functions from Social Services to AACQA) [F2013L02194]	
Food Standards Australia New Zealand Act 1991 Food Standards (Application A1077 – Fungal Chitosan as a Processing Aid) Variation [F2014L00033]	E -
Food Standards (Application A1080 – Food derived from Herbicide-tolerant Cotton MON88701) Variation [F2014L00035]	E -
Food Standards (Proposal M1009 – Maximum Residue Limits) Variation [F2014L00037]	E -
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 75 of 2013) [F2014L00031]	-
Higher Education Support Act 2003 - VET Provider Approval (No. 1 of 2014) [F2014L00043]	-
Amendment No. 1 to the VET Guidelines 2013 [F2014L00049]	-
Higher Education Support Act 2003 - Revocation of Approval as a Higher Education Provider (Jansen Newman Institute Pty Ltd) [F2014L00053	-
Motor Vehicle Standards Act 1989	
Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005 Amendment 7 [F2014L00032]	-
Vehicle Standard (Australian Design Rule 38/04 – Trailer Brake Systems) 2013 [F2014L00055]	-
National Health Act 1953	
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2013 (No. 9) (No. PB 92 of 2013) [F2013L02191]	-
National Health (Paraplegic and Quadriplegic Program) Special Arrangement Amendment Instrument 2013 (No. 4) (No. PB 94 of 2013) [F2013L02193]	-
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2013 (No. 12) (No. PB 93 of 2013) [F2013L02195]	-
National Health Determination under paragraph 98C(1)(b) Amendment 2014 (No. 1) (PB 3 of 2014) [F2014L00050]	-
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2014 (No. 1) (No. PB 1 of 2014) [F2014L00051]	-
National Health (Price and Special Patient Contribution) Amendment Determination 2014 (No. 1) (No. PB 2 of 2014) [F2014L00052]	-
Plant Health Australia (Plant Industries) Funding Act 2002	
Plant Health Australia (Plant Industries) Funding Determination 2013 [F2014L00056]	-
Primary Industries (Excise) Levies Act 1999	
Primary Industries (Excise) Levies (Designated Bodies) Declaration 2013 [F2014L00054]	-
Private Health Insurance Act 2007	
Private Health Insurance (Complying Product) Amendment Rules 2013 (No. 5) [F2014L00017]	-
Private Health Insurance (Incentives) Amendment Rules 2013 (No. 1) [F2014L00019]	-

Radiocommunications (Receiver Licence Tax) Act 1983	
Radiocommunications (Receiver Licence Tax) Amendment Determination 2013 [F2014L00036]	-
Radiocommunications (Transmitter Licence Tax) Amendment Determination 2013 [F2014L00038]	-
Radiocommunications Act 1992	
Radiocommunications (Trading Rules for Spectrum Licences) Amendment Determination 2013 [F2014L00034]	-
Radiocommunications Licence Conditions (PTS Licence) Determination 2013 [F2014L00045]	-
Safety, Rehabilitation and Compensation Act 1988	
Safety, Rehabilitation and Compensation (Definition of Employee) Amendment Notice 2013 [F2014L00006]	-
Social Security Act 1991	
Social Security (Personal Care Support) (United Kingdom Government Personal Independence Payment) Determination 2013 [F2014L00021]	-
Taxation Administration Act 1953	
Taxation Administration Act 1953 - PAYG withholding - Occasional payroll donations to deductible gift recipients No. 4 [F2014L00012]	-
Telecommunications (Interception and Access) Act 1979	
Notice of a declaration of a Commonwealth Royal Commission as an eligible Commonwealth authority under section 5AA of the Telecommunications (Interception and Access) Act 1979 [F2014L00040]	-
Therapeutic Goods Act 1989	
Poisons Standard Amendment No. 1 of 2014 [F2014L00044]	E -
Veterans' Entitlements Act 1986	
Statement of Principles concerning heart block No. 2 of 2014 [F2014L00005]	-
Statement of Principles concerning heart block No. 1 of 2014 [F2014L00007]	-
Statement of Principles concerning dermatomyositis No. 9 of 2014 [F2014L00008]	-
Statement of Principles concerning dental pulp and apical disease No. 4 of 2014 [F2014L00009]	-
Statement of Principles concerning morbid obesity No. 5 of 2014 [F2014L00010]	-
Statement of Principles concerning dermatomyositis No. 10 of 2014 [F2014L00011]	-
Statement of Principles concerning chronic fatigue syndrome No. 11 of 2014 [F2014L00013]	-
Statement of Principles concerning dental pulp and apical disease No. 3 of 2014 [F2014L00014]	-
Statement of Principles concerning chronic fatigue syndrome No. 12 of 2014 [F2014L00015]	-

Statement of Principles concerning fibromyalgia No. 13 of 2014 [F2014L00016]	-
Statement of Principles concerning fibromyalgia No. 14 of 2014 [F2014L00018]	-
Statement of Principles concerning sick sinus syndrome No. 15 of 2014 [F2014L00020]	-
Statement of Principles concerning morbid obesity No. 6 of 2014 [F2014L00022]	-
Statement of Principles concerning narcolepsy No. 7 of 2014 [F2014L00023]	-
Statement of Principles concerning sick sinus syndrome No. 16 of 2014 [F2014L00024]	-
Statement of Principles concerning narcolepsy No. 8 of 2014 [F2014L00025]	-
Amendment Statement of Principles concerning Alzheimer-type dementia No. 17 of 2014 [F2014L00026]	-
Amendment Statement of Principles concerning Alzheimer-type dementia No. 18 of 2014 [F2014L00028]	-

Instruments received week ending 24 January 2014

Agricultural and Veterinary Chemicals Code Act 1994	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 1) [F2014L00065]	E -
Corporations Act 2001	
ASIC Class order [CO 13/1644] [F2014L00058]	-
ASIC Market Integrity Rules (FEX Market) 2013 [F2014L00063]	-
Environment Protection and Biodiversity Conservation Act 1999	
Amendment to the list of threatened species, ecological communities and key threatening processes under section 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (131) (20/12/2013) [F2014L00062]	-
Higher Education Support Act 2003	
Higher Education Provider Approval No. 1 of 2014 [F2014L00059]	-
Higher Education Support Act 2003 - VET Provider Approval (No. 2 of 2014) [F2014L00060]	-
National Health Act 1953	
National Health Act 1953 - Amendment Determination under section 84AH (2014) (No. 1) (No. PB 7 of 2014) [F2014L00064]	-
Social Security Act 1991	
Social Security (Australian Government Disaster Recovery Payment) Determination 2014 (No. 1) [F2014L00061]	E -

Instruments received week ending 31 January 2014

No instruments were received.

The committee considered 315 legislative instruments.