



Parliamentary Joint Committee on Human Rights

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

Bills introduced 24 – 27 March 2014

Legislative Instruments received

8 March – 25 April 2014

Sixth Report of the 44th Parliament

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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.

Secretariat

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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
EM	Explanatory Memorandum
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
PJCHR	Parliamentary Joint Committee on Human Rights

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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 24 to 27 March 2014 and legislative instruments received during the period 8 March to 25 April 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 24 to 27 March 2014

The committee considered 18 bills, all of which were introduced with a statement of compatibility. Of these 18 bills, eight do not require further scrutiny as they do not appear to give rise to human rights concerns. The committee has decided to defer its consideration of three bills and further defer an additional three bills introduced in previous weeks.

The committee has identified eight bills that it considers require further examination and for which it will seek further information. This includes one bill which the committee had deferred consideration of in its *Fifth Report of the 44th Parliament*.

Of the bills considered, those which are scheduled for debate during the sitting week commencing 13 May 2014 include:

- G20 (Safety and Security) Complementary Bill 2014;
- Major Sporting Events (Indicia and Images) Protection Bill 2014; and
- Tax Laws Amendment (2014 Measures No. 1) Bill 2014.

Legislative instruments received between 8 March 2014 and 25 April 2014

The committee considered 175 legislative instruments received between 8 March and 25 April 2014. The full list of instruments scrutinised by the committee can be found in Appendix 1 to this report.

Of these 175 instruments, 173 do not appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate. A further two 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 do not appear to raise human rights compatibility concerns, the committee has written to the relevant minister in a purely advisory capacity.

Responses

The committee has considered ten responses relating to matters raised in relation to bills and legislative instruments in previous reports. The committee has concluded its examination relating to two bills and eight instruments.

Senator Dean Smith
Chair

Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 12 May 2014, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to the relevant proponent of the bill or instrument maker in relation to substantive matters seeking further information.

Matters which the committee draws to the attention of the proponent of the bill or instrument maker are raised on an advice-only basis and do not require a response.

This chapter includes the committee's consideration of 18 bills introduced between 24 and 27 March 2014 and 175 instruments received between 8 March and 25 April 2014.

Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014

Portfolio: Defence

Introduced: Senate, 27 March 2014

Purpose

1.1 The Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014 (the bill) seeks to establish a framework intended to provide all non-Defence users within the Woomera Prohibited Area (WPA) and industry more generally with a level of certainty over Defence activity in the area; and to allow users to make commercial decisions with some assurance as to when they will be requested to leave the area because of Defence activity. The bill is said to give effect to the recommendations in the Final Report of the Hawke Review of 3 May 2011, which included a recommendation that the WPA 'be opened up for resources exploration and mining to the maximum extent possible within the confines of its primary use for defence of Australia purposes'.¹

Background

1.2 The committee has previously examined the following, substantially similar, bills:

- Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013 (introduced in May 2013);² and

1 Explanatory memorandum (EM), p. 2.

2 Parliamentary Joint Committee on Human Rights, *Eighth Report of 2013*, 19 June 2013, p. 69.

- Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013 (introduced in December 2013).³

Committee view on compatibility

Right to privacy

1.3 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Search and request powers exercisable without consent

1.4 Schedule 1 of the bill seeks to amend the definition of 'defence premises' in the *Defence Act 1903* (the Act) to include the WPA. This will allow defence security officials at defence access control points and on defence premises in the WPA to exercise existing powers in Part VIA of the Act (Security of defence premises).

1.5 Part VIA provides that a defence security official may, in relation to a person who is about to pass a defence access control point or is on defence premises, request that that person provide identification information or undergo a limited search on the basis of consent.⁴ A defence security official may also request to search a vehicle, vessel or aircraft about to pass a defence access control point on the basis of consent.⁵ Where a person refuses such a request, a defence security official may refuse to allow a person or vehicle to pass a defence access control point.⁶

1.6 Part VIA further provides that the same powers may be exercised by special defence officials at defence access control points without consent.⁷ The committee notes that the proposed powers to request information and to search a person without their consent represent limitations on the right to privacy. Regarding the justification for these powers, the statement of compatibility for the bill generally states that the powers in part VIA

3 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, 11 February 2014, pp 39-43.

4 *Defence Act 1903*, section 71H.

5 *Defence Act 1903*, section 71J.

6 *Defence Act 1903*, sections 71H(3)(a) and 71J(2)(a).

7 *Defence Act 1903*, sections 71R and 71S.

...are intended to protect the lives of those who work and live on defence premises, as well as protecting national security information, equipment and capability stored on defence premises...[and they] may only be used in the maintenance of these objectives.⁸

1.7 However, it is not clear to the committee why the ability to exercise the powers without consent is considered necessary, particularly as defence security officials will have the power to refuse to allow a person to pass a defence access control point where a person does not to consent to an information or search request, and to restrain and detain a person who is on defence premises and refuses a request.

1.8 The committee therefore requests the Minister for Defence's further advice as to the necessity for non-consensual powers to search and request information from a person at defence access control points, and particularly:

- **whether the proposed limitation on the right to privacy is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is proportionate to that objective.**

Right to security of the person and freedom from arbitrary detention

1.9 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to security of the person and freedom from arbitrary detention. This includes the right of a person:

- to liberty and not to be subjected to arbitrary arrest or detention;
- to security;
- to be informed of the reason for arrest and any charges;
- to be brought promptly before a court and tried within a reasonable period, or to be released from detention; and
- to challenge the lawfulness of detention.

1.10 The only permissible limitations on the right to security of the person and freedom from arbitrary detention are those that are in accordance with procedures

8 EM, p. 18.

established by law, provided that the law itself and the enforcement of it are not arbitrary.

Arrest and detention powers

1.11 In addition to the search, request and seizure powers outlined above, existing Part VIA of the Act allows a defence member to arrest, without warrant, a person on defence premises if the member reasonably believes that the person has committed the offence of unauthorised entry on defence premises or defence accommodation.⁹ If a member arrests a person for this offence, he or she must, as soon as practicable, bring or cause the person to be brought before a member or special member of the Australian Federal Police (AFP) or a member of a state or territory police force.¹⁰

1.12 The statement of compatibility for the bill notes that under Part VIA arrest and detention is 'lawful in certain circumstances' and that its provisions 'outline the circumstances to be satisfied that it is not arbitrary'.¹¹

1.13 However, as described above, the right to security of the person and freedom from arbitrary detention includes the right of a person who is arrested or detained and charged with a criminal offence to be brought promptly before a court. In the committee's view, the requirement that an arrested person be brought before a law enforcement officer 'as soon as practicable' is imprecise. To the extent that this could, in practice, lead to delays in bringing a person before a court (particularly given the nature and location of the WPA), this may represent a limitation on a person's right to be brought promptly before a court.

1.14 The committee therefore requests the Minister for Defence's advice as to the compatibility of the requirement that a detained person be brought 'as soon as practicable' before a member or special member of the AFP, or member of a state or territory police force, with the right to be brought promptly before a court.

1.15 The committee further seeks the Minister for Defence's advice as to what protections may apply more generally to the right to security of the person and freedom from arbitrary detention, such as restrictions on the time a person may be detained without being brought before a relevant AFP or state or territory police force member, and provision for a person to access legal advice while detained.

9 *Defence Act 1903*, section 72P.

10 *Defence Act 1903*, section 72K.

11 EM, p. 15.

Right to enjoy and benefit from culture

Right to self-determination

1.16 The right to enjoy and benefit from culture is contained in article 27 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This includes:

- the rights of individuals belonging to ethnic, religious and linguistic minorities within a country to enjoy their own culture, practise their own religion and use their own language;
- the right of all persons to take part in cultural life;
- the right of all persons to enjoy the benefit of scientific progress and its applications; and
- the right of all persons to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.

1.17 Any proposed limitation on this right must pursue a legitimate aim, be compatible with the nature of the right and be strictly necessary for the promotion of general welfare in a democratic society.

1.18 While the right of Indigenous peoples in relation to their culture is protected by article 27 of the ICCPR and article 15 of the ICESCR, an underlying fundamental guarantee of those rights is found in the right to self-determination guaranteed by article 1 of the ICCPR and article 1 of the ICESCR.¹²

Impact of increased economic activity on Indigenous people

1.19 As noted above, the bills seeks to establish a legislative scheme to enable the WPA to be opened up for resources exploration and mining to the maximum extent possible within the confines of its primary use for defence of Australia purposes.

1.20 The EM for the bill notes that the WPA 'contains significant Indigenous sites and [that] local Indigenous groups have native title rights and interests in most of the area'.¹³ In terms of the potential impact of the bill on the right of Indigenous groups to enjoy and benefit from culture, including cultural values and rights associated with their ancestral lands and relationship with nature, the statement of compatibility states:

12 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013*, 15 May 2013, Native Title Amendment Bill 2012, pp 43-44.

13 EM, p. 2.

The Bill has not altered the rights of Indigenous people to access their traditional lands in the Woomera Prohibited Area. Clause 72TB clarifies the pre-existing rights under the Defence Force Regulations 1952 for specified Indigenous people; or someone employed, engaged by, or acting for, or on behalf of those people; or someone accompanied by those people, to continue to access their traditional lands in the Woomera Prohibited Area. Additionally, all new non-Defence users of the Woomera Prohibited Area must comply with all relevant laws, including those related to Indigenous land and sites, as a condition of access.¹⁴

1.21 While the committee notes that the current rights of access of Indigenous people will be preserved, the extent to which the proposed increase in mining and development activities may limit the right of such persons to enjoy and benefit from culture is unclear. For example, it is not clear whether mining or development activities might impact upon native title rights, or restrict or diminish the capacity of Indigenous people to express or enjoy the cultural values and rights associated with particular areas in the WPA.

1.22 The committee therefore requests further information from the Minister for Defence as to the compatibility of the bill with the right to enjoy and benefit from culture and the right to self-determination, with particular attention to native title and whether the increased economic activity in the WPA enabled by this bill might limit Indigenous groups' enjoyment of these rights.

Right to a fair trial and fair hearing rights

1.23 The right to a fair trial and fair hearing are contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.24 Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in Article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings. Such circumstances may also engage or interact with other aspects of the ICCPR, such as the prohibition on retrospective criminal laws (Article 15) and the right to challenge the lawfulness of detention (Article 9(4)).

14 EM, p. 19.

Validation of declaration and past acts in relation to the Woomera Prohibited Area

1.25 Part 2 of the Schedule 1 to the bill proposes the insertion of new section 121A in the Act. Proposed section 121A provides that the 1989 declaration of the WPA under regulation 35 of the *Defence Force Regulations 1952*, and things done by the Commonwealth under regulation 35 as a result of the declaration, are taken always to have been valid.

1.26 The statement of compatibility for the bill provides no assessment of the compatibility of the proposed measure with human rights. However, the EM states that the purpose of the proposed section is 'to avoid any doubt on the past applicability of the Defence Force Regulations to [WPA] which may arise as the result of the new access regime by the Bill.'¹⁵ No further information is provided about the reason for concerns about the validity of the declaration, or the nature of any acts that would or may be retrospectively validated under this measure.

1.27 While the terms of proposed section 121A suggest that the provision may be directed at the validation of property acquisitions,¹⁶ the committee notes that the proposed retrospective validation of the declaration and of acts done as a result of the declaration may engage the right to a fair trial and fair hearing. For example, if the effect of the retrospective validation would be to defeat a pending or prospective action before the courts, this would limit the right of a person to a fair hearing—that is, to have their rights and obligations determined before a competent, independent and impartial tribunal.

1.28 Equally, the committee notes that the retrospective validation may engage the prohibition against retrospective criminal laws,¹⁷ if its effect was to retrospectively validate an otherwise invalid provision which creates or gives rise to criminal liability.

1.29 The committee therefore requests the Minister for Defence's advice on the compatibility of the retrospective validation proposed by new section 121A with human rights, and particularly whether the measure will engage or limit the right to a fair trial and fair hearing, and the prohibition on retrospective criminal laws.

15 EM, p. 11.

16 See proposed section 121A(3) and (4).

17 Article 15, ICCPR.

Dental Benefits Legislation Amendment Bill 2014

Portfolio: Health

Introduced: House of Representatives, 26 March 2014

Purpose

1.30 The Dental Benefits Legislation Amendment Bill 2014 (the bill) seeks to amend the *Dental Benefits Act 2008* and *Health Insurance Act 1973* to apply the Professional Services Review Scheme to dental services provided under the Child Dental Benefits Schedule.

1.31 The bill will amend the *Health Insurance Act 1973* to require the Chief Executive Medicare (CEM) to waive certain debts incurred by dentists in relation to the Chronic Disease Dental Scheme (CDDS).

1.32 The bill will also amend the *Dental Benefits Act 2008* to:

- enable the CEM or their delegate to obtain certain documents from dentists to substantiate the payments of benefits under the CDBS;
- delegate ministerial functions and powers; amend the definition of ‘dental practitioner’;
- enable the disclosure of certain protected information; and
- make a technical amendment.

Committee view on compatibility

Right to a fair trial and fair hearing rights

1.33 The right to a fair trial and fair hearing is contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.34 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence and minimum guarantees in criminal proceedings, such as the right to not to incriminate oneself (article 14(3)(g)). The ICCPR also provides a guarantee against retrospective criminal laws (article 15(1)) and the right not to incriminate oneself (article 14(3)).

Whether civil penalties may be regarded as 'criminal' for the purposes of human rights law

1.35 Proposed new section 32C of the *Dental Benefits Act 2008* provides that the Chief Executive of Medicare may issue a written notice to persons whom he or she reasonably believes to have possession, custody or control of one or more documents relevant to ascertaining whether an amount paid for a dental service should have been paid. The notice may require the person to produce the document or extract from the document within a specified period.

1.36 Proposed new section 32D(1) provides for the imposition of a civil penalty on a person who fails to comply with a requirement to do something specified in a notice issued under the new section 32C. Subsection 32D(2) provides that it is a defence in proceedings against a person for any such failure if the person proves (on the balance of probabilities) that (a) the failure is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and (b) the person could not reasonably be expected to guard against the failure. The applicable penalty for the civil penalty contravention is 20 penalty units for an individual and 100 penalty units for a body corporate.

1.37 As set out in the committee's *Practice Note 2 (interim)*, the committee considers that a penalty described as 'civil' may nonetheless be regarded as 'criminal' for the purposes of human rights law depending on its purpose, character or severity. Where this is the case, the specific guarantee of criminal process rights in articles 14 and 15 of the ICCPR may apply to such penalties and proceedings to enforce them. In the present case, for example, a number of provisions would appear to be inconsistent with those guarantees if the section 32D(1) civil penalty were to be regarded as 'criminal' for the purposes of human rights law (for example the requirement that the civil standard of proof and civil rules of procedure and evidence apply to civil penalty proceedings.)¹

1.38 Accordingly, the committee's usual expectation is that statements of compatibility provide an assessment as to whether proposed civil penalty provisions are likely to be regarded as 'criminal' for the purposes of human rights law and, if so, whether they are compatible with the guarantees of criminal process rights under the ICCPR.

1 *Health Insurance Act 1973*, s 125B (4) (new subsection 32D(3) applies the provisions of Part VIA of the *Health Insurance Act 1973* relating to the enforcement of civil penalties under that Act to the enforcement of civil penalties under section 32D). On the issue of civil penalties regarded as 'criminal' more generally, see Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament*, 10 December 2013, Clean Energy Legislation (Carbon Tax Repeal) Bill 2013), pp 3-8.

1.39 The committee notes that these issues are not addressed in the statement of compatibility for the bill.

1.40 The committee therefore seeks the Minister for Health's advice as to the whether the proposed civil penalties may be regarded as 'criminal' for the purposes of human rights law and, if so, whether they are compatible with the criminal process rights in articles 14 and 15 of the ICCPR (including whether any limitations on those rights are reasonable, necessary and proportionate to achieving a legitimate objective).

1.41 The committee draws the minister's attention to the committee's *Practice Note 2 (interim)* (see Appendix 3) in preparing his advice on this matter.

Strict liability offences and reverse burden of proof – presumption of innocence

1.42 The bill proposes the creation of a number of new strict liability offences under the *Dental Benefits Act 2008*. Proposed new sections 20C and 20E will create strict liability offences and provide for a reasonable excuse defence. The defendant will bear an evidential burden in relation to the defence (thus requiring the defendant to provide evidence that suggests a reasonable possibility that the defence is made out).

1.43 The committee notes that, strict liability offences limit the right to be presumed innocent until proven guilty (article 14(2)) because they allow for the imposition of criminal liability without the need to prove fault. However, 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 sought and maintain the defendant's right to a defence.

1.44 Similarly, a reverse burden of proof limits the right to be presumed innocent until proven guilty because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. However, reverse burden clauses, whether in a criminal or civil context, will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of objective being sought and maintain the defendant's right to a defence or to a fair hearing.

1.45 Accordingly, where a bill provides for a strict liability offence or a reverse burden of proof, the committee's usual expectation is that the statement of compatibility provide an assessment of whether such limitations on the presumption of innocence are proposed in pursuit of a legitimate objective, and are a reasonable, necessary and proportionate means to achieving that objective.

1.46 The committee notes that the statement of compatibility for the bill makes no reference to these provisions. However, the explanatory memorandum provides a description of the proposed offences, and in both cases the following justification for their limitation of the right to be presumed innocent:

This has been cast as a strict liability offence because it would be difficult to obtain proof of intent to fail to comply with the direction. However, a failure to comply could have significant adverse effects on consumers, who might receive services and incur expenses not realising that benefits would not be payable, and it is important to have an offence as a deterrent to non-compliance.

It is appropriate for the defendant to bear the evidential burden because they alone will have knowledge of the circumstances that might reasonably excuse non-compliance.²

1.47 The committee notes that this discussion of the proposed offences is relevant to an assessment of their compatibility with the right to be presumed innocent, and is capable of supporting a conclusion that the limitations on the right are reasonable, necessary and proportionate to achieving a legitimate objective.

1.48 However, the committee's usual expectation is that statements of compatibility are stand-alone documents that provide an assessment of a bill's compatibility with human rights, including an assessment of whether any measures that may limit human rights are reasonable, necessary and proportionate to achieving a legitimate objective.

1.49 The committee therefore draws to the attention of the Minister for Health the committee's usual expectations in relation to the content of statements of compatibility, as outlined in the committee's *Practice Note 1* (see Appendix 3).

Reverse burden of proof – presumption of innocence

1.50 As noted above, new section 32D(2) provides for a defence to the civil penalty contravention created by new section 32D(1), and places a legal burden of proof on the defendant to prove the facts which constitute the defence. A reverse burden of proof limits the right to be presumed innocent until proven guilty because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Further, if section 32D(1) may be regarded as 'criminal' under human rights law, limitations on the specific guarantee of criminal process rights in articles 14 and 15 of the ICCPR may also arise.

1.51 Accordingly, where a bill provides for a reverse burden of proof, the committee's usual expectation is that the statement of compatibility provide an

2 Explanatory memorandum (EM), pp 6-7.

assessment of whether such limitation on the presumption of innocence is proposed in pursuit of a legitimate objective, and is a reasonable, necessary and proportionate means to achieving that objective.

1.52 The committee notes that the statement of compatibility for the bill does not address these issues.

1.53 The committee therefore seeks the advice of the Minister for Health as to the compatibility of the reverse onus provision in proposed new subsection 32D(2) with the right to a fair trial and fair hearing contained in article 14 of the ICCPR (including whether any limitations on the specific guarantee of criminal process rights are reasonable, necessary and proportionate to achieving a legitimate objective).

Exclusion of the right not to incriminate oneself

1.54 Proposed new section 32E provides that, where a person is required to produce a document under section 32C, they will not be excused from doing so on the ground that it would tend to incriminate the person or expose them to a penalty.

1.55 However, while it further provides that any document produced is not generally admissible in evidence against the individual in criminal or civil proceedings (known as use immunity), they will be admissible in criminal proceedings (i) for an offence against the Act dealing with false or misleading statements; and (ii) for an offence against certain sections of the Criminal Code (dealing with false or misleading information or documents) that relate to the Act; and in civil proceedings arising under certain sections of the Dental Benefits Act 1988 (relating to recovery of amounts paid because of false or misleading statements). Similarly, any information, document or thing obtained as a consequence of producing the document will not be generally admissible in evidence against the individual in criminal or civil proceedings (known as derivative use immunity), other than the proceedings mentioned above.

1.56 The committee notes that the admissibility of such documents limits the right not to incriminate oneself in relation to criminal proceedings and proceedings which may lead to the imposition of a penalty.

1.57 Further, if the penalty may be regarded as ‘criminal’ under human rights law, limitations on the specific guarantee of criminal process rights in articles 14 and 15 of the ICCPR may also arise.

1.58 The committee's usual expectation where a limitation on this right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. In similar fact situations, the committee has noted its expectation that

such an assessment should be provided even where use and derivative use immunity is provided (and particularly where only partial immunity is provided as in this case).

1.59 The committee notes also its previous comments on the approach of the Senate Standing Committee on the Scrutiny of Bills to assessing proposed limitations on the right not to incriminate oneself.³

1.60 The committee notes that the statement of compatibility for the bill does not address this matter (however, the explanatory memorandum includes a partial discussion of the exception in relation to use of material produced under compulsion in proceedings for the recovery of amounts paid because of false or misleading statements).⁴

1.61 The committee therefore seeks the advice of the Minister for Health as to whether the limitation of the right not to incriminate oneself in proposed section 32E is compatible with the right not to incriminate oneself, and particularly whether it is reasonable, necessary and proportionate to achieving a legitimate objective.

3 In considering legislation affecting this right, the Scrutiny of Bills committee makes an assessment of whether the 'public benefit sought will decisively outweigh the resultant harm to the maintenance of civil rights'. See Senate Standing Committee for the Scrutiny of Bills, *The work of the committee during the 42nd Parliament February 2008 – June 2010*, June 2013, paragraph 2.6.

4 EM, p. 10.

Export Legislation Amendment Bill 2014

Export Inspection (Quantity Charge) Amendment Bill 2014

Export Inspection (Service Charge) Amendment Bill 2014

Export Inspection (Establishment Registration Charges) Amendment Bill 2014

Portfolio: Agriculture

Introduced: House of Representatives, 27 March 2014

1.62 These four bills form a package of bills relating to export services.

1.63 The Export Legislation Amendment Bill 2014 (the bill) seeks to align the definition of 'prescribed good' in the *Export Inspection Meat Charges and Collection Act 1985* and the *Export Control Act 1982*. This is intended to ensure consistent cost recovery for services provided by the Department of Agriculture to exporters. The bill also seeks to amend the *Australian Meat and Live-stock Industry Act 1997* to enable the Department of Agriculture to recover costs for the provision of services, such as issuing quota certificates for export quota administered by other countries.

1.64 The remaining bills make consequential amendments to the *Export Inspection (Quantity Charge) Act 1985*, the *Export Inspection (Service Charge) Act 1985* and the *Export Inspection (Establishment Registration Charges) Act 1985* as a result of the definitional changes made to the *Export Inspection and Meat Charges Collection Act 1985* by the Export Legislation Amendment Bill 2014.

1.65 The bills are accompanied by individual statements of compatibility which each state that the bill in question 'does not engage any of the applicable rights or freedoms as the amendments are minor and technical in nature.'¹

1.66 The committee considers that the bills do not appear to give rise to human rights concerns.

1 Explanatory memorandum (EM), pp 4-7.

G20 (Safety and Security) Complementary Bill 2014

Portfolio: Justice

Introduced: House of Representatives, 20 March 2014

Purpose

1.67 The G20 (Safety and Security) Complementary Bill 2014 (the bill) creates a new standalone Commonwealth Act intended to clarify the interaction between provisions in the *G20 (Safety and Security) Act 2013* (Qld) and existing Commonwealth legislation at the Brisbane Airport during the 2014 G20 Summit, which is to be held in Brisbane in November 2014.

1.68 The new Act will provide for specified Commonwealth aviation laws (including regulations or other subordinate legislation made under Commonwealth aviation legislation) to operate concurrently with the *G20 (Safety and Security) Act 2013* (Qld). The operation of the specified Commonwealth aviation laws will be rolled back with respect to certain areas of the Brisbane Airport (a Commonwealth place) to avoid inconsistency with the Queensland G20 legislation. To the extent that they are not inconsistent with the Queensland G20 legislation, Commonwealth aviation laws will continue to apply to those areas.

Committee view on compatibility

Multiple rights

Human rights assessment of state laws applied by Commonwealth laws

1.69 As described above, the bill would permit the operation of *provisions of the G20 (Safety and Security) Act 2013* (Qld) (the Queensland Act) that would not otherwise apply in certain areas of Brisbane airport in the lead-up to and during the G20 Summit in Brisbane in 2014. The statement of compatibility for the bill concludes that it does not engage any of the applicable rights or freedoms, and is therefore compatible with human rights as it does not raise any human rights issues.

1.70 However, the committee notes that the Queensland Act contains a number of provisions which augment existing Queensland law, and which potentially engage and limit a range of human rights. This includes provisions which, for example:

- regulate the exercise of freedom of assembly;
- confer stop and search and use of force powers;
- confer powers to prevent the entry of vehicles and persons into particular areas and to order their removal;
- confer the power to prohibited or exclude persons and to take steps in relation to those persons;

- enact a presumption against bail in relation to certain persons and offences; and
- create new offences and amend the law relating to a number of existing offences.

1.71 The committee notes that such measures may engage and limit multiple rights.¹

1.72 Insofar as the bill seeks to provide for the application of the Queensland Act to some or all of the Brisbane Airport, a Commonwealth place, the Queensland Act would appear to be applied as a law of the Commonwealth pursuant to the *Commonwealth Places (Application of Laws) Act 1970* (discussed below). The purpose of the bill is to ensure that the provisions of the applied Queensland law are not rendered invalid by the operation of section 109 of the Constitution, to the extent that they would, but for this bill, be inconsistent with the otherwise applicable Commonwealth aviation laws.

1.73 The committee notes that the statement of compatibility for the bill does not provide an assessment of the compatibility of the measures in the Queensland Act with human rights. To the extent that the bill would allow the Queensland Act to be applied as Commonwealth law in places it would not otherwise have applied, an assessment of that Act is required to inform any assessment of the bill's compatibility with human rights.

1.74 The committee therefore requests the Minister for Justice's advice on the compatibility of the measures in the Queensland Act with human rights, insofar as they will apply as Commonwealth laws.

Application of State laws to Commonwealth places under the Commonwealth Places Act

1.75 More generally, the committee notes that the bill is a specific instance of the application of the state law to a Commonwealth place, an example which gives rise to a more general question as to human rights assessment of such laws.

1.76 The committee notes that the general application of state laws to Commonwealth places is governed by the *Commonwealth Places (Application of*

1 For example, right to life (article 6 of the ICCPR), the prohibition on torture and cruel, inhuman or degrading treatment or punishment (article 7 of the ICCPR), right to security of the person and freedom from arbitrary detention (article 9 of the ICCPR), right to human treatment in detention (article 10 of the ICCPR), right to freedom of movement (article 12 of the ICCPR), right to a fair trial and fair hearing (article 14 of the ICCPR), right to privacy and reputation (article 17 of the ICCPR), right to freedom of thought, conscience and religion or belief (article 18 of the ICCPR), right to freedom of opinion and expression (article 19), right to freedom of assembly (article 21 of the ICCPR) and right to freedom of association (article 22 of the ICCPR).

Laws) Act 1970 (the CP Act), which was enacted in response to a decision of the High Court in 1970,² that section 52(i) of the Constitution excludes the direct application of state laws to Commonwealth places.³

1.77 The effect of the CP Act is that the provisions of an applied state law generally takes effect as a Commonwealth law in relation to the Commonwealth place.⁴ Significantly, the effect of the CP Act is to apply as Commonwealth laws the provisions of the state law as amended from time to time. Given this, to the extent that the CP Act provides for what is in effect the enactment of Commonwealth laws,⁵ without the requirement for a human rights assessment under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee considers that it should undertake an assessment of the CP Act for compatibility with human rights (as provided for by section 7(b) of the *Human Rights (Parliamentary Scrutiny) Act 2011*).

1.78 To facilitate the committee's assessment of the *Commonwealth Places (Application of Laws) Act 1970*, the committee therefore requests that the Minister for Justice provide a statement of compatibility for that Act, particularly with respect to the question of the compatibility of measures that have or may be applied as Commonwealth law by its operation.

2 *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89. See also *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* [1970] HCA 58; (1970) 124 CLR 262; and *R v Phillips* [1970] HCA 50; (1970) 125 CLR 93).

3 Section 52(i) of the Constitution provides: The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes.

4 See *Pinkstone v R* [2004] HCA 23; 219 CLR 444 at [34], where McHugh and Gummow JJ described the applied state law as operating as 'a surrogate federal law'. See also McHugh J in *Cameron v R* [2002] HCA 6; 209 CLR 339, at [46].

5 See *R v Porter* [2001] NSWCCA 441; 165 FLR 301; 53 NSWLR 354; [41] (Spigelman CJ, with whom Studdert J and Ireland AJ agreed).

Live Animal Export (Slaughter) Prohibition Bill 2014

Sponsor: Senator Rhiannon

Introduced: Senate, 27 March 2014

Purpose

1.79 This bill seeks to amend the *Export Control Act 1982* to prohibit the export of live-stock for slaughter.

Committee view on compatibility

Right to work and rights at work

1.80 The right to work and rights in work are guaranteed in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹

1.81 The UN Committee on Economic Social and Cultural Rights has stated that the right to work affirms the obligation of States parties to ICESCR to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly.

1.82 Under article 2(1) of ICESCR, countries must take steps, to the maximum of available resources, to progressively achieve the full realisation of the rights recognised in the covenant. A number of aspects of ICESCR rights, including the right to non-discrimination in the enjoyment of those rights, are subject to an obligation of immediate implementation.

1.83 The right to work and rights at work may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Economic impact of measure

1.84 The statement of compatibility states:

This Bill does not engage any of the applicable rights or freedoms. Animals are sentient beings but as yet do not enjoy rights comparable to human rights. This Bill fulfils humanity's responsibility

1 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), article 32 of the Convention on the Rights of the Child and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

to protect and defend the rights of animals to live a life free of cruelty and suffering.²

1.85 However, the committee notes that the prohibition of exports of animals for slaughter overseas may have an adverse impact on the economic viability of Australian industries reliant on this trade, and consequently on the employment opportunities of those working in such industries. Such impacts may therefore represent a limitation on those employees' right to work and rights at work.³

1.86 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

1.87 The committee therefore requests Senator Rhiannon's advice as to the compatibility of the bill with the right to work and rights at work.

2 Explanatory memorandum, p. [2].

3 See, for example, Parliamentary Joint Committee on Human Rights, Live Animal Export Prohibition (Ending Cruelty) Bill 2014, *Third Report of the 44th Parliament*, 4 March 2014, p. 34.

Major Sporting Events (Indicia and Images) Protection Bill 2014

Portfolio: Sport

Introduced: House of Representatives, 26 March 2014

Purpose

1.88 The Major Sporting Events (Indicia and Images) Protection Bill 2014 (the bill) seeks to prevent the unauthorised commercial use of certain indicia and images associated with the Asian Football Confederation Asian Cup 2015, the International Cricket Council Cricket World Cup 2015 and the Gold Coast 2018 Commonwealth Games, consistent with written undertakings provided as a condition of being awarded the right to host these events.

1.89 The bill seeks to achieve this by establishing a registration process to restrict the use of protected indicia and images for each event to official users only.

Committee view on compatibility

Right to freedom of opinion and expression

1.90 The right to freedom of opinion and expression is guaranteed by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.91 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*),¹ or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.²

1 'The expression 'public order (*ordre public*)'...may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*)': Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

2 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

Exemptions for the use of certain indicia and images by third parties

1.92 The statement of compatibility for the bill notes that it would both engage and limit the right to freedom of expression through establishing the registration process to restrict the use of protected event indicia and images to official users only. However, this limitation is described as necessary to promote the rights of people to access culture by ensuring that sufficient revenue can be raised to stage the events in question, including through sponsorship and the commercial use of the indicia and images.³ The statement of compatibility further notes that the bill provides for 'limited exemptions' for certain third parties from prohibitions against the use of event indicia and images where the use is for the purpose of the provision of information, or for criticism or review in certain cases. It concludes:

[These]...limitations associated with freedom of expression are reasonable, necessary and proportionate to achieving the objective of promoting the right of individuals to enjoy and benefit from participating in cultural life through participation in and access to sport.⁴

1.93 The committee accepts that the limitation on freedom of expression is proposed in pursuit of the legitimate objective of promoting or protecting the rights of others (being the right of people to participate in the events in question and the protection of the intellectual property of the event sponsors), and that the proposed restrictions are rationally connected to that objective in seeking to protect the financial interests of event sponsors and investors, and thereby the financial viability of such events.

1.94 In relation to the proportionality of the proposed restriction, the committee notes that the proposed restriction on unauthorised commercial use of protected event indicia and images appears generally to be proportionate to its stated objective, particularly insofar as exemptions are provided for the purposes of criticism, review or the provision of information.⁵ This would appear to cover news reporting and critical or satirical review of the events, sponsorship arrangements and artistic or other aspects of protected indicia and images, including where such activities are undertaken for commercial purposes. For example, a show commenting on or satirising the events using protected images, logos and words could be

3 Explanatory memorandum (EM), p. 24

4 EM, p. 24.

5 See proposed sections 12 and 14. The committee notes also that the bill would not apply to the extent that it would infringe any constitutional doctrine of implied freedom of political communication (proposed section 57). This may provide additional protection to the extent that expression otherwise prohibited by the bill would be protected (and would fall within the scope of the guarantee of the right to freedom of expression).

broadcast by a commercial television or radio network with no formal relationship with the event sponsors or organisers.

1.95 However, the committee notes that the bill as drafted does not provide an explicit or 'plain' exemption for the use of protected event indicia and images when used for the primary purpose of criticism, review or the provision of information. Instead, it provides that expressions for the primary purpose of such uses will be 'not alone sufficient to suggest the existence of a sponsorship arrangement' for the purposes of proposed paragraph 12(1)(c). This paragraph provides that a protected indicia or image is used for commercial purposes if that use would suggest, to a reasonable person, that the user is or was a sponsor of, or is or was the provider of other support for the event or a related event.

1.96 It is unclear to the committee what the scope of the exemption would be as drafted in this way and whether for example, it would adequately protect news reporting and critical or satirical review of the events, sponsorship arrangements and artistic or other aspects of protected indicia and images (as discussed above). Accordingly, it is unclear whether the measure may be regarded as proportionate in the extent to which it preserves the right to use protected indicia or images for the purposes of criticism, review or the provision of information.

1.97 The committee therefore seeks the Minister for Sport's advice as to the proportionality of the proposed restriction on the right to freedom of expression, particularly in relation to as the exemptions provided for the purposes of criticism, review or the provision of information (in the terms drafted in the bill).

Power to order corrective advertisement

1.98 Proposed section 47 of the bill provides that a court may make an order requiring a person to publish at their own expense a corrective advertisement, if the court is satisfied that the person has used a protected indicia or image without authorisation. A corrective advertisement order must specify the means and times of the corrective advertisement (proposed subsection 47(3)).

1.99 The committee notes that the proposed power to order a person to publish an advertisement would involve a limitation on that person's right to freedom of expression, which includes the right not to be compelled to engage in particular forms of expression. However, the statement of compatibility for the bill provides no assessment of the compatibility of this measure with the right in the context of the bill.

1.100 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

1.101 The committee therefore requests the Minister for Sport's advice as to the compatibility of proposed section 47 with the right to freedom of expression.

Migration Amendment (Offshore Resources Activity) Repeal Bill 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 27 March 2014

Purpose

1.102 The Migration Amendment (Offshore Resources Activity) Repeal Bill 2014 (the bill) seeks to repeal the *Migration Amendment (Offshore Resources Activity) Act 2013* (ORA Act).

1.103 The purpose of the ORA Act, which would take effect from 30 June 2014,¹ is to provide that foreign workers must hold a relevant visa when they participate in, or support, offshore resource activities taken to be in the migration zone.

1.104 The proposed repeal of the ORA Act will therefore have the effect of maintaining existing arrangements in relation to visa requirements for offshore resource activities.²

Committee view on compatibility

Right to work and rights at work

1.105 The right to work and rights at work is contained in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

1.106 The UN Committee on Economic Social and Cultural Rights has stated that the right to work affirms the obligation of States parties to the covenant to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. Under article 2(1) of ICESCR, State parties are obliged to take steps, to the maximum of available resources, to progressively achieve the full realisation of this right.

1.107 This right may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportional, and must be the least restrictive alternative where several types of limitations are available.

Effect of repealing measures

1.108 The statement of compatibility for the bill states that it is compatible with human rights as it seeks to continue existing arrangements and, as such, does not raise any human rights implications'.³

1 *Migration Amendment (Offshore Resources Activity) Act 2013*, s 2(1).

2 Explanatory memorandum (EM), pp 1-2.

1.109 However, the committee notes that, while the specific measures of the ORA Act are yet to commence, the Act itself is an operative Commonwealth law. In the committee's view, the effect of the bill is therefore properly characterised as being to remove measures that would otherwise enter into force. This view would appear to be supported by the stated intention of the bill, which is to '[remove] unnecessary and disproportionate regulation impacting on industry'.⁴

1.110 Where a bill seeks to repeal existing arrangements, the committee's usual expectation is that the statement of compatibility provide an assessment of whether the repeal of those arrangements may reduce or remove human rights protections, and whether remaining or proposed arrangements in place of the repealed measures may offer equivalent or greater protection of human rights.⁵

1.111 The committee notes that the statement of compatibility for the ORA Act identified the right to work and rights to work as being significantly engaged by the then proposed imposition of visa requirements on foreign workers involved in offshore resource activities in the migration zone.⁶ That assessment concluded that the measure was 'directly supportive of the right to work of Australian citizens and permanent residents, and...[was therefore] a permissible limitation on the rights of non-citizens.'⁷

1.112 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to the compatibility of the bill with the right to work and rights at work.

3 EM, pp 1-2.

4 EM, Regulation Impact Statement (OBPR ID: 2014/16740), p. 5.

5 See, for example, Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament*, 25 March 2014, Omnibus Repeal Day (Autumn 2014) Bill 2014, p. 9.

6 Migration Amendment (Offshore Resources Activity) Bill 2013, statement of compatibility, pp 3-4.

7 Migration Amendment (Offshore Resources Activity) Bill 2013, statement of compatibility, p. 4.

Private Health Insurance Amendment (GP Services) Bill 2014

Sponsor: Senator Di Natale

Introduced: Senate, 27 March 2014

1.113 The Private Health Insurance Amendment (GP Services) Bill 2014 seeks to amend the *Private Health Insurance Act 2007* to clarify that private health insurers may not enter into agreements or arrangements with primary care providers that provide preferential treatment to their members.

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

Railway Agreement (Western Australia) Amendment Bill 2014

Portfolio: Infrastructure and Regional Development

Introduced: House of Representatives, 27 March 2014

1.115 The Railway Agreement (Western Australia) Amendment Bill 2014 (the bill) seeks to amend the *Railway Agreement (Western Australia) Act 1961* (the Act) to:

- enable early repayment of the Commonwealth loan made to the Western Australian Government for the construction of a standard gauge railway, primarily from Kalgoorlie to Perth; and
- repeal the Act 28 days after the loan repayment is made.

1.116 The bill is accompanied by a statement of compatibility which states that the bill does not engage any of the applicable rights or freedoms and 'is compatible with human rights as it does not raise any human rights issues'.¹

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

1 Explanatory memorandum (EM), p. 2.

Save Our Sharks Bill 2014

Sponsor: Senator Siewert

Introduced: Senate, 25 March 2014

Purpose

1.118 The Save Our Sharks Bill 2014 (the bill) seeks to void the 10 January 2014 exemption granted under section 158 of the *Environment Protection and Biodiversity Conservation Act 1999*, allowing the deployment of baited drum to catch sharks in Western Australia. The bill would also ensure that no similar declaration or exemption will have any effect.

Committee view on compatibility

Right to life

1.119 The right to life is contained in article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) and article 1 of the Second Optional Protocol to ICCPR. The right to life entails the right not to be deprived of life arbitrarily or unlawfully by the country or its agents. The right to life includes a duty on governments to take appropriate steps to protect the right to life of those within its jurisdiction.¹ This may include taking reasonable and appropriate measures to prevent or minimise identified and avoidable risks to the life of members of the community.

1.120 Under international human rights law, the right to life must be respected at all times.

Impact of voiding exemption

1.121 The statement of compatibility for the bill states that it does not engage any of the applicable rights or freedoms and is therefore compatible with human rights as it does not raise any human rights issues.²

1.122 However, the committee notes that the Minister for the Environment provided a statement of reasons in granting the exemption, in which the basis for the

1 UN Human Rights Committee, General Comment 6, Article 6 (right to life) (1982), paragraph 5.

2 Explanatory memorandum (EM), p. 3.

exemption was identified as 'significant increases in shark fatalities in Western Australia for the last three years'.³ The minister's statement noted:

The increase in shark strikes in Western Australia waters to well above historic norms has drawn national attention to the matter of public safety of water activities. The approaches and lessons learnt from the Western Australian trial will inform the mitigation approaches of other governments. The matter of public safety is therefore a matter of national interest.⁴

1.123 The minister further noted that the approach proposed was 'targeted at large sharks that are most likely to fatally injure humans in an unprovoked strike'.⁵

1.124 While the committee is not able to assess the likely efficacy of the measures permitted under the exemption granted by the minister, it notes that the stated reason for the exemption—to allow measures intended to reduce shark strikes and preserve lives—defines the measure as engaging the right to life.

1.125 The committee therefore requests Senator Siewert's advice as to the compatibility of the bill with the right to life.

Right to work and rights at work

1.126 The right to work and rights in work is contained in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶

1.127 The UN Committee on Economic Social and Cultural Rights has stated that the right to work affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. Under article 2(1) of ICESCR, countries are obliged to take steps, to the maximum of available resources, to progressively achieve the full realisation of this

3 Department of the Environment, 'Statement of reasons for granting an exemption under section 158 of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*' (15 January 2014).

4 Department of the Environment, 'Statement of reasons for granting an exemption under section 158 of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*' (15 January 2014), paragraph 13.

5 Department of the Environment, 'Statement of reasons for granting an exemption under section 158 of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*' (15 January 2014), paragraph 16.

6 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (articles 5(e)(i) and (ii)), the Convention on the Elimination of All Forms of Discrimination against Women ((articles 11 and 14(2)(e)), the Convention on the Rights of the Child (article 32) and the Convention on the Rights of Persons with Disabilities (article 27).

right. A number of aspects of the rights, including but not limited to the right to non-discrimination in the enjoyment of ICESCR rights, are subject to an obligation of immediate implementation.

1.128 This right may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportional, and must be the least restrictive alternative where several types of limitations are available.

Economic impact of measure

1.129 As noted above, the statement of compatibility for the bill states that it does not engage any of the applicable rights or freedoms and is therefore compatible with human rights as it does not raise any human rights issues.⁷

1.130 However, the committee notes that the minister's statement of reasons for granting the exemption identified, in addition to the preservation of life, economic factors as a basis for his decision, broadly relating to the impact of increased shark strikes on the tourism industry. While the committee is not able to assess the likely impact of the measures permitted under the exemption granted by the minister, it notes that this additional stated reason for the exemption defines the measure as engaging the right to work and rights at work.

1.131 The committee therefore requests Senator Siewert's advice as to the compatibility of the bill with the right to work and rights at work.

7 EM, p. 3.

Social Services and Other Legislation Amendment (Seniors Health Card and Other Measures) Bill 2014

Portfolio: Social Services

Introduced: House of Representatives, 27 March 2014

1.132 The Social Services and Other Legislation Amendment (Seniors Health Card and Other Measures) Bill 2014 (the bill) seeks to:

- amend the *Social Security Act 1991* and *Veterans' Entitlements Act 1986* to annually index income thresholds for the Commonwealth seniors' health card;
- amend the *Student Assistance Act 1973* to align provisions in relation to the operation of the Social Security Appeals Tribunal (SSAT) with similar provisions in social security and related laws;
- amend the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Social Security (Administration) Act 1999* and the *Student Assistance Act 1973* to ensure that a statement of reasons for an SSAT decision is provided to the Administrative Appeals Tribunal if there is to be a review of the decision; and
- amend a number of Acts to reflect machinery of government changes and make technical amendments to the *Social Security Act 1991*, including a restructure of the Part of that Act that deals with definitions.

1.133 The bill is accompanied by a statement of compatibility which states that the bill promotes the right to social security and the right to health.¹

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

1 Explanatory memorandum (EM), p. 2.

Tax Laws Amendment (2014 Measures No. 1) Bill 2014

Portfolio: Treasury

Introduced: House of Representatives, 27 March 2014

1.135 The Tax Laws Amendment (2014 Measures No. 1) Bill 2014 (the bill) seeks to amend various taxation laws.

1.136 Schedule 1 would amend the *Income Tax Assessment Act 1997* and the *Banking Act 1959* (Banking Act) to:

- allow taxpayers to consolidate multiple Farm Management Deposits (FMD) that they might hold with different providers;
- raise the non-primary production income threshold; and
- exclude FMD from becoming unclaimed moneys.

1.137 Schedule 2 of the bill would amend the *A New Tax System (Goods and Services Tax) Act 1999* and the *Taxation Administration Act 1953* to provide that overpaid GST is refundable only in certain circumstances.

1.138 The bill is accompanied by a statement of compatibility which states that the bill does not engage any of the applicable human rights or freedoms and is compatible with human rights as it does not raise any human rights issues.¹

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

1 Explanatory memorandum (EM), p. 19 (Schedule 1) and p. 52 (Schedule 2).

Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014

Portfolio: Veterans' Affairs

Introduced: House of Representatives, 27 March 2014

Purpose

1.140 The Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014 (the bill) seeks to enable the expansion of mental health services for veterans and members of the Defence Force and their families, and make changes to the operation of the Veterans' Review Board.

1.141 The bill will amend the *Veterans' Entitlements Act 1986* to:

- expand non-liability health care to include certain mental health conditions and alcohol and substance use disorders (Schedule 1);
- expand eligibility for the Veterans and Veterans Families Counselling Service from 1 July 2014 (Schedule 2);
- provide that the seniors supplement is paid automatically following short periods of overseas travel (Schedule 3); and
- make a technical amendment (Schedule 5).

1.142 The bill will amend the *Military Rehabilitation and Compensation Act 2004* to:

- expand the circumstances in which an eligible young person is taken to be wholly dependent on a Defence Force member (Schedule 6); and
- enable the Chief Executive Officer of Comcare to be nominated for appointment to the Military Rehabilitation and Compensation Commission (Schedule 7).

1.143 The bill will also amend both the *Veterans' Entitlements Act 1986* and the *Military Rehabilitation and Compensation Act 2004* (the Acts) in relation to the operation of the Veterans' Review Board (the Board), including changes to dispute resolution processes, case management powers, and administrative business procedures of the Board (Schedule 4).

Committee view on compatibility

Right to freedom of opinion and expression

1.144 The right to freedom of opinion and expression is guaranteed by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to

any exception or restriction. The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

1.145 Under article 19(3), freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*),¹ or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.

Contempt of Board offences

1.146 The bill seeks to insert new section 170 into the *Veterans' Entitlements Act 1986* to define conduct which can be regarded as being in contempt of the Veterans' Review Board (the Board).² The section makes it an offence to:

- insult another person in, or in relation to, the exercise of their powers or functions under the Board;
- interrupt the proceedings of the Board;
- create a disturbance in or near a place where the Board is sitting;
- take part in or continue a disturbance in or near a place where the Board is sitting; and
- engage in conduct which, if the Board were a court of record, would constitute a contempt of that court.

1.147 The statement of compatibility states that, while new section 170 'clearly limits the right to freedom of expression',³ the limitation is justified for the purposes of public order (*ordre public*), understood to mean the rules which ensure the peaceful and effective functioning of society. It also states that this limitation is consistent with article 14(1) of the ICCPR (right to a fair trial and fair hearing), which provides for the exclusion of the press and the public from all or part of a trial for reasons of public order (amongst others).⁴

1 'The expression 'public order (*ordre public*)'...may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*): Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

2 Explanatory memorandum (EM), p. 38.

3 EM, p. 38.

4 EM, p. 39.

1.148 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

1.149 While the committee notes that the protection of the Board and its hearings would be a legitimate objective, it is not clear from the statement of compatibility whether the limitations of freedom of expression proposed in new section 170 are rationally connected and proportionate to achieving the protection of public order (which in this case is to ensure that the Board is able to conduct its business).

1.150 Further, the committee notes that it is unclear whether new section 170 may limit legitimate criticism of or objection to the Board and its activities, or indeed may limit expression not directed at and unrelated to the Board and its activities (but taking place near and having the effect of disturbing a Board hearing), and therefore whether the measures are proportionate to achieving their stated objective.

1.151 The committee notes that the nature of the penalties for the proposed offences is also relevant to an assessment of the proportionality of the measures, particularly as proposed section 170 does not appear to provide for the imposition of a financial penalty (as does section 63 of the *Administrative Appeals Tribunal Act 1975*, with which they are being aligned).

1.152 The committee notes its view that the existence of identical or similar provisions in other statutes is not determinative of the human rights compatibility of the provisions of a bill. In many cases, such provisions are drawn from Acts enacted prior to the commencement of the *Human Rights (Parliamentary Scrutiny) Act 2011*, and which therefore may not have undergone an assessment of their compatibility with human rights. Equally, that assessment must be conducted with reference to the particular context of a proposed law, as that context is critical to determining whether a measure is reasonable, necessary and proportionate to achieving a legitimate objective.

1.153 Accordingly, the committee's usual expectation is that, where a bill seeks to align or incorporate the provisions of another Act, the statement of compatibility identify the substantive elements of those provisions, and provide an assessment of their potential engagement and compatibility with human rights.

1.154 The committee therefore requests the advice of the Minister for Veterans' Affairs as to the compatibility of new section 170 with the right to freedom of opinion and expression, and particularly:

- **whether the measure is rationally connected to its stated objective; and**
- **whether the measure is proportionate to achieving that objective.**

Right to freedom of assembly

1.155 The right to freedom of assembly is guaranteed by article 21 of the ICCPR. The right protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.

1.156 Under article 21 freedom of assembly may be subject only to restrictions imposed in conformity with the law and which are 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.

Contempt of Board offences

1.157 The bill seeks to insert new subsections 170(3) and 170(4) into the *Veterans' Entitlements Act 1986*, expanding the range of conduct that may be in contempt of the Board to include conduct creating or continuing a disturbance in or near a place where the Board is sitting.

1.158 The committee notes that the offences created by subsections 170(3) and 170(4) may limit the right to freedom of assembly. However, the statement of compatibility provides no assessment of the potential impact of the measure on this right. As noted above, the committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

1.159 The committee notes that the objective of the proposed provisions would appear to be the protection of the Board and its hearings, and that this would be a legitimate objective. However, it is not clear whether the restrictions imposed by subsections 170(3) and 170(4) may have the effect of criminalising protected freedom of assembly rights, such as a peaceful protest.

1.160 Further, the committee notes that it is unclear whether subsections 170(3) and 170(4) may limit legitimate criticism of or objection to the Board and its activities, or indeed may limit assemblies not directed at and unrelated to the Board and its activities (but taking place near and having the effect of disturbing a Board hearing), and therefore whether the provisions are proportionate to achieving their apparent objective.

1.161 The committee notes that the nature of the penalties for the proposed offences is also relevant to an assessment of the proportionality of the measures, particularly as proposed subsections 170(3) and 170(4) do not appear to provide for the imposition of a financial penalty (as does section 63 of the *Administrative Appeals Tribunal Act 1975*, with which they are being aligned).

1.162 The committee therefore requests the advice of the Minister for Veterans' Affairs as to the compatibility of new subsections 170(3) and 170(4) with the right to freedom of assembly, and particularly:

- **whether the measures are rationally connected to their apparent objective; and**
- **whether the measures are proportionate to achieving that objective.**

**The committee had deferred its consideration
of the following bills**

Agriculture and Veterinary Chemicals Legislation Amendment (Removing Re-approval and Re-registration) Bill 2014

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

Fair Work Amendment Bill 2014

Health Insurance Amendment (Extended Medicare Safety Net) Bill 2014

Migration Legislation Amendment Bill (No. 1) 2014

Student Identifiers Bill 2014

Chapter 2 - Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on 12 May 2014. The committee has concluded its examination of these matters on the basis of responses received by the proponents of the bill or relevant instrument makers.

Qantas Sale Amendment Bill 2014

Portfolio: Infrastructure and Regional Development
Introduced: House of Representatives, 6 March 2014

Purpose

2.1 The Qantas Sale Amendment Bill 2014 (the bill) proposes the removal of various restrictions imposed on Qantas by the *Qantas Sale Act 1992* (Qantas Sale Act), as well as making amendments to the *Air Navigation Act 1920*. The bill proposes the repeal of sections of the Qantas Sale Act which require certain restrictions to be included in Qantas' articles of association to limit foreign ownership and impose other related restrictions, as well as compliance and enforcement measures to ensure Qantas abides by these requirements. In particular, the bill proposes to repeal Part 3 of the Qantas Sales Act. The explanatory memorandum states that the purpose of the bill is to place Qantas on an equal footing with other airlines by removing the foreign ownership and other restrictions on its business.

Background

2.2 The committee reported on the bill in its *Fourth Report of the 44th Parliament*

Committee view on compatibility

Right to work

Economic impact

2.3 The committee sought further information from the Minister for Infrastructure and Regional Development in relation to:

- whether the bill is likely to limit the right to work;
- whether the government undertook any analysis of the likely impact on the right to work of the repeal of Part 3 of the Qantas Sale Act 1992 and, if so, what the results of that analysis were; and

- if the bill is likely to limit the right to work, whether that limitation is compatible with Australia's obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Minister's response

Whether the bill is likely to limit the right to work

The Bill is unlikely to limit the right to work under Articles 6, 7, and 8 of the International Covenant on Economic, Social and Cultural Rights, and will not impact Australia's obligation to fulfil the enjoyment of the right to work by promoting conditions in which people can find work in Australia.

The Government notes Qantas is taking a range of measures to reduce costs following the announcement of a \$252 million loss for the first half of 2013-14. Part 3 of the Qantas Sale Act 1992 (the 'QSA') places restrictions on Qantas that do not apply to its competitors. The Government considers that removing these conditions will enhance Qantas' ability to compete and is the best way to ensure Qantas can secure Australian jobs now and into the future.

The Bill will remove subsection 7(1)(h) 3 of the QSA which relates to the location of facilities used for Qantas' international services. Qantas will continue to be subject to designation criteria that are intended to ensure our airlines are compliant with the bilateral agreements that grant traffic rights to Australian international airlines. These criteria include a requirement for the head office and the airline's operational base to be in Australia. It is in Qantas' commercial interest to ensure that they can be designated as an Australian international airline and that they do not have their designation challenged in accordance with the provisions of the bilateral agreements.

The QSA contains no provisions regarding conditions of employment and the Bill does not change this. The Bill also makes no changes to employment laws or migration laws.

Whether the government undertook any analysis of the likely impact on the right to work of the repeal of Part 3 of the Qantas Sale Act 1992 and, if so, what the results of that analysis were.

The Government carefully considered a range of options to assist Qantas to return its operations to a sustainable footing, and determined that the best response is to repeal Part 3 of the QSA.

This approach will put Qantas on an equal footing with its competitors and is the best way to protect Australian jobs at Qantas.

In the longer term, Qantas will have more flexibility to structure its operations in a more sustainable way. However, operational necessity would dictate jobs (including crewing, catering, baggage handling and other servicing) will continue to be undertaken by workers in Australia.

The Fair Work Act 2009, migration and other laws would continue to apply to these workers.

If the bill is likely to limit the right to work, whether that limitation is compatible with Australia's obligations under the ICESCR

As noted above, the Bill is unlikely to limit the right to work.¹

Committee response

2.4 The committee thanks the Minister for Infrastructure and Regional Development for his response and has concluded its examination of this bill.

1 See Appendix 2, Letter from The Hon Warren Truss MP, Minister for Infrastructure and Regional Development, to Senator Dean Smith, 26 March 2014.

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

Portfolio: Health

Introduced: House of Representatives, 12 December 2013

Purpose

2.5 The Therapeutic Goods Amendment (2013 Measures No. 1) Bill 2013 (the bill) seeks to make a range of amendments to the *Therapeutic Goods Act 1989* (the Act).

2.6 The bill would 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). Further amendments are outlined in the committee's *Second Report of the 44th Parliament*.

Background

2.7 The committee reported on the bill in its *Second Report of the 44th Parliament*.

2.8 The bill was passed by the Parliament and received Royal Assent on 28 February 2014.

Committee view on compatibility

Right to a fair trial and fair hearing

Civil Penalties

2.9 The committee sought clarification from the Minister for Health as to whether the proposed amendments to insert a new civil penalty provision and to expand the scope of an existing civil penalty provision were consistent with the right to a fair trial in article 14 of the ICCPR. In particular, the committee requested 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.

Assistant Minister's response

These measures are clearly described in the Bill as being civil penalties and are plainly distinguishable from the corresponding criminal offences in the Bill or the Act [*Therapeutic Goods Act 1989*] relating to the same conduct.

The penalties are consistent with the regime throughout the Act of having civil penalties as an alternative to criminal offences for a range of behaviour that breaches important regulatory requirements.

Although the maximum levels of these penalties may appear high, this reflects the relative size and nature of the therapeutic goods industry, in particular the presence of large multi-national companies.

It is important the Act contain a strong deterrent against providing false or misleading information to the TGA in relation to the carrying out of its functions. If the TGA were to rely upon information that is false or misleading to approve a request to vary an entry in the Register for a therapeutic good, or to come to a view that a product continued to be safe for use by consumers, there could potentially be serious consequences for public health.

[...]

These civil penalties are also not aimed at the public at large, but rather are only relevant for specific groups, namely (in the case of new section 9H) sponsors of therapeutic goods that are entered on the Register and (in the case of the expanded section 31AAA of the Act) sponsors of registered or listed goods, applicants for registration or listing and persons in relation to whom therapeutic goods were registered or listed in the previous five years.

[...]

In addition, neither of the above measures carries any sanction of imprisonment for non-payment. Section 42YD of the Act makes it clear if the Federal Court orders a person to pay a civil penalty, the Commonwealth may enforce the order as if it were a judgment of the Court - i.e. as a debt owed to the Commonwealth.

With these issues in mind, these civil penalties would not seem likely to be 'criminal' for the purposes of human rights law.

As such, the question in relation to the application of particular protections, such as the presumption of innocence, would not appear to arise in these circumstances.

It is important to note the Act protects a person from being required to pay a civil penalty if they have already been convicted of an offence

relating to the same conduct, and prohibits criminal proceedings from being started if an order has been made against the person in civil penalty proceedings for the same conduct. Any civil penalty proceedings will be stayed if criminal proceedings relating to the same conduct are, or already have been, started.

The Act also makes it clear that any evidence given by a person in civil penalty proceedings (whether or not any order was made by the court in those proceedings) will not be admissible in criminal proceedings involving the same conduct.¹

Committee response

2.10 The committee thanks the Assistant Minister for Health for her response and has concluded its examination of this bill.

1 See Appendix 2, Letter from Senator the Hon Fiona Nash, Assistant Minister for Health, to Senator Dean Smith, 14 March 2014, pp 1-3.

Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013 [F2013L02122]

Portfolio: Prime Minister and Cabinet

Authorising legislation: Aboriginal Land Rights (Northern Territory) Act 1976

Last day to disallow: The instrument was disallowed in full on 20 March 2014

Purpose

2.11 The Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013 (the 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.

2.12 The explanatory statement accompanying the regulation clarifies that subsection 28A(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* 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.

Background

2.13 The committee reported on the regulation its *Second Report of the 44th Parliament*.

2.14 The committee deferred detailed consideration of this regulation while it considered its proposed 12 month review of the human rights compatibility of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.

2.15 The committee notes that this instrument was disallowed in full by the Senate on 20 March 2014.

Committee view on compatibility

Right to equality and non-discrimination

Special measures

2.16 The committee drew the Minister for Indigenous Affairs' attention to its comments in relation to 'special measures' in its *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation*.

2.17 The committee sought clarification from the Minister for Indigenous Affairs in relation to the categorisation of the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* and related regulations, including this regulation, as a special measure in light of the committee's comments in its *Eleventh Report of 2013*.

Minister's response

The Regulation and the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) do give effect to traditional Indigenous land rights.

While the scheme provides traditional land rights benefits to individuals and groups based on race, there are objective and reasonable justifications for this differential treatment.

In relation to the specific matters contained in the Regulation, differential treatment is justified because:

- 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;
- The Regulation will assist in enabling Northern Territory Aboriginal people to have more control over their traditional lands by allowing for the devolution of certain decision-making to them and their communities;
- The Regulation will promote effective self-determination and decision-making by relevant Aboriginal people over matters that materially affect them, such as land development, land use and leasing; and
- The Regulation necessarily involves differential treatment because the Land Rights Act is a scheme designed to give effect to traditional Indigenous land rights in the Northern Territory.¹

Committee response

2.18 The committee thanks the Minister for Indigenous Affairs for his response and has concluded its examination of this instrument.

1 See Appendix 2, Letter from Senator the Hon Nigel Scullion, Minister for Indigenous Affairs, to Senator Dean Smith, 17 March 2014, pp 1-2.

Marine Order 503 (Certificates of survey — national law) Amendment 2014 (No. 1) [F2014L00195]

Portfolio: Infrastructure and Regional Development

Authorising legislation: Marine Safety (Domestic Commercial Vessel) National Law Act 2012

Last day to disallow: 17 June 2014 (Senate)

Purpose

2.19 The Marine Order 503 (Certificates of survey — national law) Amendment 2014 (No. 1) makes minor amendments to the Marine Order 503 (Certificates of survey — national law) 2013 to replace references to the Uniform Shipping Laws Code with references to the National Standard for Commercial Vessels as they apply to an application for a certificate of survey for a new vessel.

Background

2.20 The committee reported on the instrument in its *Fifth Report of the 44th Parliament*.

2.21 The committee noted that the instrument does not raise human rights concerns in itself. However, the committee noted that the instrument is made under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, which is a national law scheme. The committee has previously set out its concerns regarding areas of activity regulated under national schemes of legislation resulting from intergovernmental agreements.¹

Committee view on compatibility

Consideration of human rights

National scheme legislation

2.22 The committee wrote to the Minister for Infrastructure and Regional Development to draw his attention to the previous government's undertaking that the First Parliamentary Counsel would consult with the states and territories on amending the Protocol on Drafting National Uniform to refer to the Commonwealth's requirements for assessing human rights compatibility; and requested an update on the progress of these matters.

1 See, Parliamentary Joint Committee on Human Rights, *Third Report of 2013*, 13 March 2013, pp 29-36; *Sixth Report of 2013*, 15 May 2013, pp 253-254; and *Tenth Report of 2013*, 26 June 2013, pp 125 and 173.

Minister's response

I note the Parliamentary Joint Committee on Human Rights' (the Committee) advice of the undertaking by the former Prime Minister, the Hon Julia Gillard, that the First Parliamentary Counsel would seek the views of the states and territories on amending the Protocol on Drafting National Uniform Legislation to refer to the Commonwealth's requirements for assessing human rights compatibility. I can inform the Committee that Mr Peter Quiggin PSM, First Parliamentary Counsel, has advised me that the matter is being considered by the Parliamentary Counsel's Committee and that it is on the agenda for the next meeting, which will be in July 2014.²

Committee response

2.23 The committee thanks the Minister for Infrastructure and Regional Development for his response and has concluded its examination of this instrument.

2.24 The committee intends to write to Mr Peter Quiggin PSM, First Parliamentary Counsel, to request an update on the matter following the Parliamentary Counsel's Committee meeting in July 2014.

2 See Appendix 2, Letter from the Hon Warren Truss MP, Minister for Infrastructure and Regional Development, to Senator Dean Smith, 4 April 2014.

MRCA Pharmaceutical Benefits Scheme (No. MRCC 44/2013) [F2013L02012]

Portfolio: Veterans' Affairs

Authorising legislation: Military Rehabilitation and Compensation Act 20014

Last day to disallow: 19 March 2014 (Senate)

Purpose

2.25 The MRCA Pharmaceutical Benefits Scheme (No. MRCC 44/2013) 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).

Background

2.26 The committee reported on the instrument in its *Second Report of the 44th Parliament*.

Committee view on compatibility

Right to health

Impact of changes to calculation of reimbursement on access to medicines

2.27 The committee sought clarification from the Minister for Veterans' Affairs in relation to the objective of the amendment to the pharmaceutical reimbursement measure and the impact the amendment will have on those affected.

Minister's response

The VPRS [Veterans' Pharmaceutical Reimbursement Scheme] reimbursement amount is calculated using an IT system known as the Pharmaceutical Allowance Calculator. The unintended advantage occurred in circumstances where the veteran or member received the pharmaceutical allowance via financial supplements that had not been included in the Pharmaceutical Allowance Calculator. This meant that the pharmaceutical allowance was not included in the calculation of their reimbursement, resulting in them receiving a reimbursement for some co-payments that had already been subsidised by the pharmaceutical allowance.

As the offsetting of co-payments against the pharmaceutical allowance is an integral part of the VPRS, the VPRS needed to be amended to stop these unintended payments. Without the amendments some people would continue to have all their co-payments off set against would not

have their pharmaceutical allowance recognised in their reimbursement calculation.

The amendments to the VPRS included the addition of the "missing" financial supplements into the Pharmaceutical Allowance Calculator. These supplements should have been identified in the Pharmaceutical Calculator when the Veterans' Pharmaceutical Reimbursement Scheme commenced. The amendments prevent the payment of double-compensation and thereby protect the public revenue.

Unfortunately, the example given in reference to "policy intention" for the pharmaceutical reimbursement as mentioned in the Consultation part of the Explanatory Statement for the instrument was incorrect. The reference to policy intention was made in relation to the provision relating to a service couple where both members of the couple were eligible for the pharmaceutical reimbursement. This was an error. The provision in question (paragraph 37(c)) is beneficial in nature. It has nothing to do with public-revenue protection. Please accept my apology on behalf of the Department of Veterans' Affairs for the confusion.

The example should have referred to the situation described above where additional sources of pharmaceutical allowance were not included in the Pharmaceutical Allowance Calculator - the policy intention being that the pharmaceutical reimbursement should always be a net amount i.e. co-payments less pharmaceutical allowance, so as to avoid double-compensation.¹

Committee response

2.28 The committee thanks the Minister for Veterans' Affairs for his response and has concluded its examination of this instrument.

1 See Appendix 2, Letter from Senator the Hon Michael Ronaldson, Minister for Veterans' Affairs, to Senator Dean Smith, 19 March 2013, p 2.

National Disability Insurance Scheme (Nominees) Rules 2013 [F2013L01062]

Portfolio: Social Services

Authorising legislation: National Disability Insurance Scheme Act 2013

Last day to disallow: 12 December 2013 (Senate)

Purpose

2.29 The *National Disability Insurance Scheme Act 2013* provides for the appointment of nominees to manage the affairs of persons with a disability who are participating in the scheme and provides for the further prescription of criteria to be applied or matters to be taken into account in the appointment of nominees in the NDIS rules

2.30 The National Disability Insurance Scheme (Nominees) Rules 2013 sets out the requirements relating to whether a nominee should be appointed, who should be appointed as nominees, the duties of nominees and the cancellation and suspension of nominees.

Background

2.31 The committee reported on the instrument in its *First and Third Reports of the 44th Parliament*.

Committee view on compatibility

Rights of persons with disabilities

Right to exercise legal capacity

2.32 The committee sought clarification from the Assistant Minister for Social Services as to:

- the legal status of the *Operational Guidelines* and the details of the power under which they have been made;
- whether the *Operational Guidelines* may be amended without parliamentary scrutiny; and
- whether any restrictions on rights carried out pursuant to the operational guidelines would be considered to be authorised by 'law'.

Assistant Minister's response

The operational guidelines are not legislative instruments; they are policy documents and, as such, have only the relevance and force in exercising discretion in decision-making as described by Brennan J in the

Administrative Appeals Tribunal in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409. In that case, his Honour clarified that a decision maker is free to exercise their power without adopting a policy as to the standards and values to which they will have regard in deciding particular cases. His Honour went on to say that, decision makers are equally free, in point of law, to adopt a policy in order to guide them in the exercise of the statutory discretion, provided the policy is consistent with the statute.

The operational guidelines are made pursuant to section 202(3) of the *National Disability Insurance Scheme Act 2013* (the Act). As was said in the above cited case, it is good practice to have guidelines that encourage consistency in decision-making even though operational guidelines are often published by government agencies without any specific legislative basis.

Restrictions on rights carried out pursuant to the operational guidelines are not considered to be authorised by 'law'. However, many operational guidelines reflect legal provisions in the Act and acts done pursuant to the guidelines would be authorised by the laws being described in the guidelines.

As they are not legislative instruments the operational guidelines may be amended without Parliamentary scrutiny. They are publicly available on the National Disability Insurance Agency website: www.ndis.gov.au/about-us-1. These operational guidelines have been updated since launch and will continue to be updated for full scheme in line with lessons learned from the experience in trial sites.¹

Committee response

2.33 The committee thanks the Assistant Minister for Social Services for his response and has concluded its examination of this instrument.

¹ See Appendix 2, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, 19 March 2013, Attachment p 1.

National Disability Insurance Scheme (Supports for Participants – Accounting for Compensation) Rules 2013 [F2013L01414]

Portfolio: Social Services

Authorising legislation: National Disability Insurance Scheme Act 2013

Last day to disallow: 4 March 2014 (Senate)

Purpose

2.34 The *National Disability Insurance Scheme Act 2013* provides that the NDIS rules may prescribe the criteria to be applied or the matters to be taken into account, when deciding whether to provide or fund specific supports for NDIS participants.

2.35 The National Disability Insurance Scheme (Supports for Participants – Accounting for Compensation) Rules 2013 sets out how compensation payments for personal injury suffered by an NDIS participant are to be taken into account in determining the reasonable and necessary support that will be funded or provided under the NDIS.

Background

2.36 The committee reported on the instrument in its *First and Third Reports of the 44th Parliament*.

Committee view on compatibility

Right to an adequate standard of living

Suspension of NDIS support

2.37 The committee sought clarification from the Assistant Minister for Social Services in relation to:

- why it is not appropriate to impose a duty on the CEO under rule 3.10 to take into account financial hardship to ensure that supports are not reduced or withdrawn if that may lead to a participant falling below the minimum level of enjoyment of the right to an adequate standard of living; and
- why it is necessary to suspend the provision of supports to a participant pending the resolution of a dispute over whether it is reasonable for the participant not to seek compensation under another law or scheme and how this is compatible with the obligation to ensure the right to an adequate standard of living.

Assistant Minister's response

Under Rule 3.10 the CEO is provided with the discretion to ignore the whole or part of a compensation reduction amount if it is appropriate in the special circumstances of the case. The committee is correct to point out that this does not impose a duty upon the CEO. A duty is imposed on the CEO under section 104(3) of the National Disability Insurance Scheme Act (the NDIS Act). Under this subsection the CEO must, when considering whether a person should be required to take action to obtain compensation under section 104, consider the impact (including any financial impact) on the participant or prospective participant and his or her family that would have occurred if the claim for compensation had been pursued or continued.

[...]

There was concern at the time of drafting the Bill that, without suspension provisions in relation to compensation, a participant with a good claim for compensation would be free to decide not to take action for compensation, instead relying on the NDIS for all of his or her supports. Given the importance of establishing a financially sustainable scheme, the drafters sought to introduce a sanction to ensure that people who could pursue compensation would pursue compensation.

The only sanctions available in such a case were seen to be suspension or cancellation of the participant's plan, or revocation of access to the scheme. Of these, suspension was regarded as the least punitive. Once a suspension ceases the participant is paid all NDIS amounts that were withheld during the suspension. Suspension applies only where the compensation scheme is an administrative scheme run by a Commonwealth, state or territory government. Applications to these schemes are purely administrative actions requiring the completion of forms and going through relevant medical examinations. It requires no personal expenditure and only a minor inconvenience on the part of the participant.¹

Committee response

2.38 The committee thanks the Assistant Minister for Social Services for his response and has concluded its examination of this instrument.

1 See Appendix 2, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, 19 March 2013, Attachment pp 2-3.

National Disability Insurance Scheme (Supports for Participants) Rules 2013 [F2013L01063]

Portfolio: Social Services

Authorising legislation: National Disability Insurance Scheme Act 2013

Last day to disallow: 12 December 2013 (Senate)

Purpose

2.39 The *National Disability Insurance Scheme Act 2013* (the Act) provides for the making of participant plans, including the supports to be provided and allows for the NDIS rules to prescribe additional matters or methods or criteria to be applied in relation to making decisions about supports.

2.40 The National Disability Insurance Scheme (Supports for Participants) Rules 2013 sets out the criteria and considerations the Chief Executive Officer of DisabilityCare Australia (the CEO) is to use, in addition to considerations set out in the Act, when assessing and determining reasonable and necessary supports that will be funded or provided under the NDIS.

Background

2.41 The committee reported on the instrument in its *First and Third Reports of the 44th Parliament*.

Committee view on compatibility

Rights of persons with disabilities

Access to legal services and to effective independent review of adverse decisions

2.42 The committee recommended that the Department of Social Services closely monitor the issues with a view to assessing whether the restrictive test for the provision of legal services is appropriate to ensure the exercise by persons with disability of their right to effective independent review of decisions that adversely affect them.

Assistant Minister's response

The Australian Government welcomes this recommendation and will monitor these issues with a view to assessing whether the provision of legal services is appropriate to ensure the exercise by persons with

disability of their right to effective independent review of decisions that adversely affect them.¹

Committee response

2.43 The committee thanks the Assistant Minister for Social Services for his response and has concluded its examination of this instrument.

1 See Appendix 2, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, 19 March 2013, Attachment p. 4.

Repatriation Pharmaceutical Benefits Scheme (No. R43/2013) [F2013L02009]

Portfolio: Veterans' Affairs

Authorising legislation: Veterans' Entitlements Act 1986

Last day to disallow: 19 March 2014 (Senate)

Purpose

2.44 The Repatriation Pharmaceutical Benefits Scheme (No. R43/2013) 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).

Background

2.45 The committee reported on the instrument in its *Second Report of the 44th Parliament*.

Committee view on compatibility

Right to health

Impact of recalculation of pharmaceutical benefit on access to medicines

2.46 The committee sought clarification from the Minister for Veterans' Affairs in relation to the objective of the changes to the method of calculating the pharmaceutical allowance and the impact the changes will have on those affected.

Minister's response

It is correct that the refinements to the Pharmaceutical Allowance Calculator could reduce the amount of reimbursement a relevant member received compared to the person's situation before the refinements. However, as explained above¹, this situation is not a case of reducing a payment as a cost-saving measure, rather the refinements were made to ensure a legislative scheme works properly as it is intended.

The refinements result in all members receiving the correct payment as intended when this measure was implemented. Indeed it would be inequitable if some members eligible for a pharmaceutical reimbursement

1 See the committee's comments on the MRCA Pharmaceutical Benefits Scheme (No. MRCC 44/2013) [F2013L02012] in this report and Appendix 2, Letter from Senator the Hon Michael Ronaldson, Minister for Veterans' Affairs, to Senator Dean Smith, 19 March 2013, pp 1-2.

had their pharmaceutical co-payments reduced by their pharmaceutical allowance(s) but others did not.²

Committee response

2.47 The committee thanks the Minister for Veterans' Affairs for his response and has concluded its examination of this instrument.

2 See Appendix 2, Letter from Senator the Hon Michael Ronaldson, Minister for Veterans' Affairs, to Senator Dean Smith, 19 March 2013, p. 3.

Treatment Principles (Australian Participants in British Nuclear Tests) 2006 [F2013L02031]

Portfolio: Veteran's Affairs

Authorising legislation: Australian Participants in British Nuclear Tests (Treatment) Act 2006

Last day to disallow: 19 March 2014 (Senate)

Purpose

2.48 The Treatment Principles (Australian Participants in British Nuclear Tests) 2006 modifies the Treatment Principles (No. R52/2013) made under the *Veterans' Entitlements Act 1986* (VEA) in the application of the principles to persons eligible for treatment under the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*.

Background

2.49 The committee reported on the instrument in its *Second Report of the 44th Parliament*.

Committee view on compatibility

Right to health

'Double-dipping' provision

2.50 The committee sought further information from the Minister for Veterans' Affairs on the measure addressing 'double-dipping' and how it is compatible with the right to health.

Minister's response

In 2013, several new provisions were inserted into the Treatment Principles. One of these measures required the Repatriation Commission to refuse an application for a rehabilitation appliance if the appliance could be provided under another piece of DVA [Department of Veterans' Affairs] administered legislation. It is not unusual for some clients to have dual eligibility under different pieces of legislation and there is considerable potential for overlap. The purpose of the measure was to preclude the possibility of clients with dual eligibility obtaining additional, unnecessary rehabilitation appliances for the same condition ("double-dipping").

[...]

The Statement of Compatibility with Human Rights for the instrument under discussion states that there was only one change to "existing

arrangements" (community nursing measure) but then refers to the "double dipping measure" and is confusing in this regard.

Under the existing VEA Treatment Principles, the Repatriation Commission has a discretion to approve a rehabilitation appliance for a DVA client. It would be a relevant for the exercise of that discretion to consider whether the client had already obtained a rehabilitation appliance under other DVA administered legislation, or if it was more appropriate for the client to obtain the rehabilitation appliance under that other DVA legislation.

All that has occurred is that the Repatriation Commission's implied power to refuse to approve a rehabilitation appliance in double-dipping circumstances has been made express. Clearly stating the Commission's power in this situation benefits administrators and beneficiaries alike.¹

Committee response

2.51 The committee thanks the Minister for Veterans' Affairs for his response and has concluded its examination of this instrument.

1 See Appendix 2, Letter from Senator the Hon Michael Ronaldson, Minister for Veterans' Affairs, to Senator Dean Smith, 19 March 2013, pp 3-4.

Appendix 1

**Index of instruments considered and
received by the committee between
8 March and 25 April 2014**

Appendix 1 – Index of instruments considered and received by the committee between 8 March and 25 April 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 8 March and 25 April 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 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'.

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 an unmarked square.

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 number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

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.

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 14 March 2014

<i>Agricultural and Veterinary Chemicals Code Act 1994</i>	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 3) [F2014L00236]	E
<i>Australian Film, Television and Radio School Act 1973</i>	
Determination of Degrees, Diplomas and Certificates No. 2014/1 [F2014L00228]	
<i>Civil Aviation Regulations 1988</i>	
CASA 47/14 - Permission - flying over a public gathering at the 2014 Tyabb Air Show, Tyabb, Victoria - Permission - flying below minimum height at the 2014 Tyabb Air Show, Tyabb, Victoria [F2014L00235]	
<i>Corporations Act 2001</i>	
ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2014 (No. 1) [F2014L00233]	
<i>Fisheries Management Act 1991 and Southern and Eastern Scalefish and Shark Fishery Management Plan 2003</i>	
Southern and Eastern Scalefish and Shark Fishery Total Allowable Catch (Non-Quota Species) Determination 2014 [F2014L00232]	
Southern and Eastern Scalefish and Shark Fishery Overcatch and Undercatch Determination 2014 [F2014L00234]	
Southern and Eastern Scalefish and Shark Fishery Total Allowable Catch (Quota Species) Determination 2014 [F2014L00230]	
<i>Fisheries Management Act 1991 and Western Tuna and Billfish Fishery Management Plan 2005</i>	
Western Tuna and Billfish Fishery Overcatch and Undercatch Determination 2014 [F2014L00231]	
<i>Motor Vehicle Standards Act 1989</i>	
Vehicle Standard (Australian Design Rule 4/05 – Seatbelts) 2012 Amendment 1 [F2014L00227]	
<i>Taxation Administration Act 1953</i>	
Taxation Administration Act 1953 – Provision of further time for lodgment of the 2014 Minerals Resource Rent Tax (MRRT) Return – Low volume non-payers' Instrument (No. 1) 2014 [F2014L00237]	

Instruments received week ending 21 March 2014

<i>Aged Care Act 1997</i>	
Aged Care (Residential Care Subsidy — Amount of Respite Supplement) Determination 2014 (No. 1) [F2014L00288]	
Aged Care (Residential Care Subsidy — Amount of Transitional Supplement) Determination 2014 (No. 1) [F2014L00289]	

Aged Care (Residential Care Subsidy — Amount of Transitional Accommodation Supplement) Determination 2014 (No. 1) [F2014L00290]	
Aged Care (Residential Care Subsidy — Amount of Pensioner Supplement) Determination 2014 (No. 1) [F2014L00291]	
Aged Care (Residential Care Subsidy — Amount of Concessional Resident Supplement) Determination 2014 (No. 1) [F2014L00292]	
Aged Care (Residential Care Subsidy — Amount of Accommodation Supplement) Determination 2014 (No. 1) [F2014L00293]	
ASIC Market Integrity Rules (Competition in Exchange Markets) 2011	
ASIC Class Rule Waiver [CW 14/6] [F2014L00239]	
Australian Education Act 2013	
Australian Education (SES Scores) Amendment Determination 2014 (No. 1) [F2014L00252]	
Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 2 of 2014 [F2014L00258]	
Broadcasting Services Act 1992	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 2 of 2014) [F2014L00262]	
Civil Aviation Safety Regulations 1998	
CASA EX10/14 - Exemption - Requirement for conversion training to be in a Qualified Synthetic Training Device (QSTD) [F2014L00246]	
CASA EX13/14 - Exemption — take-off with traces of frost [F2014L00247]	
Competition and Consumer Act 2010, Corporations Act 2001, Payment Systems and Netting Act 1998, and Australian Securities and Investments Commission Act 2001	
Corporations Laws Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 33] [F2014L00261]	
Corporations Act 2001	
AASB 1048 - Interpretation of Standards - December 2013 [F2014L00238]	
Currency Act 1965	
Currency (Perth Mint) Determination 2014 (No. 1) [F2014L00263]	
Currency (Perth Mint) Determination 2014 (No. 2) [F2014L00265]	
Customs Act 1901	
Customs Amendment (Maritime Powers Consequential Amendments) Regulation 2014 [SLI 2014 No. 29] [F2014L00285]	
Customs Amendment (Anti-Dumping Commission Transfer) Act 2013	
Customs Amendment (Anti-Dumping Commission Transfer) Commencement Proclamation 2014 [F2014L00281]	E
Defence Act 1903	
Defence Determination 2014/13, Post indexes – amendment	
Financial Management and Accountability Act 1997	
Financial Management and Accountability Amendment (2014 Measures No. 3) Regulation	

2014 [SLI 2014 No. 34] [F2014L00284]	
Fisheries Management Act 1991	
Northern Prawn Fishery (Closures) Direction No. 166 [F2014L00253]	
Northern Prawn Fishery (Closures) Direction No. 167 [F2014L00254]	
Northern Prawn Fishery (Closures) Direction No. 168 [F2014L00255]	
Health Insurance Act 1973	
Health Insurance Amendment (Specialist Trainee Program) Regulation 2014 [SLI 2014 No. 28] [F2014L00280]	
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 12 of 2014) [F2014L00248]	
Higher Education Support Act 2003 - VET Provider Approval (No. 14 of 2014) [F2014L00249]	
Higher Education Support Act 2003 - VET Provider Approval (No. 15 of 2014) [F2014L00250]	
Higher Education Support Act 2003 - VET Provider Approval (No. 16 of 2014) [F2014L00251]	
Maritime Powers Act 2013	
Maritime Powers Regulation 2014 [SLI 2014 No. 31] [F2014L00283]	
Migration Act 1958	
Migration Amendment (Redundant and Other Provisions) Regulation 2014 [SLI 2014 No. 30] [F2014L00272]	
Renewable Energy (Electricity) Act 2000	
Renewable Energy (Electricity) Amendment (Percentages) Regulation 2014 [SLI 2014 No. 27] [F2014L00259]	
Telecommunications (Carrier Licence Charges) Act 1997	
Telecommunications (Carrier Licence Charges) Act 1997 - Determination Under Paragraph 15(1)(d) No. 1 of 2014 [F2014L00260]	

Instruments received week ending 28 March 2014

Administration Ordinance 1990 (Jervis Bay Territory)	
Water and Wastewater Services Fees Determination 2014 (Jervis Bay Territory) [F2014L00328]	A
Administration Ordinance 1990 (Jervis Bay Territory)	
Electricity Supply Fees Determination 2014 (Jervis Bay Territory) [F2014L00329]	A
Australian Meat and Live-stock Industry Act 1997	
Australian Meat and Live-stock Industry (Export of Live-stock to Egypt) Repeal Order 2014 [F2014L00312]	
Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 4 of 2014 [F2014L00346]	
Australian Research Council Act 2001	
Australian Research Council Funding Rules for schemes under the Linkage Program 2015 - Linkage Infrastructure, Equipment and Facilities [F2014L00324]	E

Bankruptcy Act 1966	
Bankruptcy Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 36] [F2014L00350]	
Broadcasting Services Act 1992	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 3 of 2014) [F2014L00295]	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 4 of 2014) [F2014L00325]	
Civil Aviation Safety Regulations 1998	
CASA ADCX 005/14 - Repeal of Airworthiness Directives [F2014L00319]	
CASA EX20/14 - Exemption — single-pilot operations in Cessna 500 series aeroplanes [F2014L00338]	
Competition and Consumer Act 2010	
Australian Competition and Consumer Commission (Accounting Separation—Telstra Corporation Limited) Direction (No. 1) 2003 Instrument of Revocation 2014 [F2014L00333]	
Defence Act 1903	
Defence Determination 2014/15, International campaign allowance - amendment	
Defence Force (Superannuation) (Productivity Benenfit) Amendment (Interest Factor) Determination 2014 [F2014L00310]	E
Environment Protection and Biodiversity Conservation Act 1999	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Trawl Fishery (25/03/2014) [F2014L00347]	
Federal Financial Relations Act 2009	
Federal Financial Relations (National Specific Purpose Payments) Determination 2012-13 [F2014L00323]	
Federal Financial Relations (National Health Reform Payments) Determination 2012-13 [F2014L00317]	E
Financial Sector (Collection of Data) Act 2001	
Financial Sector (Collection of Data) (reporting standard) determination No. 7 of 2014 - SRS 520.0 - Responsible Persons Information [F2014L00343]	
Financial Sector (Collection of Data) (reporting standard) determination No. 8 of 2014 - SRS 530.1 - Investments and Investment Flows [F2014L00345]	
Financial Sector (Collection of Data) (reporting standard) determination No. 9 of 2014 - SRS 533.0 - Asset Allocation [F2014L00348]	
Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2014 - SRS 320.0 - Statement of Financial Position [F2014L00351]	
Financial Sector (Collection of Data) (reporting standard) determination No. 10 of 2014 - SRS 702.0 - Investment Performance [F2014L00353]	
Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2014 - SRS 330.0 - Statement of Financial Performance [F2014L00354]	
Migration Act 1958	
Migration Act 1958 - Instrument of Revocation - IMMI 13/160 [F2014L00326]	E

Migration Regulations 1994	
Migration Regulations 1994 - Specification of Evidence of Further Funds and Living Costs - IMMI 14/004 [F2014L00316]	
Migration Regulations 1994 - Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas - IMMI 14/009 [F2014L00327]	
Migration Regulations 1994 - Specification of Student Visa Assessment Levels - IMMI 14/003 [F2014L00315]	E
Migration Regulations 1994 - Specification of Alternative English Language Proficiency Tests to the International English Language Testing System for Student Visa Purposes - IMMI 14/002 [F2014L00318]	E
Migration Regulations 1994 - Specification of Types of Courses for Student Visas - IMMI 14/015 [F2014L00320]	E
Migration Regulations 1994 - Specification of Classes of Persons - IMMI 14/017 [F2014L00321]	E
Migration Regulations 1994 - Specification of Countries - IMMI 13/161 [F2014L00322]	E
Migration Regulations 1994 - Specification of Class of Persons - IMMI 14/032 [F2014L00344]	E
National Health Act 1953	
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2014 (No. 3) - PB 17 of 2014 [F2014L00342]	
National Health (Pharmaceutical Benefits - Early Supply) Amendment Instrument 2014 (No. 1) - specification under subsection 84AAA(2) (No. PB 25 of 2014) [F2014L00355]	
National Health (Price and Special Patient Contribution) Amendment Determination 2014 (No. 2) (No. PB 18 of 2014) [F2014L00356]	
Private Health Insurance Act 2007	
Private Health Insurance (Benefit Requirements) Amendment Rules 2014 (No. 1) [F2014L00309]	
Private Health Insurance (Complying Product) Amendment Rules 2014 (No. 2) [F2014L00311]	
Quarantine Act 1908	
Quarantine Legislation Amendment (2014 Measures No. 1) Proclamation 2014 [F2014L00352]	E
Safety, Rehabilitation and Compensation Act 1988	
Safety, Rehabilitation and Compensation (Licence Eligibility - BWA Group Services Pty Ltd) Declaration 2014 (No. 1) [F2014L00341]	
Social Security Act 1991	
Social Security (Exempt Lump Sum) (HILDA Survey Lump Sum Participant Payment) Determination 2014 [F2014L00298]	
Social Security Foreign Currency Exchange Rate Determination 2014 (No. 1) [F2014L00339]	
Telecommunications (Carrier Licence Charges) Act 1997	
Telecommunications (Carrier Licence Charges) Revocation Determination 2014 [F2014L00301]	
Telecommunications (Numbering Charges) Act 1997, Telecommunications (Consumer	

<i>Protection and Service Standards) Act 1999, Telecommunications Act 1997, Radiocommunications Act 1992</i>	
Australian Communications and Media Authority Omnibus Revocation Instrument 2014 [F2014L00297]	
<i>Telecommunications Act 1997</i>	
Carrier Licence Conditions (Optus Mobile Pty Ltd) Declaration 1997 Instrument of Revocation 2014 [F2014L00330]	
Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997 (Amendment No. 1 of 2014) [F2014L00331]	
Carrier Licence Conditions (Vodafone Pty Limited) Declaration 1997 Instrument of Revocation 2014 [F2014L00332]	
Carrier Licence Conditions (Optus Networks Pty Ltd) Instrument of Revocation 2014 [F2014L00340]	
<i>Therapeutic Goods Act 1989</i>	
Therapeutic Goods (Medical Devices) Amendment (Auditing Applications) Regulation 2014 [SLI 2014 No. 38] [F2014L00349]	
<i>Veterans' Entitlements Act 1986</i>	
Veterans' Entitlements Income (Exempt Lump Sum – Thalidomide Class Action Payment) Determination No. R19 of 2014 [F2014L00296]	
Statement of Principles concerning somatic symptom disorder No. 25 of 2014 [F2014L00299]	
Statement of Principles concerning allergic rhinitis No. 23 of 2014 [F2014L00300]	
Amendment Statement of Principles concerning ischaemic heart disease No. 33 of 2014 [F2014L00302]	
Amendment Statement of Principles concerning chronic lymphoid leukaemia No. 28 of 2014 [F2014L00303]	
Statement of Principles concerning somatic symptom disorder No. 24 of 2014 [F2014L00304]	
Amendment Statement of Principles concerning ischaemic heart disease No. 34 of 2014 [F2014L00305]	
Statement of Principles concerning allergic rhinitis No. 22 of 2014 [F2014L00306]	
Statement of Principles concerning restless legs syndrome No. 20 of 2014 [F2014L00307]	
Statement of Principles concerning restless legs syndrome No. 21 of 2014 [F2014L00308]	
Statement of Principles concerning periodic limb movement disorder No. 26 of 2014 [F2014L00313]	
Statement of Principles concerning periodic limb movement disorder No. 27 of 2014 [F2014L00314]	
Amendment Statement of Principles concerning substance use disorder No. 31 of 2014 [F2014L00334]	
Amendment Statement of Principles concerning alcohol use disorder No. 29 of 2014 [F2014L00335]	
Amendment Statement of Principles concerning alcohol use disorder No. 30 of 2014 [F2014L00336]	

Amendment Statement of Principles concerning substance use disorder No. 32 of 2014 [F2014L00337]	
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Instruments received week ending 4 April 2014

<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>	
Anti-Money Laundering and Counter-Terrorism Financing (Iran Countermeasures) Regulation 2014 [SLI 2014 No. 35] [F2014L00371]	
<i>Bankruptcy Act 1966</i>	
Bankruptcy (Fees and Remuneration) Determination 2014 [F2014L00367]	
<i>Civil Aviation Safety Regulations 1998</i>	
CASA ADCX 006/14 - Repeal of Airworthiness Directives [F2014L00362]	
<i>Competition and Consumer Act 2010</i>	
Competition and Consumer (Corded Internal Window Coverings) Safety Standard 2014 [F2014L00363]	
<i>Corporations Act 2001</i> AASB 2013-9 - Amendments to Australian Accounting Standards – Conceptual Framework, Materiality and Financial Instruments - December 2013 [F2014L00370]	
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	
Environment Protection and Biodiversity Conservation Amendment (Heard Island and McDonald Islands) Proclamation 2014 [F2014L00361]	E
<i>Health Insurance Act 1973</i>	
Health Insurance (Pharmacogenetic Testing Kirsten ras (KRAS)) Determination 2014 [F2014L00369]	
<i>Higher Education Support Act 2003</i>	
Higher Education Provider Approval No. 2 of 2014 [F2014L00373]	
<i>Migration Regulations 1994</i>	
Migration Regulations 1994 - Specification of Specified Place - IMMI 14/030 [F2014L00364]	E
<i>National Health Act 1953</i>	
National Health (Listed drugs on F1 or F2) Amendment Determination 2014 (No. 2) (No. PB 22 of 2014) [F2014L00358]	
National Health (Pharmaceutical Benefits - Therapeutic Groups) Amendment Determination 2014 (No. 1) (No. PB 23 of 2014) [F2014L00359]	
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2014 (No. 3) (No. PB 21 of 2014) [F2014L00360]	
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 3) (No. PB 20 of 2014) [F2014L00372]	
<i>Parliamentary Service Act 1999</i> Parliamentary Service Amendment (Public Interest Disclosure and Other Matters) Determination 2014 [F2014L00368]	
<i>Workplace Gender Equality Act 2012</i>	
Workplace Gender Equality (Minimum Standards) Instrument 2014 [F2014L00365]	

Instruments received week ending 11 April 2014

<i>Agricultural and Veterinary Chemicals Code Act 1994</i>	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 4) [F2014L00386]	E
<i>Australian Prudential Regulation Authority Act 1998</i>	
Australian Prudential Regulation Authority instrument fixing charges No. 1 of 2014 [F2014L00383]	
<i>Bankruptcy (Estate Charges) Act 1997</i>	
Bankruptcy (Estate Charges) (Amount of Charge Payable) Determination 2014 [F2014L00377]	
<i>Charter of the United Nations Act 1945</i>	
Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2014 (No. 1) [F2014L00378]	
<i>Civil Aviation Regulations 1988</i>	
CASA 66/14 - Authorisation and permission — helicopter winching operations [F2014L00387]	
CASA EX26/14 - Exemptions — compliance with SIDs in the maintenance of Cessna aircraft [F2014L00388]	
<i>Corporations Act 2001</i>	
ASIC Instrument [14/0234] [F2014L00374]	
<i>Currency Act 1965</i> Currency (Royal Australian Mint) Determination 2014 (No. 2) [F2014L00384]	
<i>Financial Management and Accountability Act 1997</i>	
FMA Act Determination 2014/05 — Section 32 (Transfer of Functions from DEEWR to Social Services) [F2014L00376]	E
FMA Act Determination 2014/06 — Section 32 (Transfer of Functions from Health to Social Services) [F2014L00390]	E
<i>Higher Education Support Act 2003</i>	
Higher Education Support Act 2003 - VET Provider Approval (No. 17 of 2014) [F2014L00380]	
Higher Education Support Act 2003 - VET Provider Approval (No. 18 of 2014) [F2014L00381]	
Higher Education Support Act 2003 - VET Provider Approval (No. 19 of 2014) [F2014L00382]	
Higher Education Support Act 2003 - VET Provider Approval (No. 20 of 2014) [F2014L00385]	
<i>Motor Vehicle Standards Act 1989</i>	
Vehicle Standard (Australian Design Rule 58/00 – Requirements for Omnibuses Designed for Hire and Reward) 2006 Amendment 2 [F2014L00391]	
<i>National Health Act 1953</i>	
National Health Determination under paragraph 98C(1)(b) Amendment 2014 (No. 3) (No. PB 19 of 2014) [F2014L00357]	
<i>Personal Property Securities Act 2009</i>	
Personal Property Securities Amendment (Motor Vehicles) Regulation 2014 [SLI 2014 No. 37] [F2014L00375]	

Taxation Administration Act 1953	
Taxation Administration Act 1953 - Pay as you go withholding - Variation to remove the requirement to withhold from payments for certain US resident entertainers and sport persons [F2014L00379]	
Veterans' Entitlements Act 1986	
Veterans' Entitlements Income (Exempt Lump Sum – HILDA Survey Lump Sum Participant Payment) Determination No. R21 of 2014 [F2014L00389]	

Instruments received week ending 18 April 2014

A New Tax System (Australian Business Number) Act 1999	
A New Tax System (Australian Business Number) Amendment (Display of Trading Names) Regulation 2014 [SLI 2014 No. 41] [F2014L00419]	
Anti-Money Laundering and Counter-Terrorism Financing Act 2006	
Anti-Money Laundering and Counter-Terrorism Financing (Iran Countermeasures) Amendment (Transitional) Regulation 2014 [SLI 2014 No. 42] [F2014L00409]	
Australian Research Council Act 2001	
Australian Research Council Funding Rules for schemes under the Linkage Program for 2014 – Special Research Initiatives and Learned Academies Special Projects [F2014L00403]	E
Autonomous Sanctions Regulations 2011	
Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) Amendment List 2014 [F2014L00411]	
Banking Act 1959	
Banking (prudential standard) determination No. 1 of 2014 - Prudential Standard APS 111 - Capital Adequacy: Measurement of Capital [F2014L00416]	
Broadcasting Services Act 1992	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 5 of 2014) [F2014L00395]	
Civil Aviation Act 1988	
Civil Aviation Legislation Amendment (Part 21) Regulation 2014 [SLI 2014 No. 40] [F2014L00414]	
Civil Aviation Safety Regulations 1998	
CASA ADCX 007/14 - Repeal of Airworthiness Directives [F2014L00405]	
Civil Aviation Safety Regulations 1998, Civil Aviation Regulations 1988	
CASA 26/14 - Repeal — Directions, Exemptions and Civil Aviation Orders [F2014L00406]	
Currency Act 1965	
Currency (Royal Australian Mint) Determination 2014 (No. 3) [F2014L00394]	
Defence Act 1903	
Defence Determination 2014/14, Reserve employer support payments - amendments	
Defence Determination 2014/16, Post indexes - amendment	
Defence Determination 2014/17, Living-in accommodation - amendment	
Defence Determination 2014/18, Dependents, overseas travel costs and post indexes -	

amendment	
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	
Amendment to the list of threatened species under section 178 of the Environment Protection and Biodiversity Conservation Act 1999 (159) (02/04/2014) [F2014L00418]	
Amendment - List of Specimens Taken to be suitable for Live Import (25/03/2014) [F2014L00420]	E
<i>Federal Financial Relations Act 2009</i>	
Federal Financial Relations Act 2009 - Determination of the GST Revenue Sharing Relativity for 2014-15 [F2014L00407]	E
<i>Financial Sector (Collection of Data) Act 2001</i>	
Financial Sector (Collection of Data) (reporting standard) determination No. 2 of 2014 - ARS 210.0 - Liquidity [F2014L00404]	
<i>Food Standards Australia New Zealand Act 1991</i>	
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 3, 2014 [F2014L00417]	E
<i>Greenhouse and Energy Minimum Standards Act 2012</i>	
Instrument under Section 37 of the Greenhouse and Energy Minimum Standards Act 2012 - Stolway Pty Ltd [F2014L00415]	
<i>Higher Education Support Act 2003</i>	
Higher Education Support Act 2003 - Revocation of approval as a VET Provider (Navitas Professional Training Pty Ltd) [F2014L00410]	
<i>National Health Act 1953</i>	
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2014 (No. 4) (No. PB 27 of 2014) [F2014L00399]	
National Health (Price and Special Patient Contribution) Amendment Determination 2014 (No. 3)(No. PB 28 of 2014) [F2014L00400]	
National Health Determination under paragraph 98C(1)(b) Amendment 2014 (No. 4) (No. PB 29 of 2014) [F2014L00401]	
National Health (Pharmaceutical Benefits - Early Supply) Amendment Instrument 2014 (No. 2) - specification under subsection 84AAA(2) (No. PB 34 of 2014) [F2014L00402]	
Amendment Determination under section 84AH of the National Health Act 1953 (2014) (No. 2) (No. PB 33 of 2014) [F2014L00412]	
National Health (Listed drugs on F1 or F2) Amendment Determination 2014 (No. 3) (No. PB 32 of 2014) [F2014L00413]	
<i>Private Health Insurance Act 2007</i>	
Private Health Insurance (Complying Product) Amendment Rules 2014 (No. 3) [F2014L00392]	
Private Health Insurance (Incentives) Amendment Rules 2014 (No. 1) [F2014L00397]	
Private Health Insurance (Complying Product) Amendment Rules 2014 (No. 4) [F2014L00398]	
<i>Superannuation Industry (Supervision) Act 1993</i>	
Superannuation Industry (Supervision) modification declaration No. 1 of 2014 [F2014L00393]	

Self Managed Superannuation Funds (Limited Recourse Borrowing Arrangements – In-House Asset Exclusion) Determination 2014 [F2014L00396]	E
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Instruments received week ending 25 April 2014

<i>Migration Act 1958</i>	
Migration Amendment (Credit Card Surcharge) Regulation 2014 [SLI 2014 No. 39] [F2014L00421]	
<i>Migration Regulations 1994</i>	
Migration Regulations 1994 - Specification of Circumstances in which a Credit Card Surcharge is Waived or Refunded - IMMI 14/033 [F2014L00425]	E
<i>National Health Act 1953</i>	
National Health (Weighted average disclosed price - supplementary disclosure cycle A) Determination 2014 (No. PB 26 of 2014) [F2014L00424]	
National Health (Paraplegic and Quadriplegic Program) Special Arrangement Amendment Instrument 2014 (No. 5) (No. PB 35 of 2014) [F2014L00427]	
<i>Radiocommunications Act 1992</i>	
Radiocommunications (Allocation of Transmitter Licences – High Powered Open Narrowcasting Licences) Determination 2014 [F2014L00426]	E
<i>Remuneration Tribunal Act 1973</i>	
Remuneration Tribunal Determination 2014/04 - Remuneration and Allowances for Holders of Public Office including Judicial and Related Offices [F2014L00423]	
Remuneration Tribunal Determination 2014/05 - Members of Parliament - Additional Salary for Parliamentary Office Holders [F2014L00422]	E

The committee considered 175 legislative instruments

Appendix 2

Correspondence



The Hon Warren Truss MP

Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

26 MAR 2014

Reference: 02605-2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Smith

Thank you for your letter dated 18 March 2014 on behalf of the Parliamentary Joint Committee on Human Rights (Committee) and its request for clarification on a number of matters in relation to the Qantas Sale Amendment Bill 2014 (the Bill).

Whether the bill is likely to limit the right to work

The Bill is unlikely to limit the right to work under Articles 6, 7, and 8 of the International Covenant on Economic, Social and Cultural Rights, and will not impact Australia's obligation to fulfil the enjoyment of the right to work by promoting conditions in which people can find work in Australia.

The Government notes Qantas is taking a range of measures to reduce costs following the announcement of a \$252 million loss for the first half of 2013-14. Part 3 of the *Qantas Sale Act 1992* (the 'QSA') places restrictions on Qantas that do not apply to its competitors. The Government considers that removing these conditions will enhance Qantas' ability to compete and is the best way to ensure Qantas can secure Australian jobs now and into the future.

The Bill will remove subsection 7(1)(h) 3 of the QSA which relates to the location of facilities used for Qantas' international services. Qantas will continue to be subject to designation criteria that are intended to ensure our airlines are compliant with the bilateral agreements that grant traffic rights to Australian international airlines. These criteria include a requirement for the head office and the airline's operational base to be in Australia. It is in Qantas' commercial interest to ensure that they can be designated as an Australian international airline and that they do not have their designation challenged in accordance with the provisions of the bilateral agreements.

The QSA contains no provisions regarding conditions of employment and the Bill does not change this. The Bill also makes no changes to employment laws or migration laws.

Whether the government undertook any analysis of the likely impact on the right to work of the repeal of Part 3 of the Qantas Sale Act 1992 and, if so, what the results of that analysis were.

The Government carefully considered a range of options to assist Qantas to return its operations to a sustainable footing, and determined that the best response is to repeal Part 3 of the QSA.

This approach will put Qantas on an equal footing with its competitors and is the best way to protect Australian jobs at Qantas.

In the longer term, Qantas will have more flexibility to structure its operations in a more sustainable way. However, operational necessity would dictate jobs (including crewing, catering, baggage handling and other servicing) will continue to be undertaken by workers in Australia. The *Fair Work Act 2009*, migration and other laws would continue to apply to these workers.

If the bill is likely to limit the right to work, whether that limitation is compatible with Australia's obligations under the ICESCR

As noted above, the Bill is unlikely to limit the right to work.

I trust this information is of assistance to the Committee.

Yours sincerely



WARREN TRUSS



Senator the Hon Fiona Nash
Assistant Minister for Health
Senator for New South Wales
Deputy Leader of the Nationals in the Senate

Ref No: MC14-000921

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600


Dear Chair

Thank you for your correspondence of 11 February 2014 to the Minister for Health and Minister for Sport, the Hon Peter Dutton MP, regarding the Therapeutic Goods Amendment (2013 Measures No.1) Bill 2013 (the Bill). Your letter has been referred to me as Assistant Minister for Health with portfolio responsibility for this matter. I apologise for not meeting your request response date of 21 February 2014.

In its Second Report of the current Parliament tabled on 11 February 2014, the Committee indicated it would seek clarification about the following measures in the Bill:

- the introduction of a civil penalty for providing false or misleading information in a request to vary an entry in the Australian Register of Therapeutic Goods (the Register) (new section 9H); and,
- the extension of the current civil penalty in the *Therapeutic Goods Act 1989* (the Act) for providing false or misleading information in response to a request by the Secretary for information or documents about listed medicines (section 31AAA of the Act).

The Committee has requested an assessment of both measures against the criteria in its Interim Practice Note 2 relating to when civil penalties may amount to 'criminal offences' under human rights law and, where they do, whether certain protections, such as the presumption of innocence, would apply to proceedings involving these measures.

These measures are clearly described in the Bill as being civil penalties and are plainly distinguishable from the corresponding criminal offences in the Bill or the Act relating to the same conduct.

The penalties are consistent with the regime throughout the Act of having civil penalties as an alternative to criminal offences for a range of behaviour that breaches important regulatory requirements.

Although the maximum levels of these penalties may appear high, this reflects the relative size and nature of the therapeutic goods industry, in particular the presence of large multi-national companies.

It is important the Act contain a strong deterrent against providing false or misleading information to the TGA in relation to the carrying out of its functions. If the TGA were to rely upon information that is false or misleading to approve a request to vary an entry in the Register for a therapeutic good, or to come to a view that a product continued to be safe for use by consumers, there could potentially be serious consequences for public health.

New section 9H, and the expanded section 31AAA, are designed to reflect these concerns, and the seriousness of such conduct.

These civil penalties are also not aimed at the public at large, but rather are only relevant for specific groups, namely (in the case of new section 9H) sponsors of therapeutic goods that are entered on the Register and (in the case of the expanded section 31AAA of the Act) sponsors of registered or listed goods, applicants for registration or listing and persons in relation to whom therapeutic goods were registered or listed in the previous five years.

New section 9H reflects existing civil penalty provisions for providing false or misleading information in relation to applications for the registration of goods in the Register (section 22B of the Act), the certification of a matter about a listed medicine (section 21B of the Act), or in applications for the inclusion of biologicals or medical devices in the Register (sections 32DP and 41FEA of the Act refer).

The amendments to section 31AAA will bring the rules for registered and listed medicines into line with existing civil penalty provisions in the Act in relation to the giving of false or misleading information in response to a request for information or documents by the TGA about biologicals (under section 32JA of the Act) and medical devices (under section 41JA of the Act).

In addition, neither of the above measures carries any sanction of imprisonment for non-payment. Section 42YD of the Act makes it clear if the Federal Court orders a person to pay a civil penalty, the Commonwealth may enforce the order as if it were a judgment of the Court – i.e. as a debt owed to the Commonwealth.

With these issues in mind, these civil penalties would not seem likely to be 'criminal' for the purposes of human rights law.

As such, the question in relation to the application of particular protections, such as the presumption of innocence, would not appear to arise in these circumstances.

It is important to note the Act protects a person from being required to pay a civil penalty if they have already been convicted of an offence relating to the same conduct, and prohibits criminal proceedings from being started if an order has been made against the person in civil penalty proceedings for the same conduct. Any civil penalty proceedings will be stayed if criminal proceedings relating to the same conduct are, or already have been, started.


The Act also makes it clear that any evidence given by a person in civil penalty proceedings (whether or not any order was made by the court in those proceedings) will not be admissible in criminal proceedings involving the same conduct.

I note when an earlier version of this Bill, containing the same measures as above, was considered by the Committee in 2013, the Committee stated its Sixth Report of 2013 in relation to the civil penalty provisions in the Bill:

The committee has previously noted even where a penalty is described as 'civil' under national or domestic law it may nonetheless be classified as 'criminal' for the purposes of human rights law. Given that these civil penalty provisions appear in a regulatory and protective context, it is arguable that the penalties are not 'criminal' in nature. Although the penalties are large, it may be argued that they are not excessive in terms of a business and in view of the health interests of the public that are being protected. The committee considers that the civil penalty provisions in this bill do not give rise to issues of incompatibility with human rights.

I hope the above information adequately addresses the issues raised by your Committee. The contact officer within the Therapeutic Goods Administration is Ms Terry Lee, and she can be contacted by telephone on (02) 6232 8230, or via email to terry.lee@tga.gov.au.

Yours sincerely



14 MAR 2014

FIONA NASH

cc: human.rights@aph.gov.au



MINISTER FOR INDIGENOUS AFFAIRS

Reference: C14/16598

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Smith

Thank you for your letter of 11 February 2014 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) regarding the *Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013* (the Regulation).

I note that the Statement of Compatibility accompanying the Regulation concluded that the Regulation is compatible with human rights on the basis that it constitutes a 'special measure' within the meaning of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The Committee's view is that, 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, rather than 'special measures'. The Committee has asked that this be given further consideration.

The Regulation and the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) do give effect to traditional Indigenous land rights.

While the scheme provides traditional land rights benefits to individuals and groups based on race, there are objective and reasonable justifications for this differential treatment.

In relation to the specific matters contained in the Regulation, differential treatment is justified because:

- 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;

- The Regulation will assist in enabling Northern Territory Aboriginal people to have more control over their traditional lands by allowing for the devolution of certain decision-making to them and their communities;
- The Regulation will promote effective self-determination and decision-making by relevant Aboriginal people over matters that materially affect them, such as land development, land use and leasing; and
- The Regulation necessarily involves differential treatment because the Land Rights Act is a scheme designed to give effect to traditional Indigenous land rights in the Northern Territory.

A key feature of the scheme is that it allows for local-level Aboriginal corporations to apply to exercise delegated Land Council functions in a particular area. Corporations are only eligible to apply for delegated functions if the majority of their members are Indigenous, and the majority of their members are either Traditional Owners or Aboriginal residents in that area. Like Land Councils, an Aboriginal corporation exercising delegated functions must obtain the consent of Traditional Owners before making decisions in respect of Aboriginal land.

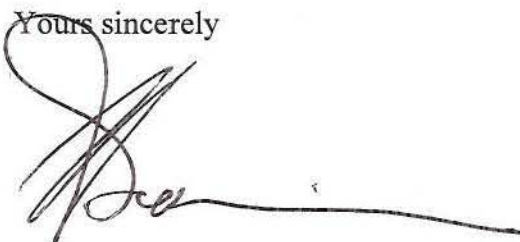
The Committee has noted differences between international law and Australian law in relation to the characterisation of a measure as a special measure. This is a complex issue. However, whichever approach is adopted, the Regulation is compatible with human rights, either because it is not discriminatory or because it constitutes a 'special measure.'

I acknowledge the Committee's role in considering legislation against the rights and freedoms recognised or declared by the international instruments set out in s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the guidance provided. I will ensure that future Statements of Compatibility appropriately consider the issue of legitimate differential treatment under the CERD rather than only special measures.

Finally, I acknowledge the Committee's comments in relation to the human rights compatibility of the *Stronger Futures in the Northern Territory Act 2012* (the Stronger Futures Act) and related legislation. The matters contained in the Regulation are unrelated to the Stronger Futures Act and related legislation. Accordingly, I request that the Committee consider the Regulation separately from any further consideration given to the Stronger Futures Act and related legislation.

Thank you again for your letter and consideration of the Regulation.

Yours sincerely



NIGEL SCULLION

17 March 2014



The Hon Warren Truss MP

Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

04 APR 2014

Reference: 02907-2014

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 dated 25 March 2014 regarding Marine Order 503 (Certificates of survey - national law) Amendment 2014 (No.1) [F2014L00195] (the instrument).

I note the Parliamentary Joint Committee on Human Rights' (the Committee) advice of the undertaking by the former Prime Minister, the Hon Julia Gillard, that the First Parliamentary Counsel would seek the views of the states and territories on amending the Protocol on Drafting National Uniform Legislation to refer to the Commonwealth's requirements for assessing human rights compatibility. I can inform the Committee that Mr Peter Quiggin PSM, First Parliamentary Counsel, has advised me that the matter is being considered by the Parliamentary Counsel's Committee and that it is on the agenda for the next meeting, which will be in July 2014.

I note the Committee agrees the instrument does not raise any human rights concerns in itself.

I thank you again for taking the time to write and inform me of the Committee's concerns on this matter.

Yours sincerely

WARREN TRUSS



Senator the Hon. Michael Ronaldson

Minister for Veterans' Affairs
Minister Assisting the Prime Minister for the Centenary of ANZAC
Special Minister of State

Ref: M14/0559

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600


Dear Senator Smith,

Thank you for your letter of 11 February 2014 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee). I understand the Committee is seeking clarification of several matters relating to three legislative instruments administered by the Department of Veterans' Affairs (DVA). I note that the *Second Report of the 44th Parliament* was tabled on 11 February 2014 and contains the Committee's views on these instruments.

The legislative instruments in question are:

- MRCA Pharmaceutical Benefits Scheme (No. MRCC 44/2013) [F2013L02012] (your file c08)
- Repatriation Pharmaceutical Benefits Scheme (No. R43/2013) [F2013L02009] (your file c10)
- Treatment Principles (Australian Participants in British Nuclear Tests) 2006 [F2013L02031] (your file c11).

MRCA Pharmaceutical Benefits Scheme

Firstly, I would like to make a correction to the Statement of Compatibility with Human Rights (the Statement) for this instrument. The Statement should have referred to "relevant members [of the Australian Defence Force] or dependants" not "relevant veterans or dependants". Veterans and their dependants are covered under an almost identical instrument called the Repatriation Pharmaceutical Benefits Scheme.

The Veterans' Pharmaceutical Reimbursement Scheme (VPRS) is a component of DVA's two pharmaceutical schemes – the Repatriation Pharmaceutical Benefits Scheme and the MRCA Pharmaceutical Benefits Scheme. The VPRS provides an annual reimbursement to eligible veterans and members for the cost of the concessional pharmaceutical co-payments not covered by existing DVA entitlements. It ensures that entitled persons receive free pharmaceutical benefits.

Veterans and members pay a concessional co-payment for their pharmaceuticals until they reach the "Safety Net Threshold" of 60 scripts for the relevant calendar year. Pharmaceuticals are free after the threshold has been reached.

Under the VPRS, veterans and members with war or warlike service may receive a reimbursement for the co-payments they have made. However, as this cohort receives a pharmaceutical allowance to assist with the purchase of pharmaceuticals, the amount which is reimbursed is the difference between the co-payments made and the pharmaceutical allowance received.

In 2013, some “public revenue amendments” were made to the VPRS as it had been identified that some people were gaining an unintended and unfair financial advantage from the VPRS and the relevant gaps in the scheme needed to be closed.

The Committee has sought clarification of the specific circumstances the amendment described as the “public revenue amendment” in the Explanatory Statement for the instrument is intended to address. In particular, the Committee sought further information about what is meant by the statement in the Explanatory Statement “in line with the policy intention for the pharmaceutical reimbursement” and what impact the amendment will have on couples where both members of the couple are eligible for pharmaceutical reimbursement.

The VPRS reimbursement amount is calculated using an IT system known as the Pharmaceutical Allowance Calculator. The unintended advantage occurred in circumstances where the veteran or member received the pharmaceutical allowance via financial supplements that had not been included in the Pharmaceutical Allowance Calculator. This meant that the pharmaceutical allowance was not included in the calculation of their reimbursement, resulting in them receiving a reimbursement for some copayments that had already been subsidised by the pharmaceutical allowance.

As the offsetting of co-payments against the pharmaceutical allowance is an integral part of the VPRS, the VPRS needed to be amended to stop these unintended payments. Without the amendments some people would continue to have all their co-payments off set against would not have their pharmaceutical allowance recognised in their reimbursement calculation.

The amendments to the VPRS included the addition of the “missing” financial supplements into the Pharmaceutical Allowance Calculator. These supplements should have been identified in the Pharmaceutical Calculator when the *Veterans’ Pharmaceutical Reimbursement Scheme* commenced

The amendments prevent the payment of double-compensation and thereby protect the public revenue.

Unfortunately, the example given in reference to “policy intention” for the pharmaceutical reimbursement as mentioned in the Consultation part of the Explanatory Statement for the instrument was incorrect. The reference to policy intention was made in relation to the provision relating to a service couple where both members of the couple were eligible for the pharmaceutical reimbursement. This was an error. The provision in question (paragraph 37(c)) is beneficial in nature. It has nothing to do with public-revenue protection. Please accept my apology on behalf of the Department of Veterans’ Affairs for the confusion.

The example should have referred to the situation described above where additional sources of pharmaceutical allowance were not included in the Pharmaceutical Allowance Calculator – the policy intention being that the pharmaceutical reimbursement should always be a net amount i.e. co-payments less pharmaceutical allowance, so as to avoid double-compensation.

Repatriation Pharmaceutical Benefits Scheme

The Committee raised some concerns about this instrument in relation to 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. The Committee expressed the view that the Statement of Compatibility with Human Rights for the instrument 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, neither the statement of compatibility or the explanatory statement identifies what impact the amendments will have on previously eligible persons.

It is correct that the refinements to the Pharmaceutical Allowance Calculator could reduce the amount of reimbursement a relevant member received compared to the person's situation before the refinements. However, as explained above, this situation is not a case of reducing a payment as a cost-saving measure, rather the refinements were made to ensure a legislative scheme works properly as it is intended.

The refinements result in all members receiving the correct payment as intended when this measure was implemented. Indeed it would be inequitable if some members eligible for a pharmaceutical reimbursement had their pharmaceutical co-payments reduced by their pharmaceutical allowance(s) but others did not.

Treatment Principles (Australian Participants in British Nuclear Tests) 2006

The purpose of this instrument is to modify the Treatment Principles, which is an existing legislative instrument made under the *Veterans' Entitlements Act 1986* (VEA). The instrument modifies the application of the Treatment Principles to persons eligible for treatment under the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*.

I note that the Committee is seeking clarification of references made to "double-dipping" in the Statement accompanying this instrument. Specifically, the Committee was concerned that the Statement did not identify the specific provisions in the instrument that address "double-dipping" nor did it explain the specific circumstances in which "double-dipping" may arise.

I acknowledge that the Statement is confusing in this regard and, while essentially accurate, could have been better expressed. I have provided further background information below in an effort to clarify the references made to "double-dipping" in the Statement.

In 2013, several new provisions were inserted into the Treatment Principles. One of these measures required the Repatriation Commission to refuse an application for a rehabilitation appliance if the appliance could be provided under another piece of DVA administered legislation. It is not unusual for some clients to have dual eligibility under different pieces of legislation and there is considerable potential for overlap. The purpose of the measure was to preclude the possibility of clients with dual-eligibility obtaining additional, unnecessary rehabilitation appliances for the same condition ("double-dipping").

It was considered that the amendment to the VEA Treatment Principles containing the measure in question did not need to be modified by the instrument under discussion as it could apply directly to persons eligible for treatment under the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*. That is the reason the instrument under discussion does not address the measure. However, as the measure does have an impact on persons eligible for treatment under the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*, albeit by virtue of the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* applying the VEA Treatment Principles to the people, rather than the instrument under discussion, it was decided it was appropriate for the Statement of Compatibility with Human Rights for the instrument under discussion to acknowledge the measure.

The Statement of Compatibility with Human Rights for the instrument under discussion states that there was only one change to “existing arrangements” (community nursing measure) but then refers to the “double dipping measure” and is confusing in this regard.

Under the existing VEA Treatment Principles, the Repatriation Commission has a discretion to approve a rehabilitation appliance for a DVA client. It would be relevant for the exercise of that discretion to consider whether the client had already obtained a rehabilitation appliance under other DVA-administered legislation, or if it was more appropriate for the client to obtain the rehabilitation appliance under that other DVA legislation.

All that has occurred is that the Repatriation Commission’s implied power to refuse to approve a rehabilitation appliance in double-dipping circumstances has been made express. Clearly stating the Commission’s power in this situation benefits administrators and beneficiaries alike.

Conclusion

I can assure the Committee that the “public revenue protection refinements” to the “Veterans’ Pharmaceutical Reimbursement Scheme” are not mere cost-saving measures but initiatives necessary to preserve the integrity and fairness of the scheme. Also, I can assure the Committee that the “double-dipping measure” in relation to the approval of rehabilitation appliances is to ensure that public monies are not wasted by providing a DVA client with unnecessary rehabilitation appliances. Neither of these sets of measures unreasonably curtail a person’s right to health in the context in question. They prevent the waste and abuse of the financial resources available for the betterment of the health of all members of the Veteran and Defence Community.

I hope my comments have clarified the matters in question.

Yours sincerely,

SENATOR THE HON. MICHAEL RONALDSON



SENATOR THE HON MITCH FIFIELD

ASSISTANT MINISTER FOR SOCIAL SERVICES

BR14-000228

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letters of 4 March 2014 in which you seek clarification on behalf of the Parliamentary Joint Committee on Human Rights on aspects of:

- the National Disability Insurance Scheme Rules;
- the National Disability Insurance Scheme Legislation Amendment Bill 2013; and
- the DisabilityCare Australia Fund Bill 2013 and eleven related Bills.

I am pleased to provide the attached responses to the issues the Committee has raised. Please note that on the matter relating to the exclusion of non-protected Special Category Visa holders, I am not able to provide the requested information. Although the Department of Social Services has access to data on the numbers of people who are on a Special Category Visa, it is not readily available without a customised query programme written to extract this data from the Department of Human Services data holdings. In addition, the Department does not hold data on Australian citizens receiving welfare and benefits administered by the New Zealand Government.

I trust that the information I have provided is helpful addressing the Committee's concerns.

Yours sincerely



MITCH FIFIELD

Encl.

19/3/14

RESPONSES TO THE SPECIFIC ISSUES RAISED BY THE COMMITTEE

National Disability Insurance Scheme (Nominees) Rules 2013

3.71 *The committee intends to write to the Assistant Minister to seek clarification as to:*

- *the legal status of the Operational Guidelines and the details of the power under which they have been made;*
- *whether the Operational Guidelines may be amended without parliamentary scrutiny; and*
- *whether any restrictions on rights carried out pursuant to the operational guidelines would be considered to be authorised by 'law'.*

The operational guidelines are not legislative instruments; they are policy documents and, as such, have only the relevance and force in exercising discretion in decision-making as described by Brennan J in the Administrative Appeals Tribunal in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409. In that case, his Honour clarified that a decision maker is free to exercise their power without adopting a policy as to the standards and values to which they will have regard in deciding particular cases. His Honour went on to say that, decision makers are equally free, in point of law, to adopt a policy in order to guide them in the exercise of the statutory discretion, provided the policy is consistent with the statute.

The operational guidelines are made pursuant to section 202(3) of the *National Disability Insurance Scheme Act 2013* (the Act). As was said in the above cited case, it is good practice to have guidelines that encourage consistency in decision-making even though operational guidelines are often published by government agencies without any specific legislative basis.

Restrictions on rights carried out pursuant to the operational guidelines are not considered to be authorised by 'law'. However, many operational guidelines reflect legal provisions in the Act and acts done pursuant to the guidelines would be authorised by the laws being described in the guidelines.

As they are not legislative instruments the operational guidelines may be amended without Parliamentary scrutiny. They are publicly available on the National Disability Insurance Agency website: www.ndis.gov.au/about-us-1. These operational guidelines have been updated since launch and will continue to be updated for full scheme in line with lessons learned from the experience in trial sites.

***National Disability Insurance Scheme (Supports for Participants – Accounting for Compensation)
Rules 2013***

3.78 The committee will write to the Assistant Minister to seek clarification on:

- ***why it is not appropriate to impose a duty on the CEO under rule 3.10 to take into account financial hardship to ensure that supports are not reduced or withdrawn if that may lead to a participant falling below the minimum level of enjoyment of the right to an adequate standard of living; and***
- ***why it is necessary to suspend the provision of supports to a participant pending the resolution of a dispute over whether it is reasonable for the participant not to seek compensation under another law or scheme and how this is compatible with the obligation to ensure the right to an adequate standard of living.***

Under Rule 3.10 the CEO is provided with the discretion to ignore the whole or part of a compensation reduction amount if it is appropriate in the special circumstances of the case. The committee is correct to point out that this does not impose a duty upon the CEO. A duty is imposed on the CEO under section 104(3) of the *National Disability Insurance Scheme Act* (the NDIS Act). Under this subsection the CEO must, when considering whether a person should be required to take action to obtain compensation under section 104, consider the impact (including any financial impact) on the participant or prospective participant and his or her family that would have occurred if the claim for compensation had been pursued or continued. The factors to be taken into account are listed below where an extract from section 104(3) appears.

There was concern at the time of drafting the Bill that, without suspension provisions in relation to compensation, a participant with a good claim for compensation would be free to decide not to take action for compensation, instead relying on the NDIS for all of his or her supports. Given the importance of establishing a financially sustainable scheme, the drafters sought to introduce a sanction to ensure that people who could pursue compensation would pursue compensation.

The only sanctions available in such a case were seen to be suspension or cancellation of the participant's plan, or revocation of access to the scheme. Of these, suspension was regarded as the least punitive. Once a suspension ceases the participant is paid all NDIS amounts that were withheld during the suspension. Suspension applies only where the compensation scheme is an administrative scheme run by a Commonwealth, state or territory government. Applications to these schemes are purely administrative actions requiring the completion of forms and going through relevant medical examinations. It requires no personal expenditure and only a minor inconvenience on the part of the participant.

If the participant has a reason recognised in the Act for not taking action then there is no suspension. In considering whether to require a participant to take action for compensation a decision-maker must have regard, under section 104(3) to:

- a) the disability of the participant or prospective participant;
- b) the circumstances which give rise to the entitlement or possible entitlement to compensation;
- c) any impediments the participant or prospective participant may face in recovering compensation;
- d) any reasons given by the participant or prospective participant as to why he or she has not claimed or obtained compensation;
- e) the financial circumstances of the participant or prospective participant;
- f) the impact of the requirement to take the action on the participant or prospective participant and his or her family.

It is only if none of these considerations suggest that it is reasonable for the participant not to seek compensation that the obligation to take action will be activated. The decision to require someone to seek compensation is reviewable by the Administrative Appeals Tribunal.

To the extent a participant may need assistance in approaching or dealing with the compensation administrator the National Disability Insurance Agency funds local area coordinators that can assist the participant in contacting the relevant department and filling out the required forms.

This is not incompatible with the obligation to ensure the right to an adequate standard of living because the participant has access to supports if he or she takes simple steps to seek compensation.

National Disability Insurance Scheme (Supports for Participants) Rules 2013

3.83 *The committee recommends that the Department closely monitor the issues with a view to assessing whether the restrictive test for the provision of legal services is appropriate to ensure the exercise by persons with disability of their right to effective independent review of decisions that adversely affect them.*

The Australian Government welcomes this recommendation and will monitor these issues with a view to assessing whether the provision of legal services is appropriate to ensure the exercise by persons with disability of their right to effective independent review of decisions that adversely affect them.

Appendix 3

Practice Note 1 and Practice Note 2 (interim)

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

PRACTICE NOTE 1

Introduction

This practice note:

- (i) sets out the underlying principles that the committee applies to the task of scrutinising bills and legislative instruments for human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*; and
- (ii) gives guidance on the committee's expectations with regard to information that should be provided in statements of compatibility.

The committee's approach to human rights scrutiny

- The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.
- Consistent with the approaches adopted by other human rights committees in other jurisdictions, the committee will test legislation for its potential to be incompatible with human rights, rather than considering whether particular legislative provisions could be open to a human rights compatible interpretation. In other words, the starting point for the committee is whether the legislation could be applied in ways which would breach human rights and not whether

a consistent meaning may be found through the application of statutory interpretation principles.

- The committee considers that the inclusion of adequate human rights safeguards in the legislation will often be essential to the development of human rights compatible legislation and practice. The inclusion of safeguards is to ensure a proper guarantee of human rights in practice. The committee observes that human rights case-law has also established that the existence of adequate safeguards will often go directly to the issue of whether the legislation in question is compatible. Safeguards are therefore neither ancillary to compatibility and nor are they merely 'best practice' add-ons.
- The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- The committee notes that previously settled drafting conventions and guides are not determinative of human rights compatibility and may now need to be re-assessed for the purposes of developing human rights compatible legislation and practice.

The committee's expectations for statements of compatibility

- The committee views statements of compatibility as essential to the consideration

of human rights in the legislative process. It is also the starting point of the committee's consideration of a bill or legislative instrument.

- The committee expects statements to read as stand-alone documents. The committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights. While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee has found the templates¹ provided by the Attorney-General's Department to be useful models to follow.
- The committee expects statements to contain an assessment of whether the proposed legislation is compatible with human rights. The committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which

may raise human rights concerns in the time available.

- In line with the steps set out in the [assessment tool flowchart](#)² (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:
 1. whether and how the limitation is aimed at achieving a legitimate objective;
 2. whether and how there is a rational connection between the limitation and the objective; and
 3. whether and how the limitation is proportionate to that objective.
- If no rights are engaged, the committee expects that reasons should be given, where possible, to support that conclusion. This is particularly important where such a conclusion may not be self-evident from the description of the objective provided in the statement of compatibility.

SEPTEMBER 2012

1 <http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Statements-of-Compatibility-templates.aspx>

2 <http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Tool-for-assessing-human-rights-compatibility.aspx>

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

PRACTICE NOTE 2 (INTERIM)

CIVIL PENALTIES

Introduction

1.1 This interim practice note:

- sets out the human rights compatibility issues to which the committee considers the use of civil penalty provisions gives rise; and
- provides guidance on the committee's expectations regarding the type of information that should be provided in statements of compatibility.

1.2 The committee acknowledges that civil penalty provisions raise complex human rights issues and that the implications for existing practice are potentially significant. The committee has therefore decided to provide its initial views on these matters in the form of an interim practice note and looks forward to working constructively with Ministers and departments to further refine its guidance on these issues.

Civil penalty provisions

1.3 The committee notes that many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court.¹ These penalties are pecuniary, and do not include the possibility of imprisonment. They are stated to be 'civil' in nature and do not constitute criminal offences under Australian law. Therefore, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters.

1.4 These provisions often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable

undertakings, civil penalties and criminal offences. The committee appreciates that these schemes are intended to provide regulators with the flexibility to use sanctions that are appropriate to and likely to be most effective in the circumstances of individual cases.

Human rights implications

1.5 Civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).² These articles set out specific guarantees that apply to proceedings involving the determination of 'criminal charges' and to persons who have been convicted of a 'criminal offence', and provide protection against the imposition of retrospective criminal liability.³

1.6 The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even if it is considered to be 'civil' under Australian domestic law. Accordingly, when a provision imposes a civil penalty, an assessment is required of whether it amounts to a 'criminal' penalty for the purposes of the ICCPR.⁴

The definition of 'criminal' in human rights law

1.7 There are three criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law:

- a) *The classification of the penalty in domestic law*: If a penalty is labelled as 'criminal' in domestic law, this classification is considered

determinative for the purposes of human rights law, irrespective of its nature or severity. However, if a penalty is classified as ‘non-criminal’ in domestic law, this is never determinative and requires its nature and severity to be also assessed.

- b) *The nature of the penalty*: A criminal penalty is deterrent or punitive in nature. Non-criminal sanctions are generally aimed at objectives that are protective, preventive, compensatory, reparatory, disciplinary or regulatory in nature.
- c) *The severity of the penalty*: The severity of the penalty involves looking at the maximum penalty provided for by the relevant legislation. The actual penalty imposed may also be relevant but does not detract from the importance of what was initially at stake. Deprivation of liberty is a typical criminal penalty; however, fines and pecuniary penalties may also be deemed ‘criminal’ if they involve sufficiently significant amounts but the decisive element is likely to be their purpose, ie, criterion (b), rather than the amount per se.

1.8 Where a penalty is designated as ‘civil’ under domestic law, it may nonetheless be classified as ‘criminal’ under human rights law if either the nature of the penalty or the severity of the penalty is such as to make it criminal. In cases where neither the nature of the civil penalty nor its severity are separately such as to make the penalty ‘criminal’, their cumulative effect may be sufficient to allow classification of the penalty as ‘criminal’.

When is a civil penalty provision ‘criminal’?

1.9 Many civil penalty provisions have common features. However, as each provision or set of provisions is embedded in a different

statutory scheme, an individual assessment of each provision in its own legislative context is necessary.

1.10 In light of the criteria described in paragraph 1.9 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is ‘criminal’ for the purposes of human rights law.

a) *Classification of the penalty under domestic law*

1.11 As noted in paragraph 1.9(a) above, the classification of a civil penalty as ‘civil’ under Australian domestic law will be of minimal importance in deciding whether it is criminal for the purposes of human rights law. Accordingly, the committee will in general place little weight on the fact that a penalty is described as civil, is made explicitly subject to the rules of evidence and procedure applicable to civil matters, and has none of the consequences such as conviction that are associated with conviction for a criminal offence under Australian law.

b) *The nature of the penalty*

1.12 The committee considers that a civil penalty provision is more likely to be considered ‘criminal’ in nature if it contains the following features:

- the penalty is punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;⁵
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at regulating members of a specific group (the latter being more likely to be viewed as ‘disciplinary’ rather than as ‘criminal’).

c) *The severity of the penalty*

1.13 In assessing whether a pecuniary penalty is sufficiently severe to amount to a ‘criminal’ penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed;
- whether the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision is higher than the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment.

The consequences of a conclusion that a civil penalty is ‘criminal’

1.14 If a civil penalty is assessed to be ‘criminal’ for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalization. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in article 14 and article 15 of the ICCPR.

1.15 If a civil penalty is characterised as not being ‘criminal’, the criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR.

The committee’s expectations for statements of compatibility

1.16 As set out in its *Practice Note 1*, the committee views sufficiently detailed

statements of compatibility as essential for the effective consideration of the human rights compatibility of bills and legislative instruments. The committee expects statements for proposed legislation which includes civil penalty provisions, or which draws on existing legislative civil penalty regimes, to address the issues set out in this interim practice note.

1.17 In particular, the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be ‘criminal’ for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in article 14 and article 15 of the ICCPR, including providing justifications for any limitations of these rights.⁶

1.18 The key criminal process rights that have arisen in the committee’s scrutiny of civil penalty provisions are set out briefly below. The committee, however, notes that the other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as ‘criminal’ and should be addressed in the statement of compatibility where appropriate.

Right to be presumed innocent

1.19 Article 14(2) of the ICCPR provides that a person is entitled to be presumed innocent until proved guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. **In cases where a civil penalty is considered ‘criminal’, the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.**

Right not to incriminate oneself

1.20 Article 14(3)(g) of the ICCPR provides that a person has the right ‘not to be compelled to testify against himself or to confess guilt’ in criminal proceedings. **Civil penalty provisions that are considered ‘criminal’ and which compel a person to provide incriminating information that may be used against them in the civil penalty proceedings should be appropriately justified in the statement of compatibility.⁷ If use and/or derivative use immunities are not made available, the statement of compatibility should explain why they have not been included.**

Right not to be tried or punished twice for the same offence

1.21 Article 14(7) of the ICCPR provides that no one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. **If a civil penalty provision is considered to be ‘criminal’ and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.**

- 1 This approach is reflected in the Regulatory Powers (Standard Provisions) Bill 2012, which is intended to provide a standard set of regulatory powers which may be drawn on by other statutes.
- 2 The text of these articles is reproduced at the end of this interim practice note. See also UN Human Rights Committee, General Comment No 32 (2007) on article 14 of the ICCPR.
- 3 Article 14(1) of the ICCPR also guarantees the right to a fair hearing in civil proceedings.
- 4 This practice note is focused on civil penalty provisions that impose a pecuniary penalty only. But the question of whether a sanction or penalty amounts to a ‘criminal’ penalty is a more general one and other ‘civil’ sanctions imposed under legislation may raise this issue as well.
- 5 In most, if not all, cases, proceedings in relation to the civil penalty provisions under discussion will be brought by public authorities.
- 6 That is, any limitations of rights must be for a legitimate objective and be reasonable, necessary and proportionate to that objective – for further information see *Practice Note 1*.
- 7 The committee notes that a separate question also arises as to whether testimony obtained under compulsion that has already been used in civil penalty proceedings (whether or not considered ‘criminal’) is consistent with right not to incriminate oneself in article 14(3)(g) of the ICCPR if it is used in subsequent criminal proceedings.

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Articles 14 and 15 of the International Covenant on Civil and Political Rights

1. Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may

be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal

case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- c) To be tried without undue delay;
- d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.