Parliamentary Joint Committee on Human Rights

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

Bills introduced 13 – 29 May 2014

Legislative Instruments received
8 March – 30 May 2014

Seventh Report of the 44th Parliament

June 2014

ISBN 978-1-76010-032-2

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights/

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Members

Senator Dean Smith, Chair	Western Australia, LP
Mr Laurie Ferguson MP, Deputy Chair	Werriwa, New South Wales, ALP
Senator Sue Boyce	Queensland, LP
Dr David Gillespie MP	Lyne, New South Wales, NAT
Mr Andrew Laming MP	Bowman, Queensland, LP
Senator the Hon Kate Lundy	Australia Capital Territory, ALP
Ms Michelle Rowland MP	Greenway, New South Wales, ALP
Senator the Hon Ursula Stephens	New South Wales, ALP
Senator Penny Wright	South Australia, AG
Mr Ken Wyatt AM MP	Hasluck, Western Australia, LP

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

Mr Ivan Powell, Acting Committee Secretary
Mr Matthew Corrigan, Principal Research Officer
Dr Patrick Hodder, Senior Research Officer
Ms Hannah Dibley, Legislative Research Officer

External Legal Adviser

Professor Andrew Byrnes

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

Table of Contents

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 13 to 29 May 2014 and legislative instruments received during the period 8 March 2014 to 30 May 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 13 to 29 May 2014

The committee considered 42 bills, all of which were introduced with a statement of compatibility. Of these 42 bills, 32 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 seven bills and further defer an additional two bills introduced in previous weeks.

The committee has identified six bills that it considers require further examination and for which it will seek further information. This includes three bills which the committee had deferred consideration of in previous reports.

Of the bills considered, those which are scheduled for debate during the sitting week commencing 16 June 2014 include:

- Migration Legislation Amendment Bill (No. 1) Bill 2014; and
- Fair Work Amendment Bill 2014.

Legislative instruments received between 8 March 2014 and 30 May 2014

The committee considered 218 legislative instruments received between 8 March 2014 and 30 May 2014. The full list of instruments scrutinised by the committee can be found in Appendix 1 to this report.

Of these 218 instruments, 213 do not appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate. One further instrument does not appear to raise any human rights concerns but is not accompanied by statement of compatibility that fully meets the committee's expectations. As the instrument does not appear to raise human rights compatibility concerns, the committee has written to the relevant minister in a purely advisory capacity.

The committee has decided to seek further information from the relevant minister in relation to one instrument. The committee has decided to defer consideration of the remaining three instruments.

Responses

The committee has considered 15 responses regarding matters raised in relation to bills and legislative instruments in previous reports. The committee has concluded its examination relating to six bills and nine instruments.

Senator Dean Smith
Chair

Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 16 June 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 42 bills introduced between 13 and 29 May 2014, in addition to three bills which have been previously deferred, and 218 instruments received between 8 March and 30 May 2014.

Asset Recycling Fund Bill 2014

Asset Recycling Fund (Consequential Amendments) Bill 2014

Portfolio: Finance
Introduced: House of Representatives, 29 May 2014

1.1 The Asset Recycling Fund Bill 2014 seeks to establish an Asset Recycling Fund (ARF) commencing on 1 July 2014. The bill proposes to:

- enable grants of financial assistance to be made to the states and territories for expenditure incurred under the National Partnership Agreements on Asset Recycling and Land Transport Infrastructure Projects;
- make infrastructure national partnership grants; and
- enable the making of infrastructure payments.

1.2 The Asset Recycling Fund (Consequential Amendments) Bill 2014 seeks to amend the *COAG Reform Fund Act 2008*, the *Future Fund Act 2006*, the *Nation-building Funds Act 2008* and the *DisabilityCare Australia Fund Act 2013*. This bill also seeks to make various consequential amendments arising from the proposed establishment of the ARF including:

- enabling grants to the states and territories through the COAG Reform Fund;
- extending the Future Fund Board's duties to manage the ARF; and
- permitting amounts to be transferred between the ARF and Future Fund to allow for proper apportioning of common expenses incurred by the Future Fund Board in managing the funds.

1.3 Each bill is accompanied by a statement of compatibility which concludes that the bill is 'compatible with the human rights and freedoms recognised or declared in the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.'[1]

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

1.5 However, the committee notes that the statements of compatibility do not fully meet the committee's expectations as they do not include sufficient information about the purpose and effect of the proposed bills. The committee therefore draws to the attention of the Minister for Finance 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).

1 Asset Recycling Fund Bill 2014, explanatory memorandum (EM), p. 6; and Asset Recycling Fund (Consequential Amendments) Bill 2014, EM, p. 5.

Australian Education Amendment (School Funding Guarantee) Bill 2014

Sponsor: Mr Shorten
Introduced: House of Representatives, 26 May 2014

1.6 The Australian Education Amendment (School Funding Guarantee) Bill 2014 (the bill) seeks to amend the *Australian Education Act 2013* to require the Minister for Education to be satisfied that a state or territory will not reduce or has not reduced its education budget before school funding is provided to the states and territories.

1.7 The bill is accompanied by a statement of compatibility which states that the bill engages the right to education and is 'compatible with human rights because it advances the protection of human rights'.[1]

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

1.9 However, the committee notes that, while the purpose of the bill is to prevent any reduction in education funding for states and territories, it is apparent that the bill would operate to reduce such funding if a state or territory were to reduce expenditure on education (as the minister would be prevented from authorising an amount of Commonwealth funding). While such an outcome could be taken as a limitation on the right to education, the committee's assessment of the bill assumes that the chosen mechanism would be effective to prevent state and territory reductions in funding, and reductions in education funding overall.

1 Explanatory memorandum, p. 2.

Australian National Preventive Health Agency (Abolition) Bill 2014

Portfolio: Health
Introduced: House of Representatives, 15 May 2014

1.10 The Australian National Preventive Health Agency (Abolition) Bill 2014 (the bill) will repeal the *Australian National Preventive Health Agency Act 2010*, with the purpose of abolishing the Australian National Preventive Health Agency (ANPHA).

1.11 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 concludes that the bill is compatible with human rights.

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

1.13 However, the committee notes that the function of the ANPHA is to promote and develop preventive health policy at territory, state and government levels and, in this respect, the bill may be seen as engaging the right to health.[1]

1.14 The explanatory memorandum for the bill notes that abolishing ANPHA is intended to remove 'overlapping responsibilities' between it and the Department of Health, which have resulted in 'duplication of administrative, policy and programme functions and a fragmented approach to public health efforts'. It states:

> **The Bill will enable preventive health efforts currently spread across two Commonwealth agencies to be streamlined, focused and better coordinated and will remove unnecessary duplication and costs…**
>
> **The department will continue to have a national leadership role on relevant preventive health issues, providing advice on health promotion and disease prevention to the Commonwealth Minister for Health and supporting specific preventive health measures, including but not limited to the promotion of a healthy lifestyle and good nutrition; reducing tobacco use; reducing the harmful drinking of alcohol; discouraging substance abuse; and reducing the incidence of obesity amongst Australians.[2]**

1.15 The committee notes that, while the purpose of the bill is to better coordinate and re-allocate the activities of ANPHA, any consequent reduction in effective preventive health activities could result in a limitation of the right to health. The committee's assessment assumes that the policy of streamlining and reallocating of ANPHA's activities will be effective.

---

1 International Covenant on Economic Social and Cultural Rights, article 12.

2 Explanatory memorandum, p. 1.

Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 15 May 2014

1.16 The Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014 (the bill) seeks to amend the *Corporation Act 2001* in regards to issuers of corporate bonds and to provide company directors with more certainty of their liability in relation to disclosure material.

1.17 The bill is accompanied by a statement of compatibility which concludes that the bill is 'compatible with human rights as it does not raise any human rights issues.'[1]

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

1 Explanatory memorandum, p. 30.

Customs Tariff Amendment (Product Stewardship for Oil) Bill 2014

Excise Tariff Amendment (Product Stewardship for Oil) Bill 2014

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 29 May 2014

Purpose

1.19 The Customs Tariff Amendment (Product Stewardship for Oil) Bill 2014 seeks to amend the *Customs Tariff Act 1995* to increase the excise-equivalent customs duty on new and recycled petroleum-based oils and greases and their synthetic equivalents (Oils) from 5.449 cents to 8.5 cents per litre or kilogram from 1 July 2014.

1.20 The Excise Tariff Amendment (Product Stewardship for Oil) Bill 2014 seeks to amend the *Excise Tariff Act 1921* to increase the excise on new and recycled petroleum-based oils, greases and their synthetic equivalents from 5.449 cents to 8.5 cents per litre or kilogram from 1 July 2014.

Committee view on compatibility

Right to work and rights at work

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

1.22 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.

1.23 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.

1.24 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 measures

1.25 The bills are accompanied by a single statement of compatibility which states that the bills 'are compatible with human rights as they do not raise any human rights issues.'[1]

1.26 However, the committee notes that, to the extent that increase to the rate of excise and excise-equivalent customs duty may have an adverse impact on the economic viability of businesses and, consequently, on the employment opportunities of workers in those industries, the bills may limit the right to work and rights at work.

1.27 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.

1.28 The committee therefore seeks the Immigration and Border Protection's advice as to the compatibility of the bill with the right to work and rights at work.

Requirements for statements of compatibility

1.29 The committee notes that, where a statement of compatibility is prepared in relation to a package of related bills, the committee's usual expectation is that the statement of compatibility provides a separate and discrete assessment of each bill. This approach supports the committee's function of assessing the human rights compatibility of individual bills under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.30 The committee draws to the attention of the Minister for Immigration and Border Protection its usual expectations regarding the form and content of statements of compatibility.

1 Explanatory memorandum, p. 7.

Energy Efficiency Opportunities (Repeal) Bill 2014

Portfolio: Industry
Introduced: House of Representatives, 15 May 2014

1.31 The Energy Efficiency Opportunities (Repeal) Bill 2014 (the bill) proposes to terminate the Energy Efficiency Opportunities program on 29 June 2014 by repealing the *Energy Efficiency Opportunities Act 2006*. The Act requires large energy-using businesses to assess their energy use and identify cost effective energy savings opportunities and imposes mandatory compliance and reporting obligations on organisations which fall within the program.

1.32 The bill is accompanied by a statement of compatibility which concludes that the 'bill is compatible with human rights as it does not raise any human rights issues.'[1]

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

1 Explanatory memorandum, p. 2.

Environment Protection and Biodiversity Conservation Amendment (Alpine Grazing) Bill 2014

Sponsor: Senator Di Natale
Introduced: Senate, 13 May 2014

1.34 The Environment Protection and Biodiversity Conservation Amendment (Alpine Grazing) Bill 2014 (the bill) seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* to deem that the minister has:

- received from the Victorian government a referral of its proposal to trial cattle grazing in the Alpine National Park; and
- decided that the trial of alpine grazing is unacceptable.

1.35 The bill is accompanied by a statement of compatibility which concludes that the bill 'is compatible with human rights as it does not raise any human rights issues.'[1]

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

1 Explanatory memorandum, p 4.

Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014

Portfolio: Environment
Introduced: House of Representatives, 14 May 2014

1.37 The Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (the bill) seeks to amend Part 5 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) which relates to bilateral agreements. The proposed amendments include:

- allowing States and Territories to be accredited for approval decisions on large coal mining and coal seam gas developments that are likely to have a significant impact on a water resource;
- ensuring that all States and Territories are able to be declared under the EPBC Act for the purposes of requesting advice from the Independent Expert Scientific Committee;
- clarifying that proponents do not need to make referrals to the Commonwealth for actions that are covered by an approval bilateral agreement;
- ensuring there is an efficient process to enable the Commonwealth to complete the approval process where an approval bilateral agreement is suspended or cancelled, or ceases to apply to a particular action;
- ensuring that State or Territory processes that meet the appropriate EPBC Act standards can be accredited for bilateral agreements, recognising the different technical approaches taken by different States and Territories to give legal effect to those processes;
- providing for an efficient process so that the relevant bilateral agreement continues to apply to an accredited State or Territory management arrangement or authorisation process, where there are minor amendments to that arrangement or process; and
- a number of minor miscellaneous amendments.

1.38 The bill is accompanied by a statement of compatibility which concludes that the bill 'does not engage any of the applicable rights or freedoms.'[1]

1 Explanatory memorandum (EM), p. 4.

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

Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014

Portfolio: Environment
Introduced: House of Representatives, 14 May 2014

1.40 The Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014 (the bill) seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to allow for cost recovery for environmental impact assessments, including strategic assessments, under the EPBC Act.

1.41 The bill is accompanied by a statement of compatibility which concludes that the bill 'is compatible with human rights as it does not raise any human rights issues.'[1]

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

1 Explanatory memorandum (EM), p. 3.

Fair Work Amendment Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 27 February 2014

Purpose

1.43 The bill proposes amendments to the *Fair Work Act 2009* (FWA) to implement elements of *The Coalition's Policy to Improve the Fair Work Laws*. Specifically, the bill seeks to gives effect to a number of recommendations made in the report of the Fair Work Act Review Panel.[1]

1.44 The bill proposes to make a number of changes to the FWA including to:

- provide that an employer must not refuse a request for extended unpaid parental leave unless the employer has given the employee a reasonable opportunity to discuss the request;
- provide that, on termination of employment, untaken annual leave is paid out as provided by the applicable industrial instrument;
- provide that an employee cannot take or accrue leave under the FWA during a period in which the employee is absent from work and in receipt of workers' compensation;
- amends flexibility terms in modern awards and enterprise agreements;
- confirm that benefits other than an entitlement to a payment of money may be taken into account in determining whether an employee is better off overall under an individual flexibility agreement;
- establish a new process for the negotiation of single-enterprise greenfields agreements;
- amend the right of entry framework of the FWA;
- provide that an application for a protected action ballot order cannot be made unless bargaining has commenced;
- provide that, subject to certain conditions, the FWC is not required to hold a hearing or conduct a conference when determining whether to dismiss an unfair dismissal application under section 399A or section 587; and
- provide for the Fair Work Ombudsman to pay interest on unclaimed monies.

---

1 See Professor Emeritus Ron McCallum AO, The Hon Michael Moore and Dr John Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (June 2012).

Background

1.45 The bill was the subject of an inquiry by the Senate Education and Employment Legislation Committee, which reported on 5 June 2014.[2]

Committee view on compatibility

1.46 The principal rights engaged by this bill are the right to just and favourable conditions of work, freedom of association and the right to organise and bargain collectively.

Right to just and favourable conditions of work

1.47 The right to the enjoyment of just and favourable conditions of work is guaranteed by article 7 of the ICESCR. The right encompasses a number of elements, including:

- remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind;
- safe and healthy working conditions;
- equal opportunity to be promoted in employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; and
- rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

1.48 In addition, article 10(2) of the ICESCR provides that special protection should be accorded to mothers during a reasonable period before and after childbirth, with working mothers accorded paid leave or leave with adequate social security benefits during such a period. Article 11(2) of the of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States parties to take appropriate measures to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.[3] Finally, article 18(1) of the CRC states that States parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

---

2 Senate Education and Employment Legislation Committee, *Fair Work Amendment Bill 2014 [Provisions]* (5 June 2014).

3 Article 5(b) of the CEDAW Convention further provides that 'States parties shall take all appropriate measures…(b) to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.'

1.49 The committee notes that the right to just and favourable conditions of work are not absolute, and that the rights may therefore be subject to limitations. Article 4 of ICESCR provides that permissible limitations are those that are 'determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. Where a measure may limit a right, the committee's assessment of the measure's compatibility with human rights is based on three key questions: whether the limitation 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.

Inability to review decision to refuse extensions of parental leave

1.50 The FWA provides that an eligible employee is entitled to at least 12 months of unpaid parental leave. An employee may request an additional period of unpaid parental leave of up to 12 months. The employer may refuse a request 'only on reasonable business grounds.' The bill will provide that an employer must not refuse a request for additional parental leave 'unless the employer has given the employee a reasonable opportunity to discuss the request.' The committee considers that this amendment is likely to promote enjoyment of the right to just and favourable conditions of work.

1.51 The proposed amendments do not, however, provide for a right of review of an employer's decision to refuse an extension of unpaid parental leave beyond 12 months. The regulatory impact statement notes that about five per cent of applications for the extension of periods of unpaid parental leave since 2010 had been refused. Whilst this rate of refusal is quite low, it is not clear to the committee why it would not be appropriate to provide for review of a refusal to grant such an application.

1.52 The committee therefore requests the Minister for Employment's advice as to the compatibility of the measure with the right to just and favourable conditions of work.

Removal of payment of annual leave loading on termination of employment

1.53 The bill proposes to amend FWA to provide that on termination of employment, accrued annual leave is paid to the employee at the employee's base rate of pay without an annual leave loading. The explanatory memorandum states:

> The amendment restores the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee's base rate of pay. The effect of this is that annual leave loading will not be payable on termination of employment unless an applicable

> modern award or enterprise agreement expressly provides for a more beneficial entitlement than the employee's base rate of pay.[4]

1.54 The RIS also states that the amendment would 'provide clarity to employers and employees, avoiding disputes that may arise because of a lack of awareness that the longstanding position had been displaced by the FWA.'[5] The statement of compatibility states that the amendments are consistent with article 7 of the ICESCR 'because the NES continues to ensure that employees receive remuneration that provides for fair wages and a decent living, consistent with Article 7 of the ICESCR.'[6]

1.55 The committee notes that the effect of the amendment would appear to be a reduction in the entitlements of employees who are currently eligible for annual leave loading upon termination of employment. The RIS notes that for various reasons it was not possible to determine how many employees are currently entitled to annual leave loadings on termination.[7]

1.56 In the committee's view, the potential loss on termination of employment of a 17.5 per cent leave loading is to be viewed either as a limitation on the enjoyment of the right to just and favourable conditions of work or a retrogressive measure. The committee has consistently requested that where a limitation on a right or a retrogressive measure is proposed, a clear justification for the measure be provided. This involves an identification of the objective being pursued by the measure, whether there is a rational connection between the measure and the achievement of the objective, and whether overall the measure is a reasonable and proportionate measure for the achievement of the goal. This assessment also includes consideration whether other measures less restrictive of the rights in question that would have achieved the same achieved the objective were considered and why they were not adopted.

1.57 The committee therefore requests the Minster for Employment's advice as to:

- **whether the proposed limitation on the right to just and favourable conditions of work 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.**

---

4 Explanatory memorandum, p 3, para 12.

5 Explanatory memorandum , Regulatory Impact Statement, p xxxv

6 Statement of compatibility, p lii.

7 Explanatory memorandum , Regulatory Impact Statement, p xxxv.

Restrictions on taking or accruing leave while receiving workers' compensation

1.58 The bill proposes to amend the FWA so that an employee who is absent from work on workers' compensation will not be able to take or accrue leave during the compensation period. The statement of compatibility states:

> This amendment engages but does not limit human rights because the NES continues to ensure that employees receive remuneration that provides for fair wages and a decent living, consistent with Article 7 of the ICESCR. Rather, the amendment ensures that all employees in the national system have the same entitlements in relation to the taking or accrual of leave during a period in which the employee is in receipt of workers' compensation.[8]

1.59 The committee notes that the proposed amendment appears to seek to achieve the goals of clarity and uniformity of the conditions that national system employees enjoy by reducing the entitlements of some of those employees. The committee considers that this may be viewed either as a limitation on the enjoyment of the right to just and favourable conditions of work or a retrogressive measure. As noted above, the committee has consistently requested that where a limitation on a right or a retrogressive measure is proposed, that a clear justification for the measure be provided. This involves an identification of the objective being pursued by the measure, whether there is a rational connection between the measure and the achievement of the objective, and whether overall the measure is a reasonable and proportionate measure for the achievement of the goal. This assessment also includes consideration of whether other measures less restrictive of the rights in question that would have achieved the objective were considered and why they were not adopted.

1.60 The committee therefore requests the Minister for Employment's advice as to:

- **whether the proposed changes to the eligibility of some workers to take or accrue annual leave while on workers' compensation is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

8 Statement of compatibility, p liii.

Individual flexibility arrangements – potential reductions in the better off overall test'

1.61 The FWA requires the inclusion in all awards and enterprise agreements of a 'flexibility term' that enables an employee and his or her employee to agree on an arrangement (an 'individual flexibility arrangement' or IFA) varying the effect of the award or agreement, in order to meet the genuine needs of the employee and employer.[9] In order for such an arrangement to be valid, it must satisfy a number of tests, including that any IFA 'must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to' (the 'better off overall test').[10]

1.62 The bill would provide that where an enterprise agreement includes terms dealing with one of five matters, these terms may be varied by an IFA.[11] The statement of compatibility notes that the bill responds to recommendation 9 of the Fair Work Act Review Panel. However, the statement of compatibility does not explain why that recommendation was not adopted in the form recommended by the Review Panel, nor why the associated recommendation 10, which was designed to protect employees against potential misuse of IFAs, has not been implemented.[12]

1.63 The committee recognises that the availability of IFAs under both awards and enterprise agreements have the potential to benefit both employees and employers, but notes that a difference in relative bargaining power may in some cases give rise to a possibility that the provision of a non-monetary benefit in exchange for a monetary benefit may not be to the overall benefit of the employee. The committee notes that in such cases there might be a failure to guarantee the right to just and favourable working conditions guaranteed in article 7 of the ICESCR.

1.64 The committee thus considers that the bill may in certain circumstances constitute a limitation on the right to just and favourable conditions of work. Accordingly, the committee's expectation is that the statement of compatibility should set out the legitimate objective being pursued, whether there is a rational connection between the measure and the achievement of the objective, and whether the measure is a reasonable and proportionate one. The evaluation of whether a measure is proportionate involves consideration of whether other

---

9 FWA, s 144(1) (awards) and 202(1) (agreements).

10 FWA, s 144(4)(c) and 203(4).

11 These matters are: arrangements about when work is performed; overtime rates; penalty rates; allowances; and leave loading.

12 In its Recommendation 10 the Review Panel proposed that an employer should be required to notify the FWO in writing of any IFA entered into at the time it is made, as this 'would enable the FWO to investigate, as and when required at its absolute discretion, whether the opportunity afforded by the FW Act to make these arrangements was being abused by a particular employer or employers in a particular industry.' See Fair Work Review p 109.

measures less restrictive of the rights in question that would have achieved the objective were considered and why they were not adopted.

1.65 The committee therefore requests the Minster for Employment's advice as to whether the proposed amendments to the Act in relation to IFAs are a reasonable and proportionate limitation on the right to just and favourable conditions of work.

Freedom of association

1.66 The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association. Examples are political parties, professional or sporting clubs, non-governmental organisations and trade unions. The right to form and join trade unions is specifically protected in article 8 of the ICESCR. It is also protected in International Labour Organization (ILO) Convention No 87 (referred to in article 22(3) of the ICCPR and article 8(3) of ICESCR). Australia is a party to ILO Convention No 87.

1.67 The right to freedom of association includes the right to organise and bargain collectively. The right of access to workplaces in order to consult with union members is a fundamental aspect of the right to freedom of association and to bargain collectively.[13] However, this right is to be exercised in a manner which does not prejudice the ordinary functioning of the enterprise or institution in question.

Employer's ability to limit period for negotiation.

1.68 The bill proposes to introduce a number of provisions that will regulate the process of bargaining in relation to greenfields agreements.[14] The bill provides for an employer to enter into negotiations with bargaining representatives in relation to a greenfield single enterprise agreement.[15] As the statement of compatibility notes, the proposed changes engage the right to organise and bargain collectively guaranteed by article 8 of the ICESCR and article 4 of ILO Convention No 98. The statement of compatibility states that the bill promotes the right 'by extending the good faith collective bargaining framework to the negotiation of all single-enterprise greenfields agreements'.[16]

---

13 International Labour Organisation, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th ed 2006), paras 1102-1111.

14 Greenfields agreements, are enterprise agreements made before any employees have been engaged at a new enterprise, and are often used in large-scale projects in the construction, administrative and support services, manufacturing and mining industries.

15 These include the employer (or appointed representative) and an employee organisation that is entitled to represent one or more of the employees who will be covered by the agreement and with which the employer agrees to bargain: see proposed new section 177.

16 Statement of compatibility , p lxiii.

1.69 The committee notes that the proposed amendments confer on only one of the parties to the negotiations (the employer) the right to set a limited period for negotiation and to take a proposed agreement to the FWC for approval if agreement has not been reached within the three-month period. It is not clear from the statement of compatibility whether the FWC has the power do to anything other than to approve the agreement proposed by the employer. This would be a limitation on the right to organise and bargain collectively.

1.70 The statement of compatibility does not provide sufficient detail to justify such a limitation. The statement of compatibility claims that 'to the extent that the proposed amendments limit rights, they are reasonable, necessary and proportionate to achieving the legitimate objectives of addressing and improving bargaining conduct for greenfields agreements and ensuring the timely negotiation of these agreements'.[17]

1.71 The committee accepts that the objective of seeking to avoid unnecessary and unreasonable delays in the negotiation of greenfields agreements is a legitimate objective. However, questions remain as to whether it is a rational, reasonable and proportionate measure of achieving this objective. In particular the committee notes that, when assessing the permissibility of limitations on rights, it has sought details of less restrictive alternatives that were available to pursue a legitimate objective and the reasons for preferring a more intrusive option; this goes to the evaluation of whether a measure is proportionate.

1.72 The committee notes that the Review Panel recommended options that would be less restrictive of the right to bargain collectively than the measures proposed in the bill. One, which is implemented by the bill, was the extension of the good faith bargaining obligation to negotiations relating to a greenfields agreement. The Review Panel also recommended that:

> After much thought and deliberation, the Panel is of the view that, where an impasse in negotiations is not resolved within a specified time and where conciliation by FWA has failed, FWA should have the power, either on its own motion or via a request from one of the parties, to resolve the impasse by a limited form of arbitration. While the Panel does not possess hard and fast views, FWA could be empowered to resolve the remaining outstanding issues between the parties by a process of arbitration, which is colloquially known as 'last offer' arbitration. In other words, FWA would examine the positions taken by the parties on the remaining outstanding issues and would be empowered to choose the position either of the employer or of the trade union or trade unions. It is the Panel's expectation that the ultimate availability of this type of final offer

17 Statement of compatibility , p lxiii.

> arbitration will ensure that the parties adopt realistic approaches to issues in their negotiations with one another.[18]

1.73 The committee notes that this option would still allow the FWC to approve an agreement and that this might take place in combination with a limited negotiation period, thus achieving the objective of avoiding unreasonable delay. The Review Panel recommendation would allow the positions advanced by both employers and unions could be considered by the FWC. No explanation is offered in the statement of compatibility as to why this recommendation of the Review Panel was not taken up.

1.74 The committee therefore requests the Minster for Employment's advice as to whether the proposed amendments relating to greenfields agreements are a reasonable and proportionate limitation on the right to bargain collectively.

Restrictions on union rights of entry to work places

1.75 The bill proposes new eligibility criteria that determine when a union official may enter premises for the purposes of holding discussions or conducting interviews with one or more employees or Textile, Clothing and Footwear award workers. The amendments would impose additional conditions on the rights of entry for union officials.

1.76 The amendments will also require the FWC to issue an 'invitation certificate' to an organisation if the FWC is satisfied of certain conditions being met. The committee notes that the bill does not indicate what the effect of an invitation certificate is, and specifically whether an employer is required to grant entry to premises on the production of an invitation certificate.

1.77 The proposed amendments would restrict existing rights of entry to premises by unions, and may thereby restrict the right of individual workers to join a trade union. The statement of compatibility does not specifically provide a justification for the introduction of these restrictions. It states:

> These amendments place limits on the classes of persons who may exercise entry for discussion purposes, and in what circumstances. To the extent that these provisions limit the right to freedom of association, the limitation is necessary, reasonable and proportionate, because the amendments ensure that entry for discussion purposes can only be exercised if there are employees or TCF award workers on the premises who wish to participate in discussions, and the organisation has a legitimate role at the work site. The amendments ensure that the role of trade unions in Australian workplaces is enshrined appropriately in the

18 Review of the FW Act, pp 172-173.

> right of entry framework, and balances the needs of employers, occupiers and employees in a manner that is consistent with the object of Part 3-4.[19]

1.78 The committee notes that this statement does not provide a clear justification for the proposed restriction on rights guaranteed by article 8 of the ICESCR. The committee's usual expectation is that where a bill limits a human right, the statement of compatibility will set out how the limitation achieves a legitimate objective and is reasonable and necessary.

1.79 The committee therefore requests the Minister for Employment's advice as to whether the measures are compatible with the right to bargain collectively and in particular:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

Repeal of requirements for employers to facilitate union visits to remote locations

1.80 The bill proposes to repeal provisions of the FWA that require an employer or occupier to facilitate transport and accommodation arrangements for union officials exercising entry rights at work sites in remote locations such as offshore work sites, mining sites and mining construction sites.

1.81 It appears to the committee that, in cases where transport or accommodation to a worksite is available only where the employer or occupier provides or arranges for its provision, a failure to require the employer or occupier to do so (if no agreement has been reached), would in effect make it impossible for union officials to visit worksites in order to undertake consultations or other authorised activities.

1.82 The statement of compatibility does not specifically provide a justification for the proposed repeal. It states only that:

> The repeal of these amendments does not limit the right to freedom of association. Rather, the amendments set out in the Bill merely relate to procedural matters of how a trade union may go about exercising its entry rights under the Fair Work Act, and the extent to which an occupier is required to facilitate the entry. They do not prevent or otherwise limit the exercise of existing entry rights.

---

19 Statement of compatibility , p lxiii.

1.83 In the committee's view, the current provisions of the FWA relating to remote locations appear to ensure the right to freedom of association and to balance the interests of employees and employers by requiring the reimbursement of reasonable costs by union officials. While there may be some costs that are not recoverable by the employer or occupier, on the basis of the evidence provided in the RIS, these costs seem relatively small in the context of the overall budgets of the projects involved. Against this, removal of the obligation to arrange for transport to and accommodation in remote locations would appear likely to effectively nullify the right of union representatives to visit such locations to consult with union members and to undertake other activities, which is a fundamental aspect of the rights to freedom of association and to bargain collectively.

1.84 The committee therefore requests Minister for Employment's advice as to whether the proposed repeal of sections 521A to 521D of the FWA is compatible with the right to freedom of association and the right to bargain collectively.

Restrictions on the location of interviews and discussions

1.85 Currently, the FWA provides the union official is required to conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises. If the parties are unable to agree on a location, the union official is permitted to conduct the interview or hold the discussions in any room or area where the employees to be involved in interviews or discussion ordinarily take meal or other breaks.

1.86 The bill would restore the legislative position that existed prior to 2013 whereby the employer may, in the first instance, determine where the meeting is to be held provided this is reasonable. The amendments do not provide for an alternative location if the union official considers that the room allocated by the employer is unreasonable. However, the FWC has the power to deal with a dispute about whether it is reasonable. The bill would thus appear to make the exercise of the rights of trade unions to confer with its members and potential members (and vice versa) more difficult in practice, thereby limiting the right guaranteed by article 8 of the ICESCR.

1.87 The committee notes that the statement of compatibility does not specifically provide a justification for the introduction of these restrictions (See paragraph 1.35 above).

1.88 In relation to these provisions of the bill, the statement of compatibility does not provide a clear justification for the proposed restriction on rights guaranteed by article 8 of the ICESCR. The committee's usual expectation is that where a bill limits a human right, the statement of compatibility will set out how the limitation achieves a legitimate objective and is reasonable and necessary.

1.89 The committee requests the Minister for Employment's advice as to the compatibility of the proposed amendments to sections 494 and 492A, with the rights to collectively bargain, and in particular:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

Power of FWC to deal with disputes over frequency of entry

1.90 The FWC is empowered to deal with a dispute about the frequency with which union officials enter work sites. The FWC may make orders suspending, revoking or imposing conditions on an entry permit and various other orders. However, the FWC may only make an order 'if the FWC is satisfied that the frequency of entry by the permit holder or permit holders of the organisation [union officials] would require an unreasonable diversion of the occupier's critical resources.'

1.91 The bill proposes to amend the FWA to require the FWC, in dealing with such disputes, to take into account fairness between the parties concerned and the combined impact on the employer's (or the occupier of premises) operations of entries onto the premises by union officials.

1.92 It is not clear whether a consequence of the amendments might be that, because the FWC must take into account the combined impact of entries by all organisations (including those not party to the dispute), access by some unions may be limited if one union enters too frequently or if the overall impact of all entries is considered excessive from the point of view of the employer or occupier. This may apply even if the exercise of the right by each individual union might otherwise be reasonable. The committee considers that the amendments could limit access by unions to workplaces to a greater extent than is permitted under current law, and that this represents a limitation on rights guaranteed by article 8 of the ICESCR and ILO Convention No 87.

1.93 The statement of compatibility does not provide a detailed justification for the introduction of these restrictions. It states:

> The amendments also broaden the capacity of the FWC to deal with disputes about the frequency of entry to premises for discussion purposes. In dealing with right of entry disputes, FWC must take into account fairness between the parties concerned, and the combined impact of visits by permit holder's [sic] on the operations of the employer or occupier. These amendments ensure appropriate conduct by permit holders while exercising right of entry for discussion purposes, consistent with the right

> of entry framework established by the Fair Work Act, and provide for an avenue for the prompt resolution of disputes by an independent arbiter.
>
> The amendments in Part 8 of Schedule 1 to the Bill provide for right of entry disputes to be resolved with due respect for both the rights of employees to be represented at work and the rights of the occupiers of premises to maintain their property and manage their businesses. To the extent that the amendments limit the right to freedom of association, the limitations are necessary, reasonable and proportionate.[20]

1.94 The committee notes that this statement does not provide a clear justification for the proposed restriction on rights guaranteed by article 8 of the ICESCR. The committee's usual expectation is that where a bill limits a human right, the statement of compatibility to set out how the limitation achieves a legitimate objective and is reasonable and necessary.

1.95 The committee notes that there is some information about the frequency of entries and the costs to employers provided in the RIS accompanying the bill. However, this material is not applied to the analysis of whether the limitation of rights is permissible under human rights law.

1.96 The committee therefore requests the Minister for Employment's advice as to the compatibility of the measures with the rights to collectively bargain and, in particular:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

Restrictions on protected action ballot orders

1.97 Under the FWA employees may take protected industrial action in support of their claims for an enterprise agreement provided that certain conditions are satisfied.

1.98 The bill proposes the addition of a new requirement that bargaining representatives for employees must satisfy when applying for a FWC order that a protected action ballot be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement. The new

20 Statement of compatibility , p lxiii.

requirement is that an application for such an order may not be made 'unless there has been a notification time in relation to the proposed enterprise agreement.'[21]

1.99 The statement of compatibility states that the amendment 'is a direct response to and implements a recommendation by the Fair Work Review Panel that the FWA be amended so that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained (recommendation 31).'

1.100 The statement of compatibility accepts that the amendment limits the right to strike until bargaining has commenced, but concludes that the limitation:

> …is considered reasonable, necessary and proportionate to achieving the legitimate objectives of:
>
> • promoting the integrity of the collective bargaining framework, including by giving primacy to negotiations voluntarily entered into and conducted in good faith;
>
> • balancing the right to voluntary collective bargaining with the requirement to bargain where a majority of employees wish to do so; and
>
> • providing greater certainty as to the circumstances in which protected industrial action can be taken.

1.101 The committee notes that, while these may be legitimate objectives, the statement of compatibility does not explain clearly how the measure is rationally related to those objectives and whether the measures are a reasonable and proportionate means of achieving those goals (and why less restrictive alternatives such as retaining the present law would not be appropriate). Nor does it explain how these limitations are consistent with ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organize.

1.102 The committee therefore requests the Minister for Employment's advice as to the compatibility of the measure with the right to collectively bargain and in particular:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

---

21 Statement of compatibility , p lxiii.

Health Insurance Amendment (Extended Medicare Safety Net) Bill 2014

Portfolio: Health
Introduced: House of Representatives, 26 March 2014

1.103 The Health Insurance Amendment (Extended Medicare Safety Net) Bill 2014 seeks to amend the *Health Insurance Act 1973* to:

- increase the general threshold of the Extended Medicare Safety Net (EMSN) to $2000 from 1 January 2015; and
- enable the Chief Executive Medicare to determine the manner in which families are contacted to confirm their family composition for EMSN purposes.

1.104 The accompanying statement of compatibility assesses the bill as engaging the rights to health and social security. It concludes that the bill is compatible with human rights as [to] the extent that it may limit the human right to health [it] is reasonable, necessary and proportionate.[1]

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

1.106 The committee notes that, in addition to the rights identified in the statement of compatibility, the bill may be regarded as engaging the rights of equality and non-discrimination,[2] insofar as the increase is targeted only to those persons subject to the upper threshold of the Extended Medicare Safety Net (EMSN).

1.107 However, if a difference in treatment can be shown to be based on objective and reasonable criteria, and to be a proportionate measure adopted in pursuit of a legitimate goal, then it will not violate the rights of equality and non-discrimination. The committee notes that measure is designed not to affect the affordability of medical services for concession card holders and low-income earners,[3] and that the measure is likely to be compatible with the rights to equality and non-discrimination.

1 Explanatory memorandum (EM), p. 5.

2 International Covenant on Civil and Political Rights, articles 2, 12 and 16.

3 EM, 4.

Health Workforce Australia (Abolition) Bill 2014

Portfolio: Health
Introduced: House of Representatives, 15 May 2014

1.108 The Health Workforce Australia (Abolition) Bill 2014 (the bill) disestablishes Health Workforce Australia (HWA) and transfers the functions and programmes of HWA to the Commonwealth Department of Health.

1.109 The bill is accompanied by a statement of compatibility which states that it does not engage any of the applicable rights or freedoms and is therefore compatible with human rights.[1]

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

1.111 However, the committee notes that the function of HWA is to promote a national coordinated approach to creating a health workforce able to meet the current and future healthcare needs of Australia. In this respect, the bill may be seen as engaging the right to health.[2]

1.112 The explanatory memorandum for the bill notes that the functions and programmes of HWA will be moved to the Commonwealth Department of Health. It states:

> **The disestablishment of HWA and transfer of its functions and programmes to the Department of Health will provide efficiencies by removing duplication in programmes and programme management. It will also reduce the health bureaucracy. It will enable more efficient and effective delivery of policy and programme activities related to the health workforce, to ensure Australia continues to have a high quality, capable and well distributed health workforce, delivering frontline health services for all Australians.[3]**

1.113 The committee notes that, while the purpose of the bill is to provide more efficient and effective delivery of policy and program activities related to the health workforce, any consequent reduction in the effectiveness of such activities could result in a limitation of the right to health. The committee's assessment assumes that the policy of transferring HWA's functions to the Department of Health will be effective.

---

1 Explanatory memorandum (EM), p. 2.

2 International Covenant on Economic Social and Cultural Rights, article 12.

3 EM, p. 1.

Migration Amendment (Ending the Nation's Shame) Bill 2014

Sponsor: Mr Wilkie
Introduced: House of Representatives, 26 May 2014

1.114 The Migration Amendment (Ending the Nation's Shame) Bill 2014 seeks to amend the *Migration Act 1958* to afford specific rights to non-citizens who travel or are brought to Australia which they are currently denied under existing legislation.

1.115 The bills proposes the following changes:

- an end to temporary protection visas;
- a cessation of all offshore processing and mandatory detention;
- full access to Centrelink, Medicare and work rights for those on Protection and Bridging class visas; and
- an increase in the right to review and appeal provisions of the *Migration Act 1958*.

1.116 The bill is accompanied by a statement of compatibility which states that 'this bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny Act 2011*.'[1]

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

1 Explanatory memorandum (EM), [p. 1].

Migration Legislation Amendment Bill (No.1) 2014

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 27 March 2014

Purpose

1.118 The Migration Legislation Amendment Bill (No.1) 2014 (the bill) consists of six schedules of amendments to the *Migration Act 1958* (Migration Act) and the *Australian Citizenship Act 2007*. Key changes include:

- amending the existing limitations on applying for a further visa under sections 48, 48A and 501E of the Migration Act to include situations where the first visa applications was made on behalf of a non-citizen, even if the non-citizen did not know of, or did not understand, the nature of the application due to a mental impairment or because they were a minor (Schedule 1);
- providing that a bridging visa application is not an impediment to removal under subsection 198(5) (Schedule 2);
- extending debt recovery provisions for detention costs to all convicted people smugglers and illegal foreign fishers (Schedule 3);
- amending the role of authorised recipients for visa applicants; and the Migration Review Tribunal and Refugee Review Tribunal's obligation to give documents to authorised recipients (Schedule 4);
- providing access to, and use of, material and information obtained under a search warrant in migration and citizenship decisions (Schedule 5); and
- amending the procedural fairness provisions that apply to visa applicants (Schedule 6).[1]

Committee view on compatibility

Non-refoulement obligations

1.119 Australia has non-refoulement obligations under the Refugee Convention and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[2] This means that Australia must not return an individual to a country where there is a real risk that they would face torture or other serious forms

1 Explanatory memorandum (EM), p. 2.

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3(1); International Covenant on Civil and Political Rights, articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

of harm, such as arbitrary deprivation of life; the death penalty; or cruel, inhuman or degrading treatment or punishment.[3]

1.120 Non-refoulement obligations are absolute and may not be subject to any limitations.

1.121 Human rights law requires provision of an independent and effective hearing to evaluate the merits of a particular case of non-refoulement. Equally, the provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.[4]

1.122 Australia principally seeks to effect its non-refoulement obligations through the Migration Act. In particular, section 36 of the Migration Act sets out the criteria for the grant of a protection visa, which include being found to be a refugee or otherwise in need of protection under the ICCPR or the CAT.

Risk of refoulement –extension of statutory bar on further visa applications

1.123 Under the Migration Act, individuals in the migration zone at the time of making a protection visa application are allowed to make only one such application, and are barred from making a further application after being refused a visa (section 48) or protection visa (section 48A), or having a visa cancelled (section 501E). The EM for the bill notes that this bar is intended to prevent the making of repeat unmeritorious claims.[5]

1.124 Schedule 1 of the bill proposes to extend the bar on making a further visa application to an individual who has previously been refused a visa in relation to an application made on their behalf, even where they did not know of or did not understand the nature of the application due to mental impairment or because they were a minor.[6]

1.125 The statement of compatibility for the bill explains that the objective of the measure is to respond to a recent Full Federal Court case in which it was argued that section 48 would not operate to limit further applications by a minor, if the minor did not know about or understand the nature of an unsuccessful visa application made

3 The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations in addition to those under the Refugee Convention.

4 International Covenant on Civil and Political Rights, article 2.

5 EM, p. 6.

6 EM, p. 8.

on their behalf by a parent.[7] The statement of compatibility notes that such an outcome:[8]

> …could create a potential loophole that undermines the integrity of Australia's visa program by undermining the objective of section 48 of the Act, which is to prevent non-citizens who do not otherwise have a right to remain in Australia from delaying their departure from Australia by making repeat unmeritorious applications.[9]

1.126 The statement of compatibility also states that such an interpretation would create a significant administrative burden, as the department, in determining whether section 48 applies, would be required to establish whether a visa applicant knew and understood the nature of a previous application.[10]

1.127 The committee notes that the amendments would prevent a minor or person who did not know of or understand the nature of the application because of an intellectual impairment from making a further protection visa application despite having a valid independent protection claim (for example, that if returned to a country they would face a real risk of torture or other serious harm). This will be the case where:

- the person has previously been included in a family member's protection application and there has been no independent assessment of that person's protection claims;
- the person has no knowledge of the previous application made on their behalf;
- the person has not had the opportunity to be substantively involved in the preparation of the protection claim in accordance with the capacity to contribute to the making of that protection claim nor make representations on their own behalf; and
- potentially, the person did not consent to the previous application being made on their behalf and the person had the legal capacity to provide such consent.

1.128 Any such failure to consider the independent protection claims of an individual, leading to the return of a person to a country where they face torture or other serious harm, would amount to a breach of Australia's non-refoulement obligations.

---

7 EM, p. 8.

8 EM, pp 8-9.

9 EM, p. 9.

10 EM, p. 9.

1.129 On this question, the statement of compatibility for the bill points to 'adequate protections' to ensure the non-refoulement of minors and or person's with a disability with otherwise valid independent protection claims. It states:

> …a non-citizen who is being removed from Australia will be assessed for any possible risks that might arise under the CAT and the ICCPR as a consequence of their removal from Australia...
>
> Furthermore, the Minister has a personal, non-compellable power under section 48B of the Act to allow the minor or the mentally impaired non-citizen to make a further protection visa application in the public interest…[as well as] personal, non-compellable powers under other relevant provisions in the Act to grant a visa to the minor or mentally impaired non-citizen in the public interest. In consideration of the public interest, the Minister may take into account Australia's protection obligations...[11]

1.130 The statement of compatibility concludes that the measure is an administrative measure that is not inconsistent with Australia's non-refoulement obligations.[12]

1.131 The committee acknowledges the objectives of efficient and expeditious administration of protection claims, and that the ICCPR and CAT do not require Australia to grant particular forms of visa or follow particular processes in relation to persons to whom non-refoulement obligations are owed.

1.132 However, the committee notes that the obligation of non-refoulement requires the provision of procedural and substantive safeguards to ensure that a person is not removed in contravention of non-refoulement obligations (along with the general obligation to provide effective remedies for human rights breaches under article 2 of the ICCPR).[13]

1.133 Given this, the committee notes that extending the statutory bar on visa applications effectively removes existing procedural and substantive safeguards against the potential refoulement of children and persons with a disability with valid protection claims (amounting to a limitation on their right to an effective remedy). The committee is therefore concerned as to the adequacy of administrative assessment and the minister's non-compellable and non-reviewable powers, which will be relied upon to avoid the removal of any minor or person with a disability with

---

11 EM, pp. 14-15.

12 EM, p. 15.

13 See *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v. France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000), paras 11.5 and 12 and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, p 38, para 56(14), see also: Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

valid protection claims (and to whom Australia therefore owes non-refoulement obligations).[14]

1.134 The committee considers that the remaining administrative and discretionary safeguards are less stringent than the statutory protection visa application and review processes. Therefore, the amendments could increase the risk of Australia breaching its non-refoulement obligations.

1.135 The committee has previously commented that administrative consideration of protection visa claims is insufficient to satisfy the standards of 'independent, effective and impartial' review required to satisfy Australia's non-refoulement obligations under the ICCPR and the CAT.[15] In particular, rigorous independent scrutiny of decisions involving non-refoulement obligations is required because of the irreversible nature of the harm that might occur.

1.136 The committee is concerned that the bill further entrenches a preference for non-reviewable executive decision making at the expense of the important protection provided by a system of robust and independent merits review.

1.137 The committee therefore recommends that the bill be amended to provide for independent merits review of decisions to deny subsequent protection visa applications by minors and persons with a disability.

Risk of refoulement –amendments to prevent repeat bridging visa applications

1.138 Schedule 2 of the bill proposes amendments to section 198 of the Migration Act, which sets out the circumstances in which an unlawful non-citizen maybe removed from Australia. The amendments would provide that a bridging visa application is not an impediment to removal under subsection 198(5) of the Migration Act,[16] and are intended to prevent an individual from making repeat unmeritorious applications for bridging visas in order to delay their removal from Australia.

1.139 In order to ensure that the amendments do not result in the removal of individuals from Australia where a separate protection visa application is on foot, the amendments include a new subsection 198(5A), which provides that an officer must not remove an unlawful non-citizen if the non-citizen made a valid application for a protection visa and either:

- the grant of the visa has not been refused; or

14 EM, p. 15.

15 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in *Second Report of the 44th Parliament*, paras 1.89 – 1.99. See also *Fourth Report of the 44th Parliament, paras 3.55-3.66* (both relating to the Migration Amendment (regaining Control Over Australia's Protection Obligations) Bill 2013).

16 EM, p. 16.

- the application has not been finally determined.[17]

1.140 The statement of compatibility states that the amendments:

> …do not engage [Australia's non-refoulement obligations under] Article 3(1) of the CAT and Article 6, and 7 of the ICCPR. Individuals would not be subject to removal unless and until their claims for protection had been assessed according to law.[18]

1.141 However, the committee notes that proposed subsection 98(5A) would apply only to individuals who have an existing protection visa application on foot. It is unclear whether the amendment may lead to the refoulement of individuals with valid protection claims who, for example, have not or have been unable to initiate a protection claim due to other provisions of the Migration Act. The committee understands that the only mechanism for ensuring non-refoulement of such persons would be the administrative pre-removal clearances procedures of the department.

1.142 As above, the committee is concerned that such procedures may not be stringent enough to provide a thorough assessment of protection claims, and are not subject to 'independent, effective and impartial' review as required to satisfy Australia's non-refoulement obligations under the ICCPR and the CAT.

1.143 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with Australia's non-refoulement obligations under the ICCPR and CAT.

Obligation to consider the best interests of the child

1.144 Under the Convention on the Rights of the Child (CRC), States parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[19]

1.145 This principle requires active measures to protect children's rights and promote their survival, growth, and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

Extension of statutory bar on further visa applications

1.146 As noted above, Schedule 1 to the bill would prevent a child from making a further protection visa application even in circumstances 'where allowing the visa

17 *Migration Legislation Amendment Bill (No.1) 2014,* Item 2, Schedule 2.

18 EM, p. 18.

19 Article 3(1).

application would likely be in…[their] best interests' (such as where they had a valid independent protection claim).[20]

1.147 While the statement of compatibility acknowledges that the measure therefore limits the rights of children to have their best interests be a primary consideration, it concludes:

> ...the preservation of the overall integrity of Australia's visa systems in accordance with Parliamentary intent (as reflected in the legislative framework) and public expectation should take precedence.[21]

1.148 Further, the statement of compatibility characterises the measure as promoting the rights of the child, specifically the right of children not to be separated from their parents against their will other than in exceptional circumstances.[22] It states:

> …the amendment will help to avoid situations where the parents are prevented from making further applications and may be subject to possible removal from Australia following a visa refusal, but the child is not liable for removal because they are able to make further applications and be granted bridging visas in association with those further visa applications. To the extent that the amendment ensures that members of the same family unit who applied for visas together will receive consistent immigration outcomes and be bound by the same consequences, the amendment will assist to preserve family unity and prevent the separation of the child from their parents.[23]

1.149 In the committee's view, the assessment provided does not contain sufficient analysis to support the committee's assessment of the compatibility of the measure with human rights, particularly in relation to how the maintenance of the integrity of the migration system in accordance with 'public expectation' may be regarded as a legitimate objective. The committee considers that seeking to justify a limitation on human rights by reference to general matters such as national security, integrity of the system or public expectation is insufficient. The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide a detailed and context-specific assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.150 Further, the committee considers that the characterisation of the proposed measure as promoting the rights of the child not to be separated from their family and therefore offsetting any potential violation of the child's other rights, is not an appropriate assessment of the limitation on human rights proposed by the measure.

---

20 EM, p. 12.

21 EM, p. 12.

22 Article 9, CRC.

23 EM, p. 13.

For example, the statement does not adequately reflect that the separation of the child from its family in certain cases could be clearly outweighed by exceptional circumstances and the child's best interests (such as where the child had valid protection claims). The committee considers that seeking to justify a limitation on human rights by reference to more remote and possibly hypothetical impacts on other human rights, fails to effectively analyse the human rights implications as required by human rights law.

1.151 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child and, particularly, how the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Right of the child to be heard in judicial and administrative proceedings

1.152 Article 12 of the CRC provides that States parties shall assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child. The views of the child must be given due weight in accordance with the age and maturity of the child.

1.153 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Failure to question the validity of prior visa application

1.154 The committee notes that the effect of the proposed amendments in Schedule 1 would be to create an assumption, in cases involving a subsequent visa application by a child, that the previous visa application made on behalf of the child was valid. This assumption would apply without a consideration of the age of the child, their relationship with the person who made the application on their behalf, or an individual assessment of the extent to which the application was consistent with the wishes of the child. In the committee's view, to effectively deem the previous application as valid without considering these factors represents a limitation on the right of the child to contribute to, or be heard in, judicial and administrative proceedings.

1.155 The committee's usual expectation where a limitation on these rights is proposed, is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.156 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the right of

the child to be heard in judicial and administrative proceedings and, particularly, whether the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Right of persons with disabilities to recognised as persons before the law and to the equal enjoyment of legal capacity

1.157 Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) requires States parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

Requirement to support persons with a mental impairment to make an informed decision about lodging a visa application

1.158 The bill provides that the restrictions on submission of further applications will also apply in cases where a person did not know about or did not understand the nature of the application 'due to any mental impairment'. The committee notes that neither the *Migration Act 1958* nor the bill contains a definition or description of the term 'mental impairment'. It is not clear what impairments this term is meant to cover, or which have arisen in practice in the context of visa applications. The committee notes that the CRPD includes both 'mental' and 'intellectual' impairment in its description of disability.

1.159 The committee notes that persons with intellectual and mental impairment may be particularly at risk as asylum-seekers. While the committee emphasises that under the CRPD the legal capacity of persons with disabilities is a starting point of any discussion, the committee recognises that in some cases persons with intellectual and mental impairment may need support or assistance in exercising that capacity. Making decisions about the lodging of a visa application, given the potential consequences and technical nature of such an action, is likely to be one such circumstance.

1.160 The statement of compatibility provides no information about the number of cases in which persons with intellectual or mental impairment may have visa applications lodged on their behalf, the procedures for determining whether a person has an intellectual or mental impairment which gives rise to the need for support for that person in making an decision in relation to a visa application, and the nature and extent of any support necessary or provided to such persons. Nor is any information provided about whether the government considers that there are cases in which a person with an intellectual or mental impairment may not, even with support, be in a position to make an informed decision about the lodging of a visa application and, if so, what approach is adopted in such cases and whether it is compatible with the CRPD.

1.161 The committee considers that it is likely to be incompatible with the provisions of the CRPD, in particular article 12, if a person with an intellectual or mental impairment were not provided with any support required to make an informed decision about lodging a visa application and was then barred from making a subsequent via application because an application had been lodged 'on behalf' of the person but without the participation of the person in that decision-making process. The Committee on the Rights of Persons with Disabilities has emphasised the responsibility of States parties to move away from substitute decision-making and replace it with 'supported decision-making, which respects the person's autonomy, will and preferences'.[24]

1.162 In order for the committee to assess the compatibility of the measure with human rights, the committee requires further information including:

- whether the term 'mental impairment' includes both 'mental' and intellectual' impairment as covered by the CRPD;
- how many cases involve visa applications made on behalf of persons with intellectual or mental impairment; and
- what procedures are in place for determining whether a person has an intellectual or mental impairment which gives rise to the need for support for that person in making an decision in relation to a visa application, and the nature and extent of any support necessary or provided to such persons.

1.163 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the requirement to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Right to equality and non-discrimination

1.164 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).[25]

1.165 These are fundamental human rights that essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the

24 Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014); Article 12: Equal recognition before the law (CRPD/C/GC/1, adopted 11 April 2014) p. 6.*

25 See also article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 2 of the Convention on the Rights of the Child (CRC), articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.166 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that result in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.[26]

1.167 Discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups.

1.168 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

1.169 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

Extension of statutory bar on further visa applications

1.170 As noted above, Schedule 1 to the bill would extend the bar on making a further visa application to an individual who has previously been refused a visa in relation to an application made on their behalf, even where they did not know of or did not understand the nature of the application due to mental impairment or because they were a minor.

1.171 The statement of compatibility states that the amendments are consistent with Australia's obligations to ensure equality before the law under the CRPD. It concludes:

> …the amendment simply seeks to ensure that the limitation or prohibition on the making of further applications will apply objectively and consistently to all non-citizens who have been refused a visa while they are in the migration zone.
>
> Therefore, amendment 6 [Schedule 1] is not discriminatory on the basis of a non-citizen's mental impairment. If there is indeed any perceived discrimination, it is not inconsistent with Article 5(1) of the CRPD.[27]

1.172 However, in the committee's view, the extension of the statutory bar on further visa applications to persons with a mental impairment may operate in such a

---

26 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

27 EM, p. 14.

way as to indirectly discriminate against such persons. This is because persons with disabilities may be disproportionately affected by this measure given that the measure specifically addresses visa applications made on their behalf. Along with minors, people with a mental impairment are the only group that will be denied the right to make a visa application if an application was made on their behalf, even if they did not authorise, contribute to or consent to the application.

1.173 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Extension of liability for detention and removal costs

1.174 Schedule 3 of the bill would amend the Migration Act to extend existing debt recovery provisions to apply to all convicted people smugglers and illegal foreign fishers. Currently, convicted people smugglers and illegal foreign fishers detained under section 250 of the Act are liable for the cost of their detention and removal from Australia.[28] The amendments would extend such liability to convicted people smugglers and illegal foreign fishers who:

- are, or have been detained under section 189 of the Act;
- are, or have been, detained under section 189 because of subsection 250(2); or
- have been granted a Criminal Justice Stay visa or any other class of visa.[29]

1.175 The method of calculating the amount of detention, transportation and removal costs that convicted people smugglers and illegal foreign fishers will be liable for will remain unchanged.

1.176 The statement of compatibility for the bill concludes that Schedule 3 of the bill is compatible with human rights, as it does not raise any human rights issues.[30]

1.177 However, the committee notes that it has previously identified the imposition of liability for detention and removal costs on convicted people smugglers

---

28 Subsection 250(2) of the Migration Act provides that a non-citizen may be detained in immigration detention if they are a non-citizen who has travelled or was brought to the migration zone, and is believed by an authorised officer on reasonable grounds to have been on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against a law in the whole or any part of Australia.

29 EM, p. 19.

30 EM, p. 20.

and illegal foreign fishers as a limitation on the right of such persons to equality and non-discrimination. This is because they are the only individuals liable for their detention costs, which amounts to differential treatment requiring a reasonable and objective basis if it is not to be incompatible with the right to equality and non-discrimination.

1.178 The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.179 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

1.180 Further, the committee notes its previous comments that the differential treatment of persons in detention (whether or not on a reasonable or objective basis), may amount to a limitation on the right to humane treatment in detention.[31]

1.181 The committee therefore requests the Minister's advice as to the whether Schedule 3 of the bill is compatible with the right to humane treatment in detention.

Right to a fair trial and fair hearing rights

1.182 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.

1.183 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.

Amendments affecting authorised recipients for visa applicants

1.184 Schedule 4 to the bill proposes amendments intended to clarify the role of individuals appointed by visa applicants as their authorised recipients for

31 The right to humane treatment in detention is guaranteed under article 7 of ICCPR and article 16 of CAT, which provides that all people deprived of their liberty must be treated with humanity and dignity. This right is linked to the prohibition against torture, cruel, inhuman or degrading treatment.

communication and documents from the department or a tribunal.[32] The amendments also seek to confirm that a tribunal's obligation to give documents to an authorised recipient extends to circumstances where a review application is found not to be properly made. [33]

1.185 The statement of compatibility states that the amendments in schedule 4 do not engage 'any rights stated in the seven core human rights treaties'.[34]

1.186 However, the committee notes that the amendments would appear to allow the department to contact a visa applicant directly, even if they were represented by a solicitor or migration agent (being the applicant's authorised recipient). It is unclear to the committee whether the amendments could diminish the ability of authorised agents, such as solicitors and migration agents, to act on behalf of their clients (thereby representing a limitation on the right to a fair trial and fair hearing). For example, it is unclear whether the proposal may undermine existing legal practice protocols, which prohibit a solicitor contacting the client of another solicitor without their consent; or whether it could result in authorised agents failing to receive information relevant to their client's cases, or clients having unrepresented interactions with the department.

1.187 The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.188 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 4 of the bill with the right to a fair trial and fair hearing rights and, in particular, whether these measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Removal of common law procedural fairness requirements

1.189 Schedule 6 to the bill proposes the removal of the current requirement to provide common law procedural fairness standards to offshore visa applicants. The result will be that both offshore and onshore applications will be subject to the narrower statutory Code of Procedure procedural fairness standard. Specifically, it will provide that the 'hearing rule' as prescribed by section 57 of the Migration Act

32 EM, p. 5.

33 EM, p. 8.

34 EM, p. 10.

will apply to offshore applications, rather than the broader common law hearing rule.[35]

1.190 The statement of compatibility for the bill, while noting that the hearing rule standard to be applied by Schedule 6 is narrower than the common law standard being displaced (and therefore amounting to a limitation of the right to a fair trial and fair hearing), characterises the measure as (essentially) promoting the right of non-citizens to be expelled from a territory only in accordance with law, based on the reasoning that decision makers will be less prone to 'confusion' and therefore to make errors through the application of the wrong hearing rule standard in respect of offshore applicants.

1.191 The committee considers that the characterisation of the proposed measure as promoting the right of non-citizens to be expelled from a territory only in accordance with law is questionable, given that it reduces the level of procedural protection available to one group of non-citizens.

1.192 The statement of compatibility explains that the common law test has led to some confusion and that decision-makers have had difficulty determining whether adverse information is 'relevant, credible and significant' and therefore to be put to the applicant. The application of the different standards would not appear onerous or difficult, compared with the standards set out in section 57 of the *Migration Act 1958*. The committee considers that the statement of compatibility does not provide sufficient information to explain the necessity of these amendments.

1.193 The committee notes that human rights are to be interpreted generously and permissible restrictions narrowly. In order to justify a limitation, the committee's usual expectation is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.194 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 6 to the bill with the right to a fair trial and fair hearing rights and, in particular, whether the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Right to privacy

1.195 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.

35 The hearing rule relates to the right of an applicant to comment on certain adverse information. See EM, p. 3.

1.196 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 disclosure of information.

Disclosure of information obtained under search warrants

1.197 Schedule 5 to the bill would allow for material obtained under a search warrant issued under the *Crimes Act 1914* to be used in administrative decisions relating to visas and citizenship. The amendments would not further widen coercive law enforcement powers under Commonwealth law, but would extend the disclosure of information gained through existing coercive powers to officials within the Department of Immigration and Border Protection.

1.198 The statement of compatibility for the bill states that the objective of the bill is:

> …to provide further information to administrative officers for more effective decision making…[to] enhance decision-making and as a result…enhance the integrity of the migration and citizenship programs…[36]

1.199 The statement of compatibility concludes that the measure is compatible with the right to privacy 'because to the extent that it may limit…[the right], those limitations are reasonable, necessary and proportionate'.[37]

1.200 However, the committee considers that, while the proposal appears to be directed to a legitimate objective, the statement of compatibility does not provide sufficient information to support the committee's assessment whether the measure is a reasonable and proportionate means of achieving that that objective. For example, it is unclear how decision making will be enhanced by the disclosure of information obtained under coercive powers.

1.201 Further, it is unclear what protections and safeguards will apply to such information as is disclosed to and used by departmental officials. This is a question of particular relevance, given that the existing regime provides that information obtained through coercive information-gathering powers may be disclosed only to those involved in the administration of the law or for the purposes of related legislation. Specifically, Part 1AA of the Crimes Act 1914 (Crimes Act) prescribes specific criteria for when a search warrant can be sought, who can authorise the use of such a warrant, what use can be made of that information, how that information is to be stored and under what circumstances it can be shared and with whom.

1.202 While the Crimes Act makes provision for permitting Commonwealth officers to access information otherwise obtained under a search warrant, the committee notes that the amendments will allow such information to be made available to

---

36 EM, p. 21.

37 EM, p. 23.

administrative decision-makers for purposes apparently extending well beyond preventing, investigating or prosecuting a criminal offence.

1.203 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 5 of the bill with the right to privacy and in particular whether the measures in Schedule 5 are reasonable and proportionate.

Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2014

Portfolio: Industry
Introduced: House of Representatives, 29 May 2014

1.204 The Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2014 seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* to:

- provide for the environment plan levy to be imposed on the submission of an environment plan by an applicant for a petroleum access authority, petroleum special prospecting authority, pipeline licence, greenhouse gas special authority or greenhouse gas search authority; and
- ensure that the annual titles administration levy is imposed for a year of the term of a title, even if the title does not remain in force for the full year.

1.205 The bill is accompanied by a statement of compatibility which states that the bills 'is compatible with human rights as it does not raise any human rights issues.'[1]

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

1 Explanatory memorandum (EM), p.4.

Offshore Petroleum and Greenhouse Gas Storage (Regulatory Powers and Other Measures) Amendment Bill 2014

Portfolio: Industry
Introduced: House of Representatives, 29 May 2014

1.207 The Offshore Petroleum and Greenhouse Gas Storage (Regulatory Powers and Other Measures) Amendment Bill 2014 proposes to make technical amendments to various Acts to enable the proper commencement of pending amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) relating to regulatory powers and enforcement measures.

1.208 The amendments in the bill will amend the commencement provisions in the *Offshore Storage Amendment (Compliance Measures) Act 2013* to link to the commencement of the proposed *Regulatory Powers (Standard Provisions) Act 2014*.

1.209 The bill also seeks to make other technical amendments to the OPGGS Act including:

- removing the ability for the regulator to apply an infringement notice for a breach of the requirement to ensure that there is an operator's representative present at a facility at all times when one or more individuals are present at the facility;
- inserting a regulation-making power to provide for refund and remittal of annual titles administration levy in certain circumstances;
- amending section 343, relating to applications for a greenhouse gas holding lease by the holder of a petroleum retention lease, for consistency with similar provisions;
- removing the requirement to provide a copy of the application with an application for approval of a transfer, application for approval of a dealing, and provisional application for approval of a dealing; and
- correcting a missing subsection number and outdated references to 'the Safety Authority' in section 649.

1.210 The bill is accompanied by a statement of compatibility which concludes that the bill is compatible with human rights.[1]

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

1 Explanatory memorandum (EM), p. 7.

Public Governance, Performance and Accountability Amendment Bill 2014

Portfolio: Finance
Introduced: House of Representatives, 29 May 2014

1.212 The Public Governance, Performance and Accountability Amendment Bill 2014 seeks to amend the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) to:

- provide certainty over the use and management of public resources and the capacity of an accountable authority to issue instructions on resource management and governance matters within entities;
- include a requirement that Commonwealth entities must provide annual reports to their Minister by the 15th day of the fourth month after the end of the reporting period;
- clarify the nature of various legislative instruments, including the introduction of a new Part to the PGPA Act (Part 4-1A) to deal with other instruments that are not subject to disallowance, but are subject to appropriate scrutiny as they relate to procurement and grant activities and arrangements covering intelligence or security agencies and listed law enforcement agencies; and
- make technical amendments to clarify the operation of the PGPA Act.

1.213 The bill is accompanied by a statement of compatibility which states that the bill is 'compatible with the human rights and freedoms recognised or declared in the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.'[1]

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

1.215 However, the committee notes that the statement of compatibility does not fully meet the committee's expectations as it does not include sufficient information about the purpose and effect of the proposed bill. The committee therefore draws to the attention of the Minister for Finance 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).

1 Explanatory memorandum (EM), p. 2.

Recognition of Foreign Marriages Bill 2014

Sponsor: Senator Hanson-Young
Introduced: Senate, 15 May 2014

1.216 The Recognition of Foreign Marriages Bill 2014 (the bill) seeks to amend the *Marriage Act 1961* to ensure that marriages which are validly entered into in foreign countries can be recognised under the laws of Australia.

1.217 The bill is accompanied by a statement of compatibility which concludes that the bill 'is compatible with human rights as it does not raise any negative human rights issues.'[1]

1.218 The committee has previously considered a substantially similar bill, the Marriage Act Amendment (Recognition of Foreign Marriage for Same-Sex Couples) Bill 2013, in its *Seventh Report of 2013*.

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

1.220 However, as with the 2013 bill, the committee notes that the bill involves drawing a distinction between same-sex couples married in foreign countries (whose marital relationship would be recognised by the proposed bill) and same-sex couples in Australia who are unable to marry under Australian law. While the bill proposes to treat the two groups differently, it is unlikely that the distinction would be considered to be discriminatory. Rather, it would be viewed as a partial step towards eliminating discrimination against same-sex couples by treating them in the same way as heterosexual couples who marry overseas.

1 Explanatory memorandum (EM), [p. 2].

Student Identifiers Bill 2014

Portfolio: Industry
Introduced: House of Representatives, 27 March 2014

Purpose

1.221 This bill establishes a framework for the introduction of a student identifier for individuals undertaking nationally recognised vocational education and training from 1 January 2015, and sets out how the identifier will be assigned, collected, used and disclosed. The bill further provides for the creation of an authenticated transcript of an individual's record of nationally recognised training undertaken or completed after 1 January 2015. The bill also provides for the appointment of a Student Identifiers Registrar (the Registrar), who will administer the student identifier scheme.

Background

1.222 The committee has previously examined the following, substantially similar, bill:

- Student Identifiers Bill 2013.[1]

Committee view on compatibility

Right to education

1.223 The right to education is guaranteed by article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), under which States parties to the convention recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

1.224 Under article 2(1) of the ICESCR, States parties 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.

1.225 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in

1 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (May 2013), 'Student Identifiers Bill 2013', p. 65; and *First Report of 44th Parliament*, 'Student Identifiers Bill 2013', p. 203.

a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

Scope of exemptions from prohibition on issuing of VET qualifications

1.226 The statement of compatibility for the bill notes that the introduction of the student identifier scheme will generally promote the right to education by 'improving the accessibility of technical and vocational education', and 'ensuring that eligibility for subsidised training can be determined with a higher degree of confidence than is currently possible'.[2]

1.227 The statement of compatibility notes also that the scheme may limit the right to education, to the extent that it may prohibit registered training organisations (RTOs) from issuing a VET qualification (or statement of attainment) to an individual who has not been assigned an identifier. It notes:

> …for those students who do not obtain a student identifier (which is expected to be very few) and are not covered by an exemption, access to education may be limited if their ability to undertake further training is dependent on the student providing a VET qualification or a VET statement of attainment for a prerequisite course.[3]

1.228 The statement of compatibility notes that this prohibition is aimed at the objective of ensuring maximum participation in the scheme, and concludes that the limitation is 'reasonable, necessary and proportionate' to achieving its stated objective.

1.229 The committee notes that the scope of exemptions for the prohibition on the issuing of VET qualifications is relevant to the assessment of the reasonableness and proportionality of the measure, particularly as such exemptions 'will be necessarily limited to maintain the integrity of the scheme'. The EM for the bill states that such exemptions are necessary:

- to allow for consistency with 'existing and prospective legislative provisions (for example, to do with national security);
- for interaction with other regulatory instruments in the sector; and
- to address issues which may not yet have arisen.[4]

2 Explanatory memorandum (EM), p. 5.

3 EM, p. 5.

4 EM, p. 61.

1.230 Proposed section 53 provides that the minister may grant exemptions by reference to an RTO, a VET qualification (or statement of attainment) or an individual. While the ability to grant exemptions, particularly to individuals, may allow the prohibition to be applied as a reasonable and proportionate limitation of a person's right to education, the committee is unable to judge whether this is likely to be that case given the lack of specific criteria for the grant of an exemption. In particular, it is not clear in what circumstances, and according to what criteria, an individual without a unique student identifier might be granted an exemption from the prohibition on the issuing of VET qualifications.

1.231 The committee notes that the availability of merits review in relation to a decision to refuse to grant an exemption is also relevant to the assessment of whether the prohibition may be regarded as reasonable and proportionate in this context.

1.232 The committee therefore seeks the Minister for Education's advice as to what circumstances, and according to what criteria, an individual without a unique student identifier may be granted an exemption from the prohibition on the issuing of VET qualifications, and whether a decision to refuse to grant an exemption will be subject to merits review.

Right to work

1.233 The right to work and rights in work are guaranteed in articles 6(1), 7 and 8(1)(a) of the ICESCR. 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.

1.234 Under article 2(1) of the 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.

1.235 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.

Scope of exemptions from prohibition on issuing of VET qualifications

1.236 The statement of compatibility for the bill notes that the prohibition on the issuing of VET qualifications (outlined above) may equally limit an individual's right to work, where it would limit a person's ability apply for or undertake employment for which formal recognition of a qualification is a prerequisite.

1.237 The committee notes that, as above, the ability to grant exemptions, particularly to individuals, may allow the prohibition to be applied as a reasonable and proportionate limitation of a person's right to work. However, in the absence of specified criteria for the granting of exemptions, the committee is unable to assess whether this is likely to be the case.

1.238 The committee notes that the availability of merits review in relation to a decision to refuse to grant an exemption is also relevant to the assessment of whether the prohibition may be regarded as reasonable and proportionate in this context.

1.239 The committee therefore seeks the Minister for Education's advice as to what circumstances, and according to what criteria, an individual without a unique student identifier may be granted an exemption from the prohibition on the issuing of VET qualifications, and whether a decision to refuse to grant an exemption will be subject to merits review.

Right to privacy

1.240 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.

1.241 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.

Permitted collection, use and disclosure of student identifiers

1.242 The statement of compatibility for the bill notes that it engages and potentially limits the right to privacy through authorising the collection, use and disclosure of student identifiers. It states that any such limitations are aimed at legitimate objectives (including the 'accessibility of vocational education and training and the promotion of free education'),[5] and are accompanied by specific safeguards to ensure protection against misuse of personal information.[6] It concludes that any limitations on the right to privacy are 'reasonable, necessary and proportionate'.[7]

1.243 However, the committee notes that the bill provides for student identifiers (that is, personal information) to be used for purposes in addition to those strictly necessary for the operation of the scheme. Proposed section 20 provides:

---

5 EM, p. 8.

6 EM, pp 8-9.

7 EM, p. 9.

> An entity is authorised to collect, use or disclose a student identifier of an individual if the entity reasonably believes that the collection, use or disclosure is reasonably necessary for one or more of following things done by, or on behalf of, an enforcement body (*within the meaning of the Privacy Act 1988*):
>
> (a) the prevention, detection, investigation, prosecution or punishment of:
>
> (i) criminal offences; or
>
> (ii) breaches of a law imposing a penalty or sanction;
>
> (b) the conduct of surveillance activities, intelligence gathering activities or monitoring activities;
>
> (c) the conduct of protective or custodial activities;
>
> (d) the enforcement of laws relating to the confiscation of the proceeds of crime;
>
> (e) the protection of the public revenue;
>
> (f) the prevention, detection, investigation or remedying of misconduct of a serious nature, or other conduct prescribed by the regulations;
>
> (g) the preparation for, or conduct of, proceedings before any court or tribunal, or the implementation of the orders of a court or tribunal.

1.244 First, the committee notes that the permitting of the collection, use and disclosure of student identifiers on the basis that it is 'reasonably necessary' for one of the listed grounds imposes a lower standard than the usual international human rights law standard, which requires that a limitation on a right be 'necessary'. On this point, the statement of compatibility states:

> While 'reasonably necessary' is [a] lower threshold than 'necessary', such an authorisation is required to ensure that the legitimate policy objective of law enforcement can be achieved which will ultimately benefit students and the wider community.[8]

1.245 In the committee's view, it is not apparent from the discussion in the statement of compatibility why the lower standard of 'reasonably necessary' is 'required' in this case. For example, the statement of compatibility does not specify how a requirement that such uses be 'necessary' would frustrate or otherwise fail to support the legitimate objective of 'law enforcement'.

1.246 The committee therefore seeks the Minister for Education's advice as to why the lower standard of 'reasonably necessary' is required to authorise the

8 EM, p. 8.

collection, use and disclosure of information for the purposes outlined in proposed section 20 of the bill.

1.247 Second, the committee notes that proposed subsection 20(f) provides that an entity will be authorised to collect, use or disclose the student identifier of an individual if it 'reasonably necessary' for the ' prevention, detection, investigation or remedying of misconduct of a serious nature, or other conduct prescribed by the regulations'.

1.248 The committee notes that the term 'misconduct of a serious nature' would appear potentially to encompass a broad range of behaviour, including behaviour that may not be related to law enforcement as such.

1.249 The committee therefore seeks the Minister for Education's advice as to whether the proposed limitation on the right to privacy in proposed subsection 20(f) is a reasonable, necessary and proportionate measure in pursuit of the legitimate objective of 'law enforcement'.

1.250 The committee notes that the range of conduct prescribed by proposed subsection 20(f) may also be expanded by way of regulation. The committee notes that any such regulations would be subject to the requirement for a statement of compatibility, as well as examination by the committee.

1.251 However, noting the absence of specified criteria for the prescribing of conduct by regulation for the purposes of subsection 20(f), the committee seeks the minister's advice as to what types of conduct are envisaged as likely to be prescribed in this way, and whether the measure is reasonable, necessary and proportionate to achieving the objective of 'law enforcement'.

Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 29 May 2014

1.252 The Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014 seeks to amend various taxation laws.

1.253 Schedule 1 proposes to amend the *Medicare Levy Act 1986* to increase the Medicare levy low-income threshold for families and the dependent child-student component of the threshold for 2013-14 income year and later income years.

1.254 Schedule 2 proposes to amend the *Income Tax Assessment Act 1936* to ensure outcomes are preserved in relation to tax assessments where:

- taxpayers have reasonably and in good faith anticipated the impact of identified announcements made by a previous government that the tax law would be amended with retrospective effect; and
- the current Government has now decided that the announced proposal to change the law will not proceed.

1.255 Schedule 3 proposes to amend the *Income Tax Assessment Act 1997* to introduce an integrity rule to limit the ability of taxpayers to obtain a tax benefit from 'dividend washing'.

1.256 The bill is accompanied by a statement of compatibility which concludes that the bill is compatible with human rights.[1]

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

1 Explanatory memorandum (EM), Schedule 1, pp 10-11, Schedule 2, p. 40 and Schedule 3, pp 59-60.

Tax and Superannuation Laws Amendment (2014 Measures No. 3) Bill 2014

Portfolio: Treasury
Introduced: House of Representatives, 29 May 2014

1.258 The Tax and Superannuation Laws Amendment (2014 Measures No. 3) Bill 2014 seeks to amend the capital allowances provisions in the *Income Tax Assessment Act 1997* to limit immediate deductibility of expenditure on mining rights and mining information.

1.259 The bill is accompanied by a statement of compatibility which states that the bill 'is compatible with human rights as it does not raise any human rights issues.'[1]

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

1 Explanatory memorandum (EM), pp 16-17.

Temporary Budget Repair Levy Package

Portfolio: Treasury
Introduced: House of Representatives, 13 May 2014

1.261 The temporary budget repair levy package consists of the following bills:

- Family Trust Distribution Tax (Primary Liability) Amendment (Temporary Budget Repair Levy) Bill 2014;
- Fringe Benefits Tax Amendment (Temporary Budget Repair Levy) Bill 2014;
- Income Tax (Bearer Debentures) Amendment (Temporary Budget Repair Levy) Bill 2014;
- Income Tax (First Home Saver Accounts Misuse Tax) Amendment (Temporary Budget Repair Levy) Bill 2014;
- Income Tax (TFN Witholding Tax (ESS)) Amendment (Temporary Budget Repair Levy) Bill 2014;
- Income Tax Rates Amendment (Temporary Budget Repair Levy) Bill 2014;
- Superannuation (Departing Australia Superannuation Payments Tax) Amendment (Temporary Budget Repair Levy) Bill 2014;
- Superannuation (Excess Non-concessional Contributions Tax) Amendment (Temporary Budget Repair Levy) Bill 2014;
- Superannuation (Excess Untaxed Roll-over Amounts Tax) Amendment (Temporary Budget Report Levy) Bill 2014;
- Tax Laws Amendment (Interest on Non-Resident Trust Distributions)(Temporary Budget Repair Levy) Bill 2014;
- Tax Laws Amendment (Temporary Budget Repair Levy) Bill 2014;
- Tax Laws Amendment (Untainting Tax)(Temporary Budget Repair Levy) Bill 2014;
- Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 1) Amendment (Temporary Budget Repair Levy) Bill 2014;
- Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 2) Amendment (Temporary Budget Repair Levy) Bill 2014; and;
- Trust Recoupment Tax Amendment (Temporary Budget Repair Levy) Bill 2014.

1.262 The bills seek to amend the *Income Tax Assessment Act 1997*, the *Income Tax Rates Act 1986*, the *Income Tax (Transitional Provisions) Act 1997* and other taxation imposition and ratings Act to introduce a three-year progressive levy of additional

income tax on Australian residents and foreign resident individuals commencing in the 2014-15 financial year.

1.263 The package of bills is accompanied by a single statement of compatibility which notes that 'the temporary budget repair levy's design retains progressivity in the tax system' as only taxpayers with annual taxable income in excess of $180,000 will directly incur the levy. In 2014-15 this will amount to around 400,000 taxpayers (less than 4 per cent of taxpayers). The statement of compatibility states that '[t]he levy's design is reasonable, necessary and proportionate to the task of repairing the nation's finances, being payable by those with a greater ability to pay. The two per cent rate is modest relative to the higher incomes of those taxpayers who will be required to pay the levy.'

1.264 The statement of compatibility concludes:

> 1.111 The bills are compatible with human rights as they do not raise any human rights issues.
>
> 1.112 If the Bills did engage the right to an adequate standard of living, the Bills are nonetheless compatible with human rights because to the extent that it could be argued they may limit human rights, those limitations are reasonable, necessary and proportionate.[1]

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

1 Explanatory memorandum (EM), p. 26.

Textile, Clothing and Footwear Investment and Innovation Programs Amendment Bill 2014

Portfolio: Industry
Introduced: House of Representatives, 29 May 2014

Purpose

1.266 The Textile, Clothing, and Footwear Investment and Innovation Programs Amendment Bill 2014 (the bill) will amend the *Textile, Clothing and Footwear Investment and Innovation Programs Act 1999* to provide for the closure of the Clothing and Household Textile Building Innovative Capability Scheme (BIC Scheme) and the Textiles, Clothing and Footwear Small Business Program (TCF Small Business Program) on 30 June 2014.

Committee view on compatibility

Right to work and rights at work

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

1.268 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.

1.269 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.

1.270 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

1.271 The bill is accompanied by a statement of compatibility which states that the bills 'is compatible with human rights as it does not raise any human rights issues'.[1]

1 Explanatory memorandum, p. [4].

1.272 However, the committee notes that the purposes of the BIC scheme and TCF program are to, respectively, foster the development of a sustainable and internationally competitive clothing and household textile manufacturing and design industry in Australia; and to provide grants of up to $50 000 for projects to improve the business enterprise culture of established TCF small businesses. The committee notes that the early closure of these schemes may limit the right to work and rights at work, to the extent that their closure may reduce the employment opportunities of those working in the industry.

1.273 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.

1.274 The committee therefore seeks the Minister for Industry's advice as to the compatibility of the bill with the right to work and rights at work.

Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286]

Portfolio: Immigration and Border Protection
Auhtorising legislation: Migration Act 1958
Last day to disallow: 26 June 2014 (Senate)

Purpose

1.275 Amends the Migration Regulations 1994 requirements relating to public interest criterion 4020, English requirements for applicants of the Subclass 457 (Temporary Work (Skilled)) visa, requirements in Part 202 of Schedule 2 and provisions dealing with disclosure of information under regulation 5.34F.

Committee view on compatibility

Requirements for assessment of limitations on human rights

1.276 In the committee's view, the human rights assessment provided in the statement of compatibility for the regulation is inadequate to support the committee's task of examining legislation for compatibility with human rights.

1.277 The committee's usual expectation is that, where a proposed measure appears to limit human rights, the accompanying statement of compatibility provide an assessment of:

- whether and how the limitation is aimed at achieving a legitimate objective;
- whether and how there is a rational connection between the limitation and the objective; and
- whether and how the limitation is proportionate to that objective.

1.278 The committee notes that the standard applied to these considerations must be high. A legitimate objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting rights.[1]

1.279 It follows that, to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.280 Having identified that the measures are aimed at a legitimate objective, it must still be shown that they are likely to be effective in achieving that objective (that is, are rationally connected to their objective). In other words, unless the proposed measure will actually go some way towards achieving that objective, the limitation of the right is likely to be impermissible.

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

1.281 Finally, having established that measures are likely to be effective to achieve their stated objective, assessments must demonstrate that they are a proportionate means of achieving that objective. In other words, measures may nevertheless be impermissible because of the severity of their effect on individuals or groups. It is therefore essential that statements of compatibility identify:

- any safeguards and protections which allow that limitation to apply as narrowly and flexibly as possible;
- any procedures for monitoring the operation and impact of the measures;
- any avenues for a person to seek review of the application and impacts of the measures.

1.282 The committee also notes that seeking to justify a limitation on human rights by reference to general matters such as national security, integrity of the system or public expectation is insufficient. The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide a detailed and context-specific assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

Amendments relating to public interest criterion 4020 – legitimate objective

1.283 Schedule 1 of the regulation amends public interest criterion (PIC) 4020, which applies to 80 classes of onshore and offshore visa for students and skilled, temporary and family migrants.

1.284 Prior to the making of the regulation, PIC 4020 allowed for a visa to be refused where the visa applicant had given the minister (or relevant authority) a bogus document or information that was false or misleading in relation to the application for the visa. Following the amendments to PIC 4020:

- a visa must not be granted to a person unless the minister is satisfied as to their identity;
- where an applicant is refused a visa under PIC 4020 on identity grounds, a ten-year exclusion period for the grant of another visa now applies; and
- the minister no longer has any discretion to waive the requirements of PIC 4020.

1.285 The statement of compatibility for the regulation states that the amendments are aimed at the objective of preventing identity fraud in Australia's visa and citizenship programs. It notes:

> [a] identity fraud is…of serious concern because it is the foundation for all checks, including national security and character checks, conducted by the department into the bona fides of individuals applying for a visa to enter Australia; and
>
> [b] all entitlements or benefits (for example, a driver's licence and Medicare card) provided by both Commonwealth and

> State/Territory agencies, as well as by the private sector, to lawful non-citizens who have been granted a visa are dependent on the department accurately identifying each person before visa grant.[2]

1.286 The statement of compatibility concludes that the amendments to PIC 4020 are compatible with human rights because, insofar as they limit human rights, they are ' reasonable and proportionate to the objective they seek to achieve, being the prevention of entry and stay of persons who may pose a risk to the Australian community'.[3]

1.287 However, in the committee's view, while the maintenance of the integrity of Australia's immigration system (and related national security considerations) is clearly a legitimate objective, the statement of compatibility does not provide a sufficiently reasoned and evidence-based explanation of why the measures are necessary in pursuit of that objective. For example, it is not clear as to how and to what extent (the previous) PIC 4020 and regulatory framework was inadequate or insufficient to protect against identity fraud, and to what extent identity fraud was occurring.

1.288 The committee is therefore unable to determine, without further information, whether the measures are both necessary, and rationally connected, to their stated objective of system integrity and national security.

Amendments relating to public interest criterion 4020 – proportionality

1.289 As described above, the regulation removed the Minister's discretion to waive the requirements of PIC 4020 in certain compelling circumstances.

1.290 The committee notes that, to the extent that the waiver allowed some flexibility in the application of PCI 4020, the removal of the discretion is directly relevant to an assessment of whether the new measures are themselves accompanied by sufficient safeguards and protections as to be regarded as a proportionate means of achieving their stated objective, and will not be applied in an arbitrary or unfair manner.

1.291 The committee is therefore unable to determine, without further information, whether the measures are proportionate.

Ten-year exclusion period for refusal under PIC 4020 on identity grounds

1.292 The committee's concerns and analysis outlined above are particularly relevant to the introduction of a 10-year exclusion period for an applicant who is refused a visa under PIC 4020 on identity grounds.

1.293 In the committee's view, the exclusion from applying for another visa appears particularly severe in the context of a failure to provide sufficient documents

---

2 Statement of compatibility, p. 3.

3 Statement of compatibility, p. 6.

to prove identity rather than an act of falsification (and especially so in cases involving onshore applicants, who will be removed from Australia and effectively barred from returning for 10 years).

1.294 While the statement of compatibility provides some justification for the measure, including that it 'better aligns with the policies of Australia's FCC [Five Country Conference] partners',[4] and that it 'reflects the Government's views of the primacy of accurately identifying non-citizens to the integrity of Australia's migration programme, and is intended to act a deterrent',[5] it is unclear to the committee whether these purposes may be regarded as legitimate objectives and, if so, whether the measure is a proportionate means of achieving those objectives (taking into account any relevant safeguards and protections, as outlined above).

1.295 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the regulation with human rights and, in particular:

- **whether the measures aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measures and their stated objective; and**
- **whether the measures are proportionate to that objective.**

Amendments relating to public interest criterion 4020 – quality of law test

1.296 The committee notes that human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible for people to understand when the interference with their rights will be justified.

1.297 In the committee's view, the requirement for visa applicants to prove their identity are not well defined, with the regulation merely providing that 'the applicant must 'satisf[y] the Minister as to the applicant's identity.'[6] No information on how an applicant may meet this requirement is specified, with the department having an apparently broad discretion to 'consider a range of identity-related documents…as well as individual applicant circumstances'.[7]

1.298 Noting that visa applicants face diverse circumstances and significant differences in relation to the accessibility of personal and public records and

4 Statement of Compatibility, p. 9.

5 Statement of Compatibility, p. 5

6 Schedule 1, item 1.

7 Statement of compatibility, p. 3.

documentation, the committee considers that the measure may not meet the quality of law test standards.

1.299 The committee therefore requests the Minister for Immigration and Border Protection's advice on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes.

Best interests of the child

1.300 Under the Convention on the Rights of the Child (CRC), States parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[8]

1.301 This principle requires active measures to protect children's rights and promote their survival, growth, and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions. Any legislative measure that seeks to balance the best interests of the child with other policy considerations must meet the standard criteria for limiting human rights. It must be demonstrated that the measures are aimed at achieving a legitimate objective, and are rationally connected to the achievement of, and proportionate to, that objective.

1.302 Article 10 of the CRC requires that applications for family reunification made by minors or their parents to be treated in a 'positive, humane and expeditious manner'.

Ten-year exclusion period for refusal under PIC 4020 on identity grounds

1.303 The committee notes that the 10-year exclusion period will affect the interests of children, in that children may be removed from Australia and excluded from applying for another visa for 10 years due to no fault of their own. This is because:

> …PIC 4020 is a 'one fails, all fails criterion' whereby all applicants for a visa would not be granted a visa if a bogus document or false or misleading information is provided by the department by any of the applicants.[9]

1.304 The statement of compatibility concludes that the measure is 'reasonable and proportionate' and notes that it:

> …reflects the Government's view of the primacy of accurately identifying non-citizens to the integrity of Australia's migration programme, and is intended to act as a deterrent.[10]

---

8 Article 3(1).

9 Statement of compatibility, p. 2.

10 Statement of compatibility, p. 5.

1.305 With reference to the remarks above, in the committee's view, the statement of compatibility does not provide a sufficiently reasoned and evidence-based explanation of why the measures are necessary in pursuit of their stated objective. For example, it is not clear whether the subordination of the obligation to consider the child's best interests to the objectives of deterrence and policy consistency may be regarded as legitimate objectives in the absence of a reasoned and evidence-based analysis.

1.306 Further, the committee notes that the statement of compatibility does not address the question of whether the measure may be regarded as proportionate (taking into account any relevant safeguards and protections, as outlined above).

Special humanitarian program: requirement that families of minors meet compelling reasons criterion

1.307 Schedule 2 of the regulation removed the concession for unaccompanied minors, which allowed their families to come to Australia under the special humanitarian programme (SHP) without having to meet the compelling reasons criterion.[11] This exemption meant that immediate family members of proposers, who arrived on a Humanitarian (Class XB) visa or were minors, were taken to have met the compelling reasons criterion based on their family connection alone. As a result of the amendment, the family of unaccompanied minors will now need to show that they have humanitarian claims in their own right to be able to join their children in Australia.

1.308 The statement of compatibility for the regulation states that the measure 'merely places those [minor] proposers on equal footing as their adult counterparts…[whose families] are assessed against the four compelling reasons factors',[12] and concludes that the measure is 'necessary, reasonable and proportionate'.[13]

1.309 However, the committee notes the characterisation of the measure as merely placing children on the same footing as 'their adult counterparts' fails to identify the clear effect of the measure as limiting human rights. In the committee's view, the removal of the exemption for the families of children may be regarded as limiting human rights. The committee's usual expectation where measures limiting human rights are proposed is that the accompanying statement of compatibility

11 The compelling reasons criterion are: a) the degree of discrimination to which the applicant is subject in their home country; b) the extent of the applicant's connection with Australia; c) whether or not there is any other suitable country that can provide for the applicant's settlement and protection from discrimination; and d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant.

12 Statement of Compatibility p .8.

13 Statement of compatibility, p. 8.

demonstrates that the measures are aimed at achieving a legitimate objective, and are rationally connected to the achievement of, and proportionate to, that objective.

1.310 While the statement of compatibility states that the obligation to consider the best interests of the child may be outweighed by 'countervailing considerations', such as program integrity and policy consistency, the committee considers that it does not contain sufficient evidence-based reasoning to support an assessment of whether the limitation is permissible in this case.

1.311 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 and 2 of the regulation with the obligation to consider the best interests of the child as a primary consideration and, in particular:

- **whether the measures aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measures and their stated objective; and**
- **whether the measures are proportionate to that objective.**

The committee has deferred its consideration of the following bills

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

Appropriation Bill (No. 5) 2013-2014

Appropriation Bill (No. 6) 2013-2014

Appropriation (Parliamentary Departments) Bill (No. 1) 2014-2015

Appropriation Bill (No. 1) 2014-2015

Appropriation Bill (No. 2) 2014-2015

Australian Citizenship Amendment (Intercountry Adoption) Bill 2014

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

Tax Laws Amendment (Implementation of the FATCA Agreement) Bill 2014

Chapter 2 - Concluded matters

This chapter list matters previously raised by the committee and considered at its meeting on 16 June 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.

Migration Amendment Bill 2013

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

Purpose

2.1 The Migration Amendment Bill 2013 (the bill) amended the *Migration Act 1958* (Migration Act) to:

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

Background

2.2 The committee reported on the bill in its *Second Report of the 44th Parliament* (11 February 2013) and *Fourth Report of the 44th Parliament* (18 March 2014).

2.3 The bill was subsequently passed by the Parliament and received Royal Assent on 27 May 2014.

2.4 The committee identified a number of issues arising from the amendments in each of the schedules. The committee concluded its examination of the issues in relation to schedules 1 and 2 based on the Minister for Immigration and Border Protection's (the minister) initial response,[1] but sought further information in relation to Schedule 3.

1 See Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (18 March 2014), p. 125.

Committee view on compatibility

Prohibition against arbitrary detention

Security assessments (Schedule 3)

2.5 The committee identified a range of concerns arising from the potential for the amendments to result in the indefinite detention of a protection visa applicant found to be a refugee but deemed a security risk by ASIO.[2] Specifically, the committee requested that the minister provide advice as to:

- the arrangements for independent review of security assessments:
- whether the bar on refugees accessing merits review by the Administrative Appeals Tribunal (AAT) of adverse security assessments is consistent with the right to equality and non-discrimination in article 26 of the ICCPR; and
- whether refugees with adverse security assessments receive an individualised assessment as to whether less restrictive alternatives to closed detention are available and appropriate for their specific circumstances and, if not, clarification as to how the absence of such individualised assessment and/or options may be considered to be a proportionate response.

Minister's response

Do the 'arrangements for independent review' mentioned in the statement of compatibility include the following features:

- Meet the 'quality of law' test;
- Permit review of the substantive grounds on which the person is held in order to determine whether the detention is arbitrary within the meaning of the ICCPR and not merely lawful under Australian law;
- Result in binding outcomes, including the power to order release if the detention is not justified;
- Include regular review of the continuing necessity of the detention, including the ability of the person to initiate a review, for example, in light of new information; and
- Provide sufficient opportunity for the person to effectively challenge the basis for the adverse security assessment.

Review of ASIO adverse security assessments (ASAs) falls within the portfolio responsibilities of the Attorney-General. The Attorney-General has provided me with the following information in response to the Committee's concerns.

2 Explanatory memorandum (EM), p. 9.

Security assessments are an important part of ensuring the safety of Australians. It is essential that ASIO advice that an individual is a risk to security is afforded appropriate weight when considering the individual's suitability for a visa. To meet community expectations, the Government must have the ability to act decisively and effectively, wherever necessary, to protect the Australian community. The Government must also have the legislative basis to refuse a protection visa or to cancel a protection visa, for those non-citizens who are a security risk.

The Government respects the professional judgment of ASIO. At the same time, the Government supports appropriate oversight arrangements of our intelligence and security agencies. The Inspector-General of intelligence and Security, an independent statutory office holder, plays a primary and comprehensive oversight role, complementing Parliamentary committees such as the Parliamentary Joint Committee on Intelligence and Security. There is also an Independent Reviewer of Adverse Security Assessments who examines all the materials relied on by ASIO, including classified material, and provides her opinion and any recommendation to the Director-General of Security. Copies of the Independent Reviewer's findings are provided to the Attorney-General, the Minister for Immigration and Border Protection and the Inspector-General of intelligence and Security.

The Independent Reviewer provides independent periodic reviews of ASAs every 12 months. In addition, ASIO can and will issue a new security assessment in the event that new information of relevance comes to light.

Review applicants are provided with an unclassified written summary of reasons for the decision to issue an ASA, as well as an unclassified version of the Independent Reviewer's report. Information can only be provided that does not prejudice the interests of security. For national security reasons, information that would reveal confidential sources and methodologies must remain protected.

Is the bar on refugees accessing merits review by the AAT of adverse security assessments consistent with the right to equality and non-discrimination in article 26 of the ICCPR.

Article 26 allows for differential treatment where it is for a legitimate aim under the ICCPR and is reasonable, necessary and prop01iionate in the circumstances. Accordingly, if a distinction on the basis of a prohibited ground has arisen, differential treatment of a particular group will not constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the ICCPR.

Review of ASAs in the Administrative Appeals Tribunal is unavailable for non-citizens who are not the holder of a valid permanent, special category or special purpose visa. In 1977, the Hope Royal Commission on Intelligence and Security specifically considered and recommended against

extending review rights to non-Australian, non-resident visa applicants who receive prejudicial security assessments.

Whether steps have been put in place and what they are to ensure that the circumstances that were the subject of consideration by the HRC [UN Human Rights Committee] will not arise again.

The Attorney-General is the Minister responsible for responding to adverse views of the United Nations Human Rights Committee (HRC). However, I am advised that the Government is currently considering its response to the UN HRC's views in this matter. While the views of the UN HRC are not binding as a matter of law, they are considered in good faith by the Government, and taken into account in the interpretation of Australia's obligations under the ICCPR. The Government has notified the UN HRC that it will respond as soon as possible to the Committee's views. It is the general practice of the Government not to publicly comment in detail while considering such views.[3]

Committee response

2.6 The committee thanks the minister for his response.[4]

2.7 However, while the committee acknowledges that security assessments are an important part of ensuring the safety of Australians, and that ASIO advice that an individual is a risk to security should be afforded appropriate weight when considering an individual's suitability for a visa, the committee does not consider that indefinite detention must automatically follow, or is the only legitimate option, for genuine refugees the subject of an adverse security assessment (ASA).

2.8 The committee notes that, while the minister's response re-emphasises the importance of the policy that individuals subject to an ASA be detained in immigration detention, the response provides no assessment of whether, in the minister's view, the non-availability of statutory individual review rights for individuals subject to indefinite detention is compatible with the prohibition against arbitrary detention.

2.9 Noting the findings of the UN Human Rights Committee (HRC),[5] which found that the continued detention of 46 refugees subject to adverse ASIO security assessments was arbitrary, and amounted to cruel, inhuman or degrading

3 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 24 March 2014.

4 See also, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament,* Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 2-9.

5 See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, pp 70-76.

treatment,[6] the committee acknowledges the minister's advice that 'it is the general practice of the Government not to publicly comment in detail while considering such views'.[7] While the committee notes that Australia's response to the HRC's communication is overdue (having been due within 180 days of their publication on 26 July 2013), the committee will consider that response, and any substantive steps that may be proposed, with reference to the committee's concerns outlined in relation to Schedule 3 of the bill.

2.10 The committee welcomes the Government's confirmation of its commitment to give due weight to the views of the HRC in good faith, which the committee expects will be reflected in the Government providing strong justification and detailed reasoning in the event that the HRC's interpretation of the ICCPR, or specific recommendations, are rejected.

2.11 The committee intends to write to the Attorney-General to request a copy of the Government's response to the views of the UN Human Rights Committee in this case once they have been submitted.

2.12 In light of the minister's advice and the views of the UN HRC, the committee notes its concern that the amendments in Schedule 3 are likely to be inconsistent with the ICCPR's prohibition on arbitrary detention and the prohibition on cruel, inhuman or degrading treatment.

6 Contrary to articles 9(1), 9(4) and 7 of the International Covenant on Civil and Political Rights.

7 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 24 March 2014, p. 3.

National Disability Insurance Scheme Legislation Amendment Bill 2013 and DisabilityCare Australia Fund Bill 2013 and eleven related bills

Portfolio: Social Services
Introduced: House of Representatives, 15 May 2013

Purpose

2.13 The National Disability Insurance Scheme Legislation Amendment Bill 2013 sought to amend the *National Disability Insurance Scheme Act 2013* (NDIS Act) to:

- clarify the range of matters relating to the National Disability Insurance Scheme (NDIS) that can be prescribed by rules made under the NDIS Act;
- strengthen the governance and financial framework of the NDIS Scheme Launch Transition Agency (DisabilityCare Australia); and
- clarify the intended operation of provisions relating to compensation claims.

2.14 The DisabilityCare Australia Fund Bill 2013 (DisabilityCare bill) and eleven related bills sought to establish a special fund, the DisabilityCare Australia Fund, to house the revenue raised by the increase in the Medicare levy. The DisabilityCare bill set out the arrangements for the administration of the Fund, and made consequential amendments to other tax rates linked to the top marginal rate and Medicare levy.

Background

2.15 The committee initially commented on the bills in its *Seventh Report of 2013*. The committee made subsequent comments in its *First Report of the 44th Parliament* and *Third Report of the 44th Parliament*.

2.16 The National Disability Insurance Scheme Legislation Amendment Bill 2013 and the DisabilityCare bill were passed by both Houses on 16 May 2013 and received Royal Assent on 28 May 2013.

Committee view on compatibility

Right of equality and non-discrimination

Exemption from the Age Discrimination Act 2004

2.17 The committee's view was that general exemptions to the provisions of the anti-discrimination statutes are in general to be avoided, unless there is a compelling case that such an exemption is needed. The committee noted that partial or temporary exemptions may be necessary and accepted that this may be so in relation to the establishment of trial sites for the NDIS. However, the committee considered that the legitimate goal of ensuring that the NDIS can be phased in could be achieved without adopting the general exemption which the legislation contains.

2.18 The committee noted its concern at the use of a general exemption, unlimited as to time, to advance a goal which is limited and temporary in nature, without any substantive engagement with the committee's views on the issue of whether a more limited exemption or exclusion would serve those goals equally well.

Assistant Minister's response

> The Australian Government supports the protections provided by the federal anti-discrimination legislation and understands the concern of the Parliamentary Joint Committee in relation to the breadth of a general exemption from the *Age Discrimination Act 2004*. As the Government has previously advised the Committee, a number of alternatives, including limited exemptions, were considered but it was concluded that these alternatives were not able to adequately achieve the necessary policy objectives.
>
> As the Government advised, without a general exemption from the *Age Discrimination Act [2004],* any new temporary age-based restrictions in trial sites could constitute unlawful age discrimination. New trial sites have been negotiated since the commencement of the trials and the flexibility created by the legislation has allowed those negotiations to take place. The Government will continue to require this flexibility in the context of continuing negotiations with State and Territory governments about trials leading to transition and full implementation.
>
> The decision to seek a general exemption was a decision of the previous Government. The operation of the *National Disability Insurance Scheme Act 2013* must be reviewed independently after two years of operation. Subject to the agreement of the Disability Reform Council, the exemption from the *Age Discrimination Act 2004* may form part of that review. This would provide further information that could assist the Government in reassessing whether a more restricted exemption could fulfil the necessary policy objectives outlined above.
>
> As previously advised, the Australian Government does not envisage undertaking any additional acts which would fall within the exemption in the Age Discrimination Act, except those analogous to the existing exemptions in establishing trial sites. The Government notes that the general exemption from the Age Discrimination Act only applies to acts done in direct compliance with the NDIS Act. Any other acts of unlawful discrimination carried out through the course of administering the scheme and Act, and which are not in direct compliance with the Act itself, are still prohibited under the Age Discrimination Act 2004.[1]

1 See Appendix 2, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, 19 March 2014, p. 5.

Committee response

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

2.20 However, in light of the potential inconsistency of the general exemption to the *Age Discrimination Act* 2004 with the right to equality and non-discrimination[2], the committee recommends that the Disability Reform Council consider this issue in its review of the NDIS Act.

Concerns about the cut-off age of 65 and the supports offered by the aged care system

2.21 In its *First Report of the 44th Parliament* the committee recommended that the cut-off eligibility age of 65 for the NDIS be evaluated when the NDIS Act is reviewed after two years in accordance with section 208 of that Act.

2.22 In its *Third Report of the 44th Parliament* the committee noted that the Assistant Minister's response of 3 February 2014 had not responded to that recommendation and requested a response.

Assistant Minister's response

> Subject to the agreement of the Disability Reform Council, the age restrictions on eligibility could be part of the review into the operation of the National Disability Insurance Scheme Act 2013 that is required under section 208 of the Act.[3]

Committee response

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

2.24 However, noting the assistant minister's advice, the committee recommends that the Disability Reform Council consider this issue in its review of the NDIS Act.

The position of New Zealand citizens who are non-protected SCV holders

2.25 The committee sought further information from the Assistant Minister for Social Services in regards to whether the exclusion of non-protected SCV holders from the NDIS is differential treatment amounting to discrimination under the ICCPR, ICESCR and ICERD, or whether the exclusion is based on objective and reasonable

---

2 See article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and articles 2(1), 26 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention of the Rights of Persons with Disabilities (CRPD).

3 See Appendix 2, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, 19 March 2014, p. 6.

justification in pursuit of a legitimate goal. In particular, the committee would appreciate the following specific information:

- In relation to the claim that exclusion is a reasonable and proportionate measure to ensure the financial sustainability of the NDIS, details of the additional costs that would be involved if access to the NDIS were extended to non-protected SCV holders and the amount of revenue that their contributions by way of the NDIS levy would raise;
- Whether there is a disparity in the numbers of Australian citizens receiving welfare and other benefits in New Zealand compared with the number of New Zealand citizens receiving such benefits in Australia; what the net cost to Australia is; and whether there is any transfer of funds between the two governments to reflect this; and
- Whether all non-protected SCV holders are eligible to apply for Australian permanent residence or citizenship, or whether age requirements or other conditions may prevent some of those, in particular those affected adversely by the 2001 changes, from doing so, and whether the number of those who might be ineligible is known.

Assistant Minister's response

New Zealanders on a special category visa (SCV) have a temporary visa which provides a mechanism for the free movement of New Zealanders and Australians between the two countries. It is difficult to quantify how many visa holders will be in Australia at any time. This capacity for fluctuation means that it is difficult to determine the additional costs that would be caused by extending coverage of the NDIS to New Zealanders on special category visas, or the amount of revenue that may be generated by these individuals through the NDIS levy.

The transfer of funds between the Australian and New Zealand government in relation to welfare benefits is largely the legacy of previous agreements and not a major part of the current arrangements. Prior to the revised Social Security Agreement that commenced in 2001, New Zealand would provide Australia funds in relation to payments made by the Australian Government to its citizens. After the revised Social Security Agreement was concluded individuals receive payments directly from the relevant governments. Under the Agreement, Australia and New Zealand share responsibility for paying certain benefits, broadly according to the period people have lived in both Australia and New Zealand (between 20 and 65 years of age). A person will generally be entitled to two pensions - one from New Zealand and one from Australia. Generally the two pensions, when added together, would equal the amount of pension an individual would have received had they lived all their life in one country. The revised Agreement does not cover working age payments such as Parenting Payment (single or partnered), Newstart allowance, sickness

allowance or special benefit. Transfers between the governments are only in the form of legacy payments that account for the previous agreement.

Like the nationals of other countries, New Zealand citizens seeking an option to apply for a permanent visa are encouraged to explore the range of visa options available under the Family and Skill streams. Alternatively, people who spent time in Australia as a New Zealand citizen prior to 1 September 1994 may be considered former permanent residents and can be eligible for the Subclass 155 Resident Return visa.

While there is a diverse range of permanent visas available, the Australian Government does acknowledge that there will be some temporary visa holders, including Special Category Visa holders, who will not be able to meet the requirements for a permanent visa, despite having lived in Australia for many years. All permanent visas have a health requirement that takes into account the cost to the Australian community or the impact on the access to services of the person becoming a permanent visa holder. In some visa categories there is a health waiver available, where a person's individual circumstances can be considered, which in the case of New Zealand citizens includes their existing access to Medicare and existing support to disability benefits and services under the bi-lateral agreement.

Based on analysis of passenger card data, the Department of Immigration and Border Protection estimates that around 40 per cent of New Zealand citizens living in Australia would appear to have a permanent visa pathway available.[4]

Committee response

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

2.27 However, the committee notes that under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), non-citizens are entitled to the enjoyment of the human rights guaranteed by the covenants without discrimination.[5] The Convention on the Rights of Persons with Disabilities (CPRD) also guarantees persons with disabilities the equal enjoyment of human rights without discrimination.[6] Exclusion from access to certain benefits, such as the NDIS, on the grounds of immigration status may therefore amount to discrimination, unless the

4 See Appendix 2, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, 19 March 2014, pp 7-8.

5 International Covenant on Civil and Political Rights, articles 2 and 26; and article 2 of the ICESCR. See also, UN Human rights Committee, *General Comment No 15: The position of aliens under the Covenant* (1986).

6 Convention on the Rights of Persons with Disabilities, article 5.

distinction can be shown to be based on reasonable and objective criteria in pursuit of a legitimate objective.

2.28 Therefore, the committee recommends that the Disability Reform Council consider this issue in its review of the NDIS Act.

Response to the Joint Report of the Productivity Commissions

2.29 The committee sought further advice from the Assistant Minister for Social Services in regards to whether the Australian government has adopted a position in relation to the recommendations of the two Productivity Commissions addressed to the Australian government relating to SCV visa holders, and how those recommendations will be progressed, as indicated in the joint statement of 7 February 2014 by the prime ministers of Australia and New Zealand.

Minister's response

> The Australian Government is considering the recommendations of the joint report *Strengthening trans-Tasman economic relations*. As the Committee notes, both Prime Ministers are committed to review the progress on implementing the report's recommendations at the next Leaders' meeting in 2015.[7]

Committee response

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

7 See Appendix 2, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, 19 March 2014, p. 9.

Quarantine Charges (Imposition-General) Bill 2014

Quarantine Charges (Imposition-Customs) Bill 2014

Quarantine Charges (Imposition-Excise) Bill 2014

Quarantine Charges (Collection) Bill 2014

Portfolio: Agriculture
Introduced: House of Representatives, 6 March 2014

Purpose

2.31 The Quarantine Charges (Collection) Bill 2014 (the bill) forms part of a legislative package intended to re-align Australia's biosecurity and quarantine imports system with an efficient and effective cost-recovery model, consistent with the Australian Government Cost-Recovery Guidelines.

2.32 The bill provides the authority to collect charges which are proposed to be imposed by the Quarantine Charges (Imposition–General) Bill 2014, the Quarantine Charges (Imposition–Excise) Bill 2014 and the Quarantine Charges (Imposition–Customs) Bill 2014. The bill includes a number of measures to:

- provide that regulations may be made to determine the manner in which quarantine charges are to be paid;
- provide the Commonwealth with powers to refuse service to a person liable to a charge or late payment fee, and to suspend or revoke permits;
- provide for enforcement powers to deal with goods and vessels to recover unpaid charges and late payment fees, to make directions in relation to any such goods and vessels (with a related offence for engaging in conduct that contravenes a direction) and to sell goods and vessels to recover outstanding debts;
- provide the Commonwealth with the power to deal with goods and vessels that are abandoned or forfeited; and
- provide for the remitting or refunding of fees in exceptional circumstances.

Background

2.33 The committee reported on the bills in its *Fourth Report of the 44th Parliament.*

Committee view on compatibility

Right to privacy

Application of existing enforcement powers

2.34 The committee sought further information from the Minister for Agriculture regarding the compatibility of Part VIA of the *Quarantine Act 1908* (Quarantine Act), as applied in the context of the bill, with the right to privacy.

Minister's response

> Part VIA of the Quarantine Act has been incorporated into the Bill to ensure that there are consistent enforcement powers available to quarantine offices to enforce the collection of fees under the Quarantine Act and quarantine charges under this Bill. As noted in the Report, the application of Part VIA to the Bill is intended to protect the ability of the Commonwealth to collect quarantine charges when they are due and payable. The application of Part VIA to the Bill is limited by the extent that matters under this Part apply to the collection of charges and not for the general management of quarantine under the Quarantine Act. For example, section 66AO of the Quarantine Act relates to the use of equipment to examine and process things found at a premises for the purpose of quarantine. Powers under this section would not be applicable to the Quarantine Charges (Collection) Bill 2014. The limited application of Part VIA to the Bill ensures the extent that the right to privacy may be engaged is limited and will only occur in circumstances where it is necessary for the proper operation of the Bill.
>
> In addition to the limited application of Part VIA of the Quarantine Act to the Bill, those sections which do apply have safeguards and restrictions built into them to ensure that the right to privacy and other human rights considerations are protected. For example, section 66AC of the Quarantine Act (which relates to monitoring warrants) prescribes a test of reasonableness so that a warrant to monitor premises can only be issued when it is reasonable to do so. Similarly, a quarantine officer may only search a vessel or vehicle without a warrant in an emergency situation and where the quarantine officer reasonably suspects that it is necessary to do so (see Division 5 of Part VIA of the Quarantine Act).
>
> The tests of reasonableness built in to many of the enforcement provisions under Part VIA of the Quarantine Act, and which may in turn apply to the Bill, ensure that these enforcement powers are not used arbitrarily. In addition to these tests of reasonableness, many of the powers under this Part only apply to quarantine officers with appropriate training (see for example sections 66AA, 66AB and 6qAH) or authorisation {see for example sections 66AG, 66AK and 66AS). More generally, and as noted by the

Report, the operation of the enforcement provisions under the Bill would be required to be exercised in compliance with the *Privacy Act 1988*.[1]

Committee response

2.35 The committee thanks the Minister for Agriculture for his response and has concluded its examination of this matter.

Right to freedom of movement

Application of existing enforcement powers

2.36 The committee sought further information from the Minister for Agriculture regarding the compatibility of Part VIA of the Quarantine Act, as applied in the context of the bill, with the right to freedom of movement.

Minister's response

Part VIA of the Quarantine Act will only apply to the Bill to the extent that it applies to the collection of quarantine charges. The department anticipates using these provisions in very limited circumstances. As noted in the Report, Clause 24 of the Bill provides a Director of Quarantine with power to detain a vessel that is the subject of a charge. Given the relative value of a potential charge or late payment fee under the Bill and the potential value of a detained vessel it will only be in extremely rare circumstances that these enforcement powers would be used in a manner that may limit the right to freedom of movement.

The exercise of enforcement powers under clause 24 of the Bill are only available to the Director of Quarantine (as opposed to a quarantine officer) and therefore any potential limitation on the right to movement as a result of the use of these powers would be at the discretion of a senior officer. In addition to this high level of assessment, the department will ensure that the application of the powers under Part VIA of the Quarantine Act, in the context of this Bill, will be exercised in consideration of the right to the freedom of movement.[2]

Committee response

2.37 The committee thanks the Minister for Agriculture for his response and has concluded its examination of this matter.

---

1 See Appendix 2, Letter from The Hon Barnaby Joyce MP, Minister for Agriculture, to Senator Dean Smith, 12 April 2014, pp 1-2.

2 See Appendix 2, Letter from The Hon Barnaby Joyce MP, Minister for Agriculture, to Senator Dean Smith, 12 April 2014, pp 2-3.

Right to a fair hearing

Presumption of innocence – reverse burden of proof

2.38 The committee noted that the reverse burdens proposed by the bill are unlikely to raise issues of incompatibility with the presumption of innocence. In particular, the burdens placed on the defendant are evidential burden only (as opposed to legal burden) and relate to matters that appear to be likely to be within the defendant's knowledge.

2.39 The committee emphasised its expectation that statements of compatibility should include sufficient detail of relevant provisions in a bill which impact on human rights to enable it to assess their compatibility. This includes identifying and providing justification where a reverse burden of proof is imposed.

Minister's response

> These comments made by the committee have been noted and will be considered in the preparation of future statements of capability by my department.[3]

Committee response

2.40 The committee thanks the Minister for Agriculture for his response.

Merits review

2.41 The committee sought further information from the Minister for Agriculture on the compatibility of the bill with the right to a fair hearing, particularly the justification for the non-availability of merits review for a decision under proposed section 14, including:

- why it is necessary to preclude merits review for such decisions; and
- how preclusion of merits review in relation to such decisions is proportionate to achieving a legitimate objective, including all relevant procedural and other safeguards, and details of any less restrictive policy measures that may have been available or were considered in the development of the bill.

Minister's response

> Clause 14 of the Bill provides for the power to suspend or revoke a number of approvals or authorisations made under the Quarantine Act where a person has not paid a quarantine charge or late payment fee which is due and payable. To ensure consistency with the Quarantine Act and to ensure that those subject to the Quarantine Act are afforded the same rights under this Bill, decisions made under clause 14 of the Bill are not subject to merits review. It would not be appropriate for fees charged under the

3 See Appendix 2, Letter from The Hon Barnaby Joyce MP, Minister for Agriculture, to Senator Dean Smith, 12 April 2014, p. 3.

Quarantine Act and quarantine charges under this Bill to have different review mechanisms.

Where required, mechanisms exist under the Bill to allow for decisions to be reviewed. For example, judicial review is available to challenge any decision made under clause 14 of the Bill. The availability of judicial review for decisions made under clause 14 is consistent with existing arrangements under the Quarantine Act and is an appropriate safeguard. The availability of judicial review under clause 14 achieves the legitimate objective of providing persons who are affected by decisions under the bill with the opportunity to have those decisions reviewed.[4]

Committee response

2.42 The committee thanks the Minister for Agriculture for his response and has concluded its examination of this matter.

2.43 However, as the committee stated in its initial consideration of the bill, the committee accepts that there may be some administrative or regulatory benefits to a degree of conformity between aspects of the bill and the Quarantine Act. The committee noted that the fact that a particular approach is or is not taken in a primary Act or elsewhere is not in and of itself a sufficient reason for justifying limitations on rights, in this instance the preclusion of merits review.

2.44 The committee notes that although decisions made under clause 14 of the bill may be subject to judicial review, this would be limited to a review of the application of the law, and could not include a consideration of the merits of the decision.

2.45 It is not clear to the committee how the preclusion of merits review for a decision made under proposed section 14 of the bills is consistent with the right to a fair hearing. The committee therefore recommends that the Minister for Agriculture consider the appropriateness of establishing a merits review scheme under the *Quarantine Act 1908* and hence the Quarantine Charges (Collection) Bill 2014.

4 See Appendix 2, Letter from The Hon Barnaby Joyce MP, Minister for Agriculture, to Senator Dean Smith, 12 April 2014, p. 3.

Migration Act 1958 - Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year - IMMI 14/026 [F2014L00224]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: Exempt from disallowance

Purpose

2.46 The Migration Act 1958 - Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year - IMMI 14/026 operates to set the cap for the Protection (Class XA) visa (protection visa). It determines that the maximum number of protection visas that may be granted in the financial year 1 July 2013 to 30 June 2014 is 2773.[1] The instrument applies to all applicants who have applied for a protection visa, including applicants who have applied before the implementation of this cap.

Background

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

Committee view on compatibility

Multiple rights

Statement of compatibility

2.48 The committee noted that is commented on a substantially similar instrument in its *Second Report of the 44th Parliament*.[2] The committee also noted that a human rights compatibility assessment addressing that committee's previously identified concerns had not been provided with this instrument. The committee reiterated its view that legislative instruments which have the potential to limit human rights should be accompanied by a statement of compatibility, even if one is not technically required under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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

2 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, 11 February 2014, pp 101-102.

2.49 The committee also sought further information from the Minister for Immigration and Border Protection in regards to the following issues:

- whether the cap of 2773 determined for this financial year has already been reached;
- and if so, whether the capping on the issuing of protection visas to those held in immigration detention is compatible with the prohibition on arbitrary detention, the right to humane treatment, the right to health, and children's rights;
- whether the capping on the issuing of protection visas to those who are in the community on bridging visas is compatible with the right to work, the right to social security, and the right to an adequate standard of living; and
- whether the capping on the issuing of protection visas is compatible with rights relating to the protection of the family.

Minister's response

> The Government will continue to abide by section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which outlines when Statements of Compatibility are required to be prepared. This instrument does not fall within the scope of section 9 and therefore does not require a Statement of Compatibility; therefore I do not propose to respond to questions in relation to this instrument.[3]

Committee response

2.50 The committee thanks the Minister for Immigration and Border protection for his response and has concluded its examination of this instrument.

2.51 However, the committee notes that its mandate derives from the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). Section 7 of the Act states that the committee may examine 'legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both House of the Parliament on that issue.' The committee is therefore required to examine instruments exempt from disallowance.

2.52 While the committee acknowledges that the provision of a statement of compatibility is not required for instruments that are exempt from disallowance, the committee routinely provides the proponent of the legislation with the opportunity to provide a statement of compatibility, or further information before determining whether legislation is compatible with human rights. This approach

3 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection to Senator Dean Smith, 15 April 2014, p. 8.

supports the committee in fulfilling its statutory obligation to assess exempt instruments for compatibility with human rights, and provides a proponent with the opportunity to ensure that the committee's assessment is informed by the views of the proponent. The committee regards this as a best-practice approach, and notes that a number of departments routinely provide statements of compatibility for exempt instruments, notwithstanding there is no legal requirement to do so.

2.53 The committee notes that the Minister for Immigration and Border Protection has declined the request to provide a statement of compatibility for the instrument, and to provide information in response to the committee's request.

2.54 On the basis of the information provided, the committee is unable to determine that the Migration Act 1958 - Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year - IMMI 14/026 [F2014L00224] is compatible with human rights.

Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 [F2013L02102]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 13 May 2014 (Senate)

Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 [F2013L02105]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Regulations 1994
Last day to disallow: Exempt from disallowance

Purpose

2.55 The Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 and the Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 introduced a mandatory code of behaviour as an additional visa condition for certain Bridging E (Class WE) visa (BVE) holders. A person who breaches the code may be returned to immigration detention, transferred to Nauru or Manus Island, or have their income support reduced or terminated.

Background

2.56 The committee initially reported on the instruments in its *Second Report of the 44th Parliament*. The committee made further comments on the instruments in its *Fourth Report of the 44th Parliament*.

2.57 The committee notes that the Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 is currently subject to a notice of motion to disallow which expires on 14 July 2014.[1]

1 On 13 May 2014, a notice of motion to disallow the Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 was given. This extended the disallowance period by 15 sitting days to 14 July 2014. See *Journals of the Senate*, 13 May 2014, p. 769.

Committee view on compatibility

Multiple rights

Limitation of human rights

2.58 The committee noted that the introduction of a mandatory code of behaviour for BVE holders risked limiting a range of human rights and sought further information form the Minister for Immigration and Border Protection to ascertain whether the amendments were aimed at achieving a legitimate objective and were reasonable proportionate to that objective.

Legitimate objective

Minister's response

> 3.120 The committee, however, notes that the government must show that there are objective and reasonable grounds for adopting a specific behaviour regime applicable only to BVE holders and that any asserted factual basis for the differential treatment is supported by evidence.
>
> 3.121 While the committee accepts that the measures are primarily aimed at public safety objectives, the committee remains concerned that the necessity for these measures has not been adequately demonstrated.
>
> I note the Committee's views in this regard. I would also reiterate that the introduction of the Code of Behaviour provides the appropriate tools to support the education of BVE holders about community expectations and acceptable behaviour and supports the taking of compliance action, including consideration of visa cancellation, where BVE holders do not behave appropriately or represent a risk to the public. If not for my decision or the decision of previous Ministers to temporarily release these non-citizens from detention on a BVE granted in the public interest, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Act. [2]

Committee response

2.59 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this matter.

2.60 However, the committee notes that minister has not demonstrated objective and reasonable grounds for adopting a specific behaviour regime which is applicable only to BVE holders.

---

2 See Appendix 2, Letter from Mr Scott Morrison MP, Minister for Immigration and Border Protection to Senator Dean Smith, 15 April 2014, pp 5-8.

Visa cancellation powers

Minister's response

> 3.132 For these measures to be proportionate, the committee considers that the power to cancel a BVE holder's visa for breach of the code should only be possible when the decision-maker is satisfied:
>
> - that the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power; and
> - that the exercise of the power is no more restrictive than is required in the circumstances.
>
> 3.133 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.
>
> I note the Committee's recommendation. As stated in my previous response, the decision to cancel a visa based on a breach of the Code of Behaviour is discretionary. Existing legislation requires that the person must be provided with notification and an opportunity to demonstrate that cancellation grounds either do not exist, or that their visa should not be cancelled. The combination of this discretionary cancellation framework and the sanctions framework supporting the Code of Behaviour enable decision makers to make proportionate responses based on the individual merits of each case where the Code of Behaviour is found to have been breached.

Committee response

2.61 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this matter.

2.62 However, the committee reiterates its view that in order for these measure to be considered proportionate, appropriate legislative amendments should be made to the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 in order to mitigate the broad and discretionary nature of the cancellation powers.[3]

Exclusion of merits review

Minister's response

> 3.134 The committee notes that merits review of a decision to cancel a BVE for a breach of the code will not be available if the Minister issues a

3 See the committee's consideration of the Migration Amendment (Subclass 050 and Subclass 051) regulation 2013 [F2013L01218] in this report.

conclusive certificate. pursuant to section 399 of the Migration Act, stating that it would be contrary to the national interest to change a decision or for the decision to be reviewed. The committee has already noted its concerns about the exclusion of merits review for BVE cancellation decisions subject to a conclusive certificate in its comments on the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013.

3.135 The Minister's response says that 'historically, this power has been exercised rarely'. The response does not explain whether and how the exercise of this power would be appropriate in the context of decisions to cancel a BVE for a breach of the code.

3.136 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the types of situations envisaged and possible examples where it would be appropriate to issue a conclusive certificate for visa cancellation decisions relating to a breach of the code of behaviour.

I am not prepared to speculate about the type of situations where it may be appropriate for me to issue a conclusive certificate. I may issue a conclusive certificate if I believe it would be contrary to the national interest for a decision to be reviewed. The courts have accepted that the term 'national interest' is a broad term and that such a decision is one that is entrusted to me as Minister.

Committee response

2.63 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this matter.

2.64 The committee notes that, in circumstances where a cancellation decision results in the re-detention of the person, the relevant issue is whether the availability of judicial review only (and the exclusion of merits review) is consistent with the prohibition against arbitrary detention in article 9 of the International Covenant on Civil and Political Rights (ICCPR).

2.65 The committee reiterates its view that the minister has not provided sufficient reasons to demonstrate that the exclusion of merits review for BVE cancellation decisions, that are subject to a conclusive certificate, is consistent with article 9 of the ICCPR.

Reduction or termination of income support

Minister's response

3.139 The committee notes that:

- Payment for income support under the CAS and ASAS is 89% of the equivalent Centrelink Special Benefit (which is comparable to 89% of Newstart Allowance).
- Decisions to reduce or terminate income support payments are not subject to merits review.
- BVE holders who arrived by boat after 13 August 2012 (that is, the majority of BVE holders) do not have permission to work.

3.140 Our predecessor committee had noted that the absence of work rights combined with the provision of minimal support for asylum seekers on BVEs risks resulting in their destitution, contrary to the right to work and an adequate standard of living in article 6 and 11 of the ICESCR and potentially the prohibition against inhuman and degrading treatment in article 7 of the ICCPR.

3.141 In light of the already minimal support that is provided to BVE holders, the committee is concerned that any further reduction to their income support payments is likely to have a disproportionately severe impact on the person and their family. The committee is hard pressed to see how terminating a BVE holder's income support in these circumstances could ever be a reasonable option given that the person is also barred from working.

3.142 For these measures to be proportionate, the committee considers that:

- the power to sanction a BVE holder for breach of the code by reducing or terminating their income support must only be possible if the decision maker is satisfied that such action will not result in the destitution of the person or their family; and
- decisions to reduce or terminate a person's income support for breach of the code must be subject to independent merits review.

3.143 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.

I note the Committee's recommendation. As explained previously, income support payments and support under the Asylum Seeker Assistance Scheme (ASAS) and Community Assistance Support (CAS) is not a legislative entitlement. The provision of this support is provided administratively, and to prescribe within legislation the circumstances in which a decision to reduce or terminate these types of payments would therefore not be appropriate. The decision making framework that has

been established to support the consideration of using this particular sanction includes natural justice provisions which will enable the circumstances of each case to be assessed on a case by case basis. No decision to reduce or terminate a person's income support payments would be made where that decision would result in destitution.

Committee response

2.66 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this matter.

2.67 The committee welcomes the minister's assertion that 'No decision to reduce or terminate a person's income support payments would be made where that decision would result in destitution'.

2.68 However, the committee reiterates its view that, in order for the measure to be considered proportionate, appropriate legislative amendments should be made with the effect that:

- **the decision-maker is required to be satisfied that terminating or reducing income support of a BVE holder will not result in the destitution of the person or their family; and**
- **that decisions to reduce or terminate a person's income support for breach of the code must be subject to independent merits review**.

Oversight and monitoring

Minister's response

3.146 The committee accepts that the Immigration Department has strong relationships with service providers dealing with BVE holders in the community and this provides an important channel for relevant information to be passed to the department.

3.147 The committee, however, notes that these processes appear to be ad hoc rather than a systematic approach to monitoring the impacts of the behaviour code on individuals in the community. The committee considers that there should be express monitoring mechanisms in place to assess the impact of these measures on BVE holders, including regular opportunities to consult with the affected individuals and other interested parties.

I note the Committee's views. My department has well established reporting arrangements and communication channels in place under the Community Assistance Support (CAS) and Asylum Seeker Assistance Scheme (ASAS) programmes, including an incident reporting protocol. The department's engagement with service providers also includes a schedule of monthly meetings and quarterly conferences, as well as meetings on specific issues such as the code of behaviour. These arrangements provide the department with information on specific incidents affecting individual

BVE holders, and opportunities for service providers to raise issues of broader concern. Through these processes there is oversight and monitoring of substantial issues affecting BVE holders.

Committee response

2.69 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this matter.

2.70 However, the committee reiterates its view that monitoring mechanisms should be systematic in nature.

Conclusion

2.71 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of these instruments.

2.72 However, noting the minister's advice, the committee reiterates its previous statements that limitations on rights must not only be reasonable, necessary and proportionate to a legitimate objective, but also be prescribed by law. That is, limitations must have a clear legal basis, including being publicly accessible and not open-ended. Finally, the committee reiterates its view that limitations on fundamental rights based solely on administrative discretion are likely to be impermissible under human rights law.

2.73 On the basis of the information provided, the committee is unable to determine that the Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 [F2013L02102] and the Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 [F2013L02105] are compatible with human rights.

Migration Amendment (Disclosure of Information) Regulation 2013 [F2013L02101]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 13 May 2014 (Senate)

Purpose

2.74 The Migration Amendment (Disclosure of Information) Regulation 2013 amended the *Migration Regulations 1994* to enable the Minister for Immigration and Border Protection to authorise the disclosure of personal information about Bridging E (Class WE) visa (BE) holders to the Australian Federal Police (AFP) or the police force of any Australian state or territory for the purposes of supporting existing powers to cancel a BVE.

Background

2.75 The committee initially reported on the instruments in its *Second Report of the 44th Parliament*. The committee made further comments on the instruments in its *Fourth Report of the 44th Parliament*.

Committee view on compatibility

Right to privacy

Disclosure of personal information

2.76 The committee sought clarification from the Minister for Immigration and Border Protection that the Memoranda of Understanding being negotiated with the Federal, State and Territory police would be provided to the committee once finalised.

2.77 The committee also sought clarification from the minister as to whether the disclosure powers authorised by the Migration Amendment (Disclosure of Information) Regulation 2013 are intended to be used prior to the relevant memoranda being finalised.

Minister's response

> Provision of the Memoranda of Understanding to the Committee
>
> The Committee has sought confirmation that copies of the final Memoranda of Understanding will be provided for its information and assessment. The Memoranda of Understanding are still being developed with the various Federal, State and Territory police and none have been finalised at this stage. I will provide copies of the Memoranda of Understanding once they are finalised and signed.

Use of provisions in amendments

The Committee also sought clarification as to whether the disclosure powers authorised by these amendments are intended to be used prior to the relevant Memoranda being finalised. I can confirm that the information authorised for disclosure by these amendments has not been released, and will not be released, prior to the relevant Memoranda of Understanding being finalised.[1]

Committee response

2.78 The committee thanks the Minister for Immigration and Border Protection for his response.

2.79 The committee thanks the minister for his commitment to provide the committee with a copy of the Memoranda of Understanding.

2.80 The committee notes that, as many of the key safeguards and procedures for implementing the new disclosure powers are to be contained in the relevant Memoranda of Understanding being negotiated with the federal, state and territory police, the committee is unable to complete its assessment of whether the powers are compatible with human rights until it can consider the specific content of the Memoranda of Understanding.

2.81 The committee will conclude its examination of the instruments once it has received and considered a copy of the final Memoranda of Understanding.

1 See Appendix 2, Letter from Mr Scott Morrison MP, Minister for Immigration and Border Protection to Senator Dean Smith, 15 April 2014, p. 8.

Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 [F2013L01218]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 4 March 2014 (Senate)

Purpose

2.82 The Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 amends the *Migration Regulations 1994* to strengthen cancellation powers and create a new condition in relation to Bridging E (Class WE) visas (BVEs). In particular, the regulation amends the Migration Regulations to create:

- a discretionary power to cancel a BVE held by a person who is convicted of, or charged with, an offence in Australia or another country, or who is the subject of an Interpol notice relating to criminal conduct or to threat to public safety; and
- a new discretionary visa condition to, when imposed, prohibit a person who has been granted a BVE from engaging in criminal conduct.

Background

2.83 The committee initially reported on the instrument in its *First Report of the 44th Parliament*. The committee made further comments on the instruments in its *Fourth Report of the 44th Parliament*.

Committee view on compatibility

Right to fair hearing

Restriction on due process

2.84 The committee sought clarification from the Minister for Immigration and Border Protection regarding the circumstances in which a court may issue an injunction to prevent a person's removal or their transfer to a regional processing country, and in particular, how and when a person may seek an injunction before the courts and the ground on which the courts may grant an injunction.

2.85 The committee also requested clarification from the Minister with regard to the following statement contained in his response to the committee: 'As a general rule, a visa should not be cancelled where the breach [of a visa] condition occurred in circumstances beyond the visa holder's control'.[1] The committee noted that this appears to give the decision-maker the discretion to cancel the BVE irrespective of

1 See Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, 20 January 2014, p. 6.

how the breach occurred and that the committee considers that it should be a requirement for the decision-maker not to cancel a BVE where the person is not at fault for the breach.

Minister's response

Under what circumstances may a court issue an injunction to prevent removal or transfer to a regional processing centre

The Federal Circuit Court, the Federal Court and the High Court all have power to issue an injunction to prevent the removal of a person from Australia or the transfer of a person to a regional processing country in certain circumstances. If they were to do so, the Department would be obliged to comply with the terms of that injunction.

The grounds on which a court may grant an injunction are many and varied. The circumstances in which a court may issue an injunction will vary from case to case. However, the legal principles behind the courts' power to issue injunctions are well established. Usually, a court will have to be satisfied that the person has raised a substantive issue to be determined (that is, that the person has raised an arguable case about his or her circumstances that should be resolved by the court). The court will also weigh this issue against the 'balance of convenience'. Occasionally, the courts do not have time to resolve these issues and may simply issue a short injunction to preserve the status quo, while it considers these issues.

A person may seek an injunction by making an application to the court and if necessary the court can convene an urgent hearing.

Clarification of the cancellation of a Bridging Visa E (BYE) where the breach occurred in circumstances beyond the visa holder's control

The Committee requested clarification regarding the following statement: 'As a general rule, a visa should not be cancelled where the breach of [a visa] condition occurred in circumstances beyond the visa holder's control'. The Committee expressed concern that BVEs should not be cancelled where the person is not at fault for the breach.

Decisions to cancel under section 116(1)g of the Act and regulation 2.43(1)(p) of the *Migration Regulations 1994* (the Regulations) or to cancel under section 116(1)(b) of the Act for a breach of visa condition 8564 (the holder must not engage in criminal conduct) are discretionary decisions. That is, decisions under these provisions allow the decision maker to weigh the grounds for cancellation against reasons not to cancel. Under policy, the decision maker may consider a wide range of matters when deciding whether or not to cancel a visa. These matters include, but are not limited to, the circumstances in which the grounds for cancellation arose. The policy advice available for decision makers is as follows:

Cancellation under section 116(1)(g) and regulation 2.43(1)(p)

Where a BVE holder has been charged with, or convicted of, a crime in Australia or overseas, then their visa may be considered for cancellation

using the new grounds at section 116(1)(g) and regulation 2.43(l)(p). These grounds are objective, that is, the visa holder has either been charged or convicted, or they have not. However, even where grounds objectively exist, the discretionary cancellation framework still allows the decision maker to consider 'reasons not to cancel', and the decision maker may consider the circumstances in which the grounds for cancellation arose. This consideration includes whether or not there are extenuating circumstances that outweigh the grounds for cancellation.

Cancellation under section J J 6(l)(b) for breach of condition 8564

Cancellation is also discretionary where a person's visa is being considered for cancellation in relation to a breach of condition 8564 (the holder must not engage in criminal conduct). In this situation, the decision maker may not only consider the circumstances in which the ground for cancellation arose, but also the reason for, and the extent of the breach. Under policy, the visa should generally not be cancelled where the breach of visa condition occurred in circumstances beyond the person's control.

On the basis of the above policy guidance, a decision-maker considering the cancellation of a BVE pursuant to the above provisions should consider all matters relevant to the cancellation, including the liability of the visa holder for the breach of the relevant visa condition.[2]

Committee response

2.86 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this instrument.

2.87 However, the committee notes its previous recommendation that the cancellation powers be amended to provide a requirement for the relevant decision-maker to be satisfied that:

- **the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power;**
- **the exercise of the power is no more restrictive than is required in the circumstances; and**
- **the breach did not occur in circumstances beyond the person's control.**

2.88 The committee notes that the Minister for Immigration and Border Protection does not accept the committee's recommendation, and considers that

2 See Appendix 2, Letter from Mr Scott Morrison MP, Minister for Immigration and Border Protection to Senator Dean Smith, 15 April 2014, pp 4-5.

the powers will be administered in compliance with Australia's international obligations.[3]

2.89 Noting the minister's advice, the committee remains concerned that a BVE may be cancelled under such broad circumstances. The committee notes its previous statements that limitations on rights must not only be reasonable, necessary and proportionate to a legitimate objective, but also be prescribed by law. That is, limitations must have a clear legal basis, including being publicly accessible and not open-ended. Finally, the committee reiterates its view that limitations on fundamental rights based solely on administrative discretion are likely to be impermissible under human rights law.

3 See Parliamentary Joint Committee on Human Rights*, Fourth Report of the 44th Parliament*, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 5.

Migration Amendment (Temporary Protection Visas) Regulation 2013 [F2013L01811]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: The instrument was disallowed in full on 2 December 2013

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 [F2013L02104]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: The instrument was disallowed in full on 27 March 2014

Purpose

2.90 The Migration Amendment (Temporary Protection Visas) Regulation 2013 reintroduced Temporary Protection Visas (TPVs) as the only protection visa available to persons who entered Australia without a valid visa either by boat or by plane. This includes unauthorised arrivals already in Australia who had an existing application for a permanent protection visa in process when the new arrangement commenced on 18 October 2013. Key features of the TPV arrangements include the following:

- a TPV lasts for a maximum of three years unless a shorter period is prescribed by the Minister. A person may re-apply for and be granted another three-year TPV if they continue to meet the criteria for engaging Australia's protection obligations.
- a TPV holder is not eligible to apply for a permanent protection visa, which allows a person to live and work in Australia as a permanent resident, unless the Minister is satisfied that it is in the 'national interest' to grant one.
- a TPV-holder has the right to work and to selected support services. Pending arrangements with state and territory governments, children will have access to public education.
- a TPV automatically lapses if the person travels outside Australia for any reason, including visiting family.
- a TPV holder has no access to family reunion. TPV holders are not allowed to sponsor family members through either the humanitarian program or the family stream of the migration program.

2.91 The Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 was introduced to reinstate the outcome that was sought to be achieved by the Migration Amendment (Temporary Protection Visas) Regulation 2013, which had been disallowed: that is, to prevent unauthorised arrivals from accessing the

permanent protection visa regime under the *Migration Act 1958*. According to the statement of compatibility, it is expected that all unauthorised arrivals would continue to remain on bridging visas, even after they had been found to be refugees.[1]

Background

2.92 The committee first reported on the Migration Amendment (Temporary Protection Visas) Regulation 2013 in its *First Report of the 44th Parliament* and the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 in its *Second Report of the 44th Parliament*. Both regulations were subsequently reported on in the committee's *Fourth Report of the 44th Parliament*.

2.93 The Migration Amendment (Temporary Protection Visas) Regulation 2013 came into force on 18 October 2013. The regulation ceased to have effect when it was disallowed in full by the Senate on 2 December 2013. The committee understands that TPVs were issued to 22 individuals prior to the disallowance of the regulation.[2]

2.94 The Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 came into force on 14 December 2013. The regulation ceased to have effect when it was disallowed in full by the Senate on 27 March 2014. The committee notes that refusals of a permanent protection visa that were made while the regulation was in effect remain valid as the regulation was valid at the time of the decision.[3]

Committee view on compatibility

Multiple rights

Restriction on protection visa holders

2.95 In its *Second Report of the 44th Parliament* the committee sought further information on a range of issues in regards to the operation of the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013. In its *Fourth Report of the 44th Parliament* the committee noted that the Minister for Immigration and Border Protection had not provided the information sought by the committee. The committee again sought clarification on the following issues:

---

1 Explanatory statement, Attachment B, p. 2.

2 See Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, Letter from Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection to Senator Dean Smith, 20 January 2014, p. 8.

3 Department of Immigration and Border Protection, *Illegal maritime arrivals,* http://www.immi.gov.au/About/Pages/ima/info.aspx [accessed 11 June 2014].

- whether the bridging visa scheme that was intended to apply to persons who had been found to be owed protection obligations was consistent with a range of rights;
- how these amendments interacted with the changes that were introduced to the bridging visa scheme by various other instruments,[4] specifically:
  - whether unauthorised arrivals who are owed protection obligations but who remain on bridging visas would be required to sign a code of behaviour, and if so if they would be subject to the same consequences for breaching the code, including potentially being sent to an regional processing country,
  - whether their personal information would be shared with the federal and state police authorities,
  - whether their visas may be cancelled on the same grounds that currently apply to other bridging visa holders who are awaiting resolution of their immigration status; and
- the type of refugee determination processes that would apply to unauthorised arrivals, in particular whether they would have access to merits review at the Refugee Review Tribunal.

2.96 The committee also noted that it considered that the Temporary Humanitarian Concern (THC) visa system was likely to limit a range of human rights guaranteed by the United Nations treaties and sought clarification on whether the THC visa scheme was compatible with human rights.

2.97 In its *Fourth Report of the 44th Parliament* the committee noted that the TPV scheme and the scheme introduced by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 shared many of the same human rights concerns, albeit in the context of different visa types. The committee decided to reserve its final views on the compatibility of TPVs with human rights, until it received further information from the Minister with regard to the human rights compatibility of utilising the bridging visa scheme and/or the THC visa regime for unauthorised arrivals who have been found to engage Australia's protection obligations.

4 See, Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 (F2013L02102); Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 (F2013L02105); Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (F2013L01218); and Migration Amendment (Disclosure of Information) Regulation 2013 (F2013L02101).

Minister's response

> The Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 was disallowed on 27 March 2014.
>
> Regulations supporting the Temporary Humanitarian Concern Visa (THC) have been in place since July 2000 and are not within the scope of the Committee.[5]

Committee response

2.98 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of these instruments.

2.99 The committee notes that its mandate derives from the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). Section 7 of the Act states that the committee may examine 'legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both House of the Parliament on that issue.' The committee considers that, as the regulations which support the THC visa scheme have come before either house of Parliament, they are within the scope of the committee's mandate.

2.100 Furthermore, the committee's longstanding practice is to write to the proponent of legislation seeking further advice before determining whether legislation is compatible with human rights. If a bill or instrument relates to other legislation, the committee's usual practice is to examine that legislation to support its examination of the initial bill or instrument.

2.101 On the basis of the information provided by the minister, the committee is unable to determine that the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 [F2013L02104] and Migration Amendment (Temporary Protection Visas) Regulation 2013 [F2013L01811] are compatible with human rights.

5 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection to Senator Dean Smith, 15 April 2014, p. 8.

Migration Amendment Regulation 2013 (No. 4) [F2013L01014]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 11 December 2013 (Senate)

Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern [F2013L01185]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Regulations 1994
Last day to disallow: Exempt from disallowance

Purpose

2.102 A bridging visa subclass 070 is ordinarily issued to individuals who are in immigration detention and whose removal from Australia is not practicable at the time. A bridging visa subclass 070 is normally granted using the minister's non-delegable, non-compellable public interest power under section 195A of the *Migration Act 1958* (Migration Act) to grant a visa to a person in immigration detention.

2.103 The Migration Amendment Regulation 2013 (No. 4) amends the *Migration Regulations 1994* to prescribe a new class of persons to whom the minister may grant a bridging visa subclass 070 under the Migration Act. The explanatory statement describes this new class of persons as comprising individuals:

- who do not currently hold a visa;
- who are not in immigration detention (and therefore outside the power of the minister to grant a visa under section 195A of the Migration Act); and
- whose removal from Australia is not practicable at the time.[1]

2.104 The amendments insert a range of new visa conditions into the *Migration Regulations 1994*, which the minister must impose on a bridging visa granted to a person in the new class of eligible non-citizens, and may impose on a bridging visa granted to a detainee under section 195A of the Migration Act. Such conditions include, for example, requiring approval by the minister for employment in certain industries or for changes in employment (such as those involving chemicals of security concern), refraining from engaging in certain activities, and not communicating or associating with certain entities.

1 Explanatory statement, Attachment C, p. 2.

2.105 The purpose of the Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern is to specify the chemicals of security concern referred to in the Migration Amendment Regulation 2013 (No. 4).

Background

2.106 The committee reported on both instruments in its *First Report of the 44th Parliament* and *Third Report of the 44th Parliament*.

Committee view on compatibility

Multiple rights

2.107 The committee raised concerns in relation to the right to work, the right to equality and non-discrimination and the right to freedom of association.

Compatibility of amendments with human rights

2.108 The committee sought further advice from the minister in relation to the Migration Amendment Regulation 2013 (No. 4) as to:

- whether the amendments apply to persons who are currently in immigration detention; and
- whether that particular cohort was considered to pose a security risk (including whether the entire cohort was considered to pose such a risk).

2.109 The committee also noted that, without the above information, it could not assess whether the proposed limitations (on the rights engaged) imposed by the Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern (in combination with the regulation) are necessary, reasonable and proportionate to achieving a legitimate objective (that is, the protection of the community and Australia's national security).

Minister's response

> 'It remains unclear to whom the amendments will apply.'
>
> The amendments can be used to facilitate the grant of a visa to detainees who are currently in immigration detention and in the event that a detainee's current immigration detention is found to be unlawful by a court.
>
> It is government policy that the amendments will only apply to enable the grant of a visa, without the requirement of an application being made, to persons in immigration detention who have been assessed to be a security risk in the event that their current immigration detention is found to be unlawful by a court.
>
> 'In particular, it is unclear:
>
> - 'On what basis the detention of this cohort has been (or will be) found to be unlawful by a court.'

While it is not appropriate to speculate on possible future court cases, the question of whether or not indefinite immigration detention is lawful has been raised as an issue in cases where the Plaintiff has been the subject of an adverse security assessment.

The current immigration detention of persons who have been assessed to be a security risk has not been found to be unlawful by a court.

- 'If, as the response states, the amendments apply to persons currently in immigration detention and to persons whose current immigration detention has been found to be unlawful, why section 195A of the Migration Act is not available to the Minister.'

While a person is in immigration detention under section 189 of the *Migration Act 1958* (the Act), the power in section 195A of the Act is available to me. If a court finds a person's detention unlawful, they must be released from detention. The power in section 195A is only available in relation to persons in detention. Where a court has found detention to be unlawful the power in section 195A is not available.

Without this Regulation, there is no visa that could be granted without an application being made, meaning that a person ordered to be released by a court would need to be released from detention without a visa. Release without a visa is contrary to the legislation and government policy. The Regulation allows for a person to be quickly granted a Subclass 070 (Bridging (Removal Pending)) visa (RPBV) with appropriate conditions if the court orders their release from immigration detention, allowing for them to be lawfully in the community.

The conditions that must be imposed on the person reflect the necessity to manage, in the most effective way, the risk to security and the Australian community posed by detainees who are the subject of adverse security assessments.

- 'If, as the response states, it is government policy that the amendments will only be applied to persons whose current immigration detention has been found to be unlawful by a court, why the amendments also apply to persons who are currently in immigration detention (and whose detention has presumably not been found to be unlawful).'

Under the Regulation, I have the discretion to impose one or more of the conditions introduced by the amendments on a RPBV if, exercising my non compellable power under section 195A of the Act, I decide to grant this visa to a person currently in immigration detention, whose detention has not been found unlawful by a court.

I consider that the discretion to impose on a RPBV one or more of the conditions introduced by the amendments is a necessary part of the Government's strategy to manage the risk to the safety of the Australian community if detainees who pose a risk to the Australian community are released from immigration detention.

- 'On what basis and by what process a person will be 'assessed to be a security risk' and made subject to the conditions imposed by the amendments.'

The assessment that an individual is a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* - ASIO Act) is made by the Australian Security Intelligence Organisation (ASIO). Security assessments fall within the portfolio responsibilities of the Attorney-General.

In the event that a court finds that the current immigration detention of a person who has been assessed to be a security risk is unlawful under section 189 of the Act, and orders their release from immigration detention, my delegate must impose these conditions on the RPBV. If a person assessed to be a risk to security by ASIO is lawfully detained the imposition of conditions on an RPBV granted pursuant to s195A will be at my discretion.

- 'Why persons who fall within the new class of persons must have such conditions imposed and why other detainees may have such conditions imposed.'

It is Government policy that the amendments will apply only to persons who have been assessed by ASIO to be a risk to security within the meaning of section 4 of the ASIO Act.

In the event that the RPBV is granted by a departmental delegate, the mandatory imposition of the conditions introduced by the amendments will enable the government to manage risks to security and to the Australian community posed by the release from immigration detention of a person who has been assessed to be a risk to security.

Under section 195A, I can grant any visa to a person who is in immigration detention. In the exercise of this power, I am not bound by the Regulations, and can choose to exercise the power if I consider it to be in the public interest. If I grant the RPBV under section 195A, the discretionary imposition of the conditions introduced by the amendments will allow me to manage risks to the Australian community, in line with my consideration of what is in the public interest.[2]

Committee response

2.110 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this instrument.

2.111 However, while the committee acknowledges that security assessments are an important part of ensuring the safety of Australians, and that ASIO advice that an individual is a risk to security should be afforded appropriate weight, the

2 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection to Senator Dean Smith, 15 April 2014.

committee remains concerned that ASIO assessments of non-citizens are not subject to any form of merits review. The imposition of conditions on RPBV holders in relation to employment and association, as required by these regulations, may be reasonable in and of itself; however, as the decision by ASIO leading to their imposition is not reviewable the committee considers that there is a risk that such conditions may not be necessary or proportionate.

2.112 The committee is therefore unable, on the basis of the information provided, to determine that the Migration Amendment Regulation 2013 (No. 4) [F2013L01014] and Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern [F2013L01185] are compatible with the right to work and right to equality.

Appendix 1

Index of instruments considered and received by the committee between 8 March and 30 May 2014

Appendix 1: Full list of Legislative Instruments received by the committee between 8 March and 30 May 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 30 May 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

Privacy Act 1988	
Privacy (Persons Reported as Missing) Rule 2014 [F2014L00229]	

Instruments received week ending 21 March 2014

Aged Care Act 1997	
User Rights Amendment (March Indexation Measures) Principle 2014 [F2014L00287]	
Crimes Act 1914	
Crimes Amendment (Prescribed Law) Regulation 2014 [SLI 2014 No. 14] [F2014L00282]	D
Customs Administration Act 1985	
Specification of Prohibited Drugs No. 1 of 2014 [F2014L00264]	
Military Rehabilitation and Compensation Act 2004	
Military Rehabilitation and Compensation Act Education and Training Scheme (Income Support Bonus) Repeal Determination 2014 [F2014L00256]	D
Migration Act 1958	
Migration Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 32] [F2014L00286]	C
Legislative Instruments Act 2003	
Foreign Affairs and Trade (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 20] [F2014L00266]	
Immigration and Border Protection (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 22] [F2014L00267]	
Infrastructure and Regional Development (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 23] [F2014L00268]	
Social Services (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 24] [F2014L00269]	
Veterans' Affairs (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 26] [F2014L00270]	
Employment (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 17] [F2014L00271]	
Defence (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 15] [F2014L00273]	
Spent and Redundant Instruments Repeal Regulation 2014 [SLI 2014 No. 25] [F2014L00274]	
Environment (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 18] [F2014L00275]	
Education (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 16] [F2014L00276]	
Health (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 21] [F2014L00277]	

Finance (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 19] [F2014L00278]	
Civil Aviation (Spent and Redundant Instruments) Repeal Regulation 2014 [SLI 2014 No. 13] [F2014L00279]	
Privacy Act 1988 and Privacy Amendment (Enhancing Privacy Protection) Act 2012	
Privacy Public Interest (Enhancing Privacy Protection) Amendment and Repeal Determination 2014 [F2014L00240]	
Privacy Act 1988	
Privacy (International Money Transfers) Temporary Public Interest Determination 2014 (No. 1) [F2014L00241]	
Privacy (International Money Transfers) Generalising Determination 2014 (No. 1) [F2014L00242]	
Approval of guidelines issued under Section 95A of the Privacy Act 1988 [F2014L00243]	
Approval of guidelines issued under Section 95AA of the Privacy Act 1988 [F2014L00244]	
Issuing of guidelines under section 95 of the Privacy Act 1988 [F2014L00245]	
Veterans' Entitlements Act 1986	
Veterans' Children Education Scheme (Income Support Bonus) Repeal Instrument 2014 [F2014L00257]	D

Instruments received week ending 28 March 2014

Defence Service Homes Act 1918, Financial Management and Accountability Act 1997, Commonwealth Authorities and Companies Act 1997, High Court of Australia Act 1979, Natural Heritage Trust of Australia Act 1997, Aboriginal and Torres Strait Islander Act 2005	
Finance Minister's Amendment Orders (Financial Statements for reporting periods ending on or after 1 July 2013) [F2014L00294]	

Instruments received week ending 4 April 2014

Workplace Gender Equality Act 2012	
Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Amendment Instrument 2014 (No. 1) [F2014L00366]	

Instruments received week ending 11 April 2014

Instruments received this week were considered in the *Sixth Report of the 44th Parliament*

Instruments received week ending 18 April 2014

Social Security (Administration) Act 1999	
Social Security (Administration) - Queensland Commission (Family Responsibilities Commission) Specification 2014 [F2014L00408]	

Instruments received week ending 25 April 2014

Instruments received this week were considered in the *Sixth Report of the 44th Parliament*

Instruments received week ending 2 May 2014

Aged Care Act 1997	
User Rights Amendment (Publication of Accommodation Payment Information) Principles 2014 [F2014L00432]	
Aged Care (Conditions for Residential Care Allocations) Determination 2014 [F2014L00433]	A
Appropriation (Parliamentary Departments) Act (No. 1) 2013-2014, Appropriation (Parliamentary Departments) Act (No. 1) 2012-2013 and Appropriation (Parliamentary Departments) Act (No. 1) 2011-2012	
Instrument to Reduce Appropriations (No. 2 of 2013-2014) [F2014L00429]	
Australian Hearing Services Act 1991	
Declared Hearing Services Amendment Determination 2014 (No. 1) [F2014L00430]	
Australian Prudential Regulation Authority Act 1998	
Australian Prudential Regulation Authority (confidentiality) determination No. 5 of 2014 [F2014L00453]	
Civil Aviation Regulations 1988	
CASA 80/14 - Instructions — use of Global Navigation Satellite System (GNSS) [F2014L00431]	
Civil Aviation Safety Regulations 1998	
AD/ELECT/74 Amdt 1 - Lermer GmbH Water Boilers [F2014L00462]	
Customs Act 1901 and Customs Administration Act 1985	
CEO Directions No.1 of 2014 [F2014L00428]	
Environment Protection and Biodiversity Conservation Act 1999	
Amendment of List of Exempt Native Specimens - Queensland Eel Fishery (17/04/2014) [F2014L00460]	
Amendment of List of Exempt Native Specimens - Tasmanian Freshwater Eel Fishery (17/04/2014) [F2014L00461]	
Amendment of List of Exempt Native Specimens - Victorian Eel Fishery (17/04/2014) [F2014L00463]	
Inclusion of ecological communities in the list of threatened ecological communities under section 181 of the Environment Protection and Biodiversity Conservation Act 1999 - Kangaroo Island Narrow-leaved Mallee (Eucalyptus cneorifolia) Woodland (EC 102) (10/04/2014) [F2014L00465]	
Export Control (Orders) Regulations 1982	
Export Control (Plants and Plant Products) Amendment (2014 Measures No. 1) Order 2014 [F2014L00434]	
Financial Management and Accountability Act 1997	
Financial Management and Accountability Amendment (2014 Measures No. 4) Regulation 2014 [SLI 2014 No. 43] [F2014L00436]	
FMA Act Determination 2014/07 — Section 32 (Transfer of Functions from Health to Social Services) [F2014L00435]	E
Fisheries Management Act 1991	
Fisheries Legislation (Management Plans) Amendment 2013 (No. 1) [F2014L00457]	

Small Pelagic Fishery Management Plan Amendment 2013 [F2014L00458]	
Fisheries Management Act 1991 and Small Pelagic Fishery Management Plan 2009	
Small Pelagic Fishery Overcatch and Undercatch Determination 2014 [F2014L00464]	
Small Pelagic Fishery Total Allowable Catch (Quota Species) Determination 2014 [F2014L00452]	
Fisheries Management Act 1991 and Macquarie Island Toothfish Fishery Management Plan 2006	
Macquarie Island Toothfish Fishery Total Allowable Catch Determination 2014 [F2014L00445]	
Food Standards Australia New Zealand Act 1991	
Food Standards (Application A1085 – Food derived from Reduced Lignin Lucerne Line KK179) Variation [F2014L00455]	E
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 21 of 2014) [F2014L00437]	
Higher Education Support Act 2003 - VET Provider Approval (No. 22 of 2014) [F2014L00439]	
Higher Education Support Act 2003 - VET Provider Approval (No. 23 of 2014) [F2014L00440]	
Higher Education Support Act 2003 - VET Provider Approval (No. 24 of 2014) [F2014L00441]	
Higher Education Provider Approval No. 3 of 2014 [F2014L00442]	
Higher Education Support Act 2003 - VET Provider Approval (No. 26 of 2014) [F2014L00447]	
Jervis Bay Territory Acceptance Act 1915	
Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443]	
Migration Regulations 1994	
Migration Regulations 1994 - Specification of Access to Movement Records - IMMI 14/011 [F2014L00451]	
Migration Regulations 1994 - Specification of Classes of Persons - IMMI 14/035 [F2014L00444]	E
Migration Regulations 1994 - Specification of Transit Passengers who are Eligible for a Special Purpose Visa - IMMI 14/029 [F2014L00450]	E
National Health Act 1953	
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2014 (No. 4) (No. PB 31 of 2014) [F2014L00438]	
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 4) (No. PB 30 of 2014) [F2014L00449]	
Privacy Act 1988	
Privacy (Credit Reporting) Code 2014 (Version 1.2) [F2014L00459]	
Private Health Insurance (National Joint Replacement Register Levy) Act 2009	
Private Health Insurance (National Joint Replacement Register Levy) Amendment Rules 2014 (No. 1) [F2014L00454]	
Therapeutic Goods Act 1989	
Therapeutic Goods Information (Sharing of Committee Information) Specification 2014 [F2014L00446]	

Therapeutic Goods Information (Information about Advisory Committee Meetings) Specification 2014 [F2014L00448]	
Therapeutic Goods (Medical Devices) Amendment (Joint Replacements) Regulation 2014 [SLI 2014 No. 44] [F2014L00456]	

Instruments received week ending 9 May 2014

Agricultural and Veterinary Chemicals Code Act 1994	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 5) [F2014L00495]	E
ASIC Market Integrity Rules (Competition in Exchange Markets) 2011	
ASIC Class Rule Waiver [CW 14-0322] [F2014L00486]	
Australian Meat and Live-stock Industry Act 1997	
Australian Meat and Live-stock Industry (High Quality Beef Export to the European Union) Order 2014 [F2014L00506]	
Australian Participants in British Nuclear Tests (Treatment) Act 2006	
Treatment Principles (Australian Participants in British Nuclear Tests) 2006 (Rehabilitation Appliance Program) Amendment Instrument 2014 [F2014L00497]	
Civil Aviation Regulations 1988 and Civil Aviation Order 40.2.1 - Instrument ratings (02/12/2004)	
CASA 44/14 - Approval — A380 and B737-800 aircraft GLS approach procedures (Qantas) [F2014L00466]	
Civil Aviation Safety Regulations 1998 Part 66 Manual of Standards Amendment Instrument 2014 (No. 1) [F2014L00492]	
AD/CL-600/111 Amdt 1 - Nose Landing Gear Selector Valve [F2014L00496]	
CASA ADCX 008/14 - Repeal of Airworthiness Directive [F2014L00500]	
AD/CFM56/33 - Inspection of Fan Blades with 25 Degree Mid-span Shrouds [F2014L00502]	
Financial Management and Accountability Act 1997	
FMA Act Determination 2014/09 — Section 32 (Transfer of Functions from Immigration to Social Services) [F2014L00489]	E
FMA Act Determination 2014/08 — Section 32 (Transfer of Functions from DRET to Industry) [F2014L00488]	E
FMA Act Determination 2014/10 — Section 32 (Transfer of Functions from Social Services to PM&C) [F2014L00498]	E
FMA Act Determination 2014/11 — Section 32 (Transfer of Functions from DEEWR to PM&C, Education, Employment and Social Services) [F2014L00499]	E
Fisheries Management Act 1991	
Multiple Fishery (Closures) Direction No. 1 2014 [F2014L00487]	
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 25 of 2014) [F2014L00504]	
Migration Act 1958	
Migration Act 1958 - Determination of The Collection of the Registration Status Charge - IMMI 14/027 [F2014L00501]	

Military Rehabilitation and Compensation Act 2004	
MRCA Treatment Principles (Rehabilitation Appliance Program) Amendment Instrument 2014 [F2014L00494]	
Privacy Act 1988	
Privacy (Credit Related Research) Rule 2014 [F2014L00503]	
Remuneration Tribunal Act 1973	
Remuneration Tribunal Determination 2014/06 - Remuneration and Allowances for Holders of Public Office [F2014L00505]	
Telecommunications Act 1997	
Carrier Licence Conditions (NT Technology Services Pty Ltd) Declaration 2014 [F2014L00490]	
Carrier Licence Conditions (Urban Renewal Authority Victoria t/a Places Victoria Pty Ltd) Declaration 2014 [F2014L00491]	
Veterans' Entitlements Act 1986	
Statement of Principles concerning Hodgkin's lymphoma No. 35 of 2014 [F2014L00467]	
Statement of Principles concerning Hodgkin's lymphoma No. 36 of 2014 [F2014L00468]	
Statement of Principles concerning acute stress disorder No. 41 of 2014 [F2014L00469]	
Statement of Principles concerning acute stress disorder No. 42 of 2014 [F2014L00470]	
Statement of Principles concerning mitral valve prolapse No. 43 of 2014 [F2014L00471]	
Statement of Principles concerning chronic obstructive pulmonary disease No. 37 of 2014 [F2014L00472]	
Statement of Principles concerning mitral valve prolapse No. 44 of 2014 [F2014L00473]	
Statement of Principles concerning pleural plaque No. 45 of 2014 [F2014L00474]	
Statement of Principles concerning chronic obstructive pulmonary disease No. 38 of 2014 [F2014L00475]	
Statement of Principles concerning malignant neoplasm of the thyroid gland No. 39 of 2014 [F2014L00476]	
Statement of Principles concerning pleural plaque No. 46 of 2014 [F2014L00477]	
Statement of Principles concerning malignant neoplasm of the thyroid gland No. 40 of 2014 [F2014L00478]	
Statement of Principles concerning chronic myeloid leukaemia No. 47 of 2014 [F2014L00479]	
Statement of Principles concerning chronic myeloid leukaemia No. 48 of 2014 [F2014L00480]	
Statement of Principles concerning atrial fibrillation and atrial flutter No. 49 of 2014 [F2014L00481]	
Statement of Principles concerning atrial fibrillation and atrial flutter No. 50 of 2014 [F2014L00482]	
Statement of Principles concerning otitis media No. 51 of 2014 [F2014L00483]	
Statement of Principles concerning otitis media No. 52 of 2014 [F2014L00484]	
Amendment Statement of Principles concerning non-Hodgkin's lymphoma No. 57 of 2014 [F2014L00485]	

Veterans' Entitlements (Treatment Principles – Rehabilitation Appliance Program) Amendment Instrument 2014 [F2014L00493]	

Instruments received week ending 16 May 2014

Defence Act 1903	
Defence Determination 2014/20, Post indexes and benchmark schools - amendment	
Defence Determination 2014/21, Benchmark schools, summer schools, clubs and hardship package - amendment	
Environment Protection and Biodiversity Conservation Act 1999	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Trap and Line Fishery (06/05/2014) (deletion) [F2014L00509]	
Amendment of List of Exempt Native Specimens - New South Wales Ocean Trap and Line Fishery (06/05/2014) (inclusion) [F2014L00510]	
Inclusion in the list of key threatening processes under section 183 of the Environment Protection and Biodiversity Conservation Act 1999 (16) (17/04/2014) [F2014L00512]	
Amendment to the list of threatened species under section 178, 181 and 183 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (160) [F2014L00513]	
Amendment of List of Exempt Native Specimens - Torres Strait Tropical Rock Lobster Fishery (07/05/2014) [F2014L00517]	
Fisheries Management Act 1991	
Heard Island and McDonald Islands Fishery (Closures) Direction No. 1 2014 [F2014L00520]	
Heard Island and McDonald Islands Fishery (Closures) Direction No. 2 2014 [F2014L00521]	
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 27 of 2014) [F2014L00526]	
Migration (United Nations Security Council Resolutions) Regulations 2007	
Migration (United Nations Security Council Resolutions) Regulations 2007 - Specification under regulation 4 definition of 'resolution' - Specification of United Nations Security Council Resolutions - IMMI 14/034 [F2014L00516]	
Public Lending Right Act 1985	
Public Lending Right Scheme 1997 (Modification No. 1 of 2014) [F2014L00519]	
Veterans' Entitlements Act 1986	
Statement of Principles concerning malignant neoplasm of the prostate No. 53 of 2014 [F2014L00522]	
Statement of Principles concerning malignant neoplasm of the prostate No. 54 of 2014 [F2014L00523]	
Statement of Principles concerning chronic multisymptom illness No. 55 of 2014 [F2014L00524]	
Statement of Principles concerning chronic multisymptom illness No. 56 of 2014 [F2014L00525]	

Instruments received week ending 23 May 2014

A New Tax System (Goods and Services Tax) Act 1999	
A New Tax System (Goods and Services Tax) Waiver of Tax Invoice Requirement (Motor Vehicle Incentive Payment Made to Motor Vehicle Dealer) Legislative Instrument 2014 [F2014L00582]	
Anti-Money Laundering and Counter-Terrorism Financing Act 2006	
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2014 (No.3) [F2014L00563]	
Charter of the United Nations Act 1945	
Charter of the United Nations Legislation Amendment (Central African Republic and Yemen) Regulation 2014 [SLI 2014 No. 48] [F2014L00539]	
Charter of the United Nations (Sanctions—Yemen) Regulation 2014 [SLI 2014 No. 49] [F2014L00551]	
Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2014 (No. 2) [F2014L00568]	
Civil Aviation Act 1988	
Civil Aviation Order 82.1 Amendment Instrument 2014 (No. 1) [F2014L00583]	
Civil Aviation Order 82.3 Amendment Instrument 2014 (No. 1) [F2014L00584]	
Civil Aviation Order 82.5 Amendment Instrument 2014 (No. 1) [F2014L00585]	
Civil Aviation Regulations 1988	
CASA 61/14 – Direction – use of ADS-B in foreign aircraft engaged in private operations [F2014L00586]	
Civil Aviation Safety Regulations 1998	
AD/B747/298 Amdt 2 - Thrust Reverser System Locks [F2014L00527]	
CASA ADCX 009/14 - Repeal of Airworthiness Directives [F2014L00530]	
AD/B737/224 Amdt 3 - Horizontal Stabiliser Attachment Pins and Bolts - Inspection [F2014L00536]	
CASA EX23/14 - Exemption — instrument rating flight tests for navigation aid endorsements [F2014L00564]	
Commonwealth Places (Application of Laws) Act 1970	
Commonwealth Places (Application of Laws) Regulation 2014 [SLI 2014 No. 46] [F2014L00557]	
Criminal Code Act 1995	
Criminal Code Amendment (Border Controlled Drugs) Regulation 2014 [SLI 2014 No. 47] [F2014L00550]	
Customs Act 1901	
Customs Legislation Amendment (Central African Republic) Regulation 2014 [SLI 2014 No. 51] [F2014L00565]	
Environment Protection and Biodiversity Conservation Act 1999	
Amendment of List of Exempt Native Specimens - South Australia Lakes and Coorong Fishery (15/05/2014) [F2014L00567]	

Amendment of List of Exempt Native Specimens - Pilbara Fish Trawl Interim Managed Fishery (14/05/2014) [F2014L00571]	
Farm Household Support (Consequential and Transitional Provisions) Act 2014	
Farm Household Support (Consequential and Transitional Provisions) Commencement Proclamation 2014 [F2014L00555]	E
Farm Household Support Act 2014	
Farm Household Support Commencement Proclamation 2014 [F2014L00554]	E
Financial Sector (Collection of Data) Act 2001	
Financial Sector (Collection of Data) (reporting standard) determination No. 17 of 2014 - SRS 160.1 - Defined Benefit Member Flows [F2014L00540]	
Financial Sector (Collection of Data) (reporting standard) determination No. 23 of 2014 - SRS 531.0 Investment Flows [F2014L00541]	
Financial Sector (Collection of Data) (reporting standard) determination No. 24 of 2014 - SRS 532.0 Investment Exposure Concentrations [F2014L00542]	
Financial Sector (Collection of Data) (reporting standard) determination No. 21 of 2014 - SRS 530.0 Investments [F2014L00543]	
Financial Sector (Collection of Data) (reporting standard) determination No. 22 of 2014 - SRS 530.1 Investments and Investment Flows [F2014L00544]	
Financial Sector (Collection of Data) (reporting standard) determination No. 18 of 2014 - SRS 320.0 - Statement of Financial Position [F2014L00545]	
Financial Sector (Collection of Data) (reporting standard) determination No. 19 of 2014 - SRS 330.0 - Statement of Financial Performance [F2014L00546]	
Financial Sector (Collection of Data) (reporting standard) determination No. 20 of 2014 - SRS 410.0 - Accrued Default Amount [F2014L00548]	
Financial Sector (Collection of Data) (reporting standard) determination No. 25 of 2014 - SRS 533.0 - Asset Allocation [F2014L00552]	
Financial Sector (Collection of Data) (reporting standard) determination No. 26 of 2014 - SRS 702.0 - Investment Performance [F2014L00553]	
First Home Saver Accounts Act 2008	
First Home Saver Accounts Amendment (Notice of Changes) Regulation 2014 [SLI 2014 No. 53] [F2014L00535]	
Food Standards Australia New Zealand Act 1991	
Food Standards (Application A1087 – Food derived from Insect-protected Soybean Line DAS-81419-2) Variation [F2014L00528]	E
Food Standards (Application A1089 – Food derived from Herbicide-tolerant Canola Line DP-073496-4) Variation [F2014L00529]	E
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 4, 2014 [F2014L00537]	E
Health Insurance Act 1973	
Health Insurance (Accredited Pathology Laboratories - Approval) Amendment Principles 2014 (No. 1) [F2014L00538]	

Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 28 of 2014) [F2014L00531]	
Higher Education Support Act 2003 - VET Provider Approval (No. 29 of 2014) [F2014L00532]	
Income Tax Assessment Act 1997 and Superannuation (Unclaimed Money and Lost Members) Act 1999	
Tax and Superannuation Laws Amendment (2014 Measures No. 2) Regulation 2014 [SLI 2014 No. 52] [F2014L00549]	
Industrial Chemicals (Notification and Assessment) Act 1989	
Industrial Chemicals (Notification and Assessment) Amendment (Fees and Charges) Regulation 2014 [SLI 2014 No. 50] [F2014L00547]	
Jervis Bay Territory Rural Fires Ordinance 2014	
Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533]	
Military Rehabilitation and Compensation Act 2004	
Military Rehabilitation and Compensation (Warlike Service) Determination 2014 (No. 2) [F2014L00575]	E
Military Rehabilitation and Compensation (Non-warlike Service) Determination 2014 (No. 1) [F2014L00579]	E
National Health Act 1953	
National Health (Highly specialised drugs program for hospitals) Special Arrangement Amendment Instrument 2014 (No. 5) (PB 40 of 2014) [F2014L00577]	
National Health (Efficient Funding of Chemotherapy) Special Arrangement Amendment Instrument 2014 (No. 5) (PB 41 of 2014) [F2014L00578]	
National Health (Listed drugs on F1 or F2) Amendment Determination 2014 (No. 4) (PB 43 of 2014) [F2014L00580]	
Primary Industries Research and Development Act 1989	
Fisheries Research and Development Corporation Amendment (Fishing Levy) Regulation 2014 [SLI 2014 No. 45] [F2014L00556]	
Privacy Act 1988	
Privacy (International Money Transfers) Temporary Public Interest Determination 2014 (No. 2) [F2014L00534]	
Private Health Insurance Act 2007	
Private Health Insurance (Levy Administration) Amendment Rules 2014 [F2014L00576]	
Remuneration Tribunal Act 1973	
Remuneration Tribunal Determination 2014/07 - Specified Statutory Offices - Remuneration and Allowances [F2014L00558]	
Remuneration Tribunal Determination 2014/08 - Remuneration and Allowances for Holders of Part-Time Public Office [F2014L00559]	
Remuneration Tribunal Determination 2014/09 - Judicial and Related offices - Remuneration and Allowances [F2014L00560]	
Remuneration Tribunal Determination 2014/12 - Remuneration and Allowances for Holders of Full-Time Public Office [F2014L00562]	

Remuneration Tribunal Determination 2014/10 - Members of Parliament - Base Salary, Additional Salary for Parliamentary Office Holders, and Related Matters [F2014L00561]	E
Telecommunications Act 1997	
Telecommunications (Non-refundable Code Development Costs) Determination Variation 2014 (No. 1) [F2014L00569]	
Telecommunications (Approved Auditors and Auditing Requirements) Determination Variation 2014 (No. 1) [F2014L00570]	
Therapeutic Goods Act 1989	
Therapeutic Goods Information (Medicine Shortages Information Initiative) Specification 2014 [F2014L00581]	
Poisons Standard Amendment No. 2 of 2014 [F2014L00566]	E
Veterans' Entitlements Act 1986	
Veterans' Entitlements (Non-warlike Service—Operation Accordion) Determination 2014 [F2014L00572]	E
Veterans' Entitlements (Non-warlike Service—Operation Manitou) Determination 2014 [F2014L00573]	E
Veterans' Entitlements (Warlike Service—Operation Slipper) Determination 2014 [F2014L00574]	E

Instruments received week ending 30 May 2014

Civil Aviation Regulations 1988	
Civil Aviation Order 20.7.1B Amendment Instrument 2014 (No. 1) [F2014L00602]	
Civil Aviation Order 20.7.4 Amendment Instrument 2014 (No. 1) [F2014L00603]	
CASA 107/14 - Direction – number of cabin attendants – Jetstar Airways [F2014L00610]	
CASA 110/14 – Direction - number of cabin attendants (Sunstate Airlines) [F2014L00611]	
Civil Aviation Safety Regulations 1998	
CASA EX32/14 - Exemption – recency requirements for night flying – Virgin Australia Regional Airlines [F2014L00604]	
Corporations Act 2001	
ASIC Market Integrity Rules (APX Market-Capital) 2014 [F2014L00590]	
ASIC Market Integrity Rules (Chi-X Australia Market-Capital) 2014 [F2014L00592]	
ASIC Class Order [CO 14/443] [F2014L00594]	
ASIC Market Integrity Rules (FEX Market-Capital) 2014 [F2014L00595]	
ASIC Market Integrity Rules (ASX 24 Market-Capital) 2014 [F2014L00596]	
ASIC Market Integrity Rules (FEX Market) Amendment 2014 (No. 1) [F2014L00597]	
ASIC Market Integrity Rules (ASX Market-Capital) 2014 [F2014L00598]	
ASIC Market Integrity Rules (Competition in Exchange Markets) Amendment 2014 (No. 2) [F2014L00599]	
ASIC Market Integrity Rules (ASX 24 Market) Amendment 2014 (No. 1) [F2014L00600]	
ASIC Class Order [CO 14/425] [F2014L00605]	

Defence Act 1903	
Defence Determination 2014/22, Family assistance for attendance at coronial inquest	
Defence Determination 2014/23, Overseas operations - amendment	
Defence Determination, 2014/24, Member undergoing recategorisation training - amendment	
Defence Determination, 2014/25, Post indexes and summer schools - amendment	
Environment Protection and Biodiversity Conservation Act 1999	
Amendment - List of Specimens taken to be suitable for Live Import (02/05/2014) [F2014L00601]	
Fisheries Management Act 1991	
Bass Strait Central Zone Scallop Fishery Management Plan Amendment 2014 [F2014L00609]	
National Health Act 1953	
National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2014 (No. 5) (No. PB 36 of 2014) [F2014L00588]	
National Health (Price and Special Patient Contribution) Amendment Determination 2014 (No. 4) (No. PB 37 of 2014) [F2014L00589]	
National Health (Pharmaceutical Benefits - Early Supply) Amendment Instrument 2014 (No. 3) - specification under subsection 84AAA(2) (No. PB 39 of 2014) [F2014L00591]	
National Health Determination under paragraph 98C(1)(b) Amendment 2014 (No. 5) (No. PB 38 of 2014) [F2014L00593]	
Navigation Act 2012	
Marine Order 54 (Coastal pilotage) 2014 [F2014L00606]	
Marine Order 15 (Construction — fire protection, fire detection and fire extinction) 2014 [F2014L00607]	

The committee considered 218 instruments

Appendix 2

Correspondence

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Reference: 1402/00996

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

Dear Senator

Supplementary response to questions received from the Parliamentary Joint Committee on Human Rights

Thank you for your letter of 11 February 2013 in which further information was requested on a number of bills and legislative instruments. In my initial response provided on 3 March 2014, I was unable to provide information on some of the questions that were asked about the *Migration Amendment Bill 2013*. My supplementary response in respect of those queries is attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
24/3/2014

Migration Amendment Bill 2013 – Schedule 3

Do the 'arrangements for independent review' mentioned in the statement of compatibility include the following features:

- Meet the 'quality of law' test;
- Permit review of the substantive grounds on which the person is held in order to determine whether the detention is arbitrary within the meaning of the ICCPR and not merely lawful under Australian law;
- Result in binding outcomes, including the power to orer release if the detention is not justified;
- Include regular review of the continuing necessity of the detention, including the ability of the person to initiate a review, for example, in light of new information; and
- Provide sufficient opportunity for the person to effectively challenge the basis for the adverse security assessment.

Review of ASIO adverse security assessments (ASAs) falls within the portfolio responsibilities of the Attorney-General. The Attorney-General has provided me with the following information in response to the Committee's concerns.

Security assessments are an important part of ensuring the safety of Australians. It is essential that ASIO advice that an individual is a risk to security is afforded appropriate weight when considering the individual's suitability for a visa. To meet community expectations, the Government must have the ability to act decisively and effectively, wherever necessary, to protect the Australian community. The Government must also have the legislative basis to refuse a protection visa or to cancel a protection visa, for those non-citizens who are a security risk.

The Government respects the professional judgment of ASIO. At the same time, the Government supports appropriate oversight arrangements of our intelligence and security agencies. The Inspector-General of Intelligence and Security, an independent statutory office holder, plays a primary and comprehensive oversight role, complementing Parliamentary committees such as the Parliamentary Joint Committee on Intelligence and Security. There is also an Independent Reviewer of Adverse Security Assessments who examines all the materials relied on by ASIO, including classified material, and provides her opinion and any recommendation to the Director-General of Security. Copies of the Independent Reviewer's findings are provided to the Attorney-General, the Minister for Immigration and Border Protection and the Inspector-General of Intelligence and Security.

The Independent Reviewer provides independent periodic reviews of ASAs every 12 months. In addition, ASIO can and will issue a new security assessment in the event that new information of relevance comes to light.

Review applicants are provided with an unclassified written summary of reasons for the decision to issue an ASA, as well as an unclassified version of the Independent Reviewer's report. Information can only be provided that does not prejudice the interests of security. For national security reasons, information that would reveal confidential sources and methodologies must remain protected.

Is the bar on refugees accessing merits review by the AAT for their adverse security assessments consistent with the right to equality and non-discrimination in article 26 of the ICCPR.

Article 26 allows for differential treatment where it is for a legitimate aim under the ICCPR and is reasonable, necessary and proportionate in the circumstances. Accordingly, if a distinction on the basis of a prohibited ground has arisen, differential treatment of a particular group will not constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the ICCPR.

Review of ASAs in the Administrative Appeals Tribunal is unavailable for non-citizens who are not the holder of a valid permanent, special category or special purpose visa. In 1977, the Hope Royal Commission on Intelligence and Security specifically considered and recommended against extending review rights to non-Australian, non-resident visa applicants who receive prejudicial security assessments.

Whether steps have been put in place and what they are to ensure that the circumstances that were the subject of consideration by the HRC [UN Human Rights Committee] will not arise again.

The Attorney-General is the Minister responsible for responding to adverse views of the United Nations Human Rights Committee (HRC). However, I am advised that the Government is currently considering its response to the UN HRC's views in this matter. While the views of the UN HRC are not binding as a matter of law, they are considered in good faith by the Government, and taken into account in the interpretation of Australia's obligations under the ICCPR. The Government has notified the UN HRC that it will respond as soon as possible to the Committee's views. It is the general practice of the Government not to publicly comment in detail while considering such views.

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 Dean

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

PARLIAMENT HOUSE, CANBERRA ACT 2600 TELEPHONE: 02 6277 7280 EMAIL: MINISTER.FIFIELD@DSS.GOV.AU

National Disability Insurance Scheme Legislation Amendment Bill 2013 and DisabilityCare Australia Fund Bill 2013 and eleven related bills

3.95 The committee is of the view that general exemptions to the provisions of the anti-discrimination statutes are in general to be avoided, unless there is a compelling case that such an exemption is needed. The committee recognises that partial or temporary exemptions may be necessary and accepts that this may be so in relation to the establishment of trial sites for the NDIS. However, the committee considers that there appear to be ways of achieving the legitimate goal of ensuring that the NDIS can be phased in without adopting the general exemption which the legislation contains.

3.96 The committee regrets the fact that the approach adopted has been use of a general exemption, unlimited as to time, to advance a goal which is said to be limited and temporary, without any substantive engagement with the committee on the issue of whether a more limited exemption or exclusion would serve those goals equally well.

The Australian Government supports the protections provided by the federal anti-discrimination legislation and understands the concern of the Parliamentary Joint Committee in relation to the breadth of a general exemption from the *Age Discrimination Act 2004*. As the Government has previously advised the Committee, a number of alternatives, including limited exemptions, were considered but it was concluded that these alternatives were not able to adequately achieve the necessary policy objectives.

As the Government advised, without a general exemption from the *Age Discrimination Act*, any new temporary age-based restrictions in trial sites could constitute unlawful age discrimination. New trial sites have been negotiated since the commencement of the trials and the flexibility created by the legislation has allowed those negotiations to take place. The Government will continue to require this flexibility in the context of continuing negotiations with State and Territory governments about trials leading to transition and full implementation.

The decision to seek a general exemption was a decision of the previous Government. The operation of the *National Disability Insurance Scheme Act 2013* must be reviewed independently after two years of operation. Subject to the agreement of the Disability Reform Council, the exemption from the *Age Discrimination Act 2004* may form part of that review. This would provide further information that could assist the Government in reassessing whether a more restricted exemption could fulfil the necessary policy objectives outlined above.

As previously advised, the Australian Government does not envisage undertaking any additional acts which would fall within the exemption in the Age Discrimination Act, except those analogous to the existing exemptions in establishing trial sites. The Government notes that the general exemption from the Age Discrimination Act only applies to acts done in direct compliance with the NDIS Act. Any other acts of unlawful discrimination carried out through the course of administering the scheme and Act, and which are not in direct compliance with the Act itself, are still prohibited under the Age Discrimination Act 2004.

3.99 The committee notes that the Assistant Minister's response did not respond to this recommendation. The committee intends to write again to the Assistant Minister to draw his attention to the committee's recommendation and to request a response.

Subject to the agreement of the Disability Reform Council, the age restrictions on eligibility could be part of the review into the operation of the *National Disability Insurance Scheme Act 2013* that is required under section 208 of the Act.

3.106 The committee intends to write again to the Assistant Minister to seek information on the question of whether the exclusion of non-protected SCV holders from the NDIS is differential treatment amounting to discrimination under the ICCPR, ICESCR and ICERD, or whether the exclusion is based on objective and reasonable justification in pursuit of a legitimate goal. In particular, the committee would appreciate the following specific information:

- ***In relation to the claim that exclusion is a reasonable and proportionate measure to ensure the financial sustainability of the NDIS, details of the additional costs that would be involved if access to the NDIS were extended to non-protected SCV holders and the amount of revenue that their contributions by way of the NDIS levy would raise;***
- ***Whether there is a disparity in the numbers of Australian citizens receiving welfare and other benefits in New Zealand compared with the number of New Zealand citizens receiving such benefits in Australia; what the net cost to Australia is; and whether there is any transfer of funds between the two governments to reflect this; and***
- ***Whether all non-protected SCV holders are eligible to apply for Australian permanent residence or citizenship, or whether age requirements or other conditions may prevent some of those, in particular those affected adversely by the 2001 changes, from doing so, and whether the number of those who might be ineligible is known.***

New Zealanders on a special category visa (SCV) have a temporary visa which provides a mechanism for the free movement of New Zealanders and Australians between the two countries. It is difficult to quantify how many visa holders will be in Australia at any time. This capacity for fluctuation means that it is difficult to determine the additional costs that would be caused by extending coverage of the NDIS to New Zealanders on special category visas, or the amount of revenue that may be generated by these individuals through the NDIS levy.

The transfer of funds between the Australian and New Zealand government in relation to welfare benefits is largely the legacy of previous agreements and not a major part of the current arrangements. Prior to the revised Social Security Agreement that commenced in 2001, New Zealand would provide Australia funds in relation to payments made by the Australian Government to its citizens. After the revised Social Security Agreement was concluded individuals receive payments directly from the relevant governments. Under the Agreement, Australia and New Zealand share responsibility for paying certain benefits, broadly according to the period people have lived in both Australia and New Zealand (between 20 and 65 years of age). A person will generally be entitled to two pensions - one from New Zealand and one from Australia. Generally the two pensions, when added together, would equal the amount of pension an individual would have received had they lived all their life in one country. The revised Agreement does not cover working age payments such as Parenting Payment (single or partnered), Newstart allowance, sickness allowance or special benefit. Transfers between the governments are only in the form of legacy payments that account for the previous agreement.

Like the nationals of other countries, New Zealand citizens seeking an option to apply for a permanent visa are encouraged to explore the range of visa options available under the Family and Skill streams. Alternatively, people who spent time in Australia as a New Zealand citizen prior to 1 September 1994 may be considered former permanent residents and can be eligible for the Subclass 155 Resident Return visa.

While there is a diverse range of permanent visas available, the Australian Government does acknowledge that there will be some temporary visa holders, including Special Category Visa holders, who will not be able to meet the requirements for a permanent visa, despite having lived in Australia for many years. All permanent visas have a health requirement that takes into account the cost to the Australian community or the impact on the access to services of the person becoming a permanent visa holder. In some visa categories there is a health waiver available, where a person's individual circumstances can be considered, which in the case of New Zealand citizens includes their existing access to Medicare and existing support to disability benefits and services under the bi-lateral agreement.

Based on analysis of passenger card data, the Department of Immigration and Border Protection estimates that around 40 per cent of New Zealand citizens living in Australia would appear to have a permanent visa pathway available.

3.111 The committee intends to write to the Assistant Minister to request information as to whether the Australian government has adopted a position in relation to the recommendations of the two Productivity Commissions addressed to the Australian government relating to SCV visa holders, and how the report of the two Productivity Commissions is to be taken forward in that regard as indicated in the joint statement of 7 February 2014 by the Prime Ministers of the two countries.

The Australian Government is considering the recommendations of the joint report *Strengthening trans-Tasman economic relations.* As the Committee notes, both Prime Ministers are committed to review the progress on implementing the report's recommendations at the next Leaders' meeting in 2015.

The Hon. Barnaby Joyce MP

Minister for Agriculture
Federal Member for New England

Ref: MNMC2014-02918

Senator Dean Smith MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator Smith

Thank you for your letter of 18 March 2014 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Quarantine Charges Bills.

In your letter you asked for clarification on a number of matters in relation to the Quarantine Charges (Imposition-General) Bill 2014, Quarantine Charges (Imposition-Customs) Bill 2014, Quarantine Charges (Imposition-Excise) Bill 2014 and the Quarantine Charges (Collection) Bill 2014. These matters are identified in the *Fourth Report of the 44th Parliament* (the Report) which accompanied your letter to me. My response to the matters raised by the Committee is set out below.

I would also like to thank the Committee for their comments in the Report relating to the Farm Household Support Bill 2014 and the Farm Household (Consequential and Transitional Provisions) Bill 2014. I will note these comments for human rights impact statements that are prepared for future legislative proposals.

Quarantine Charges Bills 2014

Right to privacy

Paragraph 1.70 of the Report seeks further information on the compatibility of Part VIA of the *Quarantine Act 1908* (the Quarantine Act) in relation to the right to privacy as applied in the context of the Quarantine Charges (Collection) Bill 2014 (the Bill). Because the Quarantine Act was drafted some time ago, it may not reflect modern human rights principles; however, a range of safeguards on the application of this Part to the Bill means that these enforcement provisions can only be used when it would be appropriate to do so.

Part VIA of the Quarantine Act has been incorporated into the Bill to ensure that there are consistent enforcement powers available to quarantine offices to enforce the collection of fees under the Quarantine Act and quarantine charges under this Bill. As noted in the Report, the

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7520 Facsimile: 02 6273 4120 Email: minister@maff.gov.au

application of Part VIA to the Bill is intended to protect the ability of the Commonwealth to collect quarantine charges when they are due and payable. The application of Part VIA to the Bill is limited by the extent that matters under this Part apply to the collection of charges and not for the general management of quarantine under the Quarantine Act. For example, section 66AO of the Quarantine Act relates to the use of equipment to examine and process things found at a premises for the purpose of quarantine. Powers under this section would not be applicable to the Quarantine Charges (Collection) Bill 2014. The limited application of Part VIA to the Bill ensures the extent that the right to privacy may be engaged is limited and will only occur in circumstances where it is necessary for the proper operation of the Bill.

In addition to the limited application of Part VIA of the Quarantine Act to the Bill, those sections which do apply have safeguards and restrictions built into them to ensure that the right to privacy and other human rights considerations are protected. For example, section 66AC of the Quarantine Act (which relates to monitoring warrants) prescribes a test of reasonableness so that a warrant to monitor premises can only be issued when it is reasonable to do so. Similarly, a quarantine officer may only search a vessel or vehicle without a warrant in an emergency situation and where the quarantine officer reasonably suspects that it is necessary to do so (see Division 5 of Part VIA of the Quarantine Act).

The tests of reasonableness built in to many of the enforcement provisions under Part VIA of the Quarantine Act, and which may in turn apply to the Bill, ensure that these enforcement powers are not used arbitrarily. In addition to these tests of reasonableness, many of the powers under this Part only apply to quarantine officers with appropriate training (see for example sections 66AA, 66AB and 66AH) or authorisation (see for example sections 66AG, 66AK and 66AS). More generally, and as noted by the Report, the operation of the enforcement provisions under the Bill would be required to be exercised in compliance with the *Privacy Act 1988*.

Right to freedom of movement

Paragraph 1.75 of the Report seeks further information on the compatibility of Part VIA of the Quarantine Act as applied in the context of the Bill, in relation to the right to the freedom of movement. As mentioned previously, because the Quarantine Act was drafted some time ago it may not reflect modern human rights principles. Despite this, similar to the Bill's treatment of the right to privacy, there are a range of safeguards on the application of the enforcement provisions under the Quarantine Act to the Bill. This means that any limitations on the right to freedom of movement may only occur when it is reasonable or necessary to achieve the legitimate objectives of the Bill.

Part VIA of the Quarantine Act will only apply to the Bill to the extent that it applies to the collection of quarantine charges. The department anticipates using these provisions in very limited circumstances. As noted in the Report, Clause 24 of the Bill provides a Director of Quarantine with power to detain a vessel that is the subject of a charge. Given the relative value of a potential charge or late payment fee under the Bill and the potential value of a detained vessel it will only be in extremely rare circumstances that these enforcement powers would be used in a manner that may limit the right to freedom of movement.

The exercise of enforcement powers under clause 24 of the Bill are only available to the Director of Quarantine (as opposed to a quarantine officer) and therefore any potential limitation on the right to movement as a result of the use of these powers would be at the

discretion of a senior officer. In addition to this high level of assessment, the department will ensure that the application of the powers under Part VIA of the Quarantine Act, in the context of this Bill, will be exercised in consideration of the right to the freedom of movement.

Right to a fair hearing

Paragraph 1.80 of the Report seeks further information on the compatibility of the Bill with the right to a fair hearing, and particularly the justification for the non-availability of merits review for a decision under clause 14 of the Bill. In particular, the Report seeks further information as to why it is necessary to preclude merits review for decisions made under clause 14 and how the preclusion of merits review in relation to decisions made under this clause is proportionate to achieving the legitimate objective of the Bill.

Clause 14 of the Bill provides for the power to suspend or revoke a number of approvals or authorisations made under the Quarantine Act where a person has not paid a quarantine charge or late payment fee which is due and payable. To ensure consistency with the Quarantine Act and to ensure that those subject to the Quarantine Act are afforded the same rights under this Bill, decisions made under clause 14 of the Bill are not subject to merits review. It would not be appropriate for fees charged under the Quarantine Act and quarantine charges under this Bill to have different review mechanisms.

Where required, mechanisms exist under the Bill to allow for decisions to be reviewed. For example, judicial review is available to challenge any decision made under clause 14 of the Bill. The availability of judicial review for decisions made under clause 14 is consistent with existing arrangements under the Quarantine Act and is an appropriate safeguard. The availability of judicial review under clause 14 achieves the legitimate objective of providing persons who are affected by decisions under the bill with the opportunity to have those decisions reviewed.

Right to a fair trial – presumption of innocence

Paragraph 1.84 of the Report notes that the use of reverse burdens as proposed by the Bill is unlikely to raise issues of incompatibility with the presumption of innocence. Paragraph 1.85 of the Report highlights the expectation of the committee that statements of compatibility should include sufficient detail of relevant provisions in a bill which impact on human rights to enable it to assess their compatibility. These comments made by the committee have been noted and will be considered in the preparation of future statements of capability by my department.

Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

Barnaby Joyce MP

12 APR 2014

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Reference: 1403/02038, 1403/02036, 1403/02041, 1403/02042.

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

Dear Senator

Response to questions received from Parliamentary Joint Committee on Human Rights

Thank you for your letters of 5 March 2014, 18 March 2014 and 25 March 2014 in which further information was requested on the following bills and legislative instruments:

- *Migration Amendment Regulation 2013 (No. 4)* [F2013L01014];
- *Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern* [F2013L01185];
- *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* [F2013L01218];
- *Migration Amendment (Disclosure of Information) Regulation 2013* [F2013L02101];
- *Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013* [F2013L02102];
- *Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155* [F2013L02105];
- *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* [F2013L02104]; and
- *Migration Act 1958 – Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year – IMMI 14/026* [F2014L00224].

My responses in respect of the above-named bills and legislative instruments are attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
15/9/2014

***Migration Amendment Regulation 2013 (No. 4)* [F2013L01014]**

***Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2)* [F2013L01185]**

'It remains unclear to whom the amendments will apply.'

The amendments can be used to facilitate the grant of a visa to detainees who are currently in immigration detention and in the event that a detainee's current immigration detention is found to be unlawful by a court.

It is government policy that the amendments will only apply to enable the grant of a visa, without the requirement of an application being made, to persons in immigration detention who have been assessed to be a security risk in the event that their current immigration detention is found to be unlawful by a court.

'In particular, it is unclear:

- 'On what basis the detention of this cohort has been (or will be) found to be unlawful by a court.'

While it is not appropriate to speculate on possible future court cases, the question of whether or not indefinite immigration detention is lawful has been raised as an issue in cases where the Plaintiff has been the subject of an adverse security assessment.

The current immigration detention of persons who have been assessed to be a security risk has not been found to be unlawful by a court.

- 'If, as the response states, the amendments apply to persons currently in immigration detention and to persons whose current immigration detention has been found to be unlawful, why section 195A of the Migration Act is not available to the Minister.'

While a person is in immigration detention under section 189 of the *Migration Act 1958* (the Act), the power in section 195A of the Act is available to me. If a court finds a person's detention unlawful, they must be released from detention. The power in section 195A is only available in relation to persons in detention. Where a court has found detention to be unlawful the power in section 195A is not available.

Without this Regulation, there is no visa that could be granted without an application being made, meaning that a person ordered to be released by a court would need to be released from detention without a visa. Release without a visa is contrary to the legislation and government policy. The Regulation allows for a person to be quickly granted a Subclass 070 (Bridging (Removal Pending)) visa (RPBV) with appropriate conditions if the court orders their release from immigration detention, allowing for them to be lawfully in the community.

The conditions that must be imposed on the person reflect the necessity to manage, in the most effective way, the risk to security and the Australian community posed by detainees who are the subject of adverse security assessments.

- 'If, as the response states, it is government policy that the amendments will only be applied to persons whose current immigration detention has been found to be unlawful by a court, why the amendments also apply to persons who are currently in immigration detention (and whose detention has presumably not been found to be unlawful).'

Under the Regulation, I have the discretion to impose one or more of the conditions introduced by the amendments on a RPBV if, exercising my non compellable power under section 195A of the Act, I decide to grant this visa to a person currently in immigration detention, whose detention has not been found unlawful by a court.

I consider that the discretion to impose on a RPBV one or more of the conditions introduced by the amendments is a necessary part of the Government's strategy to manage the risk to the safety of the Australian community if detainees who pose a risk to the Australian community are released from immigration detention.

- 'On what basis and by what process a person will be 'assessed to be a security risk' and made subject to the conditions imposed by the amendments.'

The assessment that an individual is a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act* 1979 – ASIO Act) is made by the Australian Security Intelligence Organisation (ASIO). Security assessments fall within the portfolio responsibilities of the Attorney-General.

In the event that a court finds that the current immigration detention of a person who has been assessed to be a security risk is unlawful under section 189 of the Act, and orders their release from immigration detention, my delegate must impose these conditions on the RPBV. If a person assessed to be a risk to security by ASIO is lawfully detained the imposition of conditions on an RPBV granted pursuant to s195A will be at my discretion.

- 'Why persons who fall within the new class of persons must have such conditions imposed and why other detainees may have such conditions imposed.'

It is Government policy that the amendments will apply only to persons who have been assessed by ASIO to be a risk to security within the meaning of section 4 of the ASIO Act.

In the event that the RPBV is granted by a departmental delegate, the mandatory imposition of the conditions introduced by the amendments will enable the government to manage risks to security and to the Australian community posed by the release from immigration detention of a person who has been assessed to be a risk to security.

Under section 195A, I can grant any visa to a person who is in immigration detention. In the exercise of this power, I am not bound by the Regulations, and can choose to exercise the power if I consider it to be in the public interest. If I grant the RPBV under section 195A, the discretionary imposition of the conditions introduced by the amendments will allow me to manage risks to the Australian community, in line with my consideration of what is in the public interest.

Migration Amendment (Subclass 050 and Subclass 051) Regulation 2013 **[F2013L01218]**

Under what circumstances may a court issue an injunction to prevent removal or transfer to a regional processing centre

The Federal Circuit Court, the Federal Court and the High Court all have power to issue an injunction to prevent the removal of a person from Australia or the transfer of a person to a regional processing country in certain circumstances. If they were to do so, the Department would be obliged to comply with the terms of that injunction.

The grounds on which a court may grant an injunction are many and varied. The circumstances in which a court may issue an injunction will vary from case to case. However, the legal principles behind the courts' power to issue injunctions are well established. Usually, a court will have to be satisfied that the person has raised a substantive issue to be determined (that is, that the person has raised an arguable case about his or her circumstances that should be resolved by the court). The court will also weigh this issue against the 'balance of convenience'. Occasionally, the courts do not have time to resolve these issues and may simply issue a short injunction to preserve the status quo, while it considers these issues.

A person may seek an injunction by making an application to the court and if necessary the court can convene an urgent hearing.

Clarification of the cancellation of a Bridging Visa E (BVE) where the breach occurred in circumstances beyond the visa holder's control

The Committee requested clarification regarding the following statement: 'As a general rule, a visa should not be cancelled where the breach of [a visa] condition occurred in circumstances beyond the visa holder's control'. The Committee expressed concern that BVEs should not be cancelled where the person is not at fault for the breach.

Decisions to cancel under section 116(1)g of the Act and regulation 2.43(1)(p) of the *Migration Regulations 1994* (the Regulations) or to cancel under section 116(1)(b) of the Act for a breach of visa condition 8564 (the holder must not engage in criminal conduct) are discretionary decisions. That is, decisions under these provisions allow the decision maker to weigh the grounds for cancellation against reasons not to cancel. Under policy, the decision maker may consider a wide range of matters when deciding whether or not to cancel a visa. These matters include, but are not limited to, the circumstances in which the grounds for cancellation arose. The policy advice available for decision makers is as follows:

Cancellation under section 116(1)(g) and regulation 2.43(1)(p)

Where a BVE holder has been charged with, or convicted of, a crime in Australia or overseas, then their visa may be considered for cancellation using the new grounds at section 116(1)(g) and regulation 2.43(1)(p). These grounds are objective, that is, the visa holder has either been charged or convicted, or they have not. However, even where grounds objectively exist, the discretionary cancellation framework still allows the decision maker to consider 'reasons not to cancel', and the decision maker may consider the circumstances in which the grounds for

cancellation arose. This consideration includes whether or not there are extenuating circumstances that outweigh the grounds for cancellation.

Cancellation under section 116(1)(b) for breach of condition 8564

Cancellation is also discretionary where a person's visa is being considered for cancellation in relation to a breach of condition 8564 (the holder must not engage in criminal conduct). In this situation, the decision maker may not only consider the circumstances in which the ground for cancellation arose, but also the reason for, and the extent of the breach. Under policy, the visa should generally not be cancelled where the breach of visa condition occurred in circumstances beyond the person's control.

On the basis of the above policy guidance, a decision-maker considering the cancellation of a BVE pursuant to the above provisions should consider all matters relevant to the cancellation, including the liability of the visa holder for the breach of the relevant visa condition.

Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 **[F2013L02102]**

Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 **[F2013L02105]**

3.120 The committee, however, notes that the government must show that there are objective and reasonable grounds for adopting a specific behaviour regime applicable only to BVE holders and that any asserted factual basis for the differential treatment is supported by evidence.

3.121 While the committee accepts that the measures are primarily aimed at public safety objectives, the committee remains concerned that the necessity for these measures has not been adequately demonstrated.

I note the Committee's views in this regard. I would also reiterate that the introduction of the Code of Behaviour provides the appropriate tools to support the education of BVE holders about community expectations and acceptable behaviour and supports the taking of compliance action, including consideration of visa cancellation, where BVE holders do not behave appropriately or represent a risk to the public. If not for my decision or the decision of previous Ministers to temporarily release these non-citizens from detention on a BVE granted in the public interest, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Act.

3.132 For these measures to be proportionate, the committee considers that the power to cancel a BVE holder's visa for breach of the code should only be possible when the decision-maker is satisfied:

- that the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power; and
- that the exercise of the power is no more restrictive than is required in the circumstances.

3.133 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.

I note the Committee's recommendation. As stated in my previous response, the decision to cancel a visa based on a breach of the Code of Behaviour is discretionary. Existing legislation requires that the person must be provided with notification and an opportunity to demonstrate that cancellation grounds either do not exist, or that their visa should not be cancelled. The combination of this discretionary cancellation framework and the sanctions framework supporting the Code of Behaviour enable decision makers to make proportionate responses based on the individual merits of each case where the Code of Behaviour is found to have been breached.

3.134 The committee notes that merits review of a decision to cancel a BVE for a breach of the code will not be available if the Minister issues a conclusive certificate, pursuant to section 399 of the Migration Act, stating that it would be contrary to the national interest to change a decision or for the decision to be reviewed. The committee has already noted its concerns about the exclusion of merits review for BVE cancellation decisions subject to a conclusive certificate in its comments on the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013.

3.135 The Minister's response says that 'historically, this power has been exercised rarely'. The response does not explain whether and how the exercise of this power would be appropriate in the context of decisions to cancel a BVE for a breach of the code.

3.136 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the types of situations envisaged and possible examples where it would be appropriate to issue a conclusive certificate for visa cancellation decisions relating to a breach of the code of behaviour.

I am not prepared to speculate about the type of situations where it may be appropriate for me to issue a conclusive certificate. I may issue a conclusive certificate if I believe it would be contrary to the national interest for a decision to be reviewed. The courts have accepted that the term 'national interest' is a broad term and that such a decision is one that is entrusted to me as Minister.

3.139 The committee notes that:

- Payment for income support under the CAS and ASAS is 89% of the equivalent Centrelink Special Benefit (which is comparable to 89% of Newstart Allowance).
- Decisions to reduce or terminate income support payments are not subject to merits review.
- BVE holders who arrived by boat after 13 August 2012 (that is, the majority of BVE holders) do not have permission to work.

3.140 Our predecessor committee had noted that the absence of work rights combined with the provision of minimal support for asylum seekers on BVEs risks resulting in their destitution, contrary to the right to work and an adequate standard of living in article 6 and 11 of the ICESCR and potentially the prohibition against inhuman and degrading treatment in article 7 of the ICCPR.

3.141 In light of the already minimal support that is provided to BVE holders, the committee is concerned that any further reduction to their income support payments is likely to have a disproportionately severe impact on the person and their family. The committee is hard pressed to see how terminating a BVE holder's income support in these circumstances could ever be a reasonable option given that the person is also barred from working.

3.142 For these measures to be proportionate, the committee considers that:

- the power to sanction a BVE holder for breach of the code by reducing or terminating their income support must only be possible if the decision maker is satisfied that such action will not result in the destitution of the person or their family; and
- decisions to reduce or terminate a person's income support for breach of the code must be subject to independent merits review.

3.143 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.

I note the Committee's recommendation. As explained previously, income support payments and support under the Asylum Seeker Assistance Scheme (ASAS) and Community Assistance Support (CAS) is not a legislative entitlement. The provision of this support is provided administratively, and to prescribe within legislation the circumstances in which a decision to reduce or terminate these types of payments would therefore not be appropriate. The decision making framework that has been established to support the consideration of using this particular sanction includes natural justice provisions which will enable the circumstances of each case to be assessed on a case by case basis. No decision to reduce or terminate a person's income support payments would be made where that decision would result in destitution.

3.146 The committee accepts that the Immigration Department has strong relationships with service providers dealing with BVE holders in the community and this provides an important channel for relevant information to be passed to the department.

3.147 The committee, however, notes that these processes appear to be ad hoc rather than a systematic approach to monitoring the impacts of the behaviour code on individuals in the community. The committee considers that there should be express monitoring mechanisms in place to assess the impact of these measures on BVE holders, including regular opportunities to consult with the affected individuals and other interested parties.

I note the Committee's views. My department has well established reporting arrangements and communication channels in place under the Community Assistance Support (CAS) and Asylum Seeker Assistance Scheme (ASAS) programmes, including an incident reporting protocol. The department's engagement with service providers also includes a schedule of monthly meetings and quarterly conferences, as well as meetings on specific issues such as the code of behaviour. These arrangements provide the department with information on specific incidents affecting individual BVE holders, and opportunities for service providers to raise issues of broader concern. Through these processes there is oversight and monitoring of substantial issues affecting BVE holders.

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 **[F2013L02104]**

The Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 was disallowed on 27 March 2014.

Regulations supporting the Temporary Humanitarian Concern Visa (THC) have been in place since July 2000 and are not within the scope of the Committee.

Migration Act 1958 – Determination of Granting of Protection Class XA Visas in 2013/2014 Financial year – IMMI 14/026 **[F2014L00224]**

The Government will continue to abide by section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which outlines when Statements of Compatibility are required to be prepared. This instrument does not fall within the scope of section 9 and therefore does not require a Statement of Compatibility; therefore I do not propose to respond to questions in relation to this instrument.

Migration Amendment (Disclosure of Information) Regulation 2013 **[F2013L02101]**

Provision of the Memoranda of Understanding to the Committee

The Committee has sought confirmation that copies of the final Memoranda of Understanding will be provided for its information and assessment. The Memoranda of Understanding are still being developed with the various Federal, State and Territory police and none have been finalised at this stage. I will provide copies of the Memoranda of Understanding once they are finalised and signed.

Use of provisions in amendments

The Committee also sought clarification as to whether the disclosure powers authorised by these amendments are intended to be used prior to the relevant Memoranda being finalised. I can confirm that the information authorised for disclosure by these amendments has not been released, and will not be released, prior to the relevant Memoranda of Understanding being finalised.

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 templates[1] 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

For further Information please contact:

Parliamentary Joint Committee on Human Rights

Tel. (02) 6277 3823 • Fax. (02) 6277 5767

Email: human.rights@aph.gov.au

PO Box 6100, Parliament House
CANBERRA ACT 2600

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 the 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.

For further Information please contact:

Parliamentary Joint Committee on Human Rights

Tel. (02) 6277 3823 • Fax. (02) 6277 5767

Email: human.rights@aph.gov.au

PO Box 6100, Parliament House
CANBERRA ACT 2600

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. 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.