



Parliamentary Joint Committee on Human Rights

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

Bills introduced 2 – 19 June 2014

Legislative Instruments received

31 May – 6 June 2014

Eighth Report of the 44th Parliament

June 2014

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Functions of the committee

The Committee has the following functions:

- a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

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Abbreviations

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

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Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 2 to 19 June 2014 and legislative instruments received during the period 31 May 2014 to 6 June 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 2 to 19 June 2014

The committee considered 18 bills, all of which were introduced with a statement of compatibility. Of these 18 bills, nine 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 eight bills and further defer one additional bill which was introduced previously.

The committee has identified five 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 23 June 2014 include:

- Appropriation Bill (No. 1) 2014-2015
- Appropriation Bill (No. 2) 2014-2015
- Appropriation (Parliamentary Departments) Bill (No. 1) 2014-2015
- Appropriation Bill (No. 5) 2013-2014
- Appropriation Bill (No. 6) 2013-2014

Legislative instruments received between 31 May 2014 and 6 June 2014

The committee considered 51 legislative instruments received between 31 May 2014 and 6 June 2014. The full list of instruments scrutinised by the committee can be found in Appendix 1 to this report.

Of these 51 instruments, 50 do not appear to raise any human rights concerns and all are accompanied by statements of compatibility that are adequate. The committee has decided to defer its consideration of one instrument.

Responses

The committee has considered eleven responses in regards to matters raised in relation to bills and legislative instruments in previous reports. The committee has concluded its examination relating to ten bills and one instrument.

Senator Dean Smith
Chair

Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 23 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 18 bills introduced between 2 and 19 June 2014, in addition to eight bills which have been previously deferred, and 51 instruments received between 31 May and 6 June 2014.

Agricultural and Veterinary Chemicals Legislation Amendments (Removing Re-approval and Re-registration) Bill 2014

Portfolio: Agriculture

Introduced: House of Representatives, 19 March 2014

Purpose

1.1 The Agricultural and Veterinary Chemicals Legislation Amendments (Removing Re-approval and Re-registration) Bill 2014 (the bill) seeks to amend the *Agricultural and Veterinary Chemicals Code Act 1994* to:

- remove requirements for mandatory periodic re-registering of agricultural chemicals and veterinary medicines (together, 'agvet chemicals'), which would otherwise commence on 1 July 2014;
- prevent the expiry of active constituent approvals and prevent the application of dates after which a registration cannot be renewed;
- enable the Australian Pesticides and Veterinary Medicines Authority (APVMA) to require information to be provided about substances supplied as a chemical product;
- simplify how variations to approvals and registrations are processed by APVMA; and
- enable APVMA to charge a fee when it provides copies of documents in its possession.

1.2 The bill would also make consequential amendments to the *Agricultural and Veterinary Chemicals Code Act 1994*, *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994*, *Agricultural and Veterinary Chemicals Legislation Amendment Act 2013* and the *Food Standards Australia New Zealand Act 1991*.

Committee view on compatibility

Right to health and a healthy environment

1.3 The right to health is guaranteed by article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights.

1.4 The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).

1.5 The right is not, however, a right to be healthy, as such, given that individual health is not something wholly within the ability of the State to control.

1.6 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to health. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

Removal of mandatory re-registration process

1.7 As noted above, the bill seeks to remove requirements for mandatory periodic re-registering of agvet chemicals (to commence on 1 July 2014). This requirement was introduced by the *Agricultural and Veterinary Chemicals Legislation Amendment Act 2013* (the AVCLAA), which was enacted in June 2013. Prior to this, there was no mandatory requirement for agvet chemicals, once approved or registered, to be reviewed.

1.8 The explanatory memorandum (EM) for the AVCLAA stated that the re-registration requirements were intended 'to provide greater certainty to the community that chemicals approved for use in Australia are 'safe' and to 'provide better protection for both human health and the environment'.¹

1 Agricultural and Veterinary Chemicals Legislation Amendment Bill 2013, Explanatory Memorandum, p. 2.

1.9 The statement of compatibility for the bill identifies the removal of the re-registration requirement as engaging the right to health and a healthy environment. On the potential for the measure to limit this right it states:

Removing re-registration removes an opportunity for the APVMA to confirm that chemical products supplied to the market are the same as the product evaluation and registered.²

1.10 In concluding that the bill promotes the right to health, the statement of compatibility notes that the reduction in the APVMA's 'opportunity' for mandatory periodic evaluation of agvet chemicals:

...can be addressed in part by improving the ability of the APVMA to require a person who supplies an agvet chemical product in Australia to provide information...about the product they are supplying.³

1.11 However, the committee notes that the measure may be considered a limitation on the right to health, to the extent that the reduced opportunity for evaluation of substances that may be unsafe or unhealthy may lead to adverse health impacts or environmental conditions. A detailed justification for this limitation is not provided in the statement of compatibility.

1.12 The committee's usual expectation where a limitation on this right is proposed is that the statement of compatibility provides an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

1.13 The committee therefore seeks the advice of the Minister for Agriculture as to whether the removal of the re-registration requirement for agvet chemical is compatible with the right to health and a healthy environment and in particular 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 to a fair trial and fair hearing rights

1.14 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.

2 Explanatory Memorandum (EM), p 7.

3 EM, p. 7.

1.15 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, the right against self-incrimination and minimum guarantees in criminal proceedings.

Reintroduction of the right not to incriminate oneself

1.16 The bill would re-introduce the right not to incriminate oneself in the *Agricultural and Veterinary Chemicals Code Act 1994*. Specifically, the bill will introduce provisions which confirm that, where an individual is required to give information, produce a document or do any other thing, unless the individual has a reasonable excuse, there is no intention to abrogate the privilege against self-incrimination.

1.17 The statement of compatibility notes that this measure promotes the right not to incriminate oneself.⁴ The committee notes that the rights to a fair trial and fair hearing rights protected by the ICCPR include protection against self-incrimination.

1.18 Accordingly, the committee considers that the measure promotes the right to a fair trial.

Appropriation Bill (No 1) 2014-2015

Appropriation Bill (No 2) 2014-2015

Appropriation Bill (No 5) 2013-2014

Appropriation Bill (No 6) 2013-2014

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

Portfolio: Finance

Introduced: House of Representatives, 13 May 2014

Purpose

1.19 Appropriation Bill (No. 1) 2014-2015 proposes appropriations from the Consolidated Revenue Fund (CRF) for the ordinary annual services of the Government.

1.20 Appropriation Bill (No. 2) 2014-2015 proposes appropriations from the CRF for services that are not the ordinary annual services of the Government.

1.21 Appropriation Bill (No. 5) 2013-2014 proposes appropriations from the CRF for the ordinary annual services of the Government in addition to amounts appropriated through the appropriations Acts that implemented the 2013-2014 Budget and the 2013-2014 Mid-Year Economic and Fiscal Outlook.

1.22 Appropriation Bill (No. 6) 2013-2014 proposes appropriations from the CRF for services that are not the ordinary annual services of the Government, in addition to amounts appropriated through the appropriations Acts that implemented the 2013-2014 Budget and the 2013-2014 Mid-Year Economic and Fiscal Outlook.

1.23 Appropriation (Parliamentary Departments) Bill (No. 1) 2014-2015 proposes appropriations from the CRF for expenditure in relation to the Parliamentary Departments.

1.24 Together these bills are referred to as 'the bills'.

Background

1.25 The committee has examined a number of appropriations bills and, in each case, the question of whether it is appropriate that such bills be accompanied by a statement of compatibility that addresses their potential impact on human rights, through their operation to permit the implementation of legislation and government policies and programs.

1.26 The committee acknowledges the assistance of the Minister for Finance (and previous finance ministers), and officials of the Department of Finance, who have

continued to engage with and assist the committee's examination of appropriations bills.

Committee view on compatibility

Multiple rights

1.27 The committee considers that appropriations bills are capable of engaging the broad range of rights provided for in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) and the other treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Human rights assessment of appropriations bills

1.28 The statement of compatibility for the bills states:

[A]s the High Court has emphasised ... the Appropriation Acts do not create rights and nor do they, importantly, impose any duties.

Given that the legal effect of Appropriation Bills is limited in this way, the Appropriation Bill is not seen as engaging, or otherwise affecting, the rights or freedoms relevant to the Human Rights (Parliamentary Scrutiny) Act 2011.

Detailed information on the relevant appropriations, however, is contained in the Portfolio Statements.

1.29 Accordingly, the statement of compatibility provides no further assessment of the bills' compatibility with human rights.

1.30 However, in the committee's view, while the authorising of government expenditure may not, in itself, create rights or obligations, its ultimate role in giving effect to policy means that it does in fact engage, and have implications for, both the promotion and limitation of human rights (noting that policy assessment processes and the committee's analytical framework are based around the concept of 'engagement' with human rights).

1.31 For example, specific appropriations may involve reductions in expenditure on social security payments which could amount to retrogression or limitations on the right to social security and the right to an adequate standard of living. Thus the appropriation of funds may facilitate the taking of actions which may involve the failure by Australia to fulfil its obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.¹

1 Parliamentary Joint Committee on Human Rights, *Seventh Report of 2012* (November 2012), pp 7-8 (comments on the Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013 and the Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 2) 2012-2013).

1.32 The committee considers that, where there is a sufficiently close connection between a particular appropriations bill and the implementation of legislation, policy or programs that may give rise to human rights compatibility issues, the statement of compatibility for that bill should provide an assessment of human rights that may be engaged.² The committee notes also that the allocation of funds via appropriations bills may also be susceptible to a human rights analysis that takes into account broader questions of compatibility, such as their impacts on progressive realisation obligations and particular impact on vulnerable minorities or specific groups.

1.33 Notwithstanding the committee's view that appropriations bills may engage and potentially limit human rights, the committee acknowledges that the Minister for Finance holds the view that such bills present particular difficulties given their technical nature, and because they generally include appropriations for a wide range of programs and activities across many portfolios.

1.34 The committee therefore thanks the Minister for Finance for inviting the committee to meet with department officials to continue to progress this matter.³

2 See Parliamentary Joint Committee on Human Rights, *Seventh Report of 2012* (November 2012), pp 7-8; and *Third Report of 2013* (March 2013), p. 66.

3 See in this report, Appropriation (Parliamentary Departments) Bill (No. 2) 2013-2014, Appropriation Bill (No.3) 2013-2014 and Appropriation Bill (No. 4) 2013-2014.

Australian Citizenship (Intercountry Adoption) Bill 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 29 May 2014

Purpose

1.35 The Australian Citizenship (Intercountry Adoption) Bill 2014 (the bill) seeks to amend the Australian Citizenship Act 2007 (the Act) to allow for acquisition of Australian citizenship by a person adopted outside Australia by an Australian citizen in accordance with a bilateral arrangement between Australia and another country.

1.36 Specifically, the bill would amend the Act to create an entitlement to citizenship for persons adopted in accordance with a bilateral arrangement.¹ This entitlement is equivalent to that currently provided to persons adopted in accordance with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention).²

Committee view on compatibility

Rights of the child

1.37 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights. The rights of children include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

1.38 States parties to the CRC are required to ensure to children the enjoyment of fundamental human rights and freedoms and are required to provide for special protection for children in their laws and practices. In interpreting all rights that apply to children, the following core principles apply:

- rights are to be applied without discrimination;
- the best interests of the child are to be a primary consideration;

1 Bilateral arrangements with non-States parties to the Hague Convention appear currently to be in force with Taiwan and South Korea. South Korea signed the Convention on 24 May 2013, but is yet to ratify it. The committee notes in this regard that the texts of the bilateral agreements referred to on the Attorney-General's Department website between Australia and Taiwan and between Australia and South Korea do not appear to be available on that website.

2 The Hague (29 May 1993), Entry into force for Australia: 1 December 1998, [1998] ATS 21.

- there must be a focus on the child's right to life, survival and development, including their physical, mental, spiritual, moral, psychological and social development; and
- there must be respect for the child's right to express his or her views in all matters affecting them.

Extension of citizenship rights to children adopted from countries that are not party to the Hague Convention

1.39 Of particular relevance to the bill, article 21 of the CRC provides special protection in relation to inter-country adoption, seeking to ensure that it is performed in the best interest of the child. Specific protections include that inter-country adoption:

- is authorised only by competent authorities;
- is subject to the same safeguards and standards equivalent which apply to national adoption; and
- does not result in improper financial gain for those involved.

1.40 The Hague Convention establishes a common regime, including minimum standards and appropriate safeguards, for ensuring that inter-country adoptions are performed in the best interests of the child and with respect for the fundamental rights guaranteed by the CRC. The Hague Convention also assists in combatting the sale of children and human trafficking.

1.41 As noted above, the bill seeks to facilitate inter-country adoptions in accordance with a bilateral agreement where the country of the child's birth (or residence) is not a party to the Hague Convention. The 'fast track' arrangements for citizenship are currently only available where the birth country is a party to the Hague Convention. The statement of compatibility states that the bill does not engage human rights:

...as Australia does not generally owe obligations to persons outside its territory and or jurisdiction. As the children to whom these amendments are relevant are located outside Australia's territory and/or jurisdiction, Australia's obligations under the seven core human rights treaties are not engaged. However, once these children come within Australia's territory and/or jurisdiction it is acknowledged that some rights and freedoms articulated under the seven core international human rights treaties will be engaged.³

1.42 The statement of compatibility concludes that the bill is compatible with human rights 'as it does not raise any human rights issues'.⁴

3 Explanatory memorandum (EM), Attachment A, p. 1.

4 EM, Attachment A, p. 1.

1.43 However, the committee notes that, by providing for the grant of Australian citizenship (and the issue of passports) to children adopted by Australian citizens, the bill would clearly provide for the exercise of Australian jurisdiction over any such children both prior to and following their arrival in Australia.

1.44 Moreover, as noted above, article 21 of the CRC imposes obligations on both the country of the child's birth and the country of the adopting parents to ensure that the adoption is in the best interests of the child.

1.45 It follows that the bill is therefore properly seen, in relation to a child the subject of inter-country adoption proceedings under the bill, as potentially engaging the requirement to act in the best interests of the child and the rights guaranteed by the CRC. The committee considers that the assessment in the statement of compatibility, to the extent it suggests that Australia has no jurisdiction over or responsibility in relation to, such children until their arrival in Australia, is based on an unduly restricted view of both the scope of Australia's human rights obligations, and the circumstances in which they may apply.

1.46 In the committee's view, the bill may limit the rights of the child, and particularly the obligation to consider the best interests of the child in relation to inter-country adoptions. This is because the bill specifies no standards or safeguards that will apply to inter-country adoptions under a bilateral agreement, and it is therefore not clear whether lower standards, or fewer safeguards, may apply to inter-country adoptions under a bilateral agreement that apply under the Hague Convention. Nor are such standards or safeguards contained in the *Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 1998*, which provide for the recognition of an overseas adoption under the law of a country with which Australia has a bilateral arrangement.

1.47 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.

1.48 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the bill is compatible with the best interests of the child and the specific protections for inter-country adoptions provided for in article 21 of the CRC and the Hague Convention.

Australian Renewable Energy Agency (Repeal) Bill 2014

Portfolio: Industry

Introduced: House of Representatives, 19 June 2014

1.49 The Australian Renewable Energy Agency (Repeal) Bill 2014 (the bill) seeks to disband the Australian Renewable Energy Agency by repealing the *Australian Renewable Energy Agency Act 2011*.

1.50 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

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

1 Explanatory memorandum (EM) [p.4.]

Australian Workforce and Productivity Agency Repeal Bill 2014

Portfolio: Industry

Introduced: House of Representatives, 4 June 2014

1.52 The Australian Workforce and Productivity Agency Repeal Bill 2014 (the bill) seeks to repeal the *Australian Workforce and Productivity Agency Act 2008* and abolish the Australian Workforce and Productivity Agency (AWPA).

1.53 The bill is accompanied by a statement of compatibility which states that the bill 'is compatible with human rights and does not raise any human rights issues.'¹

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

1.55 However, the committee notes that the function of AWPA is to provide independent advice in relation to Australia's current, emerging and future skills and workforce development needs.²

1.56 The explanatory memorandum for the bill notes that the abolishing of the AWPA is intended to 'strengthen resources and the capacity of the Department of Industry to provide targeted advice',³ by incorporating AWPA's functions into the Department of Industry.

1.57 The committee notes that, while the purpose of the bill is to streamline portfolio processes and provide for stronger linkages between skills and industry sectors,⁴ any consequent reduction in effective advice on Australia's workforce development needs could result in a limitation on the right to work. The committee's assessment assumes that the policy of streamlining and reallocating AWPA's activities will be effective.

1 Explanatory memorandum (EM), [p. 3]

2 EM, [p. 2]

3 EM, [p. 2]

4 EM, [p.5]

Carbon Farming Initiative Amendment Bill 2014

Portfolio: Environment

Introduced: House of Representatives, 18 June 2014

1.58 The Carbon Farming Initiative Amendment Bill 2014 seeks to amend the *Carbon Credits (Carbon Farming Initiative) Act 2011*, the *National Greenhouse and Energy Reporting Act 2007*, the *Australian National Registry of Emissions Units Act 2011* and the *Clean Energy Regulator Act 2011* to provide for the establishment of the Emissions Reduction Fund.

1.59 The bill is accompanied by a statement of compatibility which concludes that the bill 'is compatible with human rights because the only potential limitations on human rights that the bill imposes relate to the right to privacy and the limits are reasonable, necessary and proportionate in achieving the bills' legitimate policy objectives'.¹

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

1 Explanatory memorandum (EM), p. 20.

Excise Tariff Amendment (Fuel Indexation) Bill 2014

Customs Tariff Amendment (Fuel Indexation) Bill 2014

Fuel Indexation (Road Funding) Bill 2014

Fuel Indexation (Road Funding) Special Account Bill 2014

Portfolio: Treasury and Immigration and Border Protection

Introduced: House of Representatives, 19 June 2014

1.61 The Excise Tariff Amendment (Fuel Indexation) Bill 2014, the Customs Tariff Amendment (Fuel Indexation) Bill 2014, the Fuel Indexation (Road Funding) Bill 2014 and the Fuel Indexation (Road Funding) Special Account Bill 2014 (the bills) form a package of four bills.

1.62 The Excise Tariff Amendment (Fuel Indexation) Bill 2014 seeks to amend the *Excise Tariff Act 1921* to index the rate of excise applying to fuels to assist in funding road infrastructure. The bill would also make consequential amendments to the *Excise Tariff Amendment (Taxation of Alternative Fuels) Act 2011* to increase excise-equivalent customs duty on liquefied petroleum gas, and compressed and liquefied natural gas, from 1 July 2015 as part of the final stage of the phase in of taxation on gaseous fuels.

1.63 The Customs Tariff Amendment (Fuel Indexation) Bill 2014 seeks to amend the *Customs Tariff Act 1995* to index the rate of excise-equivalent customs duty applying to fuels to assist in funding road infrastructure. The bill would also make consequential amendments to the *Customs Tariff Amendment (Taxation of Alternative Fuels) Act 2011* to increase excise-equivalent customs duty on liquefied petroleum gas, and compressed and liquefied natural gas, from 1 July 2015 as part of the final stage of the phase-in of taxation on gaseous fuels.

1.64 The Fuel Indexation (Road Funding) Bill 2014 seeks to amend the *Fuel Tax Act 2006* to ensure that taxpayers use the same indexed rate of duty that was payable on fuel for determining the amount of their fuel tax credits. The bill would also make consequential amendments to the *Energy Grants (Cleaner Fuels) Scheme Regulations 2004* to clarify that the amount of the cleaner fuel rebates for biodiesel and renewable diesel are calculated by using the biodiesel duty rate that applied at the time when the cleaner fuel was entered for home consumption.

1.65 The Fuel Indexation (Road Funding) Special Account Bill 2014 seeks to amend the *Financial Management and Accountability Act 1997* to establish a Fuel Indexation (Road Funding) special account and to ensure that the net additional revenue from the reintroduction of fuel indexation is used for road infrastructure funding.

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

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

1.68 However, 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*.

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

1 Explanatory memorandum (EM), p. 19.

Family Assistance Legislation Amendment (Child Care Measures) Bill 2014

Portfolio: Education

Introduced: House of Representatives, 5 June 2014

Purpose

1.70 The Family Assistance Legislation Amendment (Child Care Measures) Bill 2014 (the bill) seeks to amend the *A New Tax System (Family Assistance) Act 1999* to maintain the indexation pause on the child care rebate limit at \$7500 for three years from 1 July 2014.

1.71 The bill would also maintain the child care benefit income thresholds at the amounts applicable as at 30 June 2014 for a further three years from 1 July 2014. The bill also seeks to make consequential amendments to the *Family Assistance Legislation Amendment (Child Care Budget Measures) Act 2011*.

Background

1.72 The committee considered the following, substantially similar, measure in the Social Services and Other Legislation Amendment Bill 2013 in its *First Report of the 44th Parliament*.

Committee view on compatibility

Right to social security

1.73 The right to social security is guaranteed by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

1.74 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

1.75 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;

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- the obligation not to unjustifiably take any backwards steps that might affect the right;
 - the obligation to ensure the right is made available in a non-discriminatory way; and
 - the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.76 Specific situations which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

Right to an adequate standard of living

1.77 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.78 Australia has two types of obligations in relation to this right. It has immediate obligations to satisfy certain minimum aspects of the right; not to unjustifiably take any backwards steps that might affect living standards; and to ensure the right is made available in a non-discriminatory way. It also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right to an adequate standard of living.

Pausing of indexation of child care benefit

1.79 As noted above, the bill would maintain the indexation pause on the child care rebate limit at \$7500 for three years from 1 July 2014. The statement of compatibility notes that the bill engages the right to social security and states:

The Government considers that maintaining the current CCR [child care rebate] limit until 1 July 2017 is a reasonable, necessary and proportionate measure that is in the interest of Australia's current fiscal and economic position, given savings from the measure have already been taken by the previous government.

The current limit of \$7,500 per child per financial year is currently set out in the legislation and will be retained in this measure. This maximum amount of CCR is not being reduced through this Bill.¹

1.80 The committee notes that the effect of pausing the indexation of the child care rebate will be to reduce over time (by the impact of inflation) the value of the rebate in real terms. This represents a limitation on the right to social security and potentially the right to an adequate standard of living. While the statement of compatibility for the bill asserts that any limitation is 'reasonable and proportionate

1 Explanatory memorandum (EM), p. 6.

to achieving a legitimate aim',² no detailed justification is provided to support this conclusion.

1.81 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. While the statement of compatibility for the bill generally asserts that the measure is in the interests of Australia's current fiscal and economic position (as the legitimate objective of the measure), the committee notes 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.

1.82 The committee notes that information regarding the number of families that may be affected by the continued pausing of the child care rebate and the expected financial impact on those families, is particularly relevant to the human rights assessment of this measure.

1.83 The committee therefore seeks the Minister for Education's advice as to whether continuing the pause of the indexation of the child care rebate is compatible with the right to social security, and particularly:

- **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.**

Pausing of indexation of income thresholds for the child care benefit

1.84 The bill would also maintain the income thresholds for the separate child care benefit payment at the amounts applicable as at 30 June 2014 for a further three years.

1.85 The committee notes that, as a result, it can be expected that a number of families will lose their entitlement to the child care benefit payment (or at least have it reduced) if their incomes rise with inflation above a relevant threshold over the period. By operating to limit the availability of the benefit in this way, the bill may be seen as limiting the right to social security, and potentially the right to an adequate standard of living.

1.86 In concluding that the bill is compatible with human rights, the statement of compatibility states:

2 EM, p. 6.

The Government...considers that the overall effect of maintaining the CCB [child care benefit] income thresholds until 1 July 2017 will, in relation to the families whose children attend approved child care, be limited by continued indexation of the CCB standard hourly rate, the minimum hourly amount and the multiple child loadings, which are not affected by this measure. For many of the families impacted by maintaining the CCB income thresholds, half of their additional out-of-pocket child care costs will be met by CCR [child care rebate].³

1.87 However, the committee notes that this justification for the measure mainly addresses its impact on the amount of the benefit rather than its impact on the entitlement to the benefit based on family income.

1.88 The statement of compatibility does not identify the number of families who will be affected by the pausing of indexation of the income thresholds for accessing child care benefits or the financial impact on those families.

1.89 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. To demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why a measure is necessary in pursuit of a legitimate objective.

1.90 The committee notes that information regarding the number of families that may be affected by the pausing of indexation of the income thresholds, and the expected financial impact on those families, is particularly relevant to the human rights assessment of this measure.

1.91 The committee therefore seeks the Minister for Education's advice as to whether the pausing the indexation of the income thresholds for entitlement to the child care benefit is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- **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.**

Right to work

1.92 The right to work and rights in work are guaranteed in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴

1.93 The UN Committee on Economic Social and Cultural Rights has stated that the obligations of States parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

1.94 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to work. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.95 The right to 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.

Impact of measures on right to work for those with family responsibilities

1.96 Of further relevance to the right to work in this context, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States parties to implement measures to eliminate discrimination against women in the field of employment. Particular obligations include:

To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child care facilities.⁵

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

5 Article 11(2)(c) of the CEDAW.

1.97 Accordingly, CEDAW recognises that the availability of child care is a critical component of the right to work.

1.98 As noted above, the bill proposes to effectively reduce the value of the child care rebate and limit the availability of the child care benefit by pausing indexation of income thresholds for eligibility. In the committee's view, the effect of the measures on the affordability and availability of child care may thus be seen as a limitation on the right to work. The committee notes that the statement of compatibility provides no assessment of the impact of the measures on the right to work.

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

1.100 The committee therefore seeks the Minister for Education's advice as to whether the bill is compatible with the right to work, and particularly:

- **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.**

Migration Amendment (Protecting Babies Born in Australia) Bill 2014

Sponsor: Senator Hanson-Young

Introduced: Senate, 18 June 2014

1.101 The Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (the bill) seeks to amend the *Migration Act 1958* to ensure that a child who is born in Australia is not classified to have 'entered Australia by sea', and is therefore not an 'unauthorised maritime arrival' subject to transfer to Australia's offshore detention centres.

1.102 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

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

1 Explanatory memorandum (EM), p.3.

National Health Amendment (Pharmaceutical Benefits) Bill 2014

Portfolio: Health

Introduced: House of Representatives, 18 June 2014

Purpose

1.104 The National Health Amendment (Pharmaceutical Benefits) Bill 2014 (the bill) amends the *National Health Act 1953* (the Act) to increase patient co-payments and safety net thresholds for the Pharmaceutical Benefits Scheme (PBS) and the Repatriation Pharmaceutical Benefits Scheme (RPBS).

1.105 The amendments would (from 1 January 2015):

- increase the concessional patient co-payment by 80 cents;
- increase the general patient co-payment by \$5.00;
- increase the concessional safety net threshold by two prescriptions each year for four years (2015 to 2018); and
- increase the general patient safety net threshold by 10 per cent each year for four years, from 2015 to 2018.

1.106 These increases are in addition to the usual Consumer Price Index (CPI) indexation on 1 January each year under the Act. The increases in co-payments apply for prescriptions for which a PBS or RPBS subsidy is payable.

Committee view on compatibility

Right to health and a healthy environment

1.107 The right to health is guaranteed by article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights.

1.108 The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).

1.109 The right is not, however, a right to be healthy, as such, given that individual health is not something wholly within the ability of the State to control.

1.110 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to health. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;

- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

Increasing co-payments for access to medicines

1.111 As noted above, the bill would increase the amount payable by patients for medicines listed on the PBS and RPBS. The bill would also limit access to the safety net. The statement of compatibility notes that the bill engages the right to health and specifically notes that the measures assist:

...with the progressive realisation by all appropriate means of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.¹

1.112 However, the committee notes that the effect of the bill will be to increase the cost of medications for all consumers, including those reliant on social security payments. This represents a limitation on the right to health and/or a retrogressive measure, which is not explicitly addressed in the statement of compatibility for the bill.

1.113 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provides an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

1.114 While the statement of compatibility for the bill generally asserts that co-payments have been a feature of the PBS and RPBS for many years, the committee notes 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. For example, the committee would expect the statement of compatibility to provide an economic assessment of the impact of the bill on individuals and their capacity to bear the additional upfront payments for medicines.

1.115 The committee therefore seeks the Minister for Health's advice as to whether the increase in co-payments for medicines under the PPBS and RPBS is compatible with the right to health, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**

1 Explanatory memorandum (EM), p. 2.

- **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.**

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

Portfolio: Treasury

Introduced: House of Representatives, 29 May 2014

Purpose

1.116 The bill would amend Schedule 1 of the Taxation Administration Act 1953 (TAA 1953) to require Australian financial institutions to collect information about their customers that are likely to be taxpayers in the United States of America (US) and to provide that information to the Commissioner of Taxation (Commissioner) who will, in turn, provide that information to the US Internal Revenue Service (IRS).

1.117 These amendments give effect to the Australian Government's commitments as set out in the Agreement between the Government of Australia and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA (the FATCA Agreement). The agreement was signed by the Treasurer on 28 April 2014.

1.118 The Foreign Account Tax Compliance Act (FATCA) is a unilateral anti-tax evasion regime. FATCA aims to detect US taxpayers who use accounts with offshore financial institutions to conceal income and assets from the IRS. From 1 July 2014, FATCA will require all non-US financial institutions to conclude individual agreements with the IRS under which they will periodically report certain information about their account holders who are US citizens or US resident individuals. Financial institutions that do not comply with FATCA will be subject to a 30 per cent US withholding tax on their US source income.

1.119 A broad range of Australian financial institutions, including banks, some building societies, some credit unions, specified life insurance companies, private equity funds, managed funds, exchange traded funds and some brokers will be subject to FATCA. As most major Australian financial institutions operate or otherwise invest in the US, the US withholding tax creates a strong commercial incentive for these entities to comply with FATCA. However, Australian privacy laws generally prevent compliance with these US-based obligations and some Australian State and Territory anti-discrimination laws could also prevent the interrogation of customer accounts based on US citizenship.

Committee view on compatibility

Right to Privacy

1.120 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.

1.121 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.

Protections on personal information once in the hands of the IRS

1.122 The statement of compatibility notes that the bill engages the right to privacy as the bill 'will interfere with the privacy of individuals'.¹ The bill will require Reporting Australian Financial Institutions to report customer information to the Commissioner of Taxation for on forwarding to the IRS in the US. The bill will also require those entities to conduct certain due diligence procedures on their financial accounts in order to identify those account holders that are likely to be US citizens or US taxpayers. This will result in Reporting Australian Financial Institutions collecting certain personal information (such as a person's name, address, U.S. Tax Identification Number, the account number, the income credited to the account and the account balance) and providing the information to the Commissioner for forwarding to the IRIS

1.123 The statement of compatibility notes the safeguards for the protection of disclosed personal information under Australian domestic law including obligations upon the Commissioner to protect personal information. The statement of compatibility also notes that under Australia's privacy law, a person can make a complaint about the handling of their personal information by Australian government agencies. In addition, the Australian Information Commissioner has the power to investigate instances of non-compliance by agencies and organisations and to prescribe remedies to redress non-compliance.

1.124 The committee notes that the bill will create a process whereby certain personal information will be collected and disclosed by Reporting Australian Financial Institutions to the Commissioner, which will then be forwarded to the IRS in the US. The statement of compatibility does not set out the safeguards and protections that will be afforded to personal information once it has been given to the IRS in the US. Accordingly, while the statement of compatibility notes that Australian privacy laws apply to any use made by an authorised officer of such information, it is not clear whether the same or equivalent safeguards apply once the information is held by the IRS in the US. Such safeguards are an integral component of assessing whether the appropriate safeguards are in place for consistency with the right to privacy.

1.125 The committee therefore seeks the Treasurer's advice as to whether the safeguards in the bill for the protection of personal information are consistent with the right to privacy, and particularly whether the limitation is reasonable and proportionate measure for the achievement of that objective.

1 Explanatory Memorandum, (EM), p. 22.

1.126 Specifically, the committee seeks the Treasurer's advice as to:

- **the privacy safeguards that will apply under US law in relation to personal information provided to US authorities pursuant to the FATCA Agreements; and**
- **whether these safeguards can be said to be provided by 'law' insofar as they do not appear and are not identified in the bill**

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

Business Services Wage Assessment Tool Payment Scheme Bill 2014

Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014

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

Fair Work (Registered Organisations) Amendment Bill 2014

Social Security Legislation Amendment (Stronger Penalties for Serious Failure) Bill 2014

Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014

Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014

Trade Support Loans Bill 2014

Trade Support Loans (Consequential Amendments) Bill 2014

Chapter 2 - Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on 23 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.

Appropriation (Parliamentary Departments) Bill (No. 2) 2013-2014

Appropriation Bill (No.3) 2013-2014

Appropriation Bill (No. 4) 2013-2014

Portfolio: Finance

Introduced: House of Representatives, 13 February 2014

Purpose

2.1 The Appropriation (Parliamentary Departments) Bill (No. 2) 2013-2014 appropriates additional money out of the Consolidated Revenue Fund (CRF) for expenditure in relation to the parliamentary departments.

2.2 The Appropriation Bill (No. 3) 2013-2014 proposes appropriations from the CRF for the ordinary annual services of the government.

2.3 The Appropriation Bill (No. 4) 2013-2014 proposes appropriations from the CRF for services that are not considered to be the ordinary annual services of the government.

2.4 The amounts proposed for appropriation are in addition to the amounts appropriated through the appropriation Acts that implemented the 2013-14 Budget. Together, the three bills are termed the bills.

Background

2.5 The committee reported on the bills in its *Third Report of the 44th Parliament*.

2.6 The bills were subsequently passed by the Parliament and received Royal Assent on 9 April 2014.

Committee view on compatibility

Budgetary processes

Consideration of human rights

2.7 The committee sought clarification from the Minister for Finance as to whether the current budgetary processes expressly take account of human rights factors.

Minister's response

Thank you for your letter of 4 March 2014 about the statements of compatibility with human rights in the Explanatory Memoranda that accompanied the Additional Estimates Appropriation Bills.

Given that the legal effect of Appropriation Bills is extremely limited, I can confirm to the committee that I do not consider that these Bills engage, or otherwise affect, the rights, obligations or freedoms relevant to the *Human Rights (Parliamentary Scrutiny) Act 2011*.

I note that a similar question along these lines was raised by your predecessor committee last year.

My predecessor, Senator the Hon Penny Wong, replied on 10 May 2013 advising that it is neither practicable nor appropriate for the Explanatory Memoranda to Appropriation Bills to set out a concise assessment of how human rights are affected by all of the Government's Budget decisions. This remains the case.

The approach of requiring human rights impact assessments to be incorporated in portfolio budget statements, suggested in your committee's report, is also neither practicable nor appropriate.

This is also true in relation to whether complex budgetary processes can expressly take account of human rights factors. Taking that approach would entrench an extensive drafting exercise and the need to obtain detailed assessments from all agencies across the Australian Government.

That said, however, the budgetary processes do, by their nature, require an assessment of all factors that might relate to the relevant policies, including environmental, legal, economic, social and moral factors. Human rights factors are also part of these many factors taken into account.

If it would assist your committee further, I would be pleased for officials from the Department of Finance to brief the committee on aspects of the Appropriation Bills and their Explanatory Memoranda.¹

Committee response

2.8 The committee thanks the Minister for Finance for his response and has concluded its examination of these bills.

2.9 However, in the committee's view, the fact that appropriation Acts viewed in isolation may not directly affect rights or obligations under domestic law is not determinative of whether they engage human rights for the purposes of the *Human Rights (Parliamentary Scrutiny Act) 2011*.

1 See Appendix 2, Letter from Senator the Hon Mathias Cormann, Minister for Finance, to Senator Dean Smith, 17 March 2014.

2.10 As the committee has noted previously, both the promotion and limitation of human rights may result from the adoption of legislative frameworks and the allocation of funds necessary to give effect to policy. This is because, in such cases, the appropriation of funds or additional funds to support the implementation of policies ultimately facilitates actions which may give rise to human rights compatibility concerns and, indeed, involve the failure by Australia to fulfil its obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.11 Notwithstanding the committee's view that appropriations bills may engage and potentially limit human rights, the committee acknowledges the minister's view that such bills present particular difficulties given their technical nature and the fact that they frequently include appropriations for a wide range of programs and activities across many portfolios.

2.12 The committee notes the minister's advice that human rights factors are among many factors taken into account in budgetary processes. As the committee has noted, the assessment of such factors might be provided for in portfolio budget statements. However, in the committee's view, further consultation is required as to how such consideration of human rights factors in budgetary processes may be subjected to human rights assessments to support the committee's examination of appropriations bills for compatibility with human rights.

2.13 In light of the above, the committee thanks the Minister for Finance for his offer of a meeting with departmental officials, and welcomes the opportunity to continue to progress towards practical and substantive human rights assessments of appropriations bills.

Clean Energy (Income Tax Rates and Other Amendments) Bill 2013

Portfolio: Treasury

Introduced: House of Representatives, 13 November 2013

Purpose

2.14 The Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 (the bill) seeks to amend the *Clean Energy (Income Tax Rates Amendments) Act 2011* to repeal the personal income tax cuts that were legislated to commence on 1 July 2015. It would also amend the *Clean Energy (Tax Laws Amendments) Act 2011* to repeal associated amendments to the low-income tax offset that were to commence on 1 July 2015.

Background

2.15 The committee reported on the bill in its *First Report of the 44th Parliament*.

2.16 The Senate negatived the third reading of the bill 20 March 2014 and the bill is therefore not proceeding.

Committee view on compatibility

Right to an adequate standard of living

Statement of compatibility

2.17 The committee noted that neither the explanatory memorandum (EM) nor the statement of compatibility included an assessment of the impact of the changes, particularly on low-income earners. The statement of compatibility for the bill stated that the bill does not engage any of the applicable human rights or freedoms.

2.18 The committee noted that it was unable to assess whether the proposed changes were compatible with human rights in the absence of information about the impact of the changes, particularly on those earning lower incomes.

2.19 The committee sought further information about the impact of the changes and whether they limit the enjoyment of the right to an adequate standard of living.

Parliamentary Secretary's response

For the Clean Energy (Income Tax) Repeal Bill, the Committee has sought clarification about the impact of proposed changes the Bill would make to the income tax rates and thresholds, as well as the low income tax offset.

The Clean Energy (Income Tax) Repeal Bill does not seek to make any changes to the current operation of income tax rates, thresholds and offsets. Instead, it forestalls a number of planned changes that would otherwise come into effect from 1 July 2015. As a result, no taxpayer will end up with any greater tax liabilities as a result of these amendments than they would be subject to on an equivalent income in the current year.

Given the only consequence of the Clean Energy (Income Tax) Repeal Bill will be to preserve the currently applicable tax arrangements, the Government is comfortable the proposed changes are compatible with human rights.

I also note none of the changes would have any impact on an individual's entitlement to government support, such as unemployment benefits or the age pension, should they meet the relevant income and other tests.¹

Committee response

2.20 The committee thanks the Parliamentary Secretary to the Treasurer for his response. Noting that the bill is not proceeding, the committee has concluded its examination of this bill.

2.21 However, the committee notes that the Parliamentary Secretary's response did not provide a detailed and evidence-based explanation for the measures in accordance with the committee's usual expectations. The response simply states that 'the government is comfortable the proposed changes are compatible with human rights'. The committee notes that, to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why proposed measures are necessary in pursuit of a legitimate objective, and are reasonable and proportionate means to achieve that objective.

1 See Appendix 2, Letter from The Hon Steven Ciobo MP, Parliamentary Secretary to the Treasurer, to Senator Dean Smith, 21 May 2014, p. 1.

Dental Benefits Legislation Amendment Bill 2014

Portfolio: Health

Introduced: House of Representatives, 26 March 2014

Purpose

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

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

2.24 The bill also seeks to amend the *Dental Benefits Act 2008* to:

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

Background

2.25 The committee reported on the bill in its *Sixth Report of the 44th Parliament*.

Committee view on compatibility

Right to fair trial and fair hearings right

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

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

Minister's response

At paragraph 1.40 of the Report, the Committee seeks clarification on whether the civil penalty proposed by new section 32D may be regarded as 'criminal' for the purposes of articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

Proposed new section 32C provides a power to the Chief Executive Medicare to issue to certain persons a notice to produce documents

relevant to substantiating the payment of dental benefits under the Dental Benefits Act 2008 (the DB Act). A notice may be issued to the dental provider who billed the service or to another person who may have custody or control of relevant documents, other than the patient or the person who incurred the dental expenses in respect of the service (for example, the patient's parent).

Where a dental provider does not comply with the notice to produce documents, the amount paid, purportedly by way of dental benefit, is recoverable as a debt due to the Commonwealth from the dental provider. The civil penalty provision proposed by new section 320 applies to people, other than a dental provider, who fail to comply with the notice to produce documents. This is intended to apply to entities such as a corporatised dental practice which may employ the dental provider.

The provisions in Part 3 of Schedule 1 of the Bill requiring the production of documents are modelled closely on provisions contained in the Health Insurance Act 1973 (the HI Act) and are intended to be similar in scope. As with the civil penalty provision under section 129AAE of the HI Act, proposed new section 32D is necessary as it would not be acceptable to seek recovery of dental benefits from a practitioner and impose a penalty if that practitioner was unable to verify the benefit paid for the service due to refusal by another party to provide relevant documents. This compliance measure would also be unworkable if practitioners were able to establish corporate entities or structure employment arrangements in such a way as to avoid complying with the requirements of the proposed legislation.

The United Nations Human Rights Committee established under the ICCPR can be referred to for guidance on the nature of the proposed civil penalties for the purposes of human rights law.

In its General Comment 32, the United Nations Human Rights Committee sets out its view that an offence, designated as 'civil' in domestic law, may be regarded as 'criminal' because of its purpose, character or severity.

In considering the nature of the civil penalty under proposed section 320, the penalty could be considered as punitive as its purpose is to deter non-compliance and to punish non-compliance when it occurs.

However, the penalty does not apply to the public at large and operates in a regulatory context. It applies only to people, other than dental providers or patients, who may have custody of a document containing information able to substantiate payment of a dental benefit. It is necessary to ensure the integrity of the regulatory framework for the payment of dental benefits. Therefore, the civil penalty does not appear to be criminal in nature.

In relation to the severity of the penalty, the maximum penalty imposed under proposed new section 320 is 20 penalty units for an individual and 100 penalty units for a corporation. This penalty is minor and does not

reflect the degree of severity required to be considered 'criminal' for the purposes of human rights law.

Given the purpose, character and severity of the penalty, it is my view that it should not be considered as 'criminal' for the purposes of human rights law.¹

Committee response

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

Reverse burden of proof – presumption of innocence

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

Minister's response

At paragraph 1.53 of the Report, the Committee seeks advice on the compatibility of the reverse onus of proof provision in proposed new subsection 32D (2) with the right to a fair trial and fair hearing contained in article 14 of the ICCPR.

Proposed subsection 32D (2) provides that it is a defence if the failure to produce documents is brought about through circumstances outside the person's control or if they could not reasonably be expected to guard against the failure.

This limitation on the right to be presumed innocent is reasonable and necessary because the defendant alone will have knowledge of the circumstances that might reasonably excuse non-compliance. As the civil evidence and procedure rules apply, the defendant need only prove their innocence on the balance of probabilities, rather than to the criminal evidence requirement of 'beyond reasonable doubt'.²

Committee response

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

1 See Appendix 2, Letter from the Hon Peter Dutton MP, Minister for Health, to Senator Dean Smith, 29 May 2014, pp 1-2.

2 See Appendix 2, Letter from the Hon Peter Dutton MP, Minister for Health, to Senator Dean Smith, 29 May 2014, p. 2.

2.30 However, the committee notes that, where it is proposed to place a reverse burden of proof on a defendant in criminal or civil penalty provisions, the committee's usual expectation is that the statement of compatibility address the question of why a reverse burden of proof is preferred over the imposition of an evidential burden (on the basis that, where a right is to be limited, a less intrusive alternative should be preferred).

Exclusion of the right not to incriminate oneself

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

Minister's response

Paragraph 1.61 of the Report seeks clarification on whether the limitation of the right not to incriminate oneself in proposed section 32E is a reasonable and necessary limitation and is proportionate to achieving a legitimate objective.

As noted in the explanatory memorandum to the Bill (page 10):

This Part is intended to ensure that benefits may be recovered if they have been incorrectly paid. Excusing persons from producing documents on the basis that they may have to repay benefits would allow persons to retain incorrectly paid benefits by refusing to comply with the request. The public interest in ensuring that benefits under the Act are not paid inappropriately, and that inappropriate payments are recovered, is considered to outweigh the harm to individual rights from encroaching on the privilege against self-incrimination.

Prior to the introduction of similar powers to the HI Act requiring the production of documents to substantiate Medicare benefits (and a similar abrogation of the privilege against self-incrimination), around 20 per cent of practitioners did not cooperate with the request to produce documents.

The abrogation of the privilege against self-incrimination is necessary to ensure the integrity of programmes operating under the DB Act, in particular, the new Child Dental Benefits Schedule (COBS). The COBS is expected to spend \$2.5 billion of public money over four years from 2014-15.

Further, under the COBS, benefits are limited to a maximum of \$1,000 per eligible patient over two calendar years. This means that, if a dental provider claims benefits for services that have not been provided, the patient may not have sufficient funds remaining in the cap to receive necessary treatment from a different dental provider. This may leave patients in need of treatment but unable to pay for it themselves. The

requirement for providers to produce documents provides the Department of Human Services with a mechanism to limit adverse effects on patients, particularly where benefits are limited.

Under these circumstances, I consider that the protection of public money and patient access to timely and appropriate dental treatment outweigh the harm on an individual's rights to be protected against self-incrimination.³

Committee response

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

3 See Appendix 2, Letter from the Hon Peter Dutton MP, Minister for Health, to Senator Dean Smith, 29 May 2014, p. 3.

Financial Framework Legislation Amendment Bill (No. 2) 2013

Portfolio: Finance

Introduced: House of Representatives, 13 March 2013

Purpose

2.33 The Financial Framework Legislation Amendment Bill (No. 2) 2013 (the bill) sought to:

- amend the *Financial Management and Accountability Act 1997* (FMA Act) to allow the Commonwealth to form or participate in the formation of companies (including transitional provisions in relation to existing Commonwealth companies and to validate the Commonwealth's role in forming or acquiring shares in existing Commonwealth companies);¹
- amend the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to include decisions made under the proposed amendment to the FMA Act in the relevant schedule of decisions not subject to review under that Act, given the policy nature of such decisions;
- amend the *Social Security Act 1991* (in relation to payments made under the Australian Government Disaster Recovery Payments scheme);
- amend the *Judges' Pensions Act 1968* and the *Remuneration Tribunal Act 1973* to establish a 'recoverable payments' framework for dealing with administrative overpayments, and to address instances where the relevant agency makes payments that are not consistent with the requirements or pre-conditions imposed by legislation; and
- provide for the transfer of realised capital losses from the Military Superannuation and Benefits Fund (MSBF) to the ARIA Investments Trust following the transfer of assets that occurred in May 2012. This is to ensure that losses do not remain with the MSBF, given that they cannot be used to offset future capital gains of the fund (as all of the fund's assets have been transferred to the ARIA Investments Trust).

1 This measure is identified as following from the High Court's decision in *Williams v Commonwealth* [2012] HCA 23, which considered the limits of the Commonwealth's executive power. The explanatory memorandum (EM) states that the proposed amendments 'are designed to put beyond any argument the capacity of the Executive Government to form or participate in the formation of companies' (p. 5).

Background

2.34 The committee reported on the bill in its *Fourth Report of 2013* and subsequently in its *First Report of the 44th Parliament*.

2.35 The bill was subsequently passed by the Parliament and received Royal Assent on 28 May 2013.

Committee view on compatibility

Right to fair hearing

Exclusion of right to review

2.36 The committee sought clarification from the Minister for Finance as to:

- whether the decisions will be subject to judicial review, for instance, under the *Administrative Decisions (Judicial Review) Act 1977*; and
- if so, whether this encompasses review of the facts.

Minister's response

You have asked for clarification of amendments made by the FFLA Bill to the *Social Security Act 1991* (Social Security Act) regarding payments made under the Australian Government Disaster Recovery Payments scheme (the scheme). It is first necessary to explain the background to these amendments, and the context of the FFLA Bill in general.

The amendments to the Social Security Act were designed to address potential inconsistencies with section 83 of the Australian Constitution, which sets out the rules for payments of money made by the Commonwealth. In summary, no money is to be drawn from the consolidated revenue fund except under an appropriation, made by the Parliament for a specified purpose.

An appropriation specifies the purpose(s) for which money may be spent, and associated legislation, including regulations, may specify conditions under which payments are to be made. For example, who is entitled to be paid and how much in specific circumstances. Drawing money from the consolidated revenue fund beyond the scope of the appropriation's purpose constitutes a breach of section 83.

In 2012, the Australian National Audit Office (ANAO) raised with Finance that it had identified potential inconsistencies with section 83 of the Constitution across a range of Commonwealth payments being made by Departments and agencies. The ANAO asked Finance to work with all Departments and agencies to ensure they addressed any further section 83 issues. The majority of issues subsequently identified required amendments to legislation and the previous Finance Minister offered FFLA

Bills as a mechanism for Departments and agencies to make the necessary amendments.

While these amendments were made through a FFLA Bill, put to the Parliament by the previous Finance Minister, the policy substance of the amendment to the Social Security Act was requested by the then Attorney-General.

The intention of the amendments was to ensure that in disaster situations, recovery payments would be able to be made even where the qualification requirements of the scheme could not be satisfied. For example, during the Victorian bushfires, many people were unable to provide evidence of identity as required due to the nature of the disaster. The amendments sought to ensure that recovery funds would be able to be made in an emergency, while an administrative recovery framework would be in place should incorrect payments be discovered at a later date.

The recoverable payment provisions were excluded from merits review under the *Social Security(Administration) Act 1999* because the associated arrangements only relate to payments that are later found not to meet the qualification requirements under the Social Security Act. These provisions provide a mechanism for the Department to recover payments that are ineligible at law and do not go to matters of eligibility, merit or quantum. Importantly, external merits review would be available under Part 4 of the *Social Security (Administration) Act 1999* for decisions that determine qualification to a payment made under section 1061 K of the Social Security Act.

Judicial review would also be available for all decisions made under the scheme, including decisions to recover a payment. This would include judicial review under the *Administrative Decisions (Judicial Review) Act 1977* or section 75(v) of the Constitution. In such an instance, the court would examine the lawfulness of the relevant administrative decision, potentially including a review of the facts to determine the legality of the decision.

On the basis of the availability of these review mechanisms, I do not consider that human rights have been impinged by the amendments to the Social Security Act.²

Committee response

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

2 See Appendix 2, Letter from Senator the Hon Mathias Cormann, Minister for Finance, to Senator Dean Smith, 28 May 2014.

Independent National Security Legislation Monitor Repeal Bill 2014

Portfolio: Prime Minister

Introduced: House of Representatives, 19 March 2014

Purpose

2.38 The Independent National Security Legislation Monitor Repeal Bill 2014 (the bill) seeks to repeal the *Independent National Security Legislation Monitor Act 2010* (the INSLM Act) and accordingly abolish the Office of the Independent National Security Legislation Monitor (the monitor).

Background

2.39 The committee reported on the bill in its *Fifth Report of the 44th Parliament*.

Committee view on compatibility

Multiple rights

2.40 The committee notes that counter-terrorism and national security legislation potentially engages a range of human rights, including:

- the right to life;¹
- the prohibition on torture, cruel and unusual punishment;²
- the right to a fair trial and fair hearing rights;³
- the right freedom of association;⁴ and
- the right to privacy.⁵

Effective oversight of counter-terrorism and national security legislation

2.41 The committee sought clarification regarding the types of mechanisms and measures that will continue to ensure that, in the absence of the monitor, Australia's counter-terrorism and national security legislation contains appropriate safeguards, remains proportionate to any threat of terrorism or threat to national security (or both) and remains necessary.

1 International Covenant on Civil and Political Rights (ICCPR), article 4.

2 ICCPR, article 4.

3 ICCPR, article 14.

4 ICCPR, article 21.

5 ICCPR, article 17.

Parliamentary Secretary's response

Australia's national security legislation is subject to oversight by multiple independent and Parliamentary scrutiny mechanisms, which are robust and extensive. This is so despite the limited exercise of the powers contained in such legislation, which is consistent with the Parliament's intention that they are extraordinary measures that are to be reserved for emergencies. The Government considers that, in combination, these mechanisms cover the field in terms of the grounds of independent review, including in the scrutiny of human rights compatibility.

Statutory Oversight Mechanisms

The statutory oversight office of the Inspector-General of Intelligence and Security (IGIS) is invested with broad powers to inquire (on the IGIS's own motion or on a reference from the Prime Minister) into the powers, functions and broader practices of all intelligence and security agencies. This includes powers to examine and make recommendations to the Government about matters concerning: the legal compliance of the acts or practices of an agency (including compliance with human rights obligations on the reference of the Australian Human Rights Commission); an agency's compliance with Ministerial directions; the propriety of particular activities of an agency; and the effectiveness, appropriateness, legality and propriety of an agency's procedures. The Australian Commissioner for Law Enforcement Integrity also has statutory mandates to investigate the actions of law enforcement agencies with responsibilities under counter-terrorism legislation.

Parliamentary Scrutiny

These independent statutory offices are additional to the integral role of the Parliament in the scrutiny of proposed legislation and its broader powers of inquiry. Various Parliamentary committees play a valuable role in scrutinising and reviewing legislation. This Committee has a valuable role in scrutinising the compatibility of any proposed counter-terrorism legislation with human rights requirements.

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) can review matters in relation to Australian intelligence agencies on reference from the Parliament or the responsible Minister and makes recommendations on the listing of individual terrorist organisations under the *Criminal Code Act 1995*. Several comprehensive reviews have been undertaken by the PJCIS, including its 2006 inquiries into the package of counter-terrorism legislation enacted in 2002, and an inquiry into the process for the listing of terrorist organisations completed in 2007. In addition, the PJCIS has a statutory mandate to review the operation, effectiveness and implications of the Australian Security Intelligence Organisation's questioning and detention warrants regime and questioning powers by 22 January 2016.

The Parliamentary Joint Committee on Law Enforcement also monitors and reviews the performance by the Australian Federal Police.

All major pieces of counter-terrorism legislation introduced since 2002 have benefited from considerable Parliamentary scrutiny, including in debate and via committee inquiries. As a number of counter-terrorism provisions will sunset in 2015 and 2016, any proposed renewal would provide a further opportunity for the Parliament to consider the necessity, effectiveness and appropriateness of these powers in contemporary circumstances.

International Engagement and Obligations

Australia engages actively with the United Nations (UN) and other international standard-setting bodies in the scrutiny of our compliance with international obligations, including human rights obligations. This includes engagement in periodic treaty reporting mechanisms, such as the sixth periodic report on Australia under the *International Covenant on Civil and Political Rights* which is currently in progress. Other significant areas include Australia's engagement with the UN Human Rights Committee complaints resolution framework and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

Ad Hoc Reviews

These standing mechanisms are additional to the Government's ability to appoint executive reviews to undertake inquiries. This power has been exercised by successive Governments to establish comprehensive reviews of provisions, such as the Security Legislation Review Committee in 2006, the Independent Review of the Intelligence Community in 2011, and the Council of Australian Governments' (COAG) Review of Counter-Terrorism Legislation in 2012 (2012 COAG Review); as well as inquiries into specific exercises of power, such as the Clarke Inquiry into the case of Dr Haneef in 2008. While such reviews are convened at a particular point in time, they have, in practice, been examined in subsequent reviews. The 2012 COAG Review, for instance, referred extensively to the 2006 reports of the Security Legislation Review Committee and the PJCIS. The annual reports by the current Independent National Security Legislation Monitor, Mr Bret Walker SC, have also made references to the findings, recommendations and reasoning of previous ad hoc reviews.

Since the enactment of the first tranche of counter-terrorism specific legislation in 2002, the Government has consistently supported the need for independent oversight of the extraordinary powers conferred. This bottom line has not changed. We remain firmly in support of the principle that any extraordinary powers require appropriate independent oversight. Such oversight is critical to ensuring that the laws are operating in the manner intended, and to promoting public trust and confidence in their administration.

The decision to repeal the *Independent National Security Legislation Monitor Act 2010* was made after careful consideration of the role and function of extant oversight mechanisms. The Government considers that the best way forward is to work through the large number of recommendations made by Mr Walker and other recent independent reviews, and to continue engaging with the extensive range of existing oversight bodies. The Government is confident that despite the repeal Bill, there is, and will remain, no shortage of oversight bodies to conduct

inquiries and investigations and provide independent advice to the Government and the Parliament of the day on counter-terrorism and national security legislation.⁶

Committee response

2.42 The committee thanks the Parliamentary Secretary to the Prime Minister for his detailed response and has concluded its interest in this matter.

2.43 However, the committee notes that, while there are a number of existing review mechanisms and bodies which allow for oversight of Australia's counter-terrorism and national security legislation (as outlined by the Parliamentary Secretary), these review mechanisms and bodies provide oversight of performance and operational matters relating to government agencies and national security. There is no review mechanism or body, other than the monitor, with a specific statutory mandate for ongoing review of counter-terrorism legislation, having regard to Australia's obligations under international human rights agreements.

2.44 The committee notes that the INSLM Act was introduced in 2010 to establish a monitor to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation. Part of that role is to assist ministers to ensure that Australia's counter-terrorism and national security legislation is consistent with Australia's international obligations, including human rights obligations.

2.45 The monitor was introduced after reports of the Security Legislation Review Committee (June 2006) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (December 2006) recommended that the government appoint an independent reviewer of Australia's counter-terrorism legislation.⁷ In its report, the PJCIS noted that the current system was 'fragmented', with only a limited 'capacity

6 See Appendix 2, Letter from the Hon Josh Frydenberg MP, Parliamentary Secretary to the Prime Minister, to Dean Smith, 10 April 2014, [pp 1-3].

7 See Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, June 2006 and Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Review of Security and Counter Terrorism Legislation*, December 2006.

for independent, ongoing and comprehensive examination of how terrorism laws are operating'.⁸

2.46 In the committee's view, in light of the specific character and function of the monitor (notably its independence and mandate to consider human rights obligations), the committee considers that other, existing review mechanisms cannot replicate the monitor's role in the event that it is abolished.

2.47 In relation to the range of ICCPR rights potentially engaged by counter-terrorism and national security legislation, the committee notes that such legislation is inherently limiting of human rights. The monitor's continuing oversight of such legislation is an important safeguard to ensure that any such limitations are, and continue to be, reasonable and proportionate.

2.48 The committee remains of the view that a key safeguard in ensuring that the limitations placed on human rights by Australia's counter-terrorism and national security legislation are reasonable, necessary and proportionate to achieving the legitimate objective of protecting Australia's national security is independent oversight of such laws, including a body with the mandate of continuing review of the operation (and human rights implications) of such laws.

2.49 The committee notes that the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism has stated that an effective system of oversight must include at least one civilian organisation that is independent of both the intelligence services and the executive.⁹

2.50 In light of the considerations outlined above, the committee is unable to conclude that the bill is compatible with human rights.

Government consideration of monitor's recommendations

2.51 The committee sought further information regarding the stage at which the government's consideration of the recommendations made by the monitor has reached, particularly those recommendations which were made on the basis of concerns about the compatibility of existing measures with Australia's international human rights obligations.

8 PJCIS, *Review of Security and Counter Terrorism Legislation*, December 2006, p. 19.

9 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, 'Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight', A/HRC/14/46, 17 May 2010, pp 8-10.

Parliamentary Secretary's response

The task of responding to the recommendations made by Mr Walker over the three-year term of his appointment, together with related recommendations from other independent legislative reviews, is an extensive and complex body of work. Mr Walker's first annual report did not contain any recommendations, and his second and third annual reports made 21 and 30 recommendations respectively. The Attorney-General's Department is leading the development of the Government's response to Mr Walker's second and third annual reports, ensuring a coordinated response to overlapping recommendations of the 2012 COAG Review. In total, the Monitor (in his second and third reports) and the 2012 COAG Review made 98 recommendations, which are under careful consideration. This includes close consultation with states and territories under the auspices of COAG. The Government intends to respond to each report once this significant process of consideration and consultation is complete.

As most recommendations raise complex legal, policy and operational issues, and many overlap and in several instances conflict, it is essential that each recommendation and its supporting reasoning and evidence base is analysed thoroughly. Work is well advanced on responses to the 68 recommendations contained in Mr Walker's second annual report and the COAG Review, which were tabled in Parliament by the previous Government on 14 May 2013. These responses will address recommendations on provisions relating to control orders, preventative detention orders, police powers, ASIO's questioning and detention warrants regime and questioning powers, and definition of a terrorist act and the terrorism offences in the *Criminal Code Act 1995*.

Mr Walker provided his fourth annual report to the Prime Minister on 28 March 2014. This report contained a further 31 recommendations and will be tabled in accordance with section 29(5) of the *Independent National Security Legislation Monitor Act 2010*. The Government will also consider this report carefully and respond in due course. The Government is committed to working through the comprehensive package of independent review recommendations provided over the previous three years, and to continue to engage constructively with the wide range of standing oversight, accountability and scrutiny bodies exercising responsibilities in relation to counter-terrorism legislation, including this Committee.¹⁰

10 See Appendix 2, Letter from the Hon Josh Frydenberg MP, Parliamentary Secretary to the Prime Minister, to Dean Smith, 10 April 2014, [p. 4].

Committee response

2.52 The committee thanks the Parliamentary Secretary for his response.

2.53 However, the committee notes the relevance of the monitor's recommendations to the human rights compatibility of Australia's counter-terrorism and national security legislation. The committee will further consider the human rights compatibility of the repeal of the INSLM Act in light of the government's response to the recommendations of the monitor, once released.

Minerals Resource Rent Tax Repeal and Other Measures Bill 2013

Portfolio: Treasury

Introduced: House of Representatives, 13 November 2013

Purpose

2.54 The Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 (the bill) seeks to repeal the mineral resources rent tax (MRRT) by repealing a number of Acts (Schedule 1). It would also make consequential amendments to other legislation, required as a result of the repeal of the MRRT (Schedules 2 to 9).

2.55 The MRRT has applied from 1 July 2012 to taxable resources (broadly, iron ore and coal) after they are extracted from the ground but before they undergo any significant processing or value adding. Coal seam gas produced as a necessary incident of coal mining was also included as a taxable resource. The effect of the bill would be that taxpayers do not incur liabilities for MRRT on or after 1 July 2014. However, the amendments do not affect the rights, powers and obligations of taxpayers and the Commissioner of Taxation in respect of MRRT liabilities that arise before that date.

2.56 This bill would also repeal the following MRRT-related measures: loss-carry back (Schedule 2); geothermal expenditure deduction (Schedule 5); low-income superannuation contribution (Schedule 7); income support bonus (Schedule 8); and schoolkids bonus (Schedule 9).

2.57 In addition, the bill would revise the following MRRT-related measures: capital allowances for small business entities (Schedules 3 and 4); and superannuation guarantee charge percentage increase (Schedule 6).

Background

2.58 The committee reported on the bill in its *First Report of the 44th Parliament*.

2.59 The Senate negatived the second reading of the bill on 25 March 2014 and the bill is therefore not proceeding.

Committee view on compatibility

Right to an adequate standard of living and right to social security

Reduction in superannuation benefits

2.60 The committee sought clarification as to whether the measures contained in Schedules 6 and 7 of the bill (relating to the superannuation guarantee and low-income superannuation contribution, respectively) are consistent with the right to an adequate standard of living and the right to social security.

2.61 The committee sought clarification whether the measures proposed by Schedules 8 and 9 (relating to the income support bonus and schoolkids bonus,

respectively) will be accompanied by appropriate mechanisms to monitor and address any disproportionate impact the cessation of these payments may have on disadvantaged individuals, children and families, particularly if they cause undue hardship.

Parliamentary Secretary's response

Schedules 6 and 7

For the MRRT Repeal Bill, the Committee sought clarification as to whether the superannuation guarantee (SG) and the low income superannuation contribution (LISC) measures contained in Schedules 6 and 7 of the Bill are compatible with the right to an adequate standard of living and the right to social security.

The LISC repeal and the SG rephrase are occurring in the context of fiscal savings for the Government. These measures were linked to the failed Minerals Resource Rent Tax with the Government borrowing money to pay for these commitments. Repealing the LISC and rephrasing the SG needs to be seen in this context and will assist in repairing the damage done to the nation's finances.

The Government is comfortable the measures set out in Schedules 6 and 7 of the MRRT Repeal Bill are compatible with human rights.

Schedules 8 and 9

The Committee also sought clarification on whether the amendments in Schedules 8 and 9 to remove the Income Support Bonus and Schoolkids Bonus will be accompanied by appropriate mechanisms to monitor and address any undue hardship the cessation of these payments may cause to vulnerable individuals and families.

There are no specific mechanisms to monitor the impact of the repeal of the Schoolkids Bonus or Income Support Bonus. However, people experiencing financial hardship may access existing support services delivered by Centrelink and other Government funded services.¹

Committee response

2.62 The committee thanks the Parliamentary Secretary to the Treasurer for his response. Noting that the bill is not proceeding, the committee has concluded its examination of this bill.

2.63 However, the committee notes that the Parliamentary Secretary's response did not provide a detailed and evidence-based explanation for the measures. The response simply states that the 'LISC repeal and the SG rephrase are occurring in the context of fiscal savings for the Government'. The committee notes that, to

1 See Appendix 2, Letter from The Hon Steven Ciobo MP, Parliamentary Secretary to the Treasurer, to Senator Dean Smith, 21 May 2014, pp 1-2.

demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why proposed measures are necessary in pursuit of a legitimate objective, and are reasonable and proportionate means to achieve that objective.

Paid Parental Leave Amendment Bill 2014

Portfolio: Small Business

Introduced: House of Representatives, 19 March 2014

Purpose

2.64 The Paid Parental Leave Amendment Bill 2014 (the bill) seeks to amend the *Paid Parental Leave Act 2010* (the Act) to remove the requirement for employers to provide government-funded parental leave pay to their eligible long-term employees. Instead, from 1 July 2014, employees would be paid directly by the Department of Human Services (DHS), unless an employer opted in to providing parental leave pay to its employees and an employee agreed for their employer to pay them.

Background

2.65 The committee reported on the bill in its *Fifth Report of the 44th Parliament*.

Committee view on compatibility

Right to social security and right to just and favourable conditions at work

Removal of requirement for employers to provide government-funded parental leave pay

2.66 The committee sought clarification from the Minister for Small Business as to whether the removal of the requirement for employers to provide government-funded parental leave pay may limit the right to social security and the right to just and favourable conditions of work and, if so:

- 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.

Minister's response

Right of everyone to social security, including social insurance

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to social security. This right requires a social security system to be established and that State Parties must, within their maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the Convention on the Rights of the Child requires that State Parties ensure that right for every child and states that "the benefits should, where appropriate, be granted, taking into account the resources and the

circumstances of that child and persons having responsibility for the maintenance of that child."

Article 10 of the ICESCR further states that, "Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such a period working mothers should be accorded paid leave or leave with adequate social security benefits."

In addition, Article 11 (2)(b) of the Convention to Eliminate all forms of Discrimination Against Women (CEDAW) requires State Parties "to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances."

The Committee has sought: clarification as to whether the measures in the Bill may limit the right to social security, to the extent that the measure may result in reduced after-tax income for employees with salary sacrifice arrangements in place.

Payments under the PPL scheme engage the right to social security, and the amendments to the employer paymaster role under this Bill do not limit the essential level of benefits required as part of that right.

Payments under the PPL scheme are currently considered to provide an adequate social security benefit. The proposed amendments do not affect eligibility for PLP or the entitlement to paid or unpaid leave from employment before or after the birth of the child. The proposed amendments also do not affect the rate of pay, which is consistent regardless of whether PLP is paid by their employer or by the Department of Human Services (currently, around 76 per cent of PLP recipients are paid by their employer and 24 per cent are paid by the Department of Human Services).

Under the proposed amendments, in place of the current mandatory requirement their employers pass on PLP to their long-term employees, employers and employees would need to agree to this payment arrangement. Similarly, there will still be capacity to make salary sacrifice deductions against PLP payments where employers and employees agree.

The ability to make deductions for salary sacrificing is unique to PLP amongst all government payments, given the PLP employer paymaster role. This policy allows employers to apply the same treatment to PLP payments they administer on behalf of the Government as for the payment of salary and wages, if they so wish and can afford to do so. The ability for an employee to reduce the tax liability for their PLP payment through salary sacrificing is not guaranteed even under current arrangements. Therefore, there is no limitation to the right to social security as these amendments do not limit this essential level of benefit or limit access to the scheme, and allow the continuation of salary sacrifice arrangements where the employer opts in and agrees.

Right to just and favourable conditions at work

Article 7 of the ICESCR recognises the right of everyone to the enjoyment of just and favourable conditions of work. This Article seeks to ensure fair and equal wages and remuneration, safe and healthy working conditions, equal opportunity for promotion in the workplace, and adequate access to rest, leisure, and periodic paid leave.

As discussed above, Article 11 (2)(b) of CEDAW also refers to women being able to access time off work around the birth "without loss of former employment, seniority or social allowances".

Payments under the PPL scheme do not engage the right to just and favourable conditions at work as they are a government payment which is provided on the basis of past labour force participation in addition to other non-work related eligibility criteria. Access to PLP is not a condition of employment and receipt of PLP through an employer does not ensure the continuation of salary sacrifice deductions.

Despite the PPL scheme not engaging the right to just and favourable conditions at work, access to the scheme encourages the continuing participation of women in the labour force (either as an employee or in another capacity such as self-employment). Generally, a working parent cannot work during the PPL period if they wish to remain eligible for payment, however limited participation is allowed through the use of 'keeping-in-touch' days.

The proposed changes to the mandatory employer paymaster role do not limit the existing right to access 12 months of unpaid parental leave without the loss of employment or seniority within the workplace, nor will the measure affect the standards or provisions contained within the National Employment Standards or the *Fair Work Act 2009*.¹

Committee response

2.67 The committee thanks the Minister for Small Business for his response and has concluded its examination of this matter.

Right to equality and non-discrimination

Potential for reduced after-tax income to indirectly discriminate against women

2.68 The committee sought further information from the Minister for Small Business regarding the potential for reduced after-tax income to indirectly discriminate against women and, accordingly, as to whether the bill is compatible with the right to equality and non-discrimination.

1 See Appendix 2, Letter from The Hon Bruce Billson MP, Minister for Small Business, to Senator Dean Smith, 28 April 2014, [pp 1-3].

Minister's response

Article 2 of the ICESCR recognises the right to non-discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 seeks to ensure the right of both men and women to the enjoyment of all economic, social, and cultural rights set forth within the convention.

The Committee noted that the extent the measure is compatible with the right to social security it is also likely to be consistent with the right to non-discrimination.

As outlined above, the proposed amendments do not limit the right to social security. As the enjoyment of the right to social security is not limited by the amendments, this Bill also does not limit the rights to equality and non-discrimination.²

Committee response

2.69 The committee thanks the Minister for Small Business for his response and has concluded its examination of this matter.

2 See Appendix 2, Letter from The Hon Bruce Billson MP, Minister for Small Business, to Senator Dean Smith, 28 April 2014, [p. 3].

Tax Bonus for Working Australians Repeal Bill 2013

Portfolio: Treasury

Introduced: House of Representatives, 12 December 2013

Purpose

2.70 The Tax Bonus for Working Australians Repeal Bill 2013 (the bill) repealed the *Tax Bonus for Working Australians Act (No. 2) 2009* (the TBA), which authorised the Commissioner of Taxation (the commissioner) to pay a tax bonus to eligible tax payers. Eligible tax payers are those who paid tax in the 2007-08 income year and who had a taxable income of \$100 000 or less.

2.71 The effect of the bill is that no further tax bonus payments could be made by the commissioner.

Background

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

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

Committee view on compatibility

Right to an adequate standard of living

Impact of measure on low-income earners

2.74 The committee sought information on the income brackets of persons who would have remained eligible for the payment, including what proportion of persons would likely be low-income earners.

Parliamentary Secretary's response

For the Tax Bonus Repeal Bill, the Committee has expressed concerns about whether the Bill may engage the right to social security and the right to an adequate standard of living. The Committee has sought information about the income of those affected by the repeal, including the proportion of low income earners who may be affected.

The Bill ensures no further \$900 stimulus payments are made to taxpayers. The eligibility for the payment, including the proportion of low income earners entitled to a payment, was established by the Tax Bonus/or Working Australians Bill 2009.

The Government is comfortable the measures set out in the Bill are compatible with human rights.¹

1 See Appendix 2, Letter from The Hon Steven Ciobo MP, Parliamentary Secretary to the Treasurer, to Senator Dean Smith, 21 May 2014, p. 2.

Committee response

2.75 The committee thanks the Parliamentary Secretary to the Treasurer for his response and has concluded its examination of the bill.

2.76 However, the committee notes that the Parliamentary Secretary's response did not provide a detailed and evidence-based explanation for the measures in accordance with the committee's usual expectations.

Corporations and Related Legislation Amendment Regulation 2013 (No. 1) [F2013L01264]

Portfolio: Treasury

Authorising legislation: Australian Securities and Investments Commission Act 2001, Business Names Registration (Fees) Act 2011, Corporations Act 2001, Corporations (Aboriginal and Torres Strait Islander) Act 2006, Corporations (Fees) Act 2001, Fair Work (Registered Organisations) Act 2009, Occupational Superannuation Standards Act 1987, Statutory Declarations Act 1959 and Superannuation Industry (Supervision) Act 1993

Last day to disallow: 4 March 2014 (Senate)

Purpose

2.77 In July 2011, the Australian Accounting Standards Board (AASB) announced the withdrawal of certain disclosure requirements contained in the accounting standards it publishes, with effect from 1 July 2013. This instrument places remuneration disclosure requirements into the Corporations Regulations 2001 following the removal of these requirements from the relevant accounting standards.

Background

2.78 The committee reported on the instrument in its *First Report of the 44th Parliament*.

Committee view on compatibility

Right to privacy

Disclosure of information

2.79 The committee sought clarification regarding whether personal information will be released through remuneration disclosure and, if so, what protections are provided to ensure the instrument is compatible with the right to privacy.

Parliamentary Secretary's response

The Regulation identifies a number of disclosures that must be included in the remuneration report of a listed entity related to transactions between key management personnel, or related parties that exert control or influence, and the listed entity.

These disclosures are designed to achieve the objective of ensuring that the company reports contain the disclosures necessary to draw attention to the possibility that its financial position and profit and loss may have been affected by transactions entered into with key management personnel or related parties that exert control or influence.

These disclosures are not designed to require entities to release personal information, or information that is unrelated to transactions entered into

by the disclosing entity. However, consideration will be given to regulatory amendments that clarify the operation of the Regulation where necessary.¹

Committee response

2.80 The committee thanks the Acting Assistant Treasurer for his response and has concluded its examination of this instrument.

2.81 The committee welcomes the Acting Assistant Treasurer's statement that appropriate regulatory amendments will be considered to clarify the operation of the regulation.

1 See Appendix 2, Letter from Senator the Hon Mathias Cormann, Acting Assistant Treasurer, to Senator Dean Smith, 23 May 2014.

Appendix 1

**Index of instruments considered and
received by the committee between
31 May and 6 June 2014**

Appendix 1: Full list of Legislative Instruments received by the committee between 31 May and 6 June 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 31 May and 6 June 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 6 June 2014

<i>Agricultural and Veterinary Chemicals Code Act 1994</i>	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 6) [F2014L00625]	E
<i>Airports Act 1996</i>	
Airports Amendment (Service Monitoring) Regulation 2014 [SLI 2014 No. 66] [F2014L00623]	
<i>Airspace Regulations 2007</i>	
CASA OAR 061/14 - Determination of airspace and controlled aerodromes etc [F2014L00620]	E
<i>Australian Prudential Regulation Authority Act 1998</i>	
Australian Prudential Regulation Authority (confidentiality) determination No. 7 of 2014 [F2014L00613]	
Australian Prudential Regulation Authority (confidentiality) determination No. 6 of 2014 [F2014L00645]	
<i>Broadcasting Services Act 1992</i>	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 6 of 2014) [F2014L00617]	
<i>Civil Aviation Regulations 1988</i>	
CASA 104/14 - Direction — number of cabin attendants (Capiteq Limited) [F2014L00655]	
<i>Civil Aviation Safety Regulations 1998</i>	
CASA ADCX 010/14 - Repeal of Airworthiness Directives [F2014L00612]	
CASA ADCX 011/14 - Repeal of Airworthiness Directive [F2014L00647]	
<i>Currency Act 1965</i>	
Currency (Perth Mint) Determination 2014 (No. 3) [F2014L00637]	
<i>Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and Certain Other Persons (the Public Sector Superannuation Scheme)</i>	
Superannuation (PSS) Productivity Contribution (2014-2015) Determination 2014 [F2014L00650]	E
Superannuation (PSS) Maximum Benefits (2014-2015) Determination 2014 [F2014L00651]	E
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	
Amendment of List of Exempt Native Specimens - Northern Territory Demersal Fishery (22/05/2014) [F2014L00616]	
Amendment of List of Exempt Native Specimens - Queensland Gulf of Carpentaria Inshore Fin Fish Fishery (27/05/2014) [F2014L00652]	
<i>Fair Entitlements Guarantee Act 2012</i>	
Fair Entitlements Guarantee (Indexation of Maximum Weekly Wage) Amendment Regulation 2014 [SLI 2014 No. 58] [F2014L00633]	
<i>Farm Household Support Act 2014</i>	

Farm Household Support Secretary's Rule 2014 [F2014L00614]	
Federal Financial Relations Act 2009	
Federal Financial Relations (National Partnership payments) Determination No. 74 (February 2014) [F2014L00654]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 58 (January 2014) [F2014L00656]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 59 (February 2014) [F2014L00657]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 60 (March 2014) [F2014L00658]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 61 (April 2014) [F2014L00659]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 62 (May 2014) [F2014L00660]	E
Financial Management and Accountability Act 1997 Financial Management and Accountability Amendment (2014 Measures No. 5) Regulation 2014 [SLI 2014 No. 59] [F2014L00635]	
Financial Sector (Collection of Data) Act 2001	
Financial Sector (Collection of Data) (reporting standard) determination No. 11 of 2014 [F2014L00618]	
Food Standards Australia New Zealand Act 1991	
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 5, 2014 [F2014L00621]	E
Health Insurance Act 1973	
Amendment Declaration of Quality Assurance Activities under section 124X of the Health Insurance Act 1973 - QAA 1/2014 [F2014L00640]	
Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 2/2014 [F2014L00641]	
Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 3/2014 [F2014L00642]	
Higher Education Support Act 2003	
Higher Education Support Act 2003 - VET Provider Approval (No. 33 of 2014) [F2014L00615]	
Higher Education Support Act 2003 - VET Provider Approval (No. 30 of 2014) [F2014L00653]	
Migration Act 1958	
Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [SLI 2014 No. 65] [F2014L00622]	D
Migration Amendment (Offshore Resources Activity) Regulation 2014 [SLI 2014 No. 64] [F2014L00624]	
Migration Regulations 1994	
Migration Regulations 1994 - Specification of Places and Currencies for Paying of Fees - (Places and Currencies Instrument) - IMMI 14/006 [F2014L00646]	E

Migration Regulations 1994 - Specification of Payment of Visa Application Charges and Fees in Foreign Currencies (Conversion Instrument) - IMMI 14/005 [F2014L00648]	E
National Health Act 1953	
National Health (Residential Medication Chart) Amendment Determination 2014 (No. 1) (No. PB 24 of 2014) [F2014L00634]	
National Health (Pharmaceutical Benefits) Amendment (Price Disclosure) Regulation 2014 [SLI 2014 No. 60] [F2014L00636]	
National Residue Survey (Excise) Levy Act 1998 and National Residue Survey (Customs) Levy Act 1998	
Primary Industries Levies and Charges (National Residue Survey Levies) Amendment (Onions) Regulation 2014 [SLI 2014 No. 57] [F2014L00629]	
Primary Industries (Customs) Charges Act 1999	
Primary Industries (Customs) Charges Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 54] [F2014L00626]	
Primary Industries (Excise) Levies Act 1999	
Primary Industries (Excise) Levies Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 55] [F2014L00628]	
Primary Industries Levies and Charges Collection Act 1991	
Primary Industries Levies and Charges Collection Amendment (Mushrooms) Regulation 2014 [SLI 2014 No. 56] [F2014L00627]	
Programs and Awards Statute 2013	
Assessment Rules 2014 [F2014L00587]	E
Protection of the Sea (Prevention of Pollution from Ships) Act 1983 and Navigation Act 2012	
Marine Order 91 (Marine pollution prevention — oil) 2014 [F2014L00638]	
Marine Order 93 (Marine pollution prevention — noxious liquid substances) 2014 [F2014L00643]	
Social Security Act 1991	
Social Security (Personal Care Support - NSW Lifetime Care and Support Scheme - direct funding of treatment, rehabilitation and care services) Determination 2014 [F2014L00619]	
Superannuation Act 1976	
Superannuation (CSS) Productivity Contribution (2014-2015) Declaration 2014 [F2014L00649]	
Superannuation Industry (Supervision) Act 1993	
Superannuation Data and Payment Standards (Contribution Transitional Arrangements) Amendment 2014 [F2014L00608]	E
Telecommunications (Consumer Protection and Service Standards) Act 1999	
Telecommunications Universal Service Obligation (First Declaration Deferral Period) Declaration 2014 [F2014L00639]	
Telecommunications (Interception and Access) Act 1979	
Notice of a declaration of a Commonwealth Royal Commission as an eligible Commonwealth authority under section 5AA of the Telecommunications (Interception and	

Access) Act 1979 [F2014L00644]	
<i>Therapeutic Goods (Charges) Act 1989</i>	
Therapeutic Goods (Charges) Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 61] [F2014L00631]	
Therapeutic Goods Legislation Amendment (Fees and Other Measures) Regulation 2014 [SLI 2014 No. 62] [F2014L00630]	
Therapeutic Goods Legislation Amendment (In Vitro Diagnostic Medical Devices) Regulation 2014 [SLI 2014 No. 63] [F2014L00632]	

The committee considered 51 instruments

Appendix 2

Correspondence



SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: C14/733

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

Dear Senator Smith

Thank you for your letter of 4 March 2014 about the statements of compatibility with human rights in the Explanatory Memoranda that accompanied the Additional Estimates Appropriation Bills.

Given that the legal effect of Appropriation Bills is extremely limited, I can confirm to the committee that I do not consider that these Bills engage, or otherwise affect, the rights, obligations or freedoms relevant to the *Human Rights (Parliamentary Scrutiny) Act 2011*.

I note that a similar question along these lines was raised by your predecessor committee last year.

My predecessor, Senator the Hon Penny Wong, replied on 10 May 2013 advising that it is neither practicable nor appropriate for the Explanatory Memoranda to Appropriation Bills to set out a concise assessment of how human rights are affected by all of the Government's Budget decisions. This remains the case.

The approach of requiring human rights impact assessments to be incorporated in portfolio budget statements, suggested in your committee's report, is also neither practicable nor appropriate.

This is also true in relation to whether complex budgetary processes can expressly take account of human rights factors. Taking that approach would entrench an extensive drafting exercise and the need to obtain detailed assessments from all agencies across the Australian Government.

That said, however, the budgetary processes do, by their nature, require an assessment of all factors that might relate to the relevant policies, including environmental, legal, economic, social and moral factors. Human rights factors are also part of these many factors taken into account.

If it would assist your committee further, I would be pleased for officials from the Department of Finance to brief the committee on aspects of the Appropriation Bills and their Explanatory Memoranda.

I have copied this letter to the Prime Minister, the Treasurer and the Attorney-General.

Thank you for bringing the committee's concerns to my attention.

Kind regards

Mathias Cormann
Minister for Finance

17 March 2014



THE HON STEVEN CIOBO MP
Parliamentary Secretary to the Treasurer

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

Dear Senator Smith

Thank you for your letters, received on 16 April 2014, on behalf of the Parliamentary Joint Committee on Human Rights (Committee) regarding the Clean Energy (Income Tax Rates and Other Amendments) Bill 2013 (Clean Energy (Income Tax) Repeal Bill), Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 (MRRT Repeal Bill) and Tax Bonus for Working Australians Repeal Bill 2013 (Tax Bonus Repeal Bill).

The Treasurer has asked me to respond to you on these matters.

Clean Energy (Income Tax Rates and Other Amendments) Bill 2013

For the Clean Energy (Income Tax) Repeal Bill, the Committee has sought clarification about the impact of proposed changes the Bill would make to the income tax rates and thresholds, as well as the low income tax offset.

The Clean Energy (Income Tax) Repeal Bill does not seek to make any changes to the current operation of income tax rates, thresholds and offsets. Instead, it forestalls a number of planned changes that would otherwise come into effect from 1 July 2015. As a result, no taxpayer will end up with any greater tax liabilities as a result of these amendments than they would be subject to on an equivalent income in the current year.

Given the only consequence of the Clean Energy (Income Tax) Repeal Bill will be to preserve the currently applicable tax arrangements, the Government is comfortable the proposed changes are compatible with human rights.

I also note none of the changes would have any impact on an individual's entitlement to government support, such as unemployment benefits or the age pension, should they meet the relevant income and other tests.

Minerals Resource Rent Tax Repeal and Other Measures Bill 2013

Schedules 6 and 7

For the MRRT Repeal Bill, the Committee sought clarification as to whether the superannuation guarantee (SG) and the low income superannuation contribution (LISC) measures contained in

Schedules 6 and 7 of the Bill are compatible with the right to an adequate standard of living and the right to social security.

The LISC repeal and the SG rephrase are occurring in the context of fiscal savings for the Government. These measures were linked to the failed Minerals Resource Rent Tax with the Government borrowing money to pay for these commitments. Repealing the LISC and rephrasing the SG needs to be seen in this context and will assist in repairing the damage done to the nation's finances.

The Government is comfortable the measures set out in Schedules 6 and 7 of the MRRT Repeal Bill are compatible with human rights.

Schedules 8 and 9

The Committee also sought clarification on whether the amendments in Schedules 8 and 9 to remove the Income Support Bonus and Schoolkids Bonus will be accompanied by appropriate mechanisms to monitor and address any undue hardship the cessation of these payments may cause to vulnerable individuals and families.

There are no specific mechanisms to monitor the impact of the repeal of the Schoolkids Bonus or Income Support Bonus. However, people experiencing financial hardship may access existing support services delivered by Centrelink and other Government funded services.

Tax Bonus for Working Australians Repeal Bill 2013

For the Tax Bonus Repeal Bill, the Committee has expressed concerns about whether the Bill may engage the right to social security and the right to an adequate standard of living. The Committee has sought information about the income of those affected by the repeal, including the proportion of low income earners who may be affected.

The Bill ensures no further \$900 stimulus payments are made to taxpayers. The eligibility for the payment, including the proportion of low income earners entitled to a payment, was established by the *Tax Bonus for Working Australians Bill 2009*.

The Government is comfortable the measures set out in the Bill are compatible with human rights.

I trust this information will be of assistance to the Committee.

Yours sincerely

Steven Ciobo

21 MAY 2014



COPY

**THE HON PETER DUTTON MP
MINISTER FOR HEALTH
MINISTER FOR SPORT**

Ref No: MC14-005721

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

Dear ^{Dean,}Chair

Thank you for your correspondence of 13 May 2014 on behalf of the Parliamentary Joint Committee on Human Rights regarding the Dental Benefits Legislation Amendment Bill 2014 (the Bill).

You have asked for clarification on a number of matters relating to the right to a fair trial and fair hearing rights which have been raised by the Committee's *Sixth Report of the 44th Parliament* (the Report).

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

At paragraph 1.40 of the Report, the Committee seeks clarification on whether the civil penalty proposed by new section 32D may be regarded as 'criminal' for the purposes of articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

Proposed new section 32C provides a power to the Chief Executive Medicare to issue to certain persons a notice to produce documents relevant to substantiating the payment of dental benefits under the *Dental Benefits Act 2008* (the DB Act). A notice may be issued to the dental provider who billed the service or to another person who may have custody or control of relevant documents, other than the patient or the person who incurred the dental expenses in respect of the service (for example, the patient's parent).

Where a dental provider does not comply with the notice to produce documents, the amount paid, purportedly by way of dental benefit, is recoverable as a debt due to the Commonwealth from the dental provider. The civil penalty provision proposed by new section 32D applies to people, other than a dental provider, who fail to comply with the notice to produce documents. This is intended to apply to entities such as a corporatised dental practice which may employ the dental provider.

The provisions in Part 3 of Schedule 1 of the Bill requiring the production of documents are modelled closely on provisions contained in the *Health Insurance Act 1973* (the HI Act) and are intended to be similar in scope. As with the civil penalty provision under section 129AAE of the HI Act, proposed new section 32D is necessary as it would not be acceptable to seek recovery of dental benefits from a practitioner and impose a penalty if that practitioner was unable to verify the benefit paid for the service due to refusal by another party to provide relevant documents. This compliance measure would also be unworkable if practitioners were able to establish corporate entities or structure employment arrangements in such a way as to avoid complying with the requirements of the proposed legislation.

The United Nations Human Rights Committee established under the ICCPR can be referred to for guidance on the nature of the proposed civil penalties for the purposes of human rights law.

In its General Comment 32, the United Nations Human Rights Committee sets out its view that an offence, designated as 'civil' in domestic law, may be regarded as 'criminal' because of its purpose, character or severity.

In considering the nature of the civil penalty under proposed section 32D, the penalty could be considered as punitive as its purpose is to deter non-compliance and to punish non-compliance when it occurs.

However, the penalty does not apply to the public at large and operates in a regulatory context. It applies only to people, other than dental providers or patients, who may have custody of a document containing information able to substantiate payment of a dental benefit. It is necessary to ensure the integrity of the regulatory framework for the payment of dental benefits. Therefore, the civil penalty does not appear to be criminal in nature.

In relation to the severity of the penalty, the maximum penalty imposed under proposed new section 32D is 20 penalty units for an individual and 100 penalty units for a corporation. This penalty is minor and does not reflect the degree of severity required to be considered 'criminal' for the purposes of human rights law.

Given the purpose, character and severity of the penalty, it is my view that it should not be considered as 'criminal' for the purposes of human rights law.

Reverse burden of proof – presumption of innocence

At paragraph 1.53 of the Report, the Committee seeks advice on the compatibility of the reverse onus of proof provision in proposed new subsection 32D (2) with the right to a fair trial and fair hearing contained in article 14 of the ICCPR.

Proposed subsection 32D (2) provides that it is a defence if the failure to produce documents is brought about through circumstances outside the person's control or if they could not reasonably be expected to guard against the failure.

This limitation on the right to be presumed innocent is reasonable and necessary because the defendant alone will have knowledge of the circumstances that might reasonably excuse non-compliance. As the civil evidence and procedure rules apply, the defendant need only prove their innocence on the balance of probabilities, rather than to the criminal evidence requirement of 'beyond reasonable doubt'.

Exclusion of the right not to incriminate oneself

Paragraph 1.61 of the Report seeks clarification on whether the limitation of the right not to incriminate oneself in proposed section 32E is a reasonable and necessary limitation and is proportionate to achieving a legitimate objective.

As noted in the explanatory memorandum to the Bill (page 10):

This Part is intended to ensure that benefits may be recovered if they have been incorrectly paid. Excusing persons from producing documents on the basis that they may have to repay benefits would allow persons to retain incorrectly paid benefits by refusing to comply with the request. The public interest in ensuring that benefits under the Act are not paid inappropriately, and that inappropriate payments are recovered, is considered to outweigh the harm to individual rights from encroaching on the privilege against self-incrimination.

Prior to the introduction of similar powers to the HI Act requiring the production of documents to substantiate Medicare benefits (and a similar abrogation of the privilege against self-incrimination), around 20 per cent of practitioners did not cooperate with the request to produce documents.

The abrogation of the privilege against self-incrimination is necessary to ensure the integrity of programmes operating under the DB Act, in particular, the new Child Dental Benefits Schedule (CDBS). The CDBS is expected to spend \$2.5 billion of public money over four years from 2014-15.

Further, under the CDBS, benefits are limited to a maximum of \$1,000 per eligible patient over two calendar years. This means that, if a dental provider claims benefits for services that have not been provided, the patient may not have sufficient funds remaining in the cap to receive necessary treatment from a different dental provider. This may leave patients in need of treatment but unable to pay for it themselves. The requirement for providers to produce documents provides the Department of Human Services with a mechanism to limit adverse effects on patients, particularly where benefits are limited.

Under these circumstances, I consider that the protection of public money and patient access to timely and appropriate dental treatment outweigh the harm on an individual's rights to be protected against self-incrimination.

Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

29/5/14

PETER DUTTON

cc: human.rights@aph.gov.au



SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: C14/1283

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

Dear Chair

I am writing in response to your letter, dated 10 December 2013. I apologise for the delay in responding to you, however my Office did not receive the letter until 16 April 2014. Officials from my Department have discussed this matter and the content of my response with Ms Hannah Dibley from your Secretariat.

I understand that my predecessor wrote to the Committee on 27 June 2013, responding to comments on the *Financial Framework Legislation Amendment Bill (No. 2) 2013* (FFLA Bill) dated 20 March 2013.

You have asked for clarification of amendments made by the FFLA Bill to the *Social Security Act 1991* (Social Security Act) regarding payments made under the Australian Government Disaster Recovery Payments scheme (the scheme). It is first necessary to explain the background to these amendments, and the context of the FFLA Bill in general.

The amendments to the Social Security Act were designed to address potential inconsistencies with section 83 of the Australian Constitution, which sets out the rules for payments of money made by the Commonwealth. In summary, no money is to be drawn from the consolidated revenue fund except under an appropriation, made by the Parliament for a specified purpose.

An appropriation specifies the purpose(s) for which money may be spent, and associated legislation, including regulations, may specify conditions under which payments are to be made. For example, who is entitled to be paid and how much in specific circumstances. Drawing money from the consolidated revenue fund beyond the scope of the appropriation's purpose constitutes a breach of section 83.

In 2012, the Australian National Audit Office (ANAO) raised with Finance that it had identified potential inconsistencies with section 83 of the Constitution across a range of Commonwealth payments being made by Departments and agencies. The ANAO asked Finance to work with all Departments and agencies to ensure they addressed any further section 83 issues. The majority of issues subsequently identified required amendments to legislation and the previous Finance Minister offered FFLA Bills as a mechanism for Departments and agencies to make the necessary amendments.

While these amendments were made through a FFLA Bill, put to the Parliament by the previous Finance Minister, the policy substance of the amendment to the Social Security Act was requested by the then Attorney-General.

The intention of the amendments was to ensure that in disaster situations, recovery payments would be able to be made even where the qualification requirements of the scheme could not be satisfied. For example, during the Victorian bushfires, many people were unable to provide evidence of identity as required due to the nature of the disaster. The amendments sought to ensure that recovery funds would be able to be made in an emergency, while an administrative recovery framework would be in place should incorrect payments be discovered at a later date.

The recoverable payment provisions were excluded from merits review under the *Social Security(Administration) Act 1999* because the associated arrangements only relate to payments that are later found not to meet the qualification requirements under the Social Security Act. These provisions provide a mechanism for the Department to recover payments that are ineligible at law and do not go to matters of eligibility, merit or quantum. Importantly, external merits review would be available under Part 4 of the *Social Security (Administration) Act 1999* for decisions that determine qualification to a payment made under section 1061K of the Social Security Act.

Judicial review would also be available for all decisions made under the scheme, including decisions to recover a payment. This would include judicial review under the *Administrative Decisions (Judicial Review) Act 1977* or section 75(v) of the Constitution. In such an instance, the court would examine the lawfulness of the relevant administrative decision, potentially including a review of the facts to determine the legality of the decision.

On the basis of the availability of these review mechanisms, I do not consider that human rights have been impinged by the amendments to the Social Security Act.

I have copied this letter to the Attorney-General, given his portfolio responsibility.

Thank you for bringing the Committee's concerns to my attention.

Kind regards

Mathias Cormann
Minister for Finance

 May 2014



PARLIAMENTARY SECRETARY
TO THE PRIME MINISTER

C14/22343

10 April 2014

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

Dear Senator ^{/Dean}

Thank you for your letter dated 25 March 2014 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) in relation to the Independent National Security Legislation Monitor Repeal Bill 2014 (the bill). I write to respond on the Prime Minister's behalf.

I note the Committee is seeking clarification to assess the compatibility of the bill with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

I provide the following in response to the Committee's queries:

"1.8 The committee seeks further information on the types of mechanisms and measures that the government considers will provide continued coverage of the Independent National Security Legislation Monitor's mandate of ensuring that Australia's counter-terrorism and national security legislation are compatible with human rights."

Australia's national security legislation is subject to oversight by multiple independent and Parliamentary scrutiny mechanisms, which are robust and extensive. This is so despite the limited exercise of the powers contained in such legislation, which is consistent with the Parliament's intention that they are extraordinary measures that are to be reserved for emergencies. The Government considers that, in combination, these mechanisms cover the field in terms of the grounds of independent review, including in the scrutiny of human rights compatibility.

Parliament House CANBERRA ACT 2600

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Statutory Oversight Mechanisms

The statutory oversight office of the Inspector-General of Intelligence and Security (IGIS) is invested with broad powers to inquire (on the IGIS's own motion or on a reference from the Prime Minister) into the powers, functions and broader practices of all intelligence and security agencies. This includes powers to examine and make recommendations to the Government about matters concerning: the legal compliance of the acts or practices of an agency (including compliance with human rights obligations on the reference of the Australian Human Rights Commission); an agency's compliance with Ministerial directions; the propriety of particular activities of an agency; and the effectiveness, appropriateness, legality and propriety of an agency's procedures. The Australian Commissioner for Law Enforcement Integrity also has statutory mandates to investigate the actions of law enforcement agencies with responsibilities under counter-terrorism legislation.

Parliamentary Scrutiny

These independent statutory offices are additional to the integral role of the Parliament in the scrutiny of proposed legislation and its broader powers of inquiry. Various Parliamentary committees play a valuable role in scrutinising and reviewing legislation. This Committee has a valuable role in scrutinising the compatibility of any proposed counter-terrorism legislation with human rights requirements.

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) can review matters in relation to Australian intelligence agencies on reference from the Parliament or the responsible Minister and makes recommendations on the listing of individual terrorist organisations under the *Criminal Code Act 1995*. Several comprehensive reviews have been undertaken by the PJCIS, including its 2006 inquiries into the package of counter-terrorism legislation enacted in 2002, and an inquiry into the process for the listing of terrorist organisations completed in 2007. In addition, the PJCIS has a statutory mandate to review the operation, effectiveness and implications of the Australian Security Intelligence Organisation's questioning and detention warrants regime and questioning powers by 22 January 2016.

The Parliamentary Joint Committee on Law Enforcement also monitors and reviews the performance by the Australian Federal Police.

All major pieces of counter-terrorism legislation introduced since 2002 have benefited from considerable Parliamentary scrutiny, including in debate and via committee inquiries. As a number of counter-terrorism provisions will sunset in 2015 and 2016, any proposed renewal would provide a further opportunity for the Parliament to consider the necessity, effectiveness and appropriateness of these powers in contemporary circumstances.

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International Engagement and Obligations

Australia engages actively with the United Nations (UN) and other international standard-setting bodies in the scrutiny of our compliance with international obligations, including human rights obligations. This includes engagement in periodic treaty reporting mechanisms, such as the sixth periodic report on Australia under the *International Covenant on Civil and Political Rights* which is currently in progress. Other significant areas include Australia's engagement with the UN Human Rights Committee complaints resolution framework and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

Ad Hoc Reviews

These standing mechanisms are additional to the Government's ability to appoint executive reviews to undertake inquiries. This power has been exercised by successive Governments to establish comprehensive reviews of provisions, such as the Security Legislation Review Committee in 2006, the Independent Review of the Intelligence Community in 2011, and the Council of Australian Governments' (COAG) Review of Counter-Terrorism Legislation in 2012 (2012 COAG Review); as well as inquiries into specific exercises of power, such as the Clarke Inquiry into the case of Dr Haneef in 2008. While such reviews are convened at a particular point in time, they have, in practice, been examined in subsequent reviews. The 2012 COAG Review, for instance, referred extensively to the 2006 reports of the Security Legislation Review Committee and the PJCIS. The annual reports by the current Independent National Security Legislation Monitor, Mr Bret Walker SC, have also made references to the findings, recommendations and reasoning of previous ad hoc reviews.

Since the enactment of the first tranche of counter-terrorism specific legislation in 2002, the Government has consistently supported the need for independent oversight of the extraordinary powers conferred. This bottom line has not changed. We remain firmly in support of the principle that any extraordinary powers require appropriate independent oversight. Such oversight is critical to ensuring that the laws are operating in the manner intended, and to promoting public trust and confidence in their administration.

The decision to repeal the *Independent National Security Legislation Monitor Act 2010* was made after careful consideration of the role and function of extant oversight mechanisms. The Government considers that the best way forward is to work through the large number of recommendations made by Mr Walker and other recent independent reviews, and to continue engaging with the extensive range of existing oversight bodies. The Government is confident that despite the repeal Bill, there is, and will remain, no shortage of oversight bodies to conduct inquiries and investigations and provide independent advice to the Government and the Parliament of the day on counter-terrorism and national security legislation.

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“1.9 The committee also seeks information about the stage at which the Government’s consideration of the recommendations made by the Monitor during his period of appointment has reached, in particular those recommendations relating to the human rights concerns identified by the Monitor.”

The task of responding to the recommendations made by Mr Walker over the three-year term of his appointment, together with related recommendations from other independent legislative reviews, is an extensive and complex body of work. Mr Walker’s first annual report did not contain any recommendations, and his second and third annual reports made 21 and 30 recommendations respectively. The Attorney-General’s Department is leading the development of the Government’s response to Mr Walker’s second and third annual reports, ensuring a coordinated response to overlapping recommendations of the 2012 COAG Review. In total, the Monitor (in his second and third reports) and the 2012 COAG Review made 98 recommendations, which are under careful consideration. This includes close consultation with states and territories under the auspices of COAG. The Government intends to respond to each report once this significant process of consideration and consultation is complete.

As most recommendations raise complex legal, policy and operational issues, and many overlap and in several instances conflict, it is essential that each recommendation and its supporting reasoning and evidence base is analysed thoroughly. Work is well advanced on responses to the 68 recommendations contained in Mr Walker’s second annual report and the COAG Review, which were tabled in Parliament by the previous Government on 14 May 2013. These responses will address recommendations on provisions relating to control orders, preventative detention orders, police powers, ASIO’s questioning and detention warrants regime and questioning powers, and definition of a terrorist act and the terrorism offences in the *Criminal Code Act 1995*.

Mr Walker provided his fourth annual report to the Prime Minister on 28 March 2014. This report contained a further 31 recommendations and will be tabled in accordance with section 29(5) of the *Independent National Security Legislation Monitor Act 2010*. The Government will also consider this report carefully and respond in due course.

The Government is committed to working through the comprehensive package of independent review recommendations provided over the previous three years, and to continue to engage constructively with the wide range of standing oversight, accountability and scrutiny bodies exercising responsibilities in relation to counter-terrorism legislation, including this Committee.

Yours sincerely

JOSH FRYDENBERG



Minister for Small Business

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

28 APR 2014


Dear Senator Smith

Thank you for your letter of 25 March 2014 concerning the introduction of the *Paid Parental Leave Amendment Bill 2014* (the Bill).

I understand that the Parliamentary Joint Committee on Human Rights (the Committee) has requested further information as to the compatibility of the measures in the Bill with the right to social security, the right to just and favourable conditions of work, and the right to equality and non-discrimination. The Committee previously considered these amendments when they were first introduced in Schedule 7 of the *Social Services and Other Legislation Amendment Bill 2013*. The amendments were withdrawn from the *Social Services and Other Legislation Amendment Bill 2013* and re-introduced as amendments in the Bill.

The current Paid Parental Leave (PPL) scheme provides 18 weeks of Parental Leave Pay (PLP) at the level of the national minimum wage to eligible recipients. Eligibility criteria for PLP looks at past labour force participation (either as an employee or as a self-employed person), as well as other factors such as Australian residency and income. Receipt of PLP is not taken to be 'working', and PLP is neither remuneration for time taken off work, nor a condition of employment. While PLP is a flat rate payment, it is subject to certain deductions including PAYG withholdings and deductions authorised by the recipient, which could include deductions under a salary sacrifice arrangement.

The information the Committee has requested, as outlined in its *Fifth Report of the 44th Parliament*, is provided below.

Right of everyone to social security, including social insurance

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to social security. This right requires a social security system to be established and that State Parties must, within their maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the Convention on the Rights of the Child requires that State Parties ensure that right for every child and states that "the benefits should, where appropriate, be granted, taking into account the resources and the circumstances of that child and persons having responsibility for the maintenance of that child."

Article 10 of the ICESCR further states that, “Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such a period working mothers should be accorded paid leave or leave with adequate social security benefits.”

In addition, Article 11(2)(b) of the Convention to Eliminate all forms of Discrimination Against Women (CEDAW) requires State Parties “to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.”

The Committee has sought clarification as to whether the measures in the Bill may limit the right to social security, to the extent that the measure may result in reduced after-tax income for employees with salary sacrifice arrangements in place.

Payments under the PPL scheme engage the right to social security, and the amendments to the employer paymaster role under this Bill do not limit the essential level of benefits required as part of that right.

Payments under the PPL scheme are currently considered to provide an adequate social security benefit. The proposed amendments do not affect eligibility for PLP or the entitlement to paid or unpaid leave from employment before or after the birth of the child. The proposed amendments also do not affect the rate of pay, which is consistent regardless of whether PLP is paid by their employer or by the Department of Human Services (currently, around 76 per cent of PLP recipients are paid by their employer and 24 per cent are paid by the Department of Human Services).

Under the proposed amendments, in place of the current mandatory requirement that employers pass on PLP to their long-term employees, employers and employees would need to agree to this payment arrangement. Similarly, there will still be capacity to make salary sacrifice deductions against PLP payments where employers and employees agree.

The ability to make deductions for salary sacrificing is unique to PLP amongst all government payments, given the PLP employer paymaster role. This policy allows employers to apply the same treatment to PLP payments they administer on behalf of the Government as for the payment of salary and wages, if they so wish and can afford to do so. The ability for an employee to reduce the tax liability for their PLP payment through salary sacrificing is not guaranteed even under current arrangements. Therefore, there is no limitation to the right to social security as these amendments do not limit this essential level of benefit or limit access to the scheme, and allow the continuation of salary sacrifice arrangements where the employer opts in and agrees.

Right to just and favourable conditions at work

Article 7 of the ICESCR recognises the right of everyone to the enjoyment of just and favourable conditions of work. This Article seeks to ensure fair and equal wages and remuneration, safe and healthy working conditions, equal opportunity for promotion in the workplace, and adequate access to rest, leisure, and periodic paid leave.

As discussed above, Article 11(2)(b) of CEDAW also refers to women being able to access time off work around the birth “without loss of former employment, seniority or social allowances”.

Payments under the PPL scheme do not engage the right to just and favourable conditions at work as they are a government payment which is provided on the basis of past labour force participation in addition to other non-work related eligibility criteria. Access to PLP is not a condition of employment and receipt of PLP through an employer does not ensure the continuation of salary sacrifice deductions.

Despite the PPL scheme not engaging the right to just and favourable conditions at work, access to the scheme encourages the continuing participation of women in the labour force (either as an employee or in another capacity such as self-employment). Generally, a working parent cannot work during the PPL period if they wish to remain eligible for payment, however limited participation is allowed through the use of 'keeping-in-touch' days.

The proposed changes to the mandatory employer paymaster role do not limit the existing right to access 12 months of unpaid parental leave without the loss of employment or seniority within the workplace, nor will the measure affect the standards or provisions contained within the National Employment Standards or the *Fair Work Act 2009*.

Right to equality and non-discrimination

Article 2 of the ICESCR recognises the right to non-discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 seeks to ensure the right of both men and women to the enjoyment of all economic, social, and cultural rights set forth within the convention.

The Committee noted that the extent the measure is compatible with the right to social security it is also likely to be consistent with the right to non-discrimination.

As outlined above, the proposed amendments do not limit the right to social security. As the enjoyment of the right to social security is not limited by the amendments, this Bill also does not limit the rights to equality and non-discrimination.

I trust this information will be of assistance to you.

Yours sincerely

BRUCE BILSON



Minister for Finance
Acting Assistant Treasurer

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


Dear Chair

Corporations and Related Legislation Amendment Regulation 2013 (No. 1) [F2013L01264]

Thank you for your letter to the Parliamentary Secretary to the Treasurer dated 10 December 2013 in relation to the information release through remuneration disclosure. Your letter has been referred to me as I have portfolio responsibility for this matter.

Your letter draws attention to the committee's views on the *Corporations and Related Legislation Amendment Regulation 2013 (No. 1)* (the Regulation) as contained in the *First Report of the 44th Parliament*, which was tabled on 10 December 2013. In particular, the Committee has sought clarification on whether personal information will be released through remuneration disclosure and if so what protections are provided to ensure the instrument is compatible with the right to privacy.

The Regulation identifies a number of disclosures that must be included in the remuneration report of a listed entity related to transactions between key management personnel, or related parties that exert control or influence, and the listed entity.

These disclosures are designed to achieve the objective of ensuring that the company reports contain the disclosures necessary to draw attention to the possibility that its financial position and profit and loss may have been affected by transactions entered into with key management personnel or related parties that exert control or influence.

These disclosures are not designed to require entities to release personal information, or information that is unrelated to transactions entered into by the disclosing entity. However, consideration will be given to regulatory amendments that clarify the operation of the Regulation where necessary.

Kind regards

MATHIAS CORMANN

23 May 2014

Appendix 3

**Practice Note 1 and
Practice Note 2 (interim)**

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

PRACTICE NOTE 1

Introduction

This practice note:

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

The committee's approach to human rights scrutiny

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

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

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

The committee's expectations for statements of compatibility

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

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

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

may raise human rights concerns in the time available.

- In line with the steps set out in the assessment tool flowchart² (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:
 1. whether and how the limitation is aimed at achieving a legitimate objective;
 2. whether and how there is a rational connection between the limitation and the objective; and
 3. whether and how the limitation is proportionate to that objective.
- If no rights are engaged, the committee expects that reasons should be given, where possible, to support that conclusion. This is particularly important where such a conclusion may not be self-evident from the description of the objective provided in the statement of compatibility.

SEPTEMBER 2012

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

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

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

PRACTICE NOTE 2 (INTERIM)

CIVIL PENALTIES

Introduction

1.1 This interim practice note:

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

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

Civil penalty provisions

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

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

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

Human rights implications

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

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

The definition of 'criminal' in human rights law

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

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

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

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

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

When is a civil penalty provision ‘criminal’?

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

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

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

a) *Classification of the penalty under domestic law*

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

b) *The nature of the penalty*

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

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

c) The severity of the penalty

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

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

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

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

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

The committee’s expectations for statements of compatibility

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

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

1.17 In particular, the statement of compatibility should:

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

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

Right to be presumed innocent

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

Right not to incriminate oneself

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

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

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

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

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

1. Article 14

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

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

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

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

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

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

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

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

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

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

Article 15

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

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