Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Thirty-third report of the 44th Parliament

2 February 2016

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

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

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Functions of the committee

The committee has the following functions under the *Human Rights (Parliamentary Scrutiny) Act 2011*:

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

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as those contained in following seven human rights treaties to which Australia is a party:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of Discrimination against Women (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- Convention on the Rights of Persons with Disabilities (CRPD).

The establishment of the committee builds on the Parliament's established traditions of legislative scrutiny. Accordingly, the committee undertakes its scrutiny function as a technical inquiry relating to Australia's international human rights obligations. The committee does not consider the broader policy merits of legislation.

The committee's purpose is to enhance understanding of and respect for human rights in Australia and to ensure appropriate recognition of human rights issues in legislative and policy development.

The committee's engagement with proponents of legislation emphasises the importance of maintaining an effective dialogue that contributes to this broader respect for and recognition of human rights in Australia.

Committee's analytical framework

Australia has voluntarily accepted obligations under the seven core United Nations (UN) human rights treaties. It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Accordingly, the primary focus of the committee's reports is determining whether any identified limitation of a human right is justifiable.

International human rights law recognises that reasonable limits may be placed on most rights and freedoms—there are very few absolute rights which can never be legitimately limited.[1] All other rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

More information on the limitation criteria and the committee's approach to its scrutiny of legislation task is set out in Guidance Note 1, which is included in this report at Appendix 2.

1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

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Chapter 1

New and continuing matters

1.1 This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights of bills introduced into the Parliament from 30 November to 3 December 2015, legislative instruments received from 13 November to 10 December 2015, and legislation previously deferred by the committee.

1.2 The report also includes the committee's consideration of responses arising from previous reports.

1.3 The committee generally takes an exceptions based approach to its examination of legislation. The committee therefore comments on legislation where it considers the legislation raises human rights concerns, having regard to the information provided by the legislation proponent in the explanatory memorandum (EM) and statement of compatibility.

1.4 In such cases, the committee usually seeks further information from the proponent of the legislation. In other cases, the committee may draw matters to the attention of the relevant legislation proponent on an advice-only basis. Such matters do not generally require a formal response from the legislation proponent.

1.5 This chapter includes the committee's examination of new legislation, and continuing matters in relation to which the committee has received a response to matters raised in previous reports.

Bills not raising human rights concerns

1.6 The committee has examined the following bills and concluded that they either do not raise human rights concerns; or they do not require additional comment as they promote human rights or contain justifiable limitations on human rights (and may include bills that contain both justifiable limitations on rights and promotion of human rights):

- Australian Broadcasting Corporation Amendment (Rural and Regional Advocacy) Bill 2015;
- Australian Crime Commission Amendment (National Policing Information) Bill 2015;
- Australian Crime Commission (National Policing Information Charges) Bill 2015;
- Broadcasting Legislation Amendment (Digital Radio) Bill 2015;
- Communications Legislation Amendment (Deregulation and Other Measures) Bill 2015;

- Competition and Consumer Amendment (Payment Surcharges) Bill 2015;
- Corporations Amendment (Crowd-sourced Funding) Bill 2015;
- Courts Administration Legislation Amendment Bill 2015;
- Foreign Acquisitions and Takeovers Amendment (Strategic Assets) Bill 2015;
- Income Tax (Attribution Managed Investment Trusts—Offsets) Bill 2015;
- Income Tax Rates Amendment (Managed Investment Trusts) Bill 2015;
- Interactive Gambling Amendment (Sports Betting Reform) Bill 2015
- Insolvency Law Reform Bill 2015;
- Labor 2013-14 Budget Savings (Measures No. 2) Bill 2015;[1]
- Medicare Levy Amendment (Attribution Managed Investment Trusts) Bill 2015;
- Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015;
- Social Services Legislation Amendment (Budget Repair) Bill 2015;
- Social Services Legislation Amendment (Family Measures) Bill 2015;
- Tax and Superannuation Laws Amendment (2015 Measures No. 6) Bill 2015;
- Tax Laws Amendment (Implementation of the Common Reporting Standard) Bill 2015;
- Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015;
- Telecommunications (Numbering Charges) Amendment Bill 2015;
- Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015; and
- Water Amendment (Review Implementation and Other Measures) Bill 2015.

Instruments not raising human rights concerns

1.7 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[2] Instruments raising human rights concerns are identified in this chapter.

1.8 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they

1 The committee's conclusion that the bill raises no human rights concerns refers to the bill as passed by both Houses of Parliament following amendments in the Senate.

2 See Parliament of Australia website, 'Journals of the Senate', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

Previously considered measures

1.9 The committee refers to its previous comments in relation to the following bills which reintroduce measures previously considered by the committee:

- Criminal Code Amendment (Firearms Trafficking) Bill 2015;[3]
- Fair Work Amendment (Remaining 2014 Measures) Bill 2015;[4]
- Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015;[5] and
- Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill (No. 2) 2015.[6]

Deferred bills and instruments

1.10 As previously noted, the committee continues to defer one bill and a number of instruments in connection with the committee's current review of the *Stronger Futures in the Northern Territory Act 2012* and related legislation.[7]

3 For more information regarding the committee's previous comments: see Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 35.

4 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament* (June 2014) 13.

5 The bill continues arrangements in relation to the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 which the committee has previously considered; see Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (13 October 2015) 31.

6 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 53.

7 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015); and Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015).

Response required

1.11 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

Portfolio: Attorney-General
Introduced: Senate, 25 November 2015

Purpose

1.12 The Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (the bill) seeks to make a number of amendments to the *Family Law Act 1975* (FLA). In particular, the bill seeks to limit the jurisdiction of the Family Court to set aside financial agreements made at, or after, separation.

1.13 Measures raising human rights concerns or issues are set out below.

Power of the Family Court to set aside financial agreements

1.14 A binding financial agreement ousts the jurisdiction of the Family Court (the court) to make an order under the property settlement or spousal maintenance provisions of the FLA about the financial matters to which the agreement applies.

1.15 The FLA sets out a number of circumstances under which a court may set aside a financial agreement between spouses. Currently, a court can make an order setting aside a financial agreement if satisfied that a material change in circumstances relating to the care, welfare and development of a child has occurred and, as a result of the change, the child, or a party to the agreement who has caring responsibility for the child, will suffer hardship.

1.16 Schedule 1 would amend the FLA so that binding financial agreements entered into at the time of or after a relationship breakdown may be set aside by a court only in 'circumstances that are of an exceptional nature and relate to the care, welfare, and development of the child'.[1] The bill does not specify what is meant by 'exceptional' circumstances. However, the effect of the change in language from 'material change in circumstances' to 'exceptional' circumstances serves to narrow the court's power to set aside a financial agreement on the grounds that the child of the relationship will suffer hardship.

1 See items 17 and 33 of Schedule 1 to the bill, proposed new subsections 90K(2A) and 90UM(4A).

1.17 Financial agreements between separated parents involve considerations of the best interests of the child and judicial decisions must consider the best interests of a child as a primary consideration.[2]

Obligation to consider the best interests of the child

1.18 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[3]

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

1.20 This obligation is reflected in Part VII of the FLA. Under this Part, in deciding whether to make a particular parenting order, a court must regard the best interests of the child as the paramount consideration.[4] However, this requirement only applies to proceedings under Part VII. The amendments that this bill proposes modify Part VIIIA and Part VIIIAB. Neither of these Parts includes a reference to the best interests of the child. Therefore currently there is no express provision for the courts to have regard to the best interests of the child when considering whether to set aside a binding financial agreement.

Compatibility of the measure with the obligation to consider the best interests of the child

1.21 The bill would limit to exceptional circumstances the court's discretion to set aside a binding financial agreement entered into by the parents at the time of or after separation. This would limit the court's ability to issue orders relating to the financial affairs of parents that are in the best interests of a child.

1.22 The statement of compatibility does not acknowledge that amendments to the financial agreements regime engage the obligation to consider the best interests of the child. Therefore, it provides no assessment of the compatibility of the measure with the obligation to consider the best interests of the child.

1.23 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, as required by international human rights law. This conforms with the committee's

2 See *Family Law Act 1975* (FLA), Part VII, Subdivision BA.

3 Article 3(1).

4 FLA, section 60CA.

Guidance Note 1,[5] and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[6] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

1.24 The committee's assessment of the amendments to the financial agreements regime against article 3 of the Convention on the Rights of the Child (obligation to consider the best interests of the child) raises questions as to whether the amendments are justified.

1.25 As set out above, the amendments would limit to exceptional circumstances the court's power to set aside a financial agreement, made by a couple during or after separation, which may limit the court's ability to act in the best interests of the children to that couple. The statement of compatibility does not justify that limitation for the purposes of article 3 of the Convention on the Rights of the Child (obligation to consider the best interests of the child). The committee therefore seeks the advice of the Attorney-General as to:

- **the objective to which the proposed changes are addressed, and why they address a pressing and substantial concern;**
- **the rational connection between the limitation and that objective; and**
- **reasons why the limitation is a reasonable and proportionate measure for the achievement of that objective.**

5 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf.

6 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx.

Social Security Legislation Amendment (Community Development Program) Bill 2015

Portfolio: Indigenous Affairs
Introduced: Senate, 2 December 2015

Purpose

1.26 The Social Security Legislation Amendment (Community Development Program) Bill 2015 (the bill) creates a new income support payment and compliance arrangements for people living in remote Australia who are eligible for certain income support payments.

1.27 Measures raising human rights concerns or issues are set out below.

New obligations and penalty arrangements for remote income support recipients

1.28 The bill exempts eligible remote income support recipients from existing compliance obligations and penalty arrangements and enables the minister to determine these requirements in a legislative instrument. The explanatory memorandum (EM) states that the intention of the bill 'is that the legislative instrument will provide for consequences where obligations are not complied with, in order to provide incentives for remote income support recipients to engage in work or activities.'[1]

1.29 The bill does not set out the intended content of the obligations to be determined by legislative instrument. The EM states that the bill enables the minister to 'determine appropriate participation activities and compliance arrangements in consultation with communities, ensuring that they are tailored to the individual needs of remote job seekers.'[2]

1.30 The new 'simplified arrangements' also enable payments to remote income support recipients to be made on a weekly basis, and for payments to be made by service providers rather than the Department of Human Services (the department). Under these 'simplified arrangements', remote job seekers will be subject to immediate 'No Show No Pay' penalties for non-compliance with activity requirements. These penalties will also be applied by service providers rather than the department.

1.31 By enabling the creation of a different system of obligations and penalty arrangements for remote job seekers, the bill engages and may limit the right to social security and the right to an adequate standard of living, and the right to equality and non-discrimination.

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1 Explanatory memorandum (EM) 4.

2 EM ii.

Right to social security

1.32 The right to social security is protected 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.

1.33 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).

1.34 Under article 2(1) of the 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;
- 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.

1.35 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

1.36 The right to an adequate standard of living is guaranteed by article 11(1) of the ICESCR, and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.37 In respect of the right to an adequate standard of living, article 2(1) of the ICESCR also imposes on Australia the obligations listed above in relation to the right to social security.

Compatibility of the measure with the right to social security and the right to an adequate standard of living

1.38 The imposition of new obligations and immediate penalties may result in some remote job seekers having their payments reduced or losing their payments altogether, and therefore the measures may limit the recipient's right to social security. Further, the imposition of immediate penalties for non-attendance appears to have the effect that any appeal by a social security recipient will occur after the imposition of a penalty, reducing the ability of a social security recipient to avoid a penalty before it is imposed.

1.39 The bill does not set out the content of the obligations which are to be determined by legislative instrument. Given that currently social security legislation includes extensive mutual obligations, it is unclear why it is necessary to leave the content of the obligations which will apply to remote Australians, to delegated legislation rather than being set out in primary legislation.

1.40 The statement does not address the effect of the new compliance obligations or penalty arrangements on recipients' rights to social security and an adequate standard of living. The statement therefore does not provide any information as to the legitimate objective of the measures, how the measures are rationally connected to that objective and how the measures are otherwise proportionate.

1.41 The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.[3] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, as the precise obligations and compliance regime will be left to subordinate legislation it will be difficult for the committee to assess the bill as compatible with human rights without reviewing the proposed legislative instrument.

1.42 The committee's assessment of the new obligations and penalty arrangements against article 9 of the International Covenant on Economic, Social and Cultural Rights (right to social security) raises questions as to whether the measure is compatible with international human rights law.

3 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx.

1.43 As set out above, the new obligations and penalty arrangements engage and limit the right to social security. The statement of compatibility does not justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Indigenous Affairs as to:

- **the objective to which the proposed changes are aimed, and why they address a pressing and substantial concern;**
- **the rational connection between the limitation and that objective; and**
- **reasons why the limitation is a reasonable and proportionate measure for the achievement of that objective.**

1.44 In addition, to enable the committee to assess the human rights compatibility of the bill, the committee recommends that the government release an exposure draft of the legislative instrument which would set out the compliance obligations and penalty regime for remote income support recipients.

Right to equality and non-discrimination

1.45 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

1.46 This is a fundamental human right that is essential to the protection and respect of all human rights. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.47 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[4] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[5] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[6]

1.48 Articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) further describes the content of these rights and the specific elements that state parties are required to take into account to ensure the

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

5 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989).

6 *Althammer v Austria* HRC 998/01, [10.2].

elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.

Compatibility of the measure with the right to equality and non-discrimination

1.49 The statement of compatibility states that the measures in the bill:

- are aimed at remote job seekers, on the basis that there are particular obstacles faced by job seekers in remote Australia, including less robust job markets, higher levels of dependence on welfare, lower levels of literacy and numeracy, and persistent and entrenched disadvantage;
- will apply equally to all job seekers who reside within remote income support regions across Australia; and
- will be beneficial to remote income support recipients.[7]

1.50 The statement of compatibility also states:

> …the application of these measures in remote income support regions is designed to overcome the inherent imbalance in employment opportunities and consequential disadvantage experienced in parts of remote Australia. The proposed amendment is therefore necessary to promote equality through elevating the situation of persons in remote income support regions to a standard comparable with their counterparts not living in remote income support regions.[8]

1.51 The committee agrees that the bill may not constitute direct discrimination on the basis of race as it appears that the regions in which the measures will operate are chosen on the basis of remoteness and economic disadvantage rather than on the basis of race. However, as the committee outlined previously, while the bill does not directly discriminate on the basis of race, indirect discrimination may occur when a measure which is neutral on its surface has a disproportionate impact on groups of people with a particular attribute, such as race. Where a measure impacts on particular groups disproportionately, it establishes prima facie, that there may be indirect discrimination.

1.52 In this case it seems clear that Indigenous people will be disproportionately affected by this measure as more than 80 per cent of people currently supported by Community Development Program providers are Aboriginal and Torres Strait Islander people.[9]

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7 EM, statement of compatibility (SOC) 5.

8 SOC 6.

9 See Department of Prime Minister and Cabinet, *The Community Development Programme (CDP)* at http://www.dpmc.gov.au/indigenous-affairs/about/jobs-land-and-economy-programme/indigenous-employment/community-development-programme-cdp.

1.53 Under international human rights law such a disproportionate impact may be justifiable if it can be demonstrated that it seeks to pursue a legitimate objective, is rationally connected to that objective and is proportionate. Such a disproportionate impact may also be justifiable if it is a special measure designed to assist or protect disadvantaged racial groups.

1.54 The committee accepts that the aim of reducing disadvantage for remote job seekers is a legitimate objective, and that other measures in the bill, such as increasing income thresholds, promote human rights. The committee also considers that the creation of different system of obligations and penalties for remote income support recipients is rationally connected to this goal. However, on the basis of the information provided the committee is unable to make an assessment as to the proportionality of the measure, and whether the measure will disproportionately affect Indigenous Australians.

1.55 The committee's assessment of the new obligation requirements and penalties for remote income support recipients against articles 2 and 26 of the International Covenant on Civil and Political Rights (right to equality and non-discrimination) raises questions as to whether the measure is a proportionate limitation on the rights of remote income support recipients. The committee therefore seeks the advice of the Minister for Indigenous Affairs as to whether the limitation is a reasonable and proportionate measure for the achievement of a legitimate objective, or a special measure designed for the benefit of Aboriginal and Torres Strait Islander peoples.

Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015

Portfolio: Social Services
Introduced: House of Representatives, 2 December 2015

Purpose

1.56 The Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015 (the bill) seeks to amend the *Social Security Act 1991* (SS Act) and the *A New Tax System (Family Assistance) (Administration) Act 1999*. In particular, the bill would:

- provide that people serving an income maintenance period for a mainstream payment, such as Newstart allowance, cannot access a special benefit during that period;
- align reconciliation times for Family Tax Benefit recipients;
- set full-time study requirements for Youth Allowance (student) and Austudy payments;
- amend the definition of new apprentice in the SS Act so that the requirements for the definition can be determined by the minister; and
- exempt from the Austudy assets test people with a partner receiving a relevant pension, benefit, allowance or compensation.

1.57 Measures raising human rights concerns or issues are set out below.

Study requirements for Youth Allowance (student) or Austudy

1.58 Schedule 3 of the bill seeks to amend the SS Act to provide that in assessing a full-time study load for Youth Allowance (student) or Austudy, two or more courses of education for a person cannot be aggregated to satisfy the undertaking full-time study requirement.

1.59 The amendments will affect certain individuals' access to a social security payment which they are currently receiving and as such the measure engages the right to social security. The receipt of social security is an important resource to enable students to complete their education and, accordingly, the measure also engages the right to education.

Right to social security

1.60 The right to social security is protected 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.

1.61 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).

1.62 Under article 2(1) of the 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;
- 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.

1.63 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. The Australian government has highlighted its comprehensive system of social security, including payments and services to students, as part of its efforts to realise the right to social security as part of its Universal Periodic Reviews in 2011 and 2015.[1]

1.64 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available

Right to education

1.65 The right to education is guaranteed by article 13 of the ICESCR, under which state parties recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of

1 National Report of Australia, Universal Periodic Review Second Cycle – 2015, 18; Australia's Universal Periodic Review – Final National Report (2011) 16.

dignity, and shall strengthen the respect for human rights and fundamental freedoms.

Compatibility of the measure with the right to social security and the right to education

1.66 The statement of compatibility acknowledges that the right to social security and the right to education are engaged and limited by these measures. It explains:

> The Government's objective is to achieve growth in skills, qualifications and productivity through providing income support to students to assist them to undertake further education and training.[2]

1.67 To be capable of justifying a proposed limitation of human rights a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. The statement of compatibility does not set out reasons or evidence why the objective identified is a pressing or substantial concern.

1.68 Moreover, it must be demonstrated that the limitation imposed by the legislation is rationally connected to the objective being pursued. It is not explained in the statement of compatibility how these amendments will support the growth in skills, qualifications and productivity.

1.69 In terms of proportionality, the statement of compatibility states:

> Due to an ambiguity in the Social Security Act, an unintended consequence exists whereby a very small number of students have been assessed as undertaking a full-time study load by undertaking multiple unrelated courses on a part-time basis at the same or across multiple institutions (for example, a Bachelor of Engineering and a Bachelor of Fine Arts (Dance).[3]

1.70 The statement of compatibility also explains that the measure will have limited impact on a very small number of people who are undertaking more than one course of education on a part-time basis from being eligible for Youth Allowance (student) and Austudy. It states:

> People wishing to study in this manner are still able to do so; however, they will be required to self-fund their studies. However, where a person undertakes at least one of their courses on a full-time basis, they will be assessed as undertaking full-time study for Youth Allowance (student) and Austudy purposes.[4]

1.71 It is not clear, on the basis of the information provided, why it is necessary for the achievement of growth in skills, qualifications and productivity that multiple part-time courses cannot be aggregated to enable eligibility for Youth Allowance

2 Explanatory memorandum (EM), statement of compatibility (SOC) 7.

3 EM, SOC 6.

4 EM, SOC 7.

(student) and Austudy. Nor is it clear why the imposition of this limitation is reasonable or proportionate, or whether other less rights restrictive ways to achieve the stated objective are available.

1.72 The committee's assessment of the requirements for Youth Allowance (student) or Austudy against articles 9 and 13 of the International Covenant on Economic, Social and Cultural Rights (right to social security and the right to education) raises questions as to whether preventing multiple courses from being aggregated to enable eligibility for Youth Allowance (student) and Austudy is a justifiable limitation on the right to social security and the right to education.

1.73 As set out above, the requirements for Youth Allowance (student) or Austudy engage and limit the right to social security and the right to education. The statement of compatibility does not sufficiently justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Social Services as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Further response required

1.74 The committee seeks a further response from the relevant minister or legislation proponent with respect to the following bills and instruments.

Instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*

Portfolio: Foreign Affairs
Authorising legislation: Autonomous Sanctions Act 2011 and Charter of the United Nations Act 1945

Purpose

1.75 This report relates to approximately 30 instruments that have been made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*.[1]

1.76 These instruments either:

- designate and declare individuals subject to the autonomous sanctions regime under the *Autonomous Sanctions Act 2011* and the Autonomous Sanctions Regulations 2011;
- designate individuals subject to the powers under the *Charter of the United Nations Act 1945* by reference to a UN Security Council resolution or decision;
- expand the basis on which the Minister for Foreign Affairs can designate an individual under the Autonomous Sanctions Regulations 2011;
- amend the basis on which a person is prohibited from making assets available to designated persons or expand the basis on which a person will commit an offence if they make an asset available to a designated person; or
- expand the definition of 'controlled asset' to enable the assets of a person acting on behalf of a designated person to be frozen.

1.77 As the instruments under consideration expand or apply the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself, it is necessary to assess the compatibility of the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945* under which these instruments are made.

1 See: Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015). This report also covers: Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 1) [F2015L01422].

1.78 The *Autonomous Sanctions Act 2011* provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime).

1.79 Secondly, the *Charter of the United Nations Act 1945* (in conjunction with various instruments made under that Act)[2] gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations Security Council by Australia (the UN Charter sanctions regime).

1.80 Sanctions under both the autonomous sanctions regime and the UN Charter sanctions regime (together referred to as the sanctions regimes) can:

- designate or list persons or entities for a particular country with the effect that the assets of the designated person or entity are frozen, and declare that a person is prevented from travelling to, entering or remaining in Australia; and
- restrict or prevent the supply, sale or transfer or procurement of goods or services.

1.81 As at 2 September 2015, 1110 individuals and 854 entities were subject to targeted financial sanctions or travel bans under both sanctions regimes (449 individuals under the autonomous sanctions regime and 661 under the UN Charter regime). The Consolidated List currently includes the names of three Australian citizens.[3]

Background

1.82 A full explanation of the history of the committee's consideration of the sanctions regimes is set out in the committee's *Twenty-eight Report of the 44th Parliament*.[4] In that report, the committee sought detailed information from the minister as to the compatibility of the sanctions regimes with human rights.

'Freezing' of designated person's assets

1.83 Under both sanctions regimes, the effect of a designation is that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a designated person.[5] A person's assets are therefore effectively 'frozen' as a result of being designated.

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2 See in particular the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689].

3 See Department of Foreign Affairs and Trade, 'Consolidated List', available at: http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx.

4 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 15-38.

5 Section 14 of the Autonomous Sanctions Regulations 2011 and section 21 of the *Charter of the United Nations Act 1945*.

1.84 The committee previously considered that the designation of a person under the sanctions regimes therefore limits a person's right to privacy, and particularly the aspect of the right relating to personal autonomy in one's private life.[6]

Right to privacy

1.85 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.

1.86 The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life. However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective. In the case of executive powers which seriously disrupt the lives of the individuals subjected to them, the existence of safeguards is important to prevent arbitrariness and error, and ensure that powers are exercised only in the appropriate circumstances.

Compatibility of the measure with the right to privacy

1.87 The committee agreed that the use of international sanctions regimes to apply pressure to regimes and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. The committee also agreed, for the purposes of the analysis, that the measures are rationally connected to the legitimate objective. However, the committee considered that the sanctions regimes may not be regarded as proportionate to the stated objective. In particular, the committee was concerned that there may not be effective safeguards or controls over the sanctions regimes, including that:

- the designation or declaration under the autonomous sanctions regime can be based solely on the basis that the minister is 'satisfied' of a number of broadly defined matters;[7]
- the minister can make the designation or declaration without hearing from the affected person before the decision is made;
- there is no requirement that reasons be made available to the affected person as to why they have been designated or declared;

6 It does not apply in relation to the automatic designation of a person by the UN Security Council, as Australia is bound by the UN Charter to implement UN Security Council decisions. See article 2(2) and article 41 of the Charter of the United Nations 1945.

7 See examples in the committee's previous analysis at paragraph [1.89] of the *Twenty-eighth Report of the 44th Parliament* and s6 of the Autonomous Sanctions Regulations 2011.

- no guidance is available under the Act or regulations or any other publicly available document setting out the basis on which the minister decides to designate or declare a person;
- there is no report to Parliament setting out the basis on which persons have been declared or designated and what assets, or the amount of assets that have been frozen;
- once the decision is made to designate or declare a person, the designation or declaration remains in force for three years and may be continued after that time. There is no requirement that if circumstances change or new evidence comes to light that the designation or declaration will be reviewed before the three year period ends;
- a designated or declared person will only have their application for revocation considered once a year—if an application for review has been made within the year, the minister is not required to consider it;
- there is no provision for merits review before a court or tribunal of the minister's decision;
- there is no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister;
- the minister has unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses; and
- there is no requirement that in making a designation or declaration the minister needs to take into account whether in doing so, it would be proportionate to the anticipated effect on an individual's private and family life.

1.88 The committee therefore sought the advice of the Minister for Foreign Affairs as to how the designation of a person under the autonomous sanctions regime and the ministerial designation process under the UN Charter sanctions regime is a proportionate limitation on the right to privacy, having regard to the matters set out at paragraph [1.87] and whether there are adequate safeguards to protect individuals potentially subject to designation.

Lack of effective access to an independent and impartial court or tribunal (autonomous sanctions regime)

1.89 Under the autonomous sanctions regime a person can be designated or declared by the minister on a number of grounds relating to whether the minister is satisfied the person is or has been involved in certain activities.

1.90 The committee considered in its previous analysis that the process for the making of designations limits the right to a fair hearing.

Right to a fair hearing

1.91 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. In particular, the right applies where rights and obligations, such as personal property or other private rights, are to be determined.

1.92 In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private.

1.93 The right of access to the courts in civil proceedings may be limited if it can be shown to seek to achieve a legitimate objective and the limitation is rationally connected to, and a proportionate way to achieve, its legitimate objective. The limitation as applied must also not restrict or reduce access to the court or tribunal in such a way or to such an extent that the very essence of the right is impaired.

Compatibility with the right to a fair hearing

1.94 The committee considered in its previous analysis that the designation and declaration process under the autonomous sanctions regime, in not providing effective access to an independent and impartial court or tribunal, limits the right to a fair hearing.

1.95 The committee therefore sought the advice of the Minister for Foreign Affairs as to how the designation and declaration of a person under the autonomous sanctions regime is a proportionate limitation on the right to a fair hearing, in particular how, in the absence of merits review, there are adequate safeguards to protect the right to a fair hearing.

Lack of effective access to an independent and impartial court or tribunal (ministerial designations under the UN Charter sanctions regime)

1.96 The committee previously considered that the ministerial listing procedures, whereby a person is listed by the minister if he or she is satisfied on reasonable grounds that the person is a person covered by UN Security Council resolution 1373, limit the right to a fair hearing. The listing procedures do not provide for merits review or contain sufficient safeguards or procedural fairness to satisfy the requirement for a full hearing before an independent and impartial court or tribunal.

Right to a fair hearing

1.97 The content of the right to a fair hearing is described above at paragraphs [1.91] to [1.93].

Compatibility of the measure with the right to a fair hearing

1.98 The committee therefore sought the advice of the Minister for Foreign Affairs as to how the process of ministerial designation under the UN Charter sanctions regime is a proportionate limitation on the right to a fair hearing, in particular how, in the absence of merits review, there are adequate safeguards to protect the right to a fair hearing.

Declarations under the autonomous sanctions regime—effect on families

1.99 The autonomous sanctions regime includes a power to declare a person for the purpose of preventing that person from travelling to, entering or remaining in Australia. Under the Migration Regulations 1994, a person declared in this way under the autonomous sanctions regime will have their visa cancelled or will not be granted a visa.

1.100 The committee considered in its previous analysis that the declaration process under the autonomous sanctions regime engages and limits the right to protection of the family.

Right to protection of the family

1.101 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection.

1.102 An important element of protection of the family, arising from the prohibition under article 17 of the ICCPR against unlawful or arbitrary interference with family, is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents, will therefore engage this right.

Compatibility of the measure with the right to protection of the family

1.103 The committee therefore sought the advice of the Minister for Foreign Affairs as to how the declaration process is a proportionate limitation on the right to protection of the family, and in particular, whether there are adequate safeguards in place to protect this right.

Designations or declarations in relation to specified countries

1.104 The autonomous sanctions regime allows the minister to make a designation or declaration in relation to persons involved in some way with currently eight specified countries. The automatic designation under the UN Charter sanctions regime currently lists 13 countries from which people have been designated. Two of the countries listed overlap between both sanctions regimes.

1.105 As at 2 September 2015, there were 19 countries for which association with aspects of the governments of those countries could lead to a person being designated or declared under the sanctions regimes.

1.106 The committee considered previously that the designation of persons in relation to specified countries limits the right to equality and non-discrimination.

Right to equality and non-discrimination

1.107 The rights to equality and non-discrimination are protected by articles 2 and 26 of the ICCPR. These are fundamental human rights that are essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.108 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),[8] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights. Indirect discrimination is a rule or measure that is neutral on its face or without intent to discriminate, which exclusively or disproportionately affects people with a particular personal attribute.

Compatibility with the right to equality and non-discrimination

1.109 The committee therefore sought the advice of the Minister for Foreign Affairs as to how the designation or declaration of a person under the autonomous sanctions regime is a proportionate limitation on the right to equality and non-discrimination, and in particular, whether there are adequate safeguards in place to protect this right.

Minister's response

> I write in response to your letter of 17 September 2015 in which you note the Parliamentary Joint Committee on Human Rights (the Committee) seeks my advice in relation to the human rights compatibility of the Autonomous Sanctions Act 2011 and Charter of the United Nations Act 1945 (COTUNA) and subordinate legislation.
>
> Both I, and the Department of Foreign Affairs and Trade, share the Committee's concern for the protection and promotion of human rights both in Australia and internationally. The protection and promotion of human rights is vital to global efforts to achieve lasting peace and security, and freedom and dignity for all. Australia's commitment to human rights is

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

an underlying principle of our engagement with the international community.

I have noted previously that Australia implements autonomous and United Nations (UN) sanction regimes in situations of international concern, including the grave repression of human rights and the proliferation of weapons of mass destruction. The Committee has sought my advice on whether certain sanctions measures are proportionate to the objectives of each sanction legislative regime. I am confident that the sanction measures implemented by Australia through the UN and autonomous sanctions regimes are directly proportionate to the objectives of each regime.

As recognised in the Committee's report, Australia is under an international legal obligation to implement UN Security Council (UNSC) resolutions. This includes not only designating in Australian law those persons designated through the UN Security Council sanctions committees, but also implementing the administrative sanction measures mandated within UNSC resolutions such as the 'freezing' of designated persons' assets.

As noted by the Committee, from a legal perspective, such UNSC obligations prevail over Australia's obligations under international human rights law. The inclusion of sanction measures in the UNSC resolutions also reflects the international community's view that the administrative sanction measures are proportional to the objectives that they are designed to achieve.

Australia does not impose sanction measures on individuals, or countries, lightly. It is the Government's view that those administrative sanctions measures are proportionate and appropriate in targeting those responsible for repressing human rights and democratic freedoms or to end regionally or internationally destabilising actions.[9]

Committee response

1.110 **The committee thanks the Minister for Foreign Affairs for her response.** The committee appreciates the minister's advice that in her opinion the sanctions regime only imposes limitations on human rights that are proportionate.

1.111 The committee notes the minister's advice that Australia is under an international legal obligation to implement UN Security Council resolutions, and such obligations prevail over Australia's obligations under international human rights law. The committee agrees that where the UN Security Council has designated that a particular person is to be subject to UN sanctions, Australia, in automatically designating that person, is acting in accordance with its obligations under international law.

9 See Appendix 2, Letter from the Hon Julie Bishop MP, Minister for Foreign Affairs, to the Hon Philip Ruddock MP (dated 30 November 2015) 1-2.

1.112 However, the committee notes there are two other processes under Australian law for imposing sanctions that are not a direct implementation of a UN Security Council resolution. These two processes are the autonomous sanctions regime;[10] and the process of ministerial designation under UN Security Council resolution 1373.[11]

1.113 Under both of these sanctions regimes Australia is bound by its international human rights obligations to ensure that the designation or declaration process is compatible with human rights law.

1.114 It is on this basis the committee undertook a detailed review of the designation and declaration processes and sought specific information (as set out above) from the minister as to the proportionality of the measures with a number of human rights. The minister's response does not address these questions.

1.115 The committee notes for completeness that the Australian Government is responsible for national security and protecting the security of all Australians. The *National Security Information (Criminal and Civil Proceedings) Act 2004* allows a court to prevent the disclosure of information in federal criminal and civil proceedings where it would be likely to prejudice national security. Under this Act, a range of protections for sensitive information and intelligence are available, including allowing such information to be redacted or summarised, and preventing a witness from being required to give evidence. In seeking further information about the sanctions regimes, the committee is not suggesting that it is inconsistent with international human rights law that the government may seek, with a court's consent, to protect important sources of information and intelligence where disclosure of such information and its sources would necessarily compromise national security.

1.116 Without the minister's specific advice as to whether there are effective safeguards or controls in place in relation to the autonomous sanctions regime and the ministerial designation process under the UN Charter sanctions regime, the committee is not in a position to assess that the instruments under review are compatible with human rights.

1.117 As the minister's response does not address the specific questions asked by the committee, the committee seeks further information from the minister in relation to the specific questions at paragraphs [1.88], [1.95], [1.98], [1.103], and [1.109].

10 See *Autonomous Sanctions Act 2011*, in conjunction with the Autonomous Sanctions Regulations 2011 and various instruments made under those regulations.

11 See *Charter of the United Nations Act 1945* in conjunction with various instruments made under that Act, particularly the Charter of the United Nations (Dealing with Assets) Regulations 2008.

Advice only

1.118 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015

Portfolio: Justice
Introduced: House of Representatives, 26 November 2015

Purpose

1.119 The Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 seeks to amend the *Proceeds of Crime Act 2002* (POC Act), *Criminal Code Act 1995* (Criminal Code), *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, and the *AusCheck Act 2007* to:

- amend the non-conviction based proceeds of crime regime in response to two recent court decisions;
- create two new offences of false dealing with accounting documents;
- amend the serious drug offences in Part 9.1 of the Criminal Code to clarify the definitions of the terms 'drug analogue' and 'manufacture' and ensure that they capture all relevant substances and processes;
- expand the ability of designated officials and agencies to share information;
- allow the Independent Commissioner Against Corruption of South Australia to access AUSTRAC information; and
- extend the circumstances under which AusCheck can disclose AusCheck background check information to the Commonwealth and to certain state and territory government agencies.

1.120 Measures raising human rights concerns or issues are set out below.

Background

1.121 The committee previously considered the implications of the POC Act in its analysis on the Crimes Legislation (Consequential Amendments) Regulation 2015 [F2015L00787] (the regulation) in its *Twenty-sixth Report of the 44th Parliament*[1] and *Thirty-first Report of the 44th Parliament*.[2]

1 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 7-11.

2 Parliamentary Joint Committee on Human Rights, *Thirty-first Report of the 44th Parliament* (24 November 2015) 37-44.

1.122 The POC Acts limits the right to be presumed innocent, which is guaranteed by article 14(2) of the ICCPR as it permits assets to be frozen, restrained or forfeited without a finding of criminal guilt beyond reasonable doubt.

1.123 The forfeiture of property of a person who has already been sentenced for an offence may also raise concerns regarding the imposition of double punishment, contrary to article 14(7) of the ICCPR.

1.124 Accordingly, in the *Thirty-first Report of the 44th Parliament* the committee recommended that the Minister for Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing.

Strengthening the non-conviction regime for asset confiscation

1.125 The High Court in *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 agreed to stay non-conviction based forfeiture proceedings under the POC Act until criminal charges against the respondent had been determined. The court found that if the proceedings were not stayed, the prosecution would be informed in advance of the criminal trial of the defendant's defence because he could not realistically defend the forfeiture proceedings without telegraphing his likely defence. This would advantage the prosecution in such a manner as to render the trial unfair.

1.126 This bill would amend the POC Act so that civil proceedings for asset forfeiture may not be stayed by a court simply because criminal proceedings are on foot relating to the same matter.[3] The bill would effectively prohibit a court from issuing a stay merely because a defendant may consider it necessary to give evidence, or to call evidence from another person, in the POC Act proceedings and the evidence is or may be relevant to a matter at issue in criminal proceedings.

1.127 In limiting a court's ability to stay civil proceedings pending the outcome of a criminal conviction, the amendments constrain the court's ability to guarantee a fair hearing in a civil application for asset forfeiture and the court's ability to ensure that there is subsequently a fair criminal trial by ensuring that the prosecution is not advantaged by information adduced in the civil proceeding.

1.128 The committee reiterates its recommendation from the *Thirty-first Report of the 44th Parliament* that the Minister for Justice undertake a detailed assessment of the *Proceeds of Crime Act 2002* to determine its compatibility with the right to a fair trial and right to a fair hearing in light of the committee's comments above.

3 See new subsection 319(6).

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

Criminal Code Amendment (Private Sexual Material) Bill 2015

Sponsor: Tim Watts MP; Terri Butler MP
Introduced: House of Representatives, 12 October 2015

Purpose

2.3 The Criminal Code Amendment (Private Sexual Material) Bill 2015 (the bill) seeks to amend the *Criminal Code Act 1995* (Criminal Code) to criminalise what is colloquially referred to as 'revenge porn'. Specifically, the bill would introduce three new telecommunications offences that would make it an offence to:

- use a carriage service to, without consent, publish private sexual material;
- threaten to do so; or
- possess, control, produce, supply or obtain private sexual material for use through a carriage service.

2.4 Measures raising human rights concerns or issues are set out below.

Background

2.5 The committee previously considered the bill in its *Thirtieth Report of the 44th Parliament* (previous report) and requested further information from the legislation proponents as to the compatibility of the bill with the right to a fair trial (presumption of innocence).[1]

Reversal of the burden of proof

2.6 Proposed section 474.24H of the bill provides a number of exceptions to the proposed new offences introduced by the bill, including if the conduct was:

- engaged in for the public benefit;
- in relation to news, current affairs, information or a documentary (and there was no intention to cause harm);

1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 11-13.

- by a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; or
- in the course of assisting the Children's e-Safety Commissioner or relating to content filtering technology.

2.7 These exceptions reverse the burden of proof, requiring the defendant to bear an evidential burden if relying on these defences.

2.8 The committee considered in its previous report that the reversal of the burden of proof engages and limits the right to a fair trial (presumption of innocence).

Right to a fair trial (presumption of innocence)

2.9 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

2.10 An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

2.11 Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision. Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

Compatibility of the measure with the right to a fair trial

2.12 The statement of compatibility for the bill does not acknowledge that the right to a fair trial is engaged by these measures. The explanatory memorandum to the bill also provides little justification for these measures.[2]

2.13 As set out the committee's Guidance Note 2,[3] reverse burden offences are likely to be compatible with the presumption of innocence where they are shown by

2 Explanatory memorandum, paragraph 46.

the legislation proponent to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

2.14 It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with the committee's Guidance Note 1.[4]

2.15 The committee therefore sought the advice of the legislation proponents as to whether the proposed exceptions are aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

Legislation proponent's response

> Firstly, as is stated in the Explanatory Memorandum to the bill, the defences proposed in section 474.24H mirror the defences in the Criminal Code for offences relating to 'child pornography material' and 'child abuse material' along with the addition of a new defence for 'media activities' in proposed subsection 474.24H(3). It would lead to inconsistent results if an evidential burden were placed on the defendant for the other identical defences in the Criminal Code, but not for the defences for the proposed new offences in the bill.
>
> In addition, reversing the onus of proof may be justified where it is particularly difficult for a prosecution to meet a legal burden. It may be considered justifiable to reverse the onus of proof on an issue that is 'peculiarly within the knowledge' of the accused. In regard to the defence for 'media activities', the reversal is justified because the defences goes to why the defendant engaged in the conduct (paragraph (3)(a)), the intention of the defendant (paragraph (3)(b)) and the reasonable belief of the defendant (paragraph (3)(c)), all of which are peculiarly within the knowledge of the defendant.
>
> Further, the seriousness of a crime may justify placing a legal burden of proof on the accused. For the other defences proposed in section 474.24H, the seriousness of the offending conduct means that the defendant should

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3 Appendix 2; See Parliamentary Joint Committee on Human Rights, Guidance Note 2 – Offence provisions, civil penalties and human rights (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf?la=en.

4 Appendix 2; See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 - Drafting Statements of Compatibility* (December 2014) http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf.

not even consider engaging in the conduct in reliance on the defence unless they can point to evidence suggesting that defence applies.[5]

Committee response

2.16 The committee thanks the legislation proponent for his response. The committee considers that the response demonstrates that the defences provided in the bill are likely to be peculiarly within the defendant's knowledge. **Accordingly, the committee considers that the bill is compatible with the right to a fair trial (presumption of innocence) and has concluded its examination of the bill.**

5 See Appendix 1, Letter from Mr Tim Watts MP, to the Hon Philip Ruddock MP (received 27 November 2015) 1.

Federal Courts Legislation Amendment (Fees) Regulation 2015 [F2015L00780]

Portfolio: Attorney-General
Authorising legislation: Federal Court of Australia Act 1977; *Family Law Act 1975*; and *Federal Circuit Court of Australia Act 1999*
Last day to disallow: 20 August 2015

Purpose

2.17 The Federal Courts Legislation Amendment (Fees) Regulation 2015 (the regulation) amended the Federal Court and Federal Circuit Court Regulation 2012 to increase all fee categories by 10 per cent for the federal courts, except for those fees not subject to a biennial fee increase.

2.18 Schedule 2 of the regulation amended the Family Law (Fees) Regulation 2012 to:

- increase the fee for certain divorce applications, consent orders and issuing subpoenas by a prescribed amount;
- increase all other existing family law fee categories (by an average of 10 per cent) except for the reduced divorce fee in the Federal Circuit Court and divorce fees in the Family Court of Australia; and
- establish a new fee category for the filing of an amended application.

2.19 Measures raising human rights concerns or issues are set out below.

Background

2.20 On 25 June 2015, the Senate disallowed Schedule 2 of the regulation. Accordingly, the committee's analysis deals only with Schedule 1 of the regulation which continues in force.[1]

2.21 The committee previously considered the regulation in its *Twenty-fifth Report of the 44th Parliament* (previous report) and requested further information from the Attorney-General as to the compatibility of the regulation with the right to a fair hearing.[2]

1 Note that on 9 July 2015 the Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 [F2015L01138] increased the fees for divorce; consent orders and subpoenas; and all other existing family law fee categories by an amount similar to that contained in the regulation.

2 Parliamentary Joint Committee on Human Rights, *Twenty-fifth Report of the 44th Parliament* (11 August 2015) 65-67.

Increased fees for federal court proceedings

2.22 Schedule 1 of the regulation increased the costs in all fee categories by 10 per cent for all proceedings in the federal courts. This includes the costs of commencing an application or appeal and the costs for the hearing of the application or appeal.

2.23 The committee noted in its previous report that this engages and may limit the right to a fair hearing (access to justice).

Right to a fair hearing

2.24 The right to a fair hearing is protected by 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. Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in Article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

2.25 The right also includes the right to have equal access to the courts, regardless of citizenship or other status. This requires that no one is to be barred from accessing courts or tribunals (although limited exceptions are allowed if based on objective and reasonable grounds such as, for example, the prevention of vexatious litigation). Effective realisation of this right may require access to legal aid and the regulation of fees or costs that could indiscriminately prevent access to justice.

Compatibility of the measure with the right to a fair hearing

2.26 The statement of compatibility states that the regulation does not engage any of the applicable rights or freedoms and does not raise any human rights issues.

2.27 However, a substantial increase in the cost of making an application to the federal courts, and in conducting a case before the courts, engages the right to a fair hearing, which includes a right to access to justice. The UN Human Rights Committee has said that the imposition of fees on the parties to proceedings that would in practice prevent their access to justice might raise concerns in relation to the right to a fair hearing.[3]

2.28 Whether the right is limited will depend on whether the increase in fees to access the federal courts would indiscriminately prevent access to justice. No information is provided in the statement of compatibility as to whether there is any

3 See UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007). See also *Lindon v Australia*, Communication No. 646/1995 (25 November 1998), para. 6.4.

ability for an applicant to seek to have the fees waived if the fees would effectively prevent them from accessing the federal courts.

2.29 The committee therefore sought the advice of the Attorney-General as to the effect of the measure on access to justice, and the likely limitations on the right to a fair hearing.

Attorney-General's response

> I acknowledge that the Committee has considered the Regulation in its *Twenty-fifth Report of the 44th Parliament* and has sought my advice about whether changes to general federal law fees pursuant to the Regulation are a limitation to access to justice, thereby raising questions about its compatibility with Article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing).
>
> As you know, the imposition of a reasonable fee in relation to Court proceedings (or an increase to an existing fee) does not of itself constitute denial of access to justice so as to violate Article 14. I consider that this increase falls well within that principle.
>
> As stated in the explanatory materials, changes to federal law fees under the Regulation increased all general federal law fees by 10 per cent (except for those fees not subject to a biennial fee increase), following a restructure of fee categories for public authorities and publicly listed companies filing matters, other than bankruptcy matters, in the Federal Court and Federal Circuit Court of Australia.
>
> The changes did not, however, affect existing exemptions, deferral and waiver provisions in the *Federal Court and Federal Circuit Court Regulation 2012*. These provisions continue to apply to general federal law fees.
>
> Division 2.3 of the Federal Court and Federal Circuit Court Regulation provides that fee exemptions are available across all general federal law fee categories, with the exception of the filing fee to register a New Zealand judgment under the *Trans-Tasman Proceedings Act 2010*. Listed categories of vulnerable users of the court, such as individuals under the age of 18 years, holders of pension, concession or health care cards and those who have been granted legal aid, are specifically exempted from paying court fees. Additionally, Division 2.3 provides a broad discretion to grant fee exemptions to individuals where payment of fees would cause financial hardship to the individual, having regard to the individual's income, day-to-day living expenses, liabilities and assets.
>
> Division 2.4 of the Federal Court and Federal Circuit Court Regulation provides for the waiver of fees for proceedings under specific legislation, such as hearing appeals in relation to unlawful discrimination proceedings under the *Australian Human Rights Commission Act 1986* or *Fair Work Act 2009*.
>
> Division 2.5 of the Federal Court and Federal Circuit Court Regulation provides a broad discretion to grant a deferral of payment of most general

federal law fees in circumstances where an individual urgently needs to file a document or where, considering an individual's financial circumstances, it would be oppressive or otherwise unreasonable to require payment of the fee.

I consider the availability of fee exemptions, waivers and deferrals to be an important safeguard to ensure that those facing financial hardship or other difficult circumstances are not affected by any changes to court fees. On the basis that fee exemptions, deferrals and waivers continue to apply, I do not consider that the changes to general federal law fees provided in the Regulation limit the ability of parties to access justice or the right to a fair hearing.[4]

Committee response

2.30 The committee thanks the Attorney-General for his response.

2.31 The Committee agrees that the imposition of reasonable fees in relation to Court proceedings does not, of itself, constitute denial of access to justice so as to limit the right to a fair hearing.

2.32 Having regard to the Attorney-General's advice as to the fee exemptions, waivers and deferrals that are available to individuals suffering financial hardship, the committee considers that the proposed increase in court fees is not so high as to indiscriminately prevent access to justice, and therefore considers the regulation is likely to be compatible with the right to a fair hearing.

The Hon Philip Ruddock MP

Chair

4 See Appendix 1, Letter from Senator the Hon George Brandis, Attorney-General, to the Hon Philip Ruddock MP (dated 30 November 2015) 1-2.

Appendix 1

Correspondence

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Philip Ruddock

I write in response to your letter of 17 September 2015 in which you note the Parliamentary Joint Committee on Human Rights (the Committee) seeks my advice in relation to the human rights compatibility of the Autonomous Sanctions Act 2011 and Charter of the United Nations Act 1945 (COTUNA) and subordinate legislation.

Both I, and the Department of Foreign Affairs and Trade, share the Committee's concern for the protection and promotion of human rights both in Australia and internationally. The protection and promotion of human rights is vital to global efforts to achieve lasting peace and security, and freedom and dignity for all. Australia's commitment to human rights is an underlying principle of our engagement with the international community.

I have noted previously that Australia implements autonomous and United Nations (UN) sanction regimes in situations of international concern, including the grave repression of human rights and the proliferation of weapons of mass destruction. The Committee has sought my advice on whether certain sanctions measures are proportionate to the objectives of each sanction legislative regime. I am confident that the sanction measures implemented by Australia through the UN and autonomous sanctions regimes are directly proportionate to the objectives of each regime.

As recognised in the Committee's report, Australia is under an international legal obligation to implement UN Security Council (UNSC) resolutions. This includes not only designating in Australian law those persons designated through the UN Security Council sanctions committees, but also implementing the administrative sanction measures mandated within UNSC resolutions such as the 'freezing' of designated persons' assets.

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As noted by the Committee, from a legal perspective, such UNSC obligations prevail over Australia's obligations under international human rights law. The inclusion of sanction measures in the UNSC resolutions also reflects the international community's view that the administrative sanction measures are proportional to the objectives that they are designed to achieve.

Australia does not impose sanction measures on individuals, or countries, lightly. It is the Government's view that those administrative sanctions measures are proportionate and appropriate in targeting those responsible for repressing human rights and democratic freedoms or to end regionally or internationally destabilising actions.

Yours sincerely

Julie Bishop

30 NOV 2015

Tim Watts MP
FEDERAL LABOR MEMBER FOR GELLIBRAND

27 November 2015

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

Dear Mr Ruddock,

Criminal Code Amendment (Private Sexual Material) Bill 2015

Thank you for the opportunity to provide a response about the human rights compatibility of the Criminal Code Amendment (Private Sexual Material) Bill 2015.

Firstly, as is stated in the Explanatory Memorandum to the bill, the defences proposed in section 474.24H mirror the defences in the Criminal Code for offences relating to 'child pornography material' and 'child abuse material' along with the addition of a new defence for 'media activities' in proposed subsection 474.24H(3). It would lead to inconsistent results if an evidential burden were placed on the defendant for the other identical defences in the Criminal Code, but not for the defences for the proposed new offences in the bill.

In addition, reversing the onus of proof may be justified where it is particularly difficult for a prosecution to meet a legal burden. It may be considered justifiable to reverse the onus of proof on an issue that is 'peculiarly within the knowledge' of the accused. In regard to the defence for 'media activities', the reversal is justified because the defences goes to why the defendant engaged in the conduct (paragraph (3)(a)), the intention of the defendant (paragraph (3)(b)) and the reasonable belief of the defendant (paragraph (3)(c)), all of which are peculiarly within the knowledge of the defendant.

Further, the seriousness of a crime may justify placing a legal burden of proof on the accused. For the other defences proposed in section 474.24H, the seriousness of the offending conduct means that the defendant should not even consider engaging in the conduct in reliance on the defence unless they can point to evidence suggesting that defence applies.

Yours sincerely,

Tim Watts MP
Federal Member for Gellibrand

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ATTORNEY-GENERAL

CANBERRA

MC15-008196

30 NOV 2015

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair Philip

Thank you for your letter of 2 November 2015 regarding the Parliamentary Joint Committee on Human Rights' consideration of the *Federal Courts Legislation Amendment (Fees) Regulation 2015* (the Regulation). I note that you also wrote to me in relation to this matter on 11 August 2015; however this correspondence was not received by my Office until 5 November 2015.

I acknowledge that the Committee has considered the Regulation in its *Twenty-fifth Report of the 44th Parliament* and has sought my advice about whether changes to general federal law fees pursuant to the Regulation are a limitation to access to justice, thereby raising questions about its compatibility with Article 14 of the International Covenant on Civil and Political Rights (right to a fair hearing).

As you know, the imposition of a reasonable fee in relation to Court proceedings (or an increase to an existing fee) does not of itself constitute denial of access to justice so as to violate Article 14. I consider that this increase falls well within that principle.

As stated in the explanatory materials, changes to federal law fees under the Regulation increased all general federal law fees by 10 per cent (except for those fees not subject to a biennial fee increase), following a restructure of fee categories for public authorities and publicly listed companies filing matters, other than bankruptcy matters, in the Federal Court and Federal Circuit Court of Australia.

The changes did not, however, affect existing exemptions, deferral and waiver provisions in the *Federal Court and Federal Circuit Court Regulation 2012*. These provisions continue to apply to general federal law fees.

Division 2.3 of the Federal Court and Federal Circuit Court Regulation provides that fee exemptions are available across all general federal law fee categories, with the exception of the filing fee to register a New Zealand judgment under the *Trans-Tasman Proceedings Act 2010*. Listed categories of vulnerable users of the court, such as individuals under the age of 18 years, holders of pension, concession or health care cards and those who have been granted legal aid, are specifically exempted from paying court fees. Additionally,

Division 2.3 provides a broad discretion to grant fee exemptions to individuals where payment of fees would cause financial hardship to the individual, having regard to the individual's income, day-to-day living expenses, liabilities and assets.

Division 2.4 of the Federal Court and Federal Circuit Court Regulation provides for the waiver of fees for proceedings under specific legislation, such as hearing appeals in relation to unlawful discrimination proceedings under the *Australian Human Rights Commission Act 1986* or *Fair Work Act 2009*.

Division 2.5 of the Federal Court and Federal Circuit Court Regulation provides a broad discretion to grant a deferral of payment of most general federal law fees in circumstances where an individual urgently needs to file a document or where, considering an individual's financial circumstances, it would be oppressive or otherwise unreasonable to require payment of the fee.

I consider the availability of fee exemptions, waivers and deferrals to be an important safeguard to ensure that those facing financial hardship or other difficult circumstances are not affected by any changes to court fees. On the basis that fee exemptions, deferrals and waivers continue to apply, I do not consider that the changes to general federal law fees provided in the Regulation limit the ability of parties to access justice or the right to a fair hearing.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Appendix 2

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

---

[1] Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

[2] For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

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.

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 referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

[3] The Attorney-General's Department guidance may be found at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40,* [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

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. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures 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.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. 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 though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that civi; penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described 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

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

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

c) The severity of the penalty

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 with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to 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, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

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 decriminalisation. 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 articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific 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 Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' 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 articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. 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.
- 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.

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.

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