

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 Job, 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.

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

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.

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 Act 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).

