



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Thirty-eighth report of the 44th Parliament

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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 the 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 18 to 19 April 2016 and legislative instruments received from 18 March to 14 April 2016.

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 bill and concluded that it either does not raise human rights concerns; or it does not require additional comment as it promotes human rights or contains justifiable limitations on human rights (and may contain both justifiable limitations on rights and promotion of human rights):

- Statute Law Revision Bill (No. 3) 2016.

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*.¹ 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 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 following bill implements measures which the committee has previously considered limit human rights and the committee refers to its previous comments:

- Fair Work (Registered Organisations) Amendment Bill 2014 [No. 3].²

1.10 The following instruments implement measures which the committee has previously considered limit human rights and the committee refers to its previous comments in relation to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014:

- Migration Act 1958—Specification of Class of Persons Defined as Fast Track Applicants 2016/007 [F2016L00455]; and
- Migration Act 1958—Specification of Class of Persons Defined as Fast Track Applicants 2016/008 [F2016L00456].³

1.11 The following instruments implement measures which the committee has previously considered limit human rights and the committee refers to its previous comments in the *2016 Review of Stronger Futures measures* report:

- Social Security (Administration) (Trial—Declinable Transactions) Amendment Determination (No. 1) 2016 [F2016L00493]; and
- Social Security (Administration) (Excluded circumstances—Queensland Commission) Amendment Specification 2016 [F2016L00500].⁴

Deferred bills and instruments

1.12 The committee continues to defer its consideration of the following legislation:

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Iran) Amendment List 2016 (No. 1) [F2016L00047] (deferred 23 February 2016, pending a response from the Minister for Foreign Affairs)

2 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (25 March 2014) 63-65; *Ninth Report of the 44th Parliament* (15 July 2014) 21-28; and *Twenty-second Report of the 44th Parliament* (13 May 2015) 47-52.

3 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 149-194.

4 For more information regarding the committee's previous comments see Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016).

regarding instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*);⁵ and

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Iran) Amendment List 2016 (No. 2) [F2016L00117] (deferred 16 March 2016, pending a response from the Minister for Foreign Affairs regarding instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*).⁶

5 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 4.

6 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 3.

Response required

1.13 The committee seeks a response or further information from the relevant minister with respect to the following bill.

Road Safety Remuneration Repeal Bill 2016

Portfolio: Employment

Introduced: House of Representatives, 18 April 2016

Purpose

1.14 The Road Safety Remuneration Repeal Bill 2016 (the bill) sought to repeal the *Road Safety Remuneration Act 2012* (RSR Act) in order to abolish the Road Safety Remuneration Tribunal (RSRT). The repeal of the RSR Act also abolishes all orders made by the RSRT, such as orders in relation to driver remuneration and minimum rates of pay.

1.15 The bill also grants the Minister for Employment the power to make rules dealing with transitional arrangements.

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

Background

1.17 The Road Safety Remuneration Repeal Bill 2016 was introduced and passed by both Houses of Parliament on 18 April 2016, receiving Royal Assent on 19 April 2016 and becoming the *Road Safety Remuneration Repeal Act 2016* (RSR Repeal Act). As such, the committee was unable to consider the bill before its passage through parliament.

1.18 The Road Safety Remuneration Amendment (Protecting Owner Drivers) Bill 2016 was also introduced on 18 April 2016, and seeks to suspend the operation of the Contractor Driver Minimum Payments Order 2016, and any subsequent orders that may be made by the Road Safety Remuneration Tribunal, until 1 January 2017. This bill is currently before the House of Representatives; however, as the RSR Repeal Act has now abolished the tribunal and all its orders, it will not proceed.

Abolition of Road Safety Remuneration Tribunal orders

1.19 The RSR Repeal Act repealed the RSR Act and all orders made under the RSR Act. Two orders were made by the RSRT which are now therefore no longer in effect:

- the Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014 (Order 1); and
- the Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (Order 2) (together, the orders).

1.20 The primary human rights issue raised by the legislation is the right to just and favourable conditions of work, and that is the focus of the committee's analysis.

Right to just and favourable conditions of work

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

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

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

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

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

Compatibility of the measure with the right to just and favourable conditions of work

1.25 As set out above, prior to its abolition by the RSR Repeal Act, the RSRT made two orders. Order 1 set out certain minimum conditions, but not minimum payments, for contractor drivers in the described industries of transport for supermarkets and long distance transportation. Order 2 set out the minimum rates of pay for contractor drivers in the described industries.

1.26 The orders promoted the right to just and favourable conditions of work as they improved, through the imposition of minimum standards of conditions and payments, the wages and working conditions of contractors in the described industries. The orders also sought to improve the occupational health and safety of

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

contractors in the industry. In particular, the orders sought to change the way payments were structured in order to address economic factors that:

...create an incentive for truck drivers to drive fast, work long hours and use illicit substances to stay awake. These economic factors include, low rates of pay, incentive based payment methods (such as per kilometre or per trip), unpaid working time and demurrage. Other factors include the hyper-competitive nature of the industry and the low bargaining power faced by drivers.²

1.27 The orders therefore sought to promote multiple aspects of the right to just and favourable conditions of work.

1.28 By abolishing the RSRT and repealing the orders, the RSR Repeal Act engages and limits the right to just and favourable conditions of work by removing the minimum protections provided by the RSRT and its orders. The statement of compatibility to the bill explains that:

To the extent that the Bill may limit enjoyment of the right to just and favourable conditions of work, it pursues the reasonable objective of repealing the main Act to prevent any unnecessary and irreversible negative impacts on the road transport industry, particularly on the viability of owner drivers and small transport operators. The repeal of the main Act is a necessary and proportionate response to these concerns.³

1.29 The committee considers that removing a negative economic impact on owner drivers and small transport operators may be a legitimate objective for the purposes of international human rights law.

1.30 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.⁴

1.31 In terms of the financial impact of the orders, little information is provided in the statement of compatibility to explain, and provide evidence to support, the statement that the orders would have a negative impact on the road transport industry, particularly on the viability of owner drivers and small transport operators. The statement of compatibility explains that 'overwhelmingly the industry including owner drivers and small road transport business oppose' the orders, but does not

2 Road Safety Remuneration Tribunal (RSRT), Decision—Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (2015) RSRTFB 15 [6], available at: <http://www.rprt.gov.au/default/assets/File/decisions-files/2015rsrtfb15.pdf>.

3 Explanatory memorandum (EM), statement of compatibility (SOC) v.

4 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues.

provide a detailed description of those stakeholders nor their particular interest in the orders.

1.32 The statement of compatibility notes that 800 submissions were presented to the RSRT. However, those submissions covered a wide range of views and not all were opposed to the orders. The RSRT undertook research and consultation as well as public hearings between 2012 and 2015 both prior to, and following, the publication of a draft Order 2. The RSRT 'published a significant amount of research material, including currently applicable minimum rates; and commissioned and published a KPMG Research Project Report containing a cost model and minimum payments'.⁵

1.33 Further, in explaining how it arrived at the payment rates in Order 2, the RSRT stated that:

The minimum payments under any RSRO [road safety remuneration order] in these trip examples, even though they exclude rest time payments, are less than the trip rates at which witnesses indicated they may substitute contractor drivers for employee drivers.⁶

1.34 In order to justify the RSR Repeal Act as pursuing a legitimate objective, more information could be provided to explain the economic impact of the RSRT's orders and the reasons why it would financially harm contractor drivers notwithstanding the research and consultation undertaken by the RSRT.

1.35 In terms of the occupational health and safety aspects of the orders, the statement of compatibility explains that:

Two independent reviews, one by Jaguar Consulting of April 2014 and one by PricewaterhouseCoopers of January 2016, concluded that there is limited evidence of a link between safety and remuneration and that the main Act [Road Safety Act] has not delivered any tangible safety benefits.⁷

1.36 However, the PricewaterhouseCoopers report that the statement of compatibility relies on did find that:

There are four major studies that find a statistical link between remuneration and road safety... These studies indicate that a 1 per cent increase in remuneration can lead to a 0.06 per cent to 3.4 per cent decrease in road accident numbers involving crashes.⁸

5 RSRT, *Summary of decision [2016] RSRTFB 6 Application*, available at: <http://www.rsrt.gov.au/index.cfm/decisions-statements-orders/summaries/2016rsrtfb6/>.

6 RSRT, Decision—Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (2015) RSRTFB 15 [167].

7 EM, SOC, v.

8 PwC, *Review of the Road Safety Remuneration System Final Report* (January 2016) 78, available at: https://docs.employment.gov.au/system/files/doc/other/2016_review_of_the_rsrs.pdf.

1.37 Noting these studies, the PricewaterhouseCoopers report concluded that 'directly comparing remuneration and safety does demonstrate statistically significant correlations. However, results vary substantially'.⁹

1.38 Prior to publishing Order 2, the RSRT found that there was no new evidence to refute the findings of a 2008 National Transport Commission report that:

confirms that there is a link between how and how much truck drivers are paid and poor safety outcomes. The NTC believes that there is sufficient evidence which points to a link between rates and methods of payments, and a variety of on-road behaviours which are acknowledged contributors to truck crashes.¹⁰

1.39 This report highlights that rates of payment based on kilometres travelled rather than hours worked, led to increased fatigue and speeding in circumstances where drivers were delayed by poor scheduling of loads, and delays in loading and unloading.¹¹

1.40 Accordingly, there would at the very least appear to be a credible link between the payment rate and methodologies of truck drivers and road safety.

1.41 The statement of compatibility states that the RSRT 'has not delivered any tangible safety benefits' and notes significant regulatory overlap with other laws and regulations. The RSRT was only in operation for a short period and Order 2 was due to come into force in April 2016. Accordingly, it was too early to assess the effectiveness of the tribunal and its orders in improving road safety prior to its abolition by the RSR Repeal Act.

1.42 The statement of compatibility highlights that there is significant regulatory overlap between the RSRT and other laws and regulations that protect occupational health and safety. However, no specific information or analysis is provided to demonstrate that, in the absence of the RSRT, existing laws and regulations will provide equivalent protection to truck drivers and other road users.

1.43 Thus while removing negative economic impacts on owner drivers and small transport operators is capable of being a legitimate objective, more evidence and analysis is required on the points raised above to establish that the RSR Repeal Act achieves this objective for the purposes of international human rights law. In addition, in order for the limitation on the right to just and favourable conditions of work imposed by the RSR Repeal Act to be proportionate, it must be the least rights restrictive approach. Accordingly, it is necessary to explain why abolishing the RSRT

9 PwC, *Review of the Road Safety Remuneration System Final Report* (January 2016) 78-79 .

10 National Transport Commission, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry* (October 2008) 17, available at: <http://www.ntc.gov.au/archive/safe-payments>.

11 National Transport Commission, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry* (October 2008) 5.

and its orders is the most effective and least rights restrictive way to protect the economic interests of owner drivers.

1.44 As set out above, the RSR Repeal Act engages and limits the right to just and favourable conditions of work. The statement of compatibility does not fully justify that limitation for the purposes of international human rights law. The committee therefore seeks the advice of the Minister for Employment 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 on rights and that objective; and**
- **reasons why the limitation is a reasonable and proportionate measure for the achievement of that objective.**

Advice only

1.45 The committee draws the following instrument to the attention of the relevant minister on an advice only basis. The committee does not require a response to these comments.

PAYG Withholding Variation: Variation of amount to be withheld from indigenous artists when an ABN is not provided [F2016L00358]

Portfolio: Treasury

Authorising legislation: Taxation Administration Act 1953

Last day to disallow: 29 June 2016 (Senate) [tabled in the Senate 18 April 2016]

Purpose

1.46 The PAYG Withholding Variation: Variation of amount to be withheld from indigenous artists when an ABN is not provided [F2016L00358] (the instrument) repeals and replaces a previous PAYG Withholding Variation to continue to provide that no tax is to be withheld from payments made to indigenous artists for artistic works where the artist lives in a remote area and does not quote an Australian Business Number (ABN).

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

Measures bestowing a benefit on a particular group on the basis of race

1.48 The instrument provides that the withholding amount for indigenous artists who live or work in certain remote areas, and do not quote an ABN, will be nil. The instrument provides a benefit to indigenous artists in remote locations by ensuring that they are able to receive the full value of payments received for artistic works without having withholding tax deducted. While the instrument does not change the tax liability for income earned, it is designed to make it easier for indigenous artists in remote areas to manage their tax affairs and as such confers a benefit on those to whom the instrument applies. As the instrument applies only to indigenous artists, the instrument engages the right to equality and non-discrimination.

Right to equality and non-discrimination

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

1.50 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.

1.51 The ICCPR defines 'discrimination' as a distinction based on a personal attribute (for example, race, sex or religion),¹ which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.²

1.52 Articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) further describes the content of these rights and the specific elements that state parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.

1.53 Pursuant to Article 1(4) of the ICERD, where a measure is taken for the sole purpose of advancing a disadvantaged racial or ethnic group in order to ensure such a group equal enjoyment or exercise of human rights and fundamental freedoms, this shall not be deemed racial discrimination, provided that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

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

1.54 The statement of compatibility for the instrument states:

This legislative instrument does not engage any of the applicable rights or freedoms because the new instrument is of a minor or machinery nature.³

1.55 However, the instrument, by applying to a particular group, distinguished on the basis of a protected status, engages the right to equality and non-discrimination. Nevertheless, the instrument is clearly beneficial to the indigenous artists to whom it applies, as the instrument maker appears to have recognised in the explanatory statement:

This provides a less onerous arrangement for those artists who, for reasons such as age, language, level of education and isolation, may not be able to fully engage with the complexities of the taxation system. Often the relevant artistic works are a joint product of a number of contributing artists, which further complicates the taxation treatment which may apply.⁴

1.56 The measure may therefore be classified as a 'special measure' as defined by article 1(4) of ICERD, as it may assist indigenous artists to pursue work and artistic

1 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.

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

3 Statement of compatibility [1].

4 Explanatory statement [2].

pursuits. Even if the instrument is not characterised as a special measure, the committee considers that this differential treatment is otherwise justified as it pursues the legitimate objective of ensuring that compliance with the tax system does not undermine indigenous artists' ability to pursue their rights to work and culture, and is rationally connected and proportionate to that objective.

1.57 While the measure is compatible with human rights, the absence of any human rights analysis in the statement of compatibility should be addressed. It is important for legislation proponents and instrument makers to identify measures that support or promote human rights, as well as providing justifications for measures that limit rights.

1.58 Additionally, it is important for instrument makers to identify that when legislation clearly provides that a group is to receive differential treatment on the basis of a protected status, such as race, this needs to be acknowledged and justified in the statement of compatibility. This is particularly important as one of the considerations in determining whether a limitation on a right is proportionate, is considering whether any affected groups are particularly vulnerable.

1.59 The committee draws this matter to the Treasurer's attention; and recommends that the statements of compatibility for future instruments that provide a benefit to indigenous people address how the instrument engages and is compatible with the right to equality and non-discrimination.

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.

Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015

Portfolio: Environment

Introduced: House of Representatives, 20 August 2015

Purpose

2.3 The Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (the bill) seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* (the Environment Act) to remove section 487 of the Environment Act. Currently, section 487 expands the meaning of 'person aggrieved' in the *Administrative Decisions (Judicial Review) Act 1977*.

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

Background

2.5 The committee first commented on the bill in its *Twenty-seventh Report of the 44th Parliament* (first report), and requested further information from the Minister for the Environment as to whether the bill was compatible with the right to health and a healthy environment.¹

2.6 The committee considered the minister's response in its *Thirty-fifth Report of the 44th Parliament* (previous report), and sought further information from the minister in order to conclude its examination of the bill.²

Removal of extended standing to seek judicial review of decisions or conduct under the Environment Act

2.7 Currently, section 487 of the Environment Act gives standing rights (the right to bring an action before the courts) to individuals and organisations who, at any time in the preceding two years, have engaged in a series of activities for the protection or conservation of, or research into, the Australian environment. This

1 Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament* (8 September 2015) 4-7.

2 Parliamentary Joint Committee on Human Rights, *Thirty-fifth Report of the 44th Parliament* (25 February 2016) 7-12.

means that currently those individuals and organisations can bring an action to seek judicial review of actions taken, or not taken, under the Environment Act. The bill would remove the right of these individuals and organisations to bring judicial review in relation to decisions made (or failed to be made) under the Environment Act or conduct engaged under that Act (or regulations).

2.8 The objectives of the Environment Act include protecting the environment and ecosystems and promoting ecologically sustainable development, which includes principles of inter-generational equity; that the present generation should ensure the health, diversity and productivity of the environment for the benefit of future generations.³

2.9 In its first report, the committee considered that removing the extended standing provisions could result in a failure to properly enforce the protections under the Environment Act, and as a result may engage and limit the right to health and a healthy environment.

Right to health and a healthy environment

2.10 The right to health is guaranteed by article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).

Compatibility of the measure with the right to health and a healthy environment

2.11 The statement of compatibility did not consider whether the right to health and a healthy environment was engaged by this measure. The committee therefore sought the advice of the Minister for the Environment as to whether the bill limits the right to a healthy environment and, if so, further information as to the legitimate objective, rational connection and proportionality of the measures. The minister's response explained that while there is no standalone right to a healthy environment, the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life.

2.12 The minister agreed that the existing extended standing provisions under the Environment Act may facilitate judicial review that ensures that environmental law is correctly applied, thereby protecting public health.

2.13 The minister's response noted the existence of an emerging risk that the extended standing provisions are being used to deliberately disrupt and delay key

3 See section 3 of the *Environment Protection and Biodiversity Conservation Act 1999*.

projects and infrastructure development. The committee considered that this may be a legitimate objective to justify the limitation on the right to health for the purposes of international human rights law, however, further evidence as to the nature and extent of the emerging risk was required.

2.14 The committee therefore sought further advice from the Minister for the Environment as to whether the measure imposes a justified limitation on the right to health, including evidence as to the nature and extent of the emerging risk of the extended standing provisions being used to disrupt and delay key project and infrastructure development.

Minister's response

Thank you for your letter of 25 February 2016 in which the Parliamentary Joint Committee on Human Rights requested further advice regarding the human rights compatibility of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015.

In particular, the Committee has requested further advice as to whether the repeal of the extended standing provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) imposes a justified limitation on the right to health. The Committee has also requested evidence as to the nature and extent of the emerging risk of the extended standing provisions being used to disrupt and delay key project and infrastructure development.

In response to the Committee's request, I refer the Committee to a campaign document titled *Stopping the Australian Coal Export Boom: Funding proposal for the Australian anti-coal movement* prepared in 2011 by a number of environmental organisations. As I mentioned in my second reading speech, the strategy outlined in the document is "to 'disrupt and delay' key projects and infrastructure while gradually eroding public and political support for the industry and continually building the power of the movement to win more."

In relation to litigation the document goes on to state that "legal challenges can stop projects outright, or can delay them, in order to buy time to build a much stronger movement and powerful public campaigns. They can also expose the impacts, increase costs, raise investor uncertainty, and create a powerful platform for public campaigns" (section 4.1).

The purpose of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 is to bring the arrangements for standing to make a judicial review application for a decision made under the EPBC Act in-line with the broad Commonwealth standing provisions. This will ensure that those people, organisations or community groups who have a genuine and direct interest in a matter are able to challenge EPBC Act administrative decisions as provided for under the *Administrative*

Decisions (Judicial Review) Act 1977 and the *Judiciary Act 1903*. This is consistent with the majority of Commonwealth legislation.⁴

Committee response

2.15 The committee thanks the Minister for the Environment for his response.

2.16 The committee notes the importance of ensuring that key projects and infrastructure development are not delayed where all applicable environmental standards have been met.

2.17 The committee notes the minister's advice regarding the prevalence of disruption campaigns as the justification for the measures in the bill. The committee considers that the minister's response has not fully explained the link between these campaign materials and the use of the extended standing provisions in the Environment Act so as to fully justify the provisions in the bill.

2.18 Nevertheless, the committee notes that the bill would not change existing environmental standards that seek to protect the right to health through the protection of the environment. The committee also notes that the bill preserves the ability of people with a genuine and direct interest in a matter to challenge decisions under the Environment Act.

2.19 Accordingly, given the existing environmental protections under the *Environment Protection and Biodiversity Conservation Act 1999*, which seek to protect the right to health, removing the extended standing provisions may be compatible with the right to health.

4 See Appendix 1, letter from the Hon Greg Hunt MP, Minister for the Environment, to the Hon Philip Ruddock MP (received 13 April 2016) 2.

Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 [F2015L01462]

Portfolio: Employment

Authorising legislation: Fair Work (Building Industry) Act 2012

Last day to disallow: 3 December 2015 (Senate)

Purpose

2.20 The Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015 (the instrument) amends the Building Code 2013 (the code). The amendments require building contractors or building industry participants to show the ways in which they are managing drug and alcohol issues in the workplace in their work health safety and rehabilitation (WHS&R) management systems. For certain types of building work, to which the Commonwealth is making a significant contribution, building contractors and industry participants must also include a fitness for work policy to manage alcohol and other drugs in the workplace in their management plan for WHS&R.

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

Background

2.22 The committee first reported on the instrument in its *Thirtieth Report of the 44th Parliament* (first report) and requested further information from the Minister for Employment as to whether the instrument was compatible with the right to privacy.¹

2.23 The committee considered the minister's response in its *Thirty-fourth Report of the 44th Parliament* (previous report) and sought further information from the minister in order to conclude its examination of the instrument.²

Alcohol and drug testing of construction workers

2.24 Schedule 3 of the instrument sets out requirements relating to drug and alcohol testing that a fitness for work policy must address.

2.25 The committee considered in its previous analysis that establishing a policy framework for testing workers for drugs and alcohol engages and limits the right to privacy.

1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 61-63.

2 Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 5-8.

Right to privacy

2.26 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. The right to privacy includes protection of our physical selves against invasive action, including:

- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing); and
- the prohibition on unlawful and arbitrary state surveillance.

Compatibility of the measure with the right to privacy

2.27 The statement of compatibility acknowledges that drug and alcohol testing implemented under the instrument engages the right to privacy.

2.28 The committee has previously considered that the objective, which is to ensure that building and construction workplaces are drug and alcohol-free, is important. The committee also considered that the objective is legitimate for the purposes of international human rights law, and that the measures are rationally connected to the objective.

2.29 However, the committee queried whether the instrument imposes a proportionate limitation on the right to privacy. On the face of the instrument, there is no requirement that the drug and alcohol policy have appropriate and necessary safeguards, or indeed any safeguards, to protect the privacy of individuals who are subject to testing.

2.30 The minister's first response did not explain the safeguards that would apply to drug and alcohol testing so as to ensure that the limitation on the right to privacy is a reasonable and proportionate measure to achieve the stated objective.

2.31 The minister stated that the measures do not prescribe the contents of a fitness for work policy, which would be decided at a workplace level subject to existing safety, privacy and industrial laws.

2.32 The committee considered that more information was required to establish that there were sufficient safeguards around drug and alcohol testing. The committee therefore requested further advice from the Minister for Employment as to the proportionality of the requirement that construction workers undergo drug and alcohol testing, in particular, whether there are sufficient safeguards in place to protect the right to privacy.

Minister's response

This letter is in response to your letter of 23 February 2016 concerning the *Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015*.

The Parliamentary Joint Committee on Human Rights (the Committee) sought my further advice about the human rights compatibility of this instrument. I consider the measures are proportional and it is in the public interest to take steps to ensure that construction workers are not affected by drugs or alcohol in the workplace.

Should the Committee require further information, please contact my office.³

Committee response

2.33 The committee thanks the Minister for Employment for her response.

2.34 The committee notes that the minister's response merely states that the measures are 'proportional' and in the public interest. The minister's response provides no evidence or reasoning to support this view.

2.35 The committee's usual expectation where a measure may limit a human right is that there is a reasoned and evidence-based explanation of how that limitation is justified. Such a justification must demonstrate that the measure is proportionate. This conforms with the committee's Guidance Note 1,⁴ and the Attorney-General's Department's guidance on the preparation of statements of compatibility and advice on justifying limitations.⁵

2.36 Alcohol and drug testing is common in law enforcement agencies and the committee has previously considered that such schemes are compatible with the right to privacy on the basis that these testing regimes include rigorous safeguards. For example, the Australian Border Force (Alcohol and Drug Tests) Rule 2015, which sets out the rules for alcohol and drug testing of officers of the Australian Border Force, includes a suite of safeguards including that:

- (a) the alcohol or drug test must be conducted in a respectful manner and in circumstances affording reasonable privacy;

3 See Appendix 1, letter from Senator the Hon Michaelia Cash, Minister for Employment, to the Hon Philip Ruddock MP (received 13 April 2016) 2.

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_1/guidance_note_1.pdf.

5 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>.

- (b) the test must not be conducted in the presence or view of a person whose presence is not necessary and must not involve the removal of more clothing than is necessary for the conduct of the test;
- (c) if a hair sample is required, that it collected in the least painful manner and not from the genitals or buttocks;
- (d) a body sample collected for an alcohol or drug test must be kept in a secure location and destroyed after a prescribed period; and
- (e) that information revealed by the drug and alcohol test be shared only with individuals authorised by the legislative instrument.⁶

2.37 In this instance, the legislative instrument establishes a requirement that a fitness for work policy includes frequent and periodic drug and alcohol testing without providing for any safeguards as to how the information obtained from such testing is to be kept, used or shared.

2.38 In the absence of any further advice or reasoning from the Minister for Employment as to any safeguards which are in place, even recognising the important objective of ensuring construction workplaces are drug and alcohol-free, the committee can only conclude that the instrument provides insufficient safeguards to ensure that the requirement that construction workers undergo drug and alcohol testing is a proportionate limitation on the right to privacy.

6 Australian Border Force (Alcohol and Drug Tests) Rule 2015 (F2015L00973), sections 9-12.

Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113]

Portfolio: Prime Minister and Cabinet

Authorising legislation: Royal Commissions Act 1902

Last day to disallow: 21 June 2016 (Senate)

Purpose

2.39 The Royal Commissions Amendment Regulation 2016 (No. 1) (the instrument) amends the Royal Commissions Regulations 2001 (the principal regulations) to enable information gathered by the Royal Commission into Trade Union Governance and Corruption (TURC) to be given, accessed and used by different persons and bodies.

2.40 Witnesses before Royal Commissions are afforded only a limited privilege against self-incrimination (as per section 6A of the *Royal Commissions Act 1902* (RC Act)), and the instrument dispenses with the requirement to individually notify the person or body who initially provided such information to the TURC, when information will be transferred to a different person or body.

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

Background

2.42 The committee previously considered the instrument in its *Thirty-sixth Report of the 44th Parliament* (previous report), and requested further information from the Assistant Minister to the Prime Minister as to whether the instrument was compatible with the right to a fair trial, fair hearing rights and the right to privacy.¹

Sharing of information in circumstances where the witness was not afforded the privilege against self-incrimination

2.43 The instrument enables information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, to be given, accessed and used by different persons and bodies without notification to the person or body who initially provided it to the TURC.

2.44 The committee considered in its previous report that the measure engages the right to a fair trial, fair hearing rights and the right to privacy.

Right to a fair trial and fair hearing rights

2.45 The right to a fair trial and fair hearing rights are 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

1 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 14-18.

military disciplinary hearings. The right guarantees to all persons a fair and public hearing by a competent, independent and impartial tribunal established by law.

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

Compatibility of the measure with the right to a fair trial and fair hearing rights

2.47 The statement of compatibility explains that the provision of access and use of information gathered by the TURC is for the purposes of expediting the prosecution of criminal and civil wrongdoing and the committee previously acknowledged that this is a legitimate objective. The committee also considered that the measures are rationally connected to this legitimate objective.

2.48 However, the committee considered that the statement of compatibility had not demonstrated that the instrument imposes a proportionate limitation on the right to a fair trial and fair hearing rights in pursuit of that legitimate objective.

2.49 The committee considered that sharing information gathered by the TURC, in circumstances where the witness was not afforded the privilege from self-incrimination, to be given, accessed and used by different persons and bodies for purposes as broad as 'the administration of a law' engages and limits the right to a fair trial and fair hearing rights. The committee therefore sought the advice of the Assistant Minister to the Prime Minister as to whether the measure is a proportionate means of achieving the stated objective.

Right to privacy

2.50 Article 17 of the ICCPR prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

Compatibility of the measure with the right to privacy

2.51 Under the RC Act, it is an offence to fail to give evidence or produce documents to a Royal Commission if a person is summonsed to appear or produce documents.² When giving evidence, which may be on oath or affirmation, a person is not excused from answering a question on the grounds of self-incrimination, or other grounds of confidentiality.³

2 RC Act, sections 3 and 6B.

3 RC Act, section 6A.

2.52 The statement of compatibility acknowledged that this engages the right to privacy. As noted above at paragraph [2.47], the committee accepted that the measure pursues a legitimate objective, and that it is rationally connected to this legitimate objective. The committee had concerns regarding the proportionality of the measure.

2.53 The statement of compatibility did not explain why it is necessary to permit the provision of access and use of all information gathered by the TURC. For example, it is unclear, whether the regulation could result in the provision of confidential information to another person or body without consent.

2.54 The committee also considered that the statement of compatibility did not sufficiently explain why it is necessary to share information gathered by the TURC to a person or body 'responsible for advising a Minister... about the administration of a law,' if the intention is that the records be used to expedite the prosecution of criminal and civil wrongdoing.

2.55 The committee therefore sought the advice of the Assistant Minister to the Prime Minister as to whether the measure is a proportionate means of achieving the stated objective.

Assistant Minister's response

I note the Committee considers that this transfer of information engages the right to privacy and the rights to a fair trial and fair hearing. These rights are said to be engaged because when a witness gives evidence to a Royal Commission they are not able to invoke the privilege against self-incrimination (unless there are offence charges on foot). The Committee acknowledges that the information transfer is 'rationally connected' to the legitimate objective of expediting the prosecution of criminal and civil wrongdoing. However, the Committee has requested more information to support that the transfer of information authorised by the Regulation is a proportionate limitation on the right to a fair trial and fair hearing rights in pursuit of that legitimate objective.

The partial abrogation of the privilege against self-incrimination in the *Royal Commissions Act 1901* supports a Commissioner's function to inquire into matters of public importance. To the extent any records contain incriminating evidence given by a witness, the Royal Commission Act also gives some protection to the witness through the engagement of 'use' immunity (section 6DD). In this way, the evidence cannot be used against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person. The Regulation does not abrogate that protection.

The Letters Patent expressly commissioned Commissioner John Dyson Heydon AC QC to inquire, in part, into any conduct which may amount to a breach of any law, regulation or professional standard by any officers of an employee association, in relation to that entity.

When the Royal Commission was operating, the Commissioner had power to communicate information that may relate to a contravention of a law to certain persons and bodies, including to Attorneys-General, the Director of Public Prosecutions, police and a person or authority responsible for the administration or enforcement of the law. Now that the Commission has ceased, the Regulation appropriately complements that power by enabling the Secretary to continue to give records, upon request, to a person or body that has law enforcement functions or a responsibility to advise a Minister about the administration of a law. The records would need to be relevant to the performance of those functions.

As further safeguards to privacy, fair trial and hearing rights, the receiving person or body will be obliged to ensure the 'use' immunity is not infringed, as well as to comply with any other obligations affecting a person's rights when discharging duties in connection with law enforcement or the administration of the law.

In so far as the statement of compatibility states that 'provision of access to the Commission's records is the only way by which criminal and civil offences can be further investigated and prosecuted', I also note that statement is intended to clarify that while a Royal Commission has strong information gathering powers it does not have power to enforce a law.⁴

Committee response

2.56 The committee thanks the Assistant Minister to the Prime Minister for his response.

2.57 Under the RC Act, it is an offence to fail to give evidence or produce documents to a Royal Commission if a person is summonsed to appear or produce documents.⁵ When giving evidence, which may be on oath or affirmation, a person is not excused from answering a question on the grounds of self-incrimination, or other grounds of confidentiality.⁶ These broad powers granted to a Royal Commission are not ordinarily available to other agencies of government.

2.58 The RC Act is designed to enable the establishment of royal commissions with significant information gathering powers but not law enforcement powers. Royal commissions have historically been established to inquire into often complex and systemic issues that have thwarted traditional law enforcement efforts.

2.59 The investigative functions of a royal commission sit, in part, outside the protections of the right to a fair trial as a royal commission is not determining a criminal charge but undertaking a broader examination of an issue.

4 See Appendix 1, letter from the Hon Dr Peter Hendy MP, Assistant Minister to the Prime Minister, to the Hon Philip Ruddock MP (received 18 April 2016) 1-2.

5 RC Act, sections 3 and 6B.

6 RC Act, section 6A.

2.60 However, article 14 and the right to a fair trial, is directly relevant where a person is required to give information to a royal commission which may incriminate themselves and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges.

2.61 The assistant minister's response notes that the RC Act contains a 'use immunity; such that where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person.

2.62 Ordinarily, the committee looks to both a 'use' and a 'derivative use' immunity to justify limitations on the protections against self-incrimination. A 'derivative use' immunity provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.

2.63 The need for both a 'use' and a 'derivative use' immunity where the privilege against self-incrimination is abrogated is consistent with the *Commonwealth Guide to Framing Offences*.⁷

2.64 The assistant minister's response does not explain the need to exclude 'derivative use' immunities from the RC Act and accordingly does not justify the limitation on the right to a fair trial (right not to incriminate oneself). Accordingly, the committee considers that the RC Act may warrant further scrutiny for compatibility with human rights.

2.65 Noting these concerns with the RC Act, the instrument itself does not expand the powers of the royal commission nor remove the 'use immunity' that attaches to the evidence that the commission collected in circumstances where an individual was required to provide self-incriminating evidence. Accordingly, the committee's primary concern is with the RC Act and not the instrument.

2.66 In relation to the right to privacy, records of the royal commission may only be given to a person or body that has law enforcement functions or a responsibility to advise a minister about the administration of a law. In addition, the records can only be requested when they are necessary for the performance of these functions. The committee considers that these restrictions are sufficient to ensure that the instrument only imposes a proportionate limitation on the right to privacy.

2.67 The committee's assessment of the sharing of information in circumstances where the witness was not afforded the privilege against self-incrimination against articles 14 and 17 of the International Covenant on Civil and Political Rights (right

7 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 27, available at <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

to a fair trial, fair hearing rights and the right to privacy) is that the measure may be compatible with international human rights law.

The Hon Philip Ruddock MP

Chair

Appendix 1

Correspondence



The Hon Greg Hunt MP

Minister for the Environment

Hon Phillip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

MC16-002853

23 MAR 2016

Dear Mr Ruddock

A handwritten signature in blue ink, appearing to read 'Phil'.

Thank you for your letter of 25 February 2016 in which the Parliamentary Joint Committee on Human Rights requested further advice regarding the human rights compatibility of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015.

In particular, the Committee has requested further advice as to whether the repeal of the extended standing provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) imposes a justified limitation on the right to health. The Committee has also requested evidence as to the nature and extent of the emerging risk of the extended standing provisions being used to disrupt and delay key project and infrastructure development.

In response to the Committee's request, I refer the Committee to a campaign document titled *Stopping the Australian Coal Export Boom: Funding proposal for the Australian anti-coal movement* prepared in 2011 by a number of environmental organisations. As I mentioned in my second reading speech, the strategy outlined in the document is "to 'disrupt and delay' key projects and infrastructure while gradually eroding public and political support for the industry and continually building the power of the movement to win more."

In relation to litigation the document goes on to state that "legal challenges can stop projects outright, or can delay them, in order to buy time to build a much stronger movement and powerful public campaigns. They can also expose the impacts, increase costs, raise investor uncertainty, and create a powerful platform for public campaigns" (section 4.1).

The purpose of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 is to bring the arrangements for standing to make a judicial review application for a decision made under the EPBC Act in-line with the broad Commonwealth standing provisions. This will ensure that those people, organisations or community groups who have a genuine and direct interest in a matter are able to challenge EPBC Act administrative decisions as provided for under the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903*. This is consistent with the majority of Commonwealth legislation.

Yours sincerely

Greg Hunt



Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC16-000587

The Hon Phillip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

***Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment
Instrument 2015 [F2015L01462]***

This letter is in response to your letter of 23 February 2016 concerning the *Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015*.

The Parliamentary Joint Committee on Human Rights (the Committee) sought my further advice about the human rights compatibility of this instrument. I consider the measures are proportional and it is in the public interest to take steps to ensure that construction workers are not affected by drugs or alcohol in the workplace.

Should the Committee require further information, please contact my office on (02) 6277 7320.

Yours sincerely

Senator the Hon Michaelia Cash

 / 2016



THE HON DR PETER HENDY MP
ASSISTANT CABINET SECRETARY
ASSISTANT MINISTER FOR FINANCE

Reference: MC16-040820

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

Dear Mr Ruddock

Thank you for your letter dated 16 March 2016 regarding the Parliamentary Joint Committee on Human Rights' *Thirty-sixth Report of the 44th Parliament* and the Committee's request for advice on the Royal Commissions Amendment Regulation 2016 (No.1) (the Regulation).

The Regulation gives custody of the records of the Royal Commission into Trade Union Governance and Corruption to the Secretary of the Department of the Prime Minister and Cabinet. It also authorises the Secretary, in part, to give records to a person or body that performs a law enforcement function or is responsible for advising a Minister on the administration of a Commonwealth or State or Territory law.

I note the Committee considers that this transfer of information engages the right to privacy and the rights to a fair trial and fair hearing. These rights are said to be engaged because when a witness gives evidence to a Royal Commission they are not able to invoke the privilege against self-incrimination (unless there are offence charges on foot). The Committee acknowledges that the information transfer is 'rationally connected' to the legitimate objective of expediting the prosecution of criminal and civil wrongdoing. However, the Committee has requested more information to support that the transfer of information authorised by the Regulation is a proportionate limitation on the right to a fair trial and fair hearing rights in pursuit of that legitimate objective.

The partial abrogation of the privilege against self-incrimination in the *Royal Commissions Act 1901* supports a Commissioner's function to inquire into matters of public importance. To the extent any records contain incriminating evidence given by a witness, the Royal Commission Act also gives some protection to the witness through the engagement of 'use' immunity (section 6DD). In this way, the evidence cannot be used against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person. The Regulation does not abrogate that protection.

The Letters Patent expressly commissioned Commissioner John Dyson Heydon AC QC to inquire, in part, into any conduct which may amount to a breach of any law, regulation or professional standard by any officers of an employee association, in relation to that entity.

When the Royal Commission was operating, the Commissioner had power to communicate information that may relate to a contravention of a law to certain persons and bodies, including to Attorneys-General, the Director of Public Prosecutions, police and a person or authority responsible for the administration or enforcement of the law. Now that the Commission has ceased, the Regulation appropriately complements that power by enabling the Secretary to continue to give records, upon request, to a person or body that has law enforcement functions or a responsibility to advise a Minister about the administration of a law. The records would need to be relevant to the performance of those functions.

As further safeguards to privacy, fair trial and hearing rights, the receiving person or body will be obliged to ensure the 'use' immunity is not infringed, as well as to comply with any other obligations affecting a person's rights when discharging duties in connection with law enforcement or the administration of the law.

In so far as the statement of compatibility states that 'provision of access to the Commission's records is the only way by which criminal and civil offences can be further investigated and prosecuted', I also note that statement is intended to clarify that while a Royal Commission has strong information gathering powers it does not have power to enforce a law.

I trust that this information addresses your inquiries.

Yours sincerely

DR PETER HENDY

18 / 4 / 2016

Appendix 2

Guidance Note 1 and Guidance Note 2

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

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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.

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.

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 civil 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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