Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must 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 (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 7 and 10 November 2016;[1]
- legislative instruments received between 14 October and 3 November 2016 (consideration of nine legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

Instruments not raising human rights concerns

1.3 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[3] Instruments raising human rights concerns are identified in this chapter.

1.4 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions-based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. 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.

3 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.

Response required

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

Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016

Purpose	Seeks to amend a range of legislation to reflect the establishment of the Law Enforcement Conduct Commission of New South Wales and its inspector and support its functions; to provide the Independent Broad-based Anti-corruption Commission of Victoria with investigative powers; and amend the *Proceeds of Crime Act 2002* in respect of the meaning of lawfully acquired property or wealth
Portfolio	Attorney-General
Introduced	House of Representatives, 19 October 2016
Right	Privacy (see **Appendix 2**)

Access to communications and telecommunications data by the NSW Law Enforcement Conduct Commission

1.6 The bill proposes to amend Commonwealth legislation to replace references to the New South Wales (NSW) Police Integrity Commission (PIC) with the NSW Law Enforcement Conduct Commission (LECC) and its Inspector.

1.7 The proposed amendments seek to include the LECC in the definition of 'eligible authority' under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) and thereby permit the Attorney-General to declare the LECC to be an 'interception agency'.[1] Additionally, proposed amendments seek to have the LECC included in the definition of 'criminal law-enforcement agency' in the TIA Act. The effect of being declared an 'interception agency' and inclusion as a 'criminal law enforcement-agency' will be to permit officers of the LECC to:

- apply for interception warrants to access the content of private communications (such as telephone calls);[2]

1 Subject to the requirement that the respective state legislation meets the requirements in section 35 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

2 'Communication' is defined in section 5 of the TIA Act as 'conversation and a message, and any part of a conversation or message, whether: (a) in the form of: (i) speech, music or other sounds; (ii) data; (iii) text; (iv) visual images, whether or not animated; or (v) signals; or (b) in any other form or in any combination of forms.' See also, TIA Act section 46.

- issue preservation notices requiring a telecommunications carrier to preserve all stored communications that relate to a named person or telecommunications service;[3]
- apply for a warrant to access stored communications content;[4] and
- seek access to telecommunications data (metadata).[5]

Compatibility of the measure with the right to privacy

1.8 As the TIA Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment by the Attorney-General in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full human rights assessment of proposed measures which extend or amend existing legislation requires an assessment of how such measures interact with the existing legislation. The committee is therefore faced with the difficult task of assessing the human rights compatibility of permitting an agency to access powers under the TIA Act without the benefit of a foundational human rights assessment of the TIA Act from the Attorney-General.

1.9 The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life. As the effect of the proposed measures would be to permit the LECC to access an individual's private communications and telecommunications data in a range of circumstances, the measures engage and limit the right to privacy.

1.10 A limitation on the right to privacy will be permissible under international human rights law where it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.11 The statement of compatibility identifies that the measures engage the right to privacy and states that the measures 'are designed to achieve the legitimate objective of providing effective frameworks to identify, investigate and punish corruption and to protect public order through enforcing the law'.[6] This would constitute a legitimate objective for the purposes of international human rights law. Access to telecommunications data and communications would also appear to be

3 See section 107H of the TIA Act.

4 See section 109 of the TIA Act.

5 'Telecommunications data' refers to metadata rather than information that is the content or substance of a communication: see section 172 of the TIA Act.

6 Explanatory memorandum (EM), statement of compatibility (SOC) 9.

rationally connected to this stated objective, in the sense that it is likely to assist in the LECC's investigative functions.[7]

1.12 The statement of compatibility also sets out a range of further information that addresses issues of whether the measures are proportionate to the stated objective. The focus of this assessment is on the proposed role of the LECC in the context of the mechanisms under the TIA Act.

1.13 The TIA Act provides a legislative framework that criminalises the interception and accessing of telecommunications. However, as referenced in the statement of compatibility, the TIA Act sets out exceptions that enable law enforcement agencies and other agencies to apply for access to communications and telecommunications data:

- chapter 4 of the TIA Act provides for warrantless access to telecommunications data (metadata) in respect of 'enforcement agencies'; and
- chapters 2 and 3 of the TIA Act provide for warranted access by an 'interception agency' to the content of communications, including both communications passing across telecommunications services,[8] and stored communications content.

1.14 The committee previously examined chapter 4 of the TIA Act in the context of its consideration of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (which amended the TIA Act). This previous analysis considered that a scheme for accessing private or confidential information must be sufficiently circumscribed to ensure limitations on the right to privacy are proportionate (that is, are only as extensive as is strictly necessary).[9] However, the previous human rights analysis raised serious concerns regarding whether the internal self-authorisation process for access to telecommunications data by 'enforcement agencies' provided sufficient safeguards in relation to the right to privacy.

1.15 Specifically, this previous analysis noted that chapter 4 of the TIA Act permits an 'authorised officer' of an 'enforcement agency' to authorise a service provider to disclose existing telecommunications data where it is 'reasonably necessary' for the enforcement of, 'a law imposing a pecuniary penalty or the protection of the public revenue'. Accordingly, there are no significant limits on the type of investigation to which this self-approval process may apply. This could mean that metadata is accessed in a range of circumstances that go beyond what is strictly necessary, which

7 EM, SOC 11.

8 That is, the interception of live communications.

9 See, Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) at [1.161].

extends the approach beyond that required to amount to a permissible limitation under international human rights law.[10]

1.16 The previous human rights analysis also raised concerns about accessed data subsequently being used for an unrelated purpose and safeguards around the period of retention of such data and absence of a warrant process.

1.17 Accordingly, the committee made a number of recommendations for amending the provisions of the TIA Act so as to avoid the disproportionate limitation on the right to privacy. These recommendations were in relation to the purposes for which data could be accessed, safeguards relating to prior review (such as a warrant process) and safeguards in relation to the use and retention of such data after it was accessed.[11]

1.18 The statement of compatibility does not address these previous concerns regarding the right to privacy, nor the committee's proposed recommendations. Without sufficient safeguards in chapter 4 of the TIA Act to ensure the proportionality of the limitation of the right to privacy, permitting the LECC to be an 'enforcement agency' and accordingly access to telecommunications data under chapter 4, raises these same concerns.

1.19 As noted above, allowing the LECC to be declared an 'interception agency' and thereby permitting it to access the content of private communications via warrant under chapter 2 and chapter 3 of the TIA Act, also has implications in relation to the right to privacy. In relation to access to the content of private communications, the warrant regime may, in key respects, assist to ensure that access to private communications is sufficiently circumscribed. However, the use of warrants does not provide a complete answer as to whether chapters 2 and 3 of the TIA Act constitute a proportionate limit on the right to privacy, as questions arise as to the proportionality of the broad access that may be granted in relation to 'services' or 'devices' under these chapters of the TIA Act.

1.20 The committee has not previously considered chapters 2 and 3 of the TIA Act in detail. Accordingly, further information from the Attorney-General in relation to the human rights compatibility of the TIA Act would assist a human rights assessment of the proposed measures in the context of the TIA Act.

Committee comment

1.21 **Providing the LECC with a range of powers to access communications and telecommunications data under the TIA Act engages and limits the right to privacy.**

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10 Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (November 2014) at [1.44] to [1.49].

11 See, Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015); and *Fifteenth Report of the 44th Parliament* (14 November 2014) [1.44] to [1.49].

1.22 **The committee notes that the previous human rights assessment of the TIA Act in relation to telecommunications data considered that the scheme did not impose a proportionate limit on the right to privacy and made a number of recommendations. While the statement of compatibility has not addressed these issues, the committee considers the bill to raise the same concerns as have previously been identified.**

1.23 **In light of the human rights concerns regarding the scope of powers under the TIA Act, the committee notes that the preceding legal analysis raises questions as to whether permitting the LECC to access such powers constitutes a proportionate limit on the right to privacy.**

1.24 **The committee therefore requests the further advice of the Attorney-General as to:**

- **whether permitting the LECC to access such powers under the TIA Act constitutes a proportionate limit on the right to privacy (including in respect of matters previously raised by the committee); and**
- **whether an assessment of the TIA Act could be undertaken to determine its compatibility with the right to privacy (including in respect of matters previously raised by the committee).**

Definition of 'lawfully acquired' under the POC Act

1.25 Under the *Proceeds of Crime Act 2002* (POC Act) various actions can be taken in relation to the restraint, freezing or forfeiture of property which may have been obtained as a result, or used in the commission, of specified offences, including a 'serious offence'. The bill proposes to amend section 33A of the POC Act to provide that property or wealth is not to be considered 'lawfully acquired' where it has been subject to a security or liability that has wholly or partly been discharged using property that is not lawfully acquired. This would have the effect of broadening the class of assets that may be subject to being frozen, restrained or forfeited under the POC Act.

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

1.26 As the POC Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment by the Minister for Justice in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.27 The committee has previously recommended that the Minister for Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and fair hearing in light of the committee's concerns.[12] A full

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

human rights assessment of proposed measures which extend or amend existing legislation requires an assessment of how such measures interact with the existing legislation. The committee is therefore faced with the difficult task of assessing the human rights compatibility of an amendment to the POC Act without the benefit of a foundational human rights assessment of the POC Act from the Minister for Justice.

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

1.29 The POC Act enables a person's property to be frozen, restrained or forfeited either where a person has been convicted or where there are reasonable grounds to suspect a person has committed a serious offence. As set out in the committee's *Guidance Note 2*, even if a penalty is classified as civil or administrative under domestic law, its content may nevertheless be considered 'criminal' under international human rights law. The committee's reports have previously raised concerns that parts of the POC Act may involve the determination of a criminal charge.[13]

1.30 Given that assets may be frozen, restrained or forfeited without a finding of criminal guilt beyond reasonable doubt, the POC Act limits the right to be presumed innocent, which is guaranteed by article 14(2) of the ICCPR. The forfeiture of property of a person who has already been sentenced for an offence may also raise concerns regarding the imposition of double punishment, contrary to article 14(7) of the ICCPR.

1.31 As the proposed measure would have the effect of broadening the class of assets that may be subject to being frozen, restrained or forfeited under the POC Act, this measure also engages the right to a fair trial and fair hearing.

1.32 The statement of compatibility states the objective of the measure to be 'to ensure that criminals are not able to maintain ownership over property or wealth that is obtained, either directly or indirectly, using proceeds of crime'.[14] However, it does not identify the right to a fair trial and fair hearing as engaged and limited so provides no justification for this limitation. The committee's usual expectation is that, where a measure limits a human right, the accompanying statement of compatibility

13 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 189-191; and *Thirty-first Report of the 44th Parliament* (24 November 2015) 37-44.

14 EM, SOC 13.

provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.33 In assessing the proportionality of the measure against the right to a fair trial and fair hearing, it is also relevant as to whether the POC Act itself sets out sufficient safeguards to protect this right. As noted above, the committee has previously raised concerns regarding the sufficiency of such safeguards.

Committee comment

1.34 **The measure engages and limits the right to a fair trial and fair hearing.**

1.35 **The committee notes that the preceding legal analysis raises questions as to whether broadening the class of assets that may be subject to being frozen, restrained or forfeited under the POC Act is a proportionate limit on the right to a fair trial and fair hearing.**

1.36 **The committee therefore seeks the advice of the minister as to:**

- **whether the limitation is a reasonable and proportionate measure for the achievement of its objective (including the sufficiency of safeguards contained in the POC Act); and**
- **whether an assessment of the POC Act could be undertaken to determine its compatibility with the right to a fair trial and fair hearing in light of the committee's concerns.**

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

Purpose	Seeks to empower the Minister for Immigration and Border Protection to require that certain visa holders complete a revalidation check; provides that certain events that cause a visa that is held and not in effect to cease; and enables the use of contactless technology in the immigration clearance system
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 19 October 2016
Rights	Non-refoulement; effective remedy and liberty; equality and non-discrimination; privacy (see **Appendix 2**)

Power to require revalidation check relating to a prescribed visa

1.37 The measures in Schedule 1 of the bill propose to introduce a new revalidation check framework. As part of this framework, proposed section 96B would provide the minister with the discretionary power to make a decision as to whether a person who holds a visa prescribed for the purposes of new subsections 96B(1) or 96E(1) is required to complete a revalidation check for that visa. A 'revalidation check' is described at proposed subsection 96A(1) as 'a check as to whether there is any adverse information relating to a person who holds a visa'. The scope, timing or nature of a revalidation check is otherwise not provided by the bill. If a revalidation check is not completed, or is not passed, the affected person's visa will cease.

1.38 If the minister thinks it is in the public interest to do so, the minister is also empowered by proposed section 96E to make a determination, by legislative instrument, for a specified class of persons who are required to complete a revalidation check. This power is a personal non-compellable power and this instrument is not subject to disallowance.

1.39 Proposed subsection 96A(2) provides that a person will pass a revalidation check if the minister is satisfied there is no 'adverse information relating to the person'. What constitutes 'adverse information' is not defined in the bill, and is intended to include 'any adverse information *relating* to the person who holds the visa', rather than simply information that is directly about that person.[1]

1.40 The minister therefore has the power to prescribe any type of visa as being subject to proposed sections 96B and 96E. The bill places no limit on the breadth of this power. The explanatory memorandum states that the measures in Schedule 1 of

1 Explanatory memorandum (EM) 11.

the bill are designed to initially apply to Chinese nationals who will be granted a new 'longer validity Visitor visa'.[2] However, the proposed measure is not constrained to this class of visa or to any particular group of people.

Compatibility of the measure with multiple rights

1.41 The proposed provisions provide a broad power for the minister to prescribe any type of visa as being one that may be subject to a revalidation check. A failure to complete or pass a revalidation check could lead to the cessation and possible cancellation of the person's visa. As the power to prescribe the type of visa is unlimited, it appears that it could enable the minister to prescribe any type of visa, including a protection visa, spousal or other family visa or permanent visa as subject to the revalidation check. This measure therefore has the potential to engage a number of human rights, including Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family. Some of these rights will be addressed in the following discussion.

1.42 Australia's non-refoulement obligations prevent Australia from returning any person to a country where there is a real risk that this person would face persecution, torture or other serious forms of harm.[3] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.43 As noted above, it is possible that proposed sections 96B or 96E could apply to a visa holder or class of visa holders who hold a protection visa. If this were to apply to protection visas, this could lead to a protection visa holder failing the revalidation check and having their visa cancelled. If this were to occur, such individuals could, as a matter of Australian domestic law, be subject to refoulement to their country of origin. Australia's non-refoulement obligations are therefore engaged by this measure.

1.44 The proposed amendments to the *Migration Act 1958* (Migration Act) in Schedules 1 and 2 of the bill are administrative measures that would not be reviewable by the Administrative Appeals Tribunal (AAT) under Part 5 of the Migration Act.[4] Part 5 of the Migration Act limits the review powers of the Migration and Refugee Division of the AAT to certain decisions relating to the grant and

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2 EM 5.

3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. The non-refoulement obligations under the CAT and the ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by article 33 of the Convention relating to the Status of Refugees.

4 Section 338 of the *Migration Act 1958* defines a 'Part 5 - reviewable decision'. See also section 336M for a general overview of reviewable decisions under the Act.

cancellation of some visas. The measure also engages the right to an effective remedy in relation to the obligation of non-refoulement.[5]

1.45 In addition, to the extent that the proposed amendments may cause the minister to require the revalidation of a visa and, as a result, the visa could cease to be in effect, the visa holder or class of visa holders could be subject to visa cancellation, and possible detention pending their deportation, which engages the right to liberty.[6]

1.46 Furthermore, subjecting a person who holds a spousal visa or a permanent resident's visa to a revalidation check would engage the right to protection of the family, as if the visa were to be cancelled this could affect the rights of close family members not to be separated.

1.47 While it is permissible for proportionate limitations to be placed on these rights, the statement of compatibility does not address the breadth of the power to prescribe any type of visa as one that could be subject to a revalidation check and so does not discuss any possible engagement of a number of human rights. Nor does the objective set out in the explanatory memorandum explain the breadth of the proposed measure.

Committee comment

1.48 **The statement of compatibility has not identified a number of human rights that may be engaged by this measure given the breadth of the power to prescribe any type of visa as one that could be subject to a revalidation check. Noting the concerns raised in the preceding legal analysis, the committee seeks the advice of the Minister for Immigration and Border Protection as to:**

- **why there is no limit on the face of the bill as to the type of visas that may be prescribed as being subject to the possibility of a revalidation check; and**
- **whether, in light of the broad power to prescribe any kind of visa, the measure is compatible with Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family.**

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5 See the committee's previous comments in relation to these rights: Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 198; *Second Report of the 44th Parliament* (11 February 2014), paragraphs [1.89] to [1.99]; and *Fourth Report of the 44th Parliament* (18 March 2014) paragraphs [3.55] to [3.66] (both relating to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013).

6 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 202-204; and *Nineteenth Report of the 44th Parliament* (3 March 2015) 17-20.

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

1.49 As discussed at paragraphs [1.39] and [1.40] above, the minister is empowered by proposed sections 96B and 96E to require any visa holder to complete a revalidation check. The explanatory memorandum states that the measures in Schedule 1 of the bill are designed to manage risks to the Australian community that may arise in the context of a 'longer validity Visitor visa' which will initially be made available to Chinese nationals.[7] However, contrary to the stated intended application of the provisions, there is nothing on the face of the bill that limits the minister's powers to apply the revalidation check to this longer class of visitor visa for Chinese nationals. It is therefore possible that the minister could exercise this power in such a way that would have a disproportionate effect on people on the basis of their nationality, religion, race or sex, which engages and may limit the right to equality and non-discrimination.

1.50 The right to equality and non-discrimination 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.[8]

1.51 It is difficult to assess the compatibility of the power with the right to equality and non-discrimination without certainty as to the visas that will be subject to the possibility of a revalidation check. The statement of compatibility states that the right to equality and non-discrimination is engaged by the proposed amendments, but that any differential treatment will be based on objective criteria.[9] It identifies the objective of the revalidation check as to:

> …allow Australia to appropriately manage and facilitate the travel and movement of visa holders through the provision of up to date advice on potential risks and the application of appropriate measures to reduce the possibility of exposure to risk.[10]

1.52 It states that the revalidation check might occur following an assessment of an increased risk to the Australian community resulting from a health, security or other incident in a particular location.[11]

1.53 It is noted that managing risks to the Australian community through immigration channels may be capable of being a legitimate objective for human

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7 EM, statement of compatibility (SOC) 48-49.

8 Pursuant to articles 2, 16 and 26 of the ICCPR. The rights to equality and non-discrimination are also protected by articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination.

9 EM, SOC 50.

10 EM, SOC 51.

11 EM, SOC 51.

rights purposes. However, the measure in its current form may not be proportionate to achieving this objective. In respect of proposed section 96B, the statement of compatibility provides that:

> It is not the policy intention to require a visa holder to undertake or pass a revalidation check on the basis of any of the prohibited grounds set out in Articles 2 and 26 [right to equality], and departmental policy guidance will be provided to ensure this policy intention is implemented under any delegated power of the new section 96B.[12]

1.54 In respect of proposed section 96E, the statement of compatibility states that any exercise of the minister's power to determine specified classes of persons who are required to complete a revalidation check will be 'based on an assessment of risk considering information and any statistical data'.[13] The statement of compatibility states that, to the extent that the right to equality and non-discrimination is engaged, this is engaged indirectly as it is intended that initially only Chinese nationals will be able to access the 10-year visa on a trial basis, and, consequentially, will be the only group required by the minister to undertake the revalidation check.[14]

1.55 It is noted that while the statement of compatibility states that it is intended that these powers will only be used based on objective assessments of risk, there is nothing in the bill that would restrict the use of the power in this way. Further, administrative safeguards, such as the departmental policy guidance mentioned in the statement of compatibility are less reliable than the protection statutory processes offer. Therefore, it is uncertain whether the bill, as currently drafted, will guarantee the right to equality and non-discrimination.

Committee comment

1.56 **The committee notes that the preceding legal analysis identifies that proposed sections 96B and 96E engage and may limit the right to equality and non-discrimination, and raises questions as to its compatibility with this right.**

1.57 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether safeguards could be included in the legislation, such as:**

- **the minister's power to require a revalidation check be limited to long-term visitor visas;**
- **the basis upon which a revalidation check may be required be made clear in the legislation, rather than being a matter of ministerial discretion; and**

12 EM, SOC 50.

13 EM, SOC 51.

14 EM, SOC 51.

- **a requirement that the minister's power to require a person or classes of persons to complete a revalidation check is based on an objective assessment of an increased risk to the Australian community.**

Migration Legislation Amendment (Regional Processing Cohort) Bill 2016

Purpose	Seeks to amend the *Migration Act 1958* and the Migration Regulations 1994 to prevent 'unauthorised maritime arrivals' and 'transitory persons' who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 from making a valid application for an Australian visa
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 8 November 2016
Rights	Protection of the family; family reunion; children; equality and non-discrimination (see **Appendix 2**)

Permanent lifetime visa ban for classes of asylum seekers

1.58 The bill would amend the *Migration Act 1958* (Migration Act) to prevent asylum seekers who were at least 18 years of age, and were taken to a regional processing country,[1] after 19 July 2013 from making a valid application for an Australian visa (referred to as the 'regional processing cohort').[2] Such asylum seekers would accordingly face a permanent lifetime ban from obtaining a visa to enter or remain in Australia.

1.59 The minister will have a personal, discretionary, non-compellable power to determine, if the minister thinks that it is in the public interest, that the proposed statutory bar to making a valid visa application does not apply to an individual or class of persons in respect of visas specified in the determination.[3]

1 Regional processing countries include Republic of Nauru (Nauru) or Papua New Guinea (PNG) where off-shore immigration detention centres operate.

2 See proposed section 5(1) of the *Migration Act 1958* (Migration Act) which defines members of the 'regional processing cohort' as 'unauthorised maritime arrivals' (UMAs) and 'transitory persons' who were taken to a regional processing country after 19 July 2013. UMA is defined in section 5AA(a) of the Migration Act and includes asylum seekers who arrived in the migration zone by boat. A 'transitory person' is defined in section 5(1) of the Migration Act and includes a person who attempted to enter Australia by boat but may have been taken directly to a regional processing country without first having been taken to Australia under Part 3 of the *Maritime Powers Act 2013*.

3 See proposed sections 46A(2)(2AB)-(2AC), 46B(2)(2AA)-(2AB) and proposed section 46A(8) of the Migration Act.

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

1.60 The proposed lifetime visa ban would apply to the majority of individuals currently at regional processing centres (Republic of Nauru (Nauru) and Papua New Guinea (PNG)), those individuals who were previously held at those centres, and also to individuals who seek asylum by boat and are sent to regional processing centres in the future.[4] The proposal to permanently ban a group of people who have committed no crime and are entitled as a matter of international law to seek asylum in Australia,[5] regardless of their mode of arrival, from making a valid Australian visa application is a severe and exceptional step. The proposed ban would apply to visas necessary for tourism, business or professional visits, or visiting family. Under existing law a person who has had their Australian visa cancelled on character grounds may be permanently excluded from Australia.[6] However, there is no other class of persons that may be prevented in this manner from making any valid application to enter or remain in Australia.

1.61 The bill engages the right to equality and non-discrimination by its differential treatment of 'cohorts' or groups of people in materially similar situations, that is, people making an application for a visa to enter or remain in Australia. The statement of compatibility acknowledges in very general terms that the proposed ban could amount to differential treatment on the basis of 'other status' under article 26 of the International Covenant on Civil and Political Rights (ICCPR) (the right to equality and non-discrimination).

1.62 The proposed ban directly distinguishes the grant of visas between people who fall within the 'regional processing cohort' and individuals who do not, which may amount to direct discrimination on the basis of 'other status'. In this regard, Article 31 of the Convention Relating to the Status of Refugees and its Protocol (Refugee Convention) prohibits states from imposing a penalty on asylum seekers who enter its territory illegally.[7] As such, the ban would appear to apply a penalty on those who seek asylum and are part of the 'regional processing cohort'. The right to seek asylum, irrespective of the mode of transit, is protected under international law.

4 See explanatory memorandum (EM) 21; 24.

5 See Universal Declaration of Human Rights article 14.

6 See, Migration Act sections 501 and 501E; Migration Regulations 1994, schedule 5.

7 Article 31(1) provides 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

1.63 The ban may also have a disproportionate negative effect on individuals from particular national origins; nationalities; or on the basis of race, which gives rise to concerns regarding indirect discrimination on these grounds.

1.64 'Discrimination' under the ICCPR encompasses measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[8] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular protected attribute.[9]

1.65 The government's demographic data regarding the nationalities of individuals at regional processing centres shows that the vast majority come from Iran. The PNG processing centre (which only accommodates males) is largely composed of asylum seekers from Iran, Afghanistan, Iraq and Pakistan. The Nauru processing centre (which accommodates males, females and children) is largely composed of asylum seekers from Iran, Sri Lanka, Pakistan, Bangladesh, and with people who have no country of nationality.[10]

1.66 Such statistical data strongly indicates that the proposed ban will have a disproportionate negative effect on the basis of national origin, nationality or race, and one which endures for the lifetime of the affected persons. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.[11]

1.67 Differential treatment (including the differential effect of a measure that is neutral on its face)[12] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

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8 The prohibited grounds of discrimination or 'protected attributes' include 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.

9 *Althammer v Austria* HRC 998/01 [10.2]. See above, for a list of 'personal attributes'.

10 See, Elibritt Karlsen, *Australia's offshore processing of asylum seekers in Nauru and PNG: A Quick Guide to statistics and resources* (30 June 2016) http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/Offshore#_Nationalities_of_asylum (last accessed 14 November 2016).

11 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v. the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).

12 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

1.68 The issue of indirect discrimination on the basis of race; nationality or national origin is not specifically addressed in the statement of compatibility. However, as noted above, the statement of compatibility does address whether the differential treatment of those who fall within the 'regional processing cohort', and individuals who do not, constitutes unlawful discrimination. In this regard, the statement of compatibility argues that the differential treatment (that is, the visa ban):

> …is for a legitimate purpose and based on relevant objective criteria and that is reasonable and proportionate in the circumstances. This measure is a proportionate response to prevent a cohort of non-citizens who have previously sought to circumvent Australia's managed migration program by entering or attempting to enter Australia as a UMA from applying for a visa to enter Australia. This measure is also aimed at further discouraging persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encouraging them to pursue regular migration pathways instead.[13]

1.69 The statement of compatibility does not state that banning this cohort of people from making a valid visa application to enter Australia is based on any reason why these particular people should not be allowed to visit Australia in future. There is no suggestion that they present any danger to Australia or that a future visit would have any adverse affect on Australia. There appears to be no evidence for such a suggestion, and, in any event, there are other powers under the Migration Act that would allow visa applications to be declined if the circumstances justified it in a particular case.

1.70 Instead, as stated, an objective of the lifetime visa ban appears to be the imposition of a penalty on this cohort of people, with an intended deterrent effect on others embarking on 'hazardous boat journeys' in future. The bill therefore applies what is likely to be considered an unlawful penalty for seeking asylum, in contravention of article 31 of the Refugee Convention.[14] To penalise those who seek to enter Australia illegally for the purpose of seeking asylum cannot be a legitimate objective under international law.

1.71 Insofar as the objective of the bill is to 'further discourag[e] persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encourage[e] them to pursue regular migration pathways instead',[15] the statement of compatibility provides no evidence as to whether the measure would be effective in pursuing this objective. The statement of compatibility does not

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13 EM 24.

14 See A Zimmerman (ed) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, Oxford, 2011), article 31.

15 EM, statement of compatibility 24.

engage with the reasons why persons in this cohort attempt to enter Australia by boat and without obtaining a visa, whether this cohort of people have access to 'regular migration pathways' nor what proportion of this cohort have ultimately been found to be refugees entitled to protection. Each of these reasons is important to understanding whether the lifetime visa ban is likely to be effective in achieving the stated objective, and whether it risks deterring those who are entitled to seek Australia's protection.

1.72 The statement of compatibility also provides no evidence or reasoning to support its assertion that the proposed ban is proportionate. As noted above, a visa ban on classes of asylum seekers is a severe measure and will mean that even if a person is found to be a refugee and resettled in another country Australian law will prevent them from making a visa application across all visa categories. The ban is lifelong, and the class of persons subject to the ban is open-ended as the measure extends to persons taken to a 'regional processing country' in future. The only limitation on the operation of the ban is a ministerial power to lift the ban. However, this is a personal and non-compellable discretion, based only on what the minister thinks is in the public interest. The legislation thereby makes no provision, for example, for compassionate cases, or business or professional visits, both of which are situations in which the visa ban may have serious consequences for an affected person.

1.73 Accordingly, on the information available, the proposed ban does not appear to be compatible with the right to equality and non-discrimination.

Committee comment

1.74 **The proposed lifetime visa ban engages the right to equality and non-discrimination.**

1.75 **This visa ban would appear to have a disproportionate negative effect on individuals from particular national origins or nationalities. This human rights issue was not specifically addressed in the statement of compatibility.**

1.76 **The committee notes that the preceding legal analysis raises questions as to whether this disproportionate negative effect (which indicates *prima facie* indirect discrimination on the basis of national origins, nationality or race) amounts to unlawful discrimination.**

1.77 **The committee further notes that the proposed ban distinguishes the grant of visas between people who fall within the 'regional processing country cohort' and individuals who do not and the preceding legal analysis raises questions as to whether this may amount to direct discrimination on the basis of 'other status'.**

1.78 **Accordingly, in relation to the compatibility of the measure with the right to equality and non-discrimination, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether:**

- **there is a rational connection between the limitation and the stated objective (that, is evidence that the measure will be effective); and**
- **the measure is reasonable and proportionate for the achievement of that objective, including how it is based on reasonable and objective criteria; whether there are other less rights restrictive ways to achieve the stated objective; whether the visa ban could be more circumscribed; whether the measure provides sufficient flexibility to treat different cases differently and whether affected groups are particularly vulnerable.**

Right to protection of the family and rights of the child

1.79 An important element of the right to protection of the family under article 17 of the ICCPR is to ensure family members are not involuntarily separated from one another.

1.80 Relatedly, under article 10 of the Convention on the Rights of the Child (CRC), Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. Under the CRC Australia is also required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[16]

1.81 The proposed visa ban engages and limits the right to protection of the family and rights of the child as it would foreseeably operate to separate families. In this respect, there are a range of circumstances under the proposed visa ban which may lead to the separation of family members. An individual subject to the visa ban will be prevented from joining family members in Australia (including where these family members have been granted a visa to come to or remain in Australia or are Australian citizens). This would include the situation where an individual subject to the visa ban has, for example, married an Australian citizen, yet is unable to apply for a visa on this basis.

1.82 While the proposed lifetime visa ban does not apply to children under 18 years of age at the time they were taken to a regional processing centre, the measure may still clearly impact upon children by separating children (who are not subject to the visa ban) from parents (who are subject to the visa ban). It would prevent an individual subject to a visa ban from being with a child who is an Australian citizen or child who is otherwise entitled to reside in Australia.

1.83 The statement of compatibility acknowledges that the right to protection of the family and rights of the child are engaged by the measure and that it 'may result in separation, or the continued separation, of a family unit'.[17] Elsewhere in the

16 Article 3(1).

17 EM 23.

statement of compatibility the objective of the measure is identified as discouraging hazardous boat journeys and encouraging the use of regular migration programs.[18]

1.84 The statement of compatibility also provides some information regarding the role of the minister's discretionary powers in the context of the scheme in relation to the right to protection of the family:

> …the proposed legislative amendments will include flexibility for the Minister for Immigration and Border Protection personally to 'lift' the bar [visa ban] where the Minister thinks it is in the public interest to do so. This consideration could occur in circumstances involving Australia's human rights obligations towards families and children, allowing a valid application for a visa on a case by case basis and in consideration of the individual circumstances of the case, including the best interests of affected children. In addition, such matters can be considered when deciding to exercise the waiver to allow a Special Purpose Visa to be granted by operation of law, or to allow an application for certain subclasses of visa to be deemed to have been made.[19]

1.85 However, the statement of compatibility does not specifically address whether the measure is a permissible limit on the right to protection of the family or rights of the child.

1.86 The committee's usual expectation is that, where a measure limits a human right, the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective. This conforms with the committee's *Guidance Note 1* and the guidance information available from the Attorney-General's Department with respect to the preparation of statements of compatibility.

1.87 The exercise of the discretionary power by the minister, where the minister 'thinks' it is in the 'public interest', could potentially relieve some of the harshness of the visa ban in individual cases.[20] However, on its own, this discretionary safeguard is unlikely to be sufficient to ensure that the measure is a proportionate limit on the right to protection of the family in the context of a blanket visa ban.[21] In this respect, it is noted that the default position (without discretionary intervention by the minister) would be for families to remain separated.

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18 EM 24.

19 EM 23.

20 See proposed section 46A(2).

21 See, *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

Committee comment

1.88 **The proposed lifetime visa ban engages and limits the right to protection of the family and rights of the child. The statement of compatibility has not sufficiently justified these limitations for the purposes of international human rights law.**

1.89 **The committee notes that the preceding legal analysis raises questions as to whether the measure is rationally connected to and a proportionate means of achieving its stated objective, so as to be compatible with the right to protection of the family and rights of the child.**

1.90 **Accordingly, in relation to the limitations on the right to protection of the family and rights of the child, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether:**

- **there is a rational connection between the limitation and the stated objective (that, is evidence that the measure will be effective); and**
- **the limitation is a reasonable and proportionate measure for the achievement of that objective (including whether there are other less rights restrictive ways to achieve the stated objective; whether the visa ban could be more circumscribed; whether the measure provides sufficient flexibility to treat different cases differently; whether there are any additional safeguards; and whether affected groups are particularly vulnerable).**

Privacy Amendment (Re-identification Offence) Bill 2016

Purpose	Seeks to amend the *Privacy Act 1988* to introduce provisions which prohibit conduct related to the re-identification of de-identified personal information published or released by Commonwealth entities
Portfolio	Attorney-General
Introduced	Senate, 12 October 2016
Rights	Fair trial; presumption of innocence; prohibition on retrospective criminal laws (see **Appendix 2**)

Retrospective effect of the proposed offences

1.91 The Privacy Amendment (Re-identification Offence) Bill 2016 (the bill) would amend the *Privacy Act 1988* (Privacy Act) to prohibit conduct related to the re-identification of de-identified personal information that has been published or released by Commonwealth entities, acting as a deterrent against attempts to re-identify de-identified personal information in published government datasets.

1.92 The bill would apply to entities, including small businesses, and individuals.[1]

1.93 Proposed sections 16D, 16E and 16F of the bill all apply to acts that were committed on or after 29 September 2016,[2] this being the date following the Attorney-General's media release that stated the government's intention to introduce a criminal offence of re-identifying de-identified government data.[3] This differs from the usual practice that legislation creating criminal offences operates prospectively from or after Royal Assent is given to the legislation.

Compatibility of the measure with the prohibition on retrospective criminal laws

1.94 Article 15 of the International Covenant on Civil and Political Rights (ICCPR) prohibits retrospective criminal laws. It requires that no one can be found guilty of a crime that was not a crime at the time it was committed. This is an absolute right, which means that it can never be permissibly limited.

1.95 As proposed sections 16D and 16E of the bill would make the proposed offence provisions operate retrospectively, the absolute prohibition on retrospective criminal law is engaged.[4]

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1 Pursuant to Schedule 1, item 5, paragraph 16CA(1)(a).

2 At Schedule 1, item 5, paragraphs 16D(1)(c), 16E(1)(c) and (e) and 16F(1)(c).

3 Explanatory memorandum (EM), statement of compatibility (SOC) 9.

4 Proposed section 16F proscribes conduct to which a civil penalty applies, but this does not engage the prohibition on retrospective criminal law.

1.96 The statement of compatibility states that retrospective application of these provisions is reasonable, necessary and proportionate.[5] However, as an absolute right that cannot be limited, there can be no justifiable limitation on the prohibition on retrospective criminal laws so as to accord with human rights law.

Committee comment

1.97 **The committee notes that the preceding legal analysis identifies that the proposed offence provisions in sections 16D and 16E engage the prohibition of retrospective criminal laws.**

1.98 **The committee observes that the prohibition on retrospective criminal laws is absolute and can never be subject to permissible limitations.**

1.99 **The committee requests advice from the Attorney-General as to whether consideration has been given to amending paragraphs 16D(1)(c) and 16E(1)(c) such that the offences in these sections operate prospectively, that is, from or after the date of Royal Assent.**

Offences relating to interference with personal information

1.100 The bill seeks to introduce both civil and criminal penalty provisions. Proposed sections 16D and 16E provide that an offence will be committed or an entity will be liable to a civil penalty where:

- de-identified personal information is intentionally re-identified;[6] and
- re-identified personal information is intentionally disclosed, regardless of whether or not the act that resulted in the information being de-identified was done so intentionally.[7]

1.101 These sections also set out exceptions to the application of the provisions. In addition, in consultation with the Australian Information Commissioner, the Attorney-General may decide to exempt an entity from the application of the provisions.[8]

5 EM, SOC 9.

6 See Schedule 1, item 5, proposed section 16D.

7 See Schedule 1, item 5, proposed section 16E.

8 See Schedule 1, item 5, proposed section 16G.

Compatibility of the measure with the right to the presumption of innocence

1.102 The right to a fair trial in article 14 of the ICCPR includes the right to be presumed innocent. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of an offence beyond reasonable doubt.[9]

1.103 Proposed sections 16D and 16E include exceptions to the application of the offence provisions. Reliance on any of these exceptions requires entities, including individuals, to prove that their behaviour was consistent with the relevant defence. In effect, this means shifting the evidential burden of proof from the prosecution to the defendant, which engages the presumption of innocence.

1.104 The objective of these measures, as identified in the statement of compatibility, is to appropriately respond to the deliberate re-identification and disclosure of re-identified personal information.[10] This stated objective, which involves the protection of an individual's personal information published or released by Commonwealth agencies, may be regarded as a legitimate objective for the purposes of international human rights law.

1.105 There is limited discussion in the statement of compatibility as to why the measures are a proportionate limitation on the presumption of innocence, which goes to the question of whether the approach is compatible with international human rights law. In this regard, the statement of compatibility states that, for each of the defences set out in sections 16D and 16E, each limb of the defence would not be difficult for an entity to prove.[11] The statement of compatibility also provides that a prosecution will not be pursued where it is clear to authorities that the entity (including individuals) would be in a position to rely on one of the defences in the relevant section.[12]

1.106 It is relevant that although the offences in sections 16D and 16E contain a reversal of the burden of proof, the burden is evidentiary, not legal. Section 16D requires the defendant to adduce evidence that the *re-identification* of personal information was done in accordance with an Australian law or court/tribunal order where the entity is a responsible agency; for the purposes of meeting an obligation under a contract where the entity is a contracted service provider for a Commonwealth contract to provide services to a responsible agency; in accordance with an agreement to perform functions or activities on behalf of a responsible agency; or in accordance with a determination in force under section 16G. Pursuant

9 See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, [30].

10 EM, SOC 6.

11 EM, SOC 8.

12 EM, SOC 8.

to section 16E, these defences (and accompanying evidentiary burdens) also apply to entities in the context of the *disclosure* of re-identified personal information.

1.107 In these circumstances, placing evidentiary burdens on the defendant appears to be consistent with the right to the presumption of innocence under international human rights law as the prosecution retains the burden of proving the defendant's guilt beyond reasonable doubt. On this basis, it is likely that the limitation on the right to the presumption of innocence is proportionate.

Committee comment

1.108 **The committee notes that the proposed reverse burden offences engage and limit the right to the presumption of innocence.**

1.109 **Given the nature of the matters to be proven by the defendant pursuant to the proposed sections, and that the sections impose an evidentiary burden only, the committee concludes that the measures are likely to be a proportionate limitation on the presumption of innocence.**

Sex Discrimination Amendment (Exemptions) Regulation 2016 [F2016L01445]

Purpose	Amends the Sex Discrimination Regulations 1984 to extend for a further 12-month period the prescription of two Western Australian Acts under the *Sex Discrimination Act 1984*, with the effect that an exemption would be provided for conduct taken in direct compliance with these Acts that would otherwise constitute unlawful discrimination on the grounds of sexual orientation, gender identity or intersex status
Portfolio	Attorney-General
Authorising legislation	*Sex Discrimination Act 1984*
Last day to disallow	1 December 2016
Right	Equality and non-discrimination (see **Appendix 2**)

Background

1.110 The *Sex Discrimination Act 1984* was amended in 2013 by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (SDA Amendment Act) to provide new protections against discrimination on the basis of a person's sexual orientation, gender identity and intersex status, and provide protections against discrimination for same-sex de facto couples.

1.111 The committee previously considered the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 in its *Sixth report of 2013* and noted that the inclusion of these additional grounds of prohibited discrimination would advance the right to equality and non-discrimination and would better reflect the standards under international human rights law.[1]

1.112 The SDA Amendment Act included an exemption for conduct that would otherwise constitute discrimination on the basis of these additional grounds provided that that conduct is in direct compliance with a Commonwealth, state or territory law prescribed by regulations.

1.113 Section 5 of the Sex Discrimination Regulations 1984 provided that all Commonwealth, state and territory laws as in force at 1 August 2013 were initially prescribed until 31 July 2014 to allow time for jurisdictions to review their laws and assess compliance with the new protections against discrimination. A review of Commonwealth laws found that this legislation was able to operate in accordance

1 See Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 58-64.

with these new protections, and consequently no Commonwealth laws have since been prescribed past this initial prescription period.[2]

1.114 The Sex Discrimination Amendment (Exemptions) Regulation 2014 subsequently extended the sunset date applying to the prescription of state and territory laws for a further 12-month period to 31 July 2015. The Sex Discrimination Amendment (Exemptions) Regulation 2015 (2015 regulation) then extended this for a further 12-month period until 31 July 2016.

Extension of prescription period

1.115 The Sex Discrimination Amendment (Exemptions) Regulation 2016 (the regulation) extends the prescription of two Western Australian (WA) Acts (the *Human Reproductive Technology Act 1991* (WA), and *Surrogacy Act 2008* (WA)) for a further 12-month period until 31 July 2017.

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

1.116 As the regulation further extends the period in which actions that would otherwise constitute unlawful discrimination on the grounds of sexual orientation, gender identity or intersex status under the prescribed legislation would be exempted from these protections, the measure engages and limits the right to equality and non-discrimination.

1.117 The statement of compatibility for the regulation acknowledges that the regulation engages and limits the right to equality and non-discrimination but states that:

> The limitation is based on reasonable and objective criteria as it only extends two prescribed laws in force at 1 August 2013, which ensures any laws passed after that date must comply with the existing protections from discrimination on the grounds of sexual orientation, gender identity and intersex status. The limitation is proportionate as it is for a short time period, and no more restrictive than required. A period of less than 12 months may not be sufficient to allow Western Australia time to amend its laws. The Government does not propose any further extensions of this exemption after 31 July 2017.[3]

1.118 The regulation appears to identify the objective of allowing the states and territories adequate time in which to review their legislation and assess compliance with the new protections, and amend relevant laws accordingly.

1.119 However, questions arise as to whether this measure is rationally connected and/or proportionate to this stated objective. It is now three years since the SDA Amendment Act was introduced. It is unclear from the statement of compatibility

2 See explanatory statement (ES) 1.

3 ES, statement of compatibility (SOC) 5.

why this period has been insufficient to implement amendments to all relevant state and territory legislation. The initial 12-month exemption period ended on 31 July 2014, and was then extended on two previous occasions for a further 12-month period, until 31 July 2016. Indeed the explanatory statement for the most recent 2015 regulation stated that '[t]he Government does not propose any further extensions of this exemption after 31 July 2016'.[4]

1.120 The statement of compatibility does not set out reasons as to why a further period of 12 months is necessary for WA to implement the requisite changes to the two remaining WA Acts, given the time that has already passed without the changes having been made. It states that 'the limitation is proportionate as it is for a short time period'.[5] However, at the end of this extended prescription period on 31 July 2017, the two WA Acts will have been exempted for a total of four years since the measures came into effect. This means that individuals may continue to be subject to discrimination under the two Acts without any legal recourse. Continuing to subject individuals to discriminatory laws for any length of time is a serious issue from the perspective of the right to equality and non-discrimination. Accordingly, it is not clear that the measure is a proportionate means of achieving its apparent objective of giving WA sufficient time to amend the two Acts or that a further 12 month extension represents the least rights restrictive approach.

Committee comment

1.121 **The committee notes that the exemption from protections against discrimination on the basis of a person's sexual orientation, gender identity and intersex status engages and limits the right to equality and non-discrimination.**

1.122 **The committee observes that the regulation pursues the apparent objective of allowing the states and territories adequate time in which to review their legislation and assess compliance with the new protections, and amend relevant laws accordingly.**

1.123 **The committee further observes that the preceding legal analysis raises questions as to whether the measure is effective in achieving and/or a proportionate means of achieving its apparent objective.**

1.124 **The committee therefore seeks the advice of the Attorney-General as to whether the further 12-month prescription period for the *Human Reproductive Technology Act 1991* (WA) and *Surrogacy Act 2008* (WA) is effective in achieving and/or proportionate to its apparent objective, and in particular, why the previous three-year period has been insufficient to implement the necessary amendments to these laws to ensure compliance with the protections against discrimination on the basis of a person's sexual orientation, gender identity and intersex status.**

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4 See Sex Discrimination Amendment (Exemptions) Regulation 2015 [F2015L01151], ES 1.

5 ES, SOC 5.

Advice only

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

Appropriation Bill (No. 1) 2016-2017
Appropriation Bill (No. 2) 2016-2017

Purpose	Seek to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of government (No. 1) and for services that are not the ordinary annual services of the government (No. 2)
Portfolio	Finance
Introduced	House of Representatives, 31 August 2016
Rights	Multiple rights (see **Appendix 2**)

Background

1.126 The committee has previously considered the human rights implications of appropriations bills in a number of reports,[1] and they have been the subject of correspondence with the Department of Finance.[2]

Potential engagement and limitation of human rights by appropriations Acts

1.127 Proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

1.128 In concluding its previous analysis of Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015 (the 2014-2015 bills), the committee noted:

1 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013) 65; *Seventh Report of 2013* (5 June 2013) 21; *Third Report of the 44th Parliament* (March 2014) 3; *Eighth Report of the 44th Parliament* (June 2014) 5, 31; *Twentieth Report of the 44th Parliament* (18 March 2015) 5; *Twenty-third Report of the 44th Parliament* (18 June 2015) 13; *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 2.

2 Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013) 21; and *Eighth Report of the 44th Parliament* (18 June 2014) 32.

3 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); *Seventh Report of 2013* (5 June 2013); *Third Report of the 44th Parliament* (4 March 2014); and *Eighth Report of the 44th Parliament* (24 June 2014).

> …the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. In particular, the committee considers there may be specific appropriations bills or specific appropriations where there is an evident and substantial link to the carrying out of a policy or program under legislation that gives rise to human rights concerns.[4]

Compatibility of the bills with multiple rights

1.129 Like the 2014-2015 bills and previous appropriations bills, the current bills are accompanied by a brief statement of compatibility, which notes that the High Court has stated that, beyond authorising the withdrawal of money for broadly identified purposes, appropriations Acts 'do not create rights and nor do they, importantly, impose any duties'.[5] The statements of compatibility conclude that, as their legal effect is limited in this way, the bills do not engage, or otherwise affect, human rights.[6] They also state that '[d]etailed information on the relevant appropriations…is contained in the portfolio [Budget] statements'.[7] No further assessment of the human rights compatibility of the bills is provided.

1.130 Under international human rights law, Australia has obligations to respect, protect and fulfil human rights. These include specific obligations to progressively realise economic, social and cultural (ESC) rights using the maximum of resources available;[8] and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. This means that any reduction in allocated government funding for measures which realise socio-economic rights, such as specific health and education services, may be considered as retrogressive in respect of the attainment of ESC rights and, accordingly, must be justified for the purposes of international human rights law.

1.131 The cited view of the High Court that appropriations Acts do not create rights or duties as a matter of Australian law does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law, as specific appropriations reducing expenditure may be regarded as retrogressive, or as limiting rights. The appropriation of funds facilitates the taking of actions which may affect both the progressive realisation of, and the failure to fulfil, Australia's

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4 Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015) 17.

5 Explanatory statement (ES), statement of compatibility (SOC) 4.

6 ES, SOC 4.

7 ES, SOC 4.

8 See UN Office of the High Commissioner for Human Rights, *Manual on Human Rights Monitoring*, at http://www.ohchr.org/Documents/Publications/Chapter20-48pp.pdf.

obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.132 The committee acknowledges that such bills present particular difficulties for human rights assessment because they generally include high-level appropriations for a wide range of outcomes and activities across many portfolios. A human rights assessment of appropriations bills at the level of individual measures may therefore not be practical or possible for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.133 Despite this, the allocation of funds via appropriations bills is susceptible to a human rights assessment directed at broader questions of compatibility. For example, consideration could be directed to their impact on progressive realisation obligations and on vulnerable minorities or specific groups, such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities. Indeed, there is some precedent in the Australian context for assessments of this nature in relation to appropriations bills by government, which could inform the development of an appropriate template for the assessment of appropriations bills for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[9] There is also a range of international resources to assist in the assessment of budgets for human rights compatibility.[10]

Committee comment

1.134 **The committee notes that the statements of compatibility for the bills provide no assessment of their compatibility with human rights on the basis that they do not engage or otherwise create or impact on human rights. However, while the committee acknowledges that appropriations bills present particular challenges in terms of human rights assessments, it notes that the preceding legal analysis indicates that the appropriation of funds may engage and potentially limit or promote a range of human rights that fall under the committee's mandate.**

1.135 **Given the difficulty of conducting measure-level assessments of appropriations bills, the committee recommends that consideration be given to developing alternative templates for assessing their human rights compatibility,**

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9 For example, from 1983 to 2013 a Women's Budget Statement was prepared by the Australian Government which set out the impact of budget measures on women and also gender equality.

10 See, for example, Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (Unifem 2006) http://www.unicef.org/spanish/socialpolicy/files/Budgeting_for_Womens_Rights.pdf; UN Practitioners' Portal on Human Rights Approaches to Programming, *Budgeting Human Rights* http://hrbaportal.org/archives/tools/budgeting-human-rights; Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014).

drawing upon existing domestic and international precedents. Relevant factors in such an approach could include consideration of:

- **whether the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; and**
- **whether any reductions in the allocation of funding are compatible with Australia's obligations not to unjustifiably take retrogressive or backward steps in the realisation of economic, social and cultural rights.**

Criminal Code Amendment (War Crimes) Bill 2016

Purpose	Seeks to amend the *Criminal Code Act 1995* to provide that certain war crimes offences applicable in non-international armed conflict do not apply to members of organised armed groups; reflect the requirements of the international law principle of proportionality in relation to attacks on military objectives in non-international armed conflict; and makes a minor technical amendment
Portfolio	Attorney-General
Introduced	House of Representatives, 12 October 2016
Right	Life (see **Appendix 2**)

Permissible targeting of members of organised armed groups in non-international armed conflicts

1.136 The Criminal Code Amendment (War Crimes) Bill 2016 (the bill) seeks to amend war crimes contained in division 268 of the *Criminal Code Act 1995* (the Criminal Code). In particular, the bill seeks to amend the war crimes of murder, mutilation and cruel treatment to provide that the offences will not apply in respect of acts against persons who are members of an 'organised armed group' in a non-international armed conflict. Currently, the offences do not apply in respect of people 'taking an active part in hostilities'.[1] The effect of this exception is that those 'taking an active part in hostilities' can be permissibly targeted (and killed or injured) as those undertaking such targeting will not be subject to a criminal sanction. The proposed amendments would add an additional class of persons who can be permissibly targeted (and killed or injured): members of an 'organised armed group'. The concept of 'organised armed group' and 'non-international armed conflict' are described in the statement of compatibility as follows:

> A non-international armed conflict is an armed conflict which involves one or more non-State organised armed groups. Hostilities in such a conflict may occur between government forces and organised armed groups, or between such groups only, depending on the circumstances.
>
> The existence of an 'organised armed group' in a non-international armed conflict will be determined by reference to the facts in existence at the time. The key indicia are at least a minimal degree of organisation, some kind of command structure or hierarchy, and the existence of a collective purpose that is related to the broader hostilities and involves the use of force. It is also necessary that the group be 'armed' and utilising force to

1 See *Criminal Code Act 1995* sections 268.70-72.

> achieve its purposes, and that the group have sufficient connection to the non-international armed conflict. An organised armed group may exist within a larger entity; only those elements that engage in hostilities qualify as an organised armed group.[2]

Compatibility of the measure with the right to life

1.137 The right to life includes the prohibition on arbitrary killing and requires that force be used as a matter of last resort. The use of force by state authorities resulting in a person's death can only be justified if the use of force was necessary, reasonable and proportionate in the circumstances (see Appendix 2). The measures engage and may limit the right to life because, as explained above, the effect of the proposed amendments would add an additional class of persons who can be permissibly targeted, and therefore killed or injured. This is because the person undertaking such targeting would no longer be subject to criminal sanctions in relation to this additional class.

1.138 The statement of compatibility recognises that the right to life may be engaged by the amendments, but states:

> …in situations of armed conflict the scope and content of rights under international human rights law may be affected as a result of the application of international humanitarian law. The specific interrelationship between international human rights law and international humanitarian law is not settled as a matter of international law. The protection of international human rights law does not cease in situations of armed conflict. Human rights obligations will continue to apply in situations of armed conflict, although they may be displaced to the extent necessitated by international humanitarian law. This will depend on the particular circumstances and obligations involved.
>
> Thus, in situations of armed conflict, the prohibition against the arbitrary deprivation of life contained in article 6 of the ICCPR will be displaced to the extent necessitated by international humanitarian law.[3]

1.139 International humanitarian law (IHL) identifies a minimum standard of conduct in situations of armed conflict. IHL does not impose many of the positive human rights obligations guaranteed by international human rights law. For example, the positive duty to investigate, as an aspect of the right to life under international human rights law, applies to all deaths where the state is involved.[4] IHL is more

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

3 EM, SOC 4-5.

4 See, for example, *Pearson v United Kingdom* [2011] ECHR 2319 (13 December 2011); Philip Alston, *Report on Extrajudicial, Summary or Arbitrary Executions* (2006) E/CN.4/2006/53 [36].

circumscribed and requires only that governments investigate alleged or suspected war crimes.[5]

1.140 While the full extent to which international human rights law applies in the context of armed conflict is not settled as a matter of international law, human rights obligations do apply to an army acting in an overseas operation where they are exercising jurisdiction or 'effective control'.[6] This is accepted in the statement of compatibility.[7] When IHL does not provide a specific rule, or the meaning of this rule is unclear, human rights law is an appropriate source for guidance as to the content of the law in a situation of armed conflict.[8] In a situation of armed conflict, the prohibition on arbitrary killing continues to apply, but the question of whether a killing is arbitrary is generally determined by applying the rules of IHL.[9]

1.141 In the context of non-international armed conflicts, the rules of IHL are less clear, especially with respect to combatants. The terms 'civilian', 'armed forces' and 'organised armed group' are used in the treaties that govern non-international armed conflicts without being expressly defined.[10]

1.142 The explanatory memorandum states that the amendments 'reflect the distinction that exists at international law between civilians and members of an organised armed group.'[11] However, the amendments made by the bill do not apply specific obligations in the Geneva Conventions and Additional Protocols (that set out the core obligations of IHL). The terms of the Geneva Conventions and Additional

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5 The Geneva Conventions contain obligations to investigate and prosecute alleged grave breaches of the Conventions, including the wilful killing of protected persons (articles 49 and 50 of Geneva Convention I; articles 50-51 of Geneva Convention II; articles 129 and 130 of Geneva Convention III; articles 146 and 147 of Geneva Convention IV).

6 See, *Al-Saadoon & Ors Secretary of State for Defence* [2015] EWHC; *Smith v The Ministry of Defence* [2013] UKSC 41 (19 June 2013); *Al-Jedda v United Kingdom* [2011] ECHR 1092 (7 July 2011); *Al-Skeini & Ors v United Kingdom* [2011] ECHR 1093 (7 July 2011).

7 EM, SOC 4.

8 See Philip Alston, S*tudy on targeted killings* (2010) A/HRC/14/24/Add.6, 10; *Legality of the Threat or Use of Nuclear Weapons* (1996) (Advisory Opinion) ICJ rep. 226, [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) (Advisory Opinion) I.C.J. Rep. [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) I.C.J. Rep., [216].

9 See also Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament* (13 May 2015) 141 (in respect of Counter-Terrorism Legislation Amendment Bill (No. 1) 2014).

10 International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) 27.

11 EM, SOC 8.

Protocols themselves appear to contemplate that direct attacks on civilians are only permitted where the civilians 'directly participate in hostilities'.[12]

1.143 Rather, the amendments made by the bill appear to be drawn from commentary relating to customary IHL, in particular from the International Committee of the Red Cross (ICRC).[13] While the ICRC commentaries may provide soft law guidance in relation to the application of IHL they do not provide a complete answer to human rights concerns.[14]

1.144 Introducing an additional category of persons who may be targeted in a non-international armed conflict raises human right concerns because it allows targeting of people who may not 'directly participate in hostilities'. A person whose role within the organised armed group is not related to providing assistance connected to the hostilities, or whose role in or membership of the organised armed group may have changed or even ceased, would appear to be a permissible target under the amendments. In this respect, the former Special Rapporteur on extrajudicial, summary or arbitrary executions made the following observations in his *Study on Targeted Killings*:

> …the ICRC's Guidance raises concern from a human rights perspective because of the "continuous combat function" (CCF) category of armed group members who may be targeted anywhere, at any time. In its general approach to DPH [direct participation in hostilities], the ICRC is correct to focus on function (the kind of act) rather than status (combatant vs. unprivileged belligerent), but the creation of CCF category is, de facto, a status determination that is questionable given the specific treaty language that limits direct participation to "for such time" as opposed to "all the time."
>
> Creation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function. If States are to accept this category, the onus will be on them to show that the evidentiary basis is strong. In addition, States must adhere to the careful distinction the ICRC draws between continuous combatants who may always be subject to direct attack and civilians who (i) engage in sporadic or episodic direct participation (and may only be attacked during their participation), or (ii) have a general war support function ("recruiters,

12 Additional Protocol I, article 51(3); article 50(1) (defining civilian); articles 13(3) and 51(3); Geneva Conventions III and IV, article 3; Additional Protocol II, articles 4 and 13(3).

13 See minister's second reading speech 2-3, referring to ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).

14 See Emily Crawford and Alison Pert, *International Humanitarian Law* (2015) 40-41.

> trainers, financiers and propagandists") or form the political wing of an organized armed group (neither of which is a basis for attack).[15]

1.145 As the intent of the bill is to establish a specific status determination for members of organised armed groups to be targeted in non-international armed conflicts, the concerns raised by the former Special Rapporteur are particularly relevant. Where customary norms of IHL applicable to non-international armed conflicts may permit the targeting of members of organised armed groups, there should be clarity about whether conduct could subject persons who are otherwise not directly engaging in hostilities to being killed. In cases where the killing of a person is not in accordance with IHL, the obligations under the right to life, such as the duty to investigate, will also be engaged.

Committee comment

1.146 **The proposed amendment to the definition of the war crimes of murder, mutilation and cruel treatment engages and may limit the right to life.**

1.147 **The effect of this amendment would be to permit the targeting (including death or injury) of members of an 'organised armed group' without the person targeted being subject to criminal sanctions.**

1.148 **The committee notes that the preceding legal analysis identifies potential human rights concerns with respect to the right to life and targeting of members of organised armed groups in non-international armed conflicts.**

1.149 **Noting the concerns raised above, the committee draws the human rights implications of the bill to the attention of the Parliament.**

15 Philip Alston, *Study on targeted killings* (2010) A/HRC/14/24/Add.6, 19-20; see also ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) 31-36.

Bills not raising human rights concerns

1.150 Of the bills introduced into the Parliament between 7 and 10 November 2016, the following did not raise human rights concerns:[1]

- Australian Organ and Tissue Donation and Transplantation Authority Amendment (New Governance Arrangements) Bill 2016;
- Civil Nuclear Transfers to India Bill 2016;
- Export Finance and Insurance Corporation Amendment (Support for Commonwealth Entities) Bill 2016;
- Interactive Gambling Amendment Bill 2016;
- Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016;
- Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016;
- Superannuation (Objective) Bill 2016;
- Seafarers and Other Legislation Amendment Bill 2016;
- Seafarers Safety and Compensation Levies Bill 2016;
- Seafarers Safety and Compensation Levies Collection Bill 2016;
- Telecommunications and Other Legislation Amendment Bill 2016; and
- Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016.

1 This may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights.

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 3**.

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

Purpose	Expand or apply the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime
Portfolio	Foreign Affairs
Authorising legislation	*Autonomous Sanctions Act 2011* and *Charter of the United Nations Act 1945*
Rights	Privacy; fair hearing; protection of the family; equality and non-discrimination; adequate standard of living; freedom of movement; non-refoulement (see **Appendix 2**)
Previous reports	*Sixth Report of 2013*; *Seventh Report of 2013*; *Tenth Report of 2013*; *Twenty-eighth Report of the 44th Parliament*; *Thirty-third Report of the 44th Parliament*

Background

2.3 A number of instruments made under the *Autonomous Sanctions Act 2011* (Autonomous Sanctions Act) and the *Charter of the United Nations Act 1945* (Charter of the United Nations Act) have been previously examined by the committee.[1]

1 See list contained in Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015). See also, *Thirty-third Report of the 44th Parliament* (2 February 2016). Previous instruments examined include, for example, Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 [F2013L00477]; Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1) [F2013L00791]; Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2013 (No. 1) [F2013L00789]; Charter of the United Nations (Sanctions – the Taliban) Regulation 2013 [F2013L00787]; and Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 (No. 2) [F2013L00857].

2.4 This report considers a number of new instruments made under these Acts.[2]

2.5 The Autonomous Sanctions Act provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime). Sanctions can be imposed under the autonomous sanctions regime if the Minister for Foreign Affairs (the minister) is satisfied that doing so will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia, or will otherwise deal with matters, things or relationships outside Australia.[3] The Autonomous Sanctions Regulations 2011 set out the countries and activities for which a person or entity can be designated.[4]

2.6 The Charter of the United Nations Act, in conjunction with various instruments made under that Act,[5] gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations Security Council by Australia (the UN Charter sanctions regime). Under the UN Charter sanctions regime, as established under Australian law, there are two methods by which a person can be designated:

- automatic designation by the UN Security Council Committee; and
- listing by the minister if he or she is satisfied that the person is a person mentioned in UN Security Council resolution 1373.[6]

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

- designate or list persons or entities for a particular country with the effect that the assets of the designated person or entity are frozen, and declare that a person is prevented from travelling to, entering or remaining in Australia; and

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2 These are the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 1) [F2016L00047]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 2) [F2016L00117]; Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 [F2016L00799]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 3) [F2016L01100]; and Charter of the United Nations (Sanctions—Iran) Regulation 2016 [F2016L01181].

3 See subsection 10(2) of the *Autonomous Sanctions Act 2011*.

4 As at 24 August 2016, the countries listed were the Democratic People's Republic of Korea; the former Federal Republic of Yugoslavia; Iran; Libya; Myanmar; Syria; Zimbabwe; and Ukraine (see section 6 of the Autonomous Sanctions Regulations 2011).

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

6 See, Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689] section 20.

- restrict or prevent the supply, sale or transfer or procurement of goods or services.

2.8 As at 15 August 2016, 3684 individuals and 1629 entities were subject to targeted financial sanctions or travel bans under both sanctions regimes (534 individuals under the autonomous sanctions regime and 3150 under the UN Charter regime). The Consolidated List of individuals subject to sanctions currently includes the names of 25 Australian citizens.[7]

2.9 As the Autonomous Sanctions Act and the Charter of the United Nations Act were legislated prior to the establishment of this parliamentary joint committee, the sanctions regimes were not subject to a human rights compatibility assessment by the minister in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[8]

2.10 An initial human rights analysis of some of the instruments made under the sanctions regimes is contained in the *Sixth Report of 2013*, *Seventh Report of 2013* and *Tenth Report of 2013*.[9] A further detailed analysis of instruments made under the sanctions regimes is contained in the *Twenty-eighth Report of the 44th Parliament*,[10] and *Thirty-third Report of the 44th Parliament.*[11] This analysis stated that, as the instruments under consideration expand or apply the operation of the sanctions regimes by designating or declaring that a person is subject to the sanctions regimes, or by amending the regimes themselves, it was necessary to assess the compatibility of the Autonomous Sanctions Act and the Charter of the United Nations Act under which these instruments are made.

2.11 In the *Twenty-eighth Report of the 44th Parliament*, the committee sought detailed information from the minister as to the compatibility of the sanctions regimes with human rights. The minister's response was published in the *Thirty-third Report of the 44th Parliament* and the committee sought a further response from the minister.

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

8 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014); *Sixteenth Report of the 44th Parliament* (25 November 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); and *Thirty-sixth Report of the 44th Parliament* (16 March 2016).

9 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013); *Seventh Report of 2013* (5 June 2013); and *Tenth Report of 2013* (26 June 2013).

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

11 Parliamentary Joint Committee on Human Rights, *Thirty-third Report of the 44th Parliament* (2 February 2016).

2.12 The minister's response to the committee's further inquiries was received on 21 March 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

'Freezing' of designated person's assets

2.13 Under both sanctions regimes, the effect of a designation is that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a designated person.[12] A person's assets are therefore effectively 'frozen' as a result of being designated.

2.14 The designation of a person under the sanctions regimes is a significant incursion into a person's right to personal autonomy in one's private life (within the right to privacy).[13]

2.15 The committee has accepted that the use of international sanctions regimes to apply pressure to regimes and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. It has expressed concerns that the sanctions regimes may not be regarded as proportionate to their stated objective, in particular because of a lack of effective safeguards to ensure that the regimes, given their serious effects on those subject to asset freezing, are not applied in error or in a manner which is overly broad in the individual circumstances. The lack of safeguards detailed in the committee's initial analysis included that:

- the designation or declaration under the autonomous sanctions regime can be solely on the basis that the minister is 'satisfied' of a number of broadly defined matters;[14]
- the minister can make the designation or declaration without hearing from the affected person before the decision is made;
- there is no requirement that reasons be made available to the affected person as to why they have been designated or declared;[15]

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

13 The right to privacy is impacted by the automatic designation of a person by the UN Security Council, as Australia is bound by the UN Charter to implement UN Security Council decisions. See article 2(2) and article 41 of the Charter of the United Nations 1945. See, discussion of relevant case law at [2.38].

14 See examples in the committee's previous analysis at paragraph [1.114] of the *Twenty-eighth Report of the 44th Parliament* and section 6 of the Autonomous Sanctions Regulations 2011.

15 The minister has clarified that reasons are required upon request by a person aggrieved by a designation or declaration, pursuant to section 13 of the *Administrative Decisions (Judicial Review) Act 1977*, see discussion at [2.27].

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

2.16 Accordingly, the committee sought the advice of the minister as to how the designation of a person under the autonomous sanctions regime and the ministerial designation process under the UN Charter sanctions regime impose proportionate limitations on the right to privacy, having regard to the matters set out at paragraph [2.15], and in particular, whether there are adequate safeguards to protect individuals potentially subject to designation.

2.17 In addition, as noted above there is no provision for merits review before a court or tribunal of the minister's decision under the sanctions regimes. The previous human rights analysis of the sanctions regimes therefore noted that the designation and declaration process under the sanctions regimes limits the right to a fair hearing because it does not provide effective access to an independent and impartial court or tribunal.

2.18 The committee therefore sought the specific advice from the minister as to how the process of ministerial designation or declaration under the sanctions regimes is a proportionate limitation on the right to a fair hearing, and in particular

how, in the absence of merits review, there are adequate safeguards to protect the right to a fair hearing.

2.19 Noting the potential negative impact of sanctions on family members, the committee also sought the specific advice of the minister as to how the declaration process is a proportionate limitation on the right to the protection of the family and, in particular, whether there are adequate safeguards in place to protect this right.

Minister's response

2.20 The minister's response addresses each of the matters set out above at paragraph [2.15].

2.21 In relation to the decision to designate or declare a person under the autonomous sanctions regime, the minister's response states that the minister's decision is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and under common law. This is the one safeguard available under general law, and does secure the minimum requirement that the minister act in accordance with the legislation.

2.22 However, the effectiveness of judicial review as a safeguard within the sanctions regimes relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the executive. The scope of the power to designate or declare someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms.[16] It is noted that this formulation limits the scope to challenge such a decision on the basis of there being an error in law (as opposed to an error on the merits) under the ADJR Act or at common law.

2.23 The committee's previous analysis drew attention to the unavailability of merits review, which would allow for review of the substantive decision to designate or declare someone. The potential availability of judicial review is unlikely to be sufficient, in and of itself, to ensure the proportionality of the autonomous sanctions regime. The minister states that the availability of judicial review is a sufficient safeguard against 'false positives' and is consistent with international standards.[17] However, the committee is required to assess the compatibility of legislation against international human rights law rather than other standards. As the committee has

16 For example, under the autonomous sanctions regime a person can be designated or declared by the minister on a number of grounds relating to whether the minister is subjectively satisfied the person is or has been involved in certain activities. These include, for example, that a person is a supporter of the former regime of Slobodan Milosevic; is a close associate of the former Qadhafi regime in Libya (or an immediate family member); is providing support to the Syrian regime; is responsible for human rights abuses in Syria; has engaged in activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe; or is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

17 See Financial Action Task Force (FATA) Methodology.

explained previously, judicial review will generally be insufficient, in and of itself, for human rights purposes and in particular the right to a fair hearing.[18]

2.24 In relation to making a designation or declaration without hearing from the affected person, the minister states that this may be necessary to ensure the effectiveness of the regime. In particular, the minister states that:

> …providing prior notice to a person or entity that they are being considered for targeted financial sanctions would effectively 'tip off' the person and could lead to any assets they had in Australia being moved off-shore before the targeted financial sanctions took effect.

2.25 The Financial Action Task Force (FATF) Methodology, referred to by the minister, states that authorities should have to seek designation ex parte for this reason. While it is a valid concern to avoid the dispersal of assets before financial sanctions are able to take effect, this problem is well known to the law. One mechanism to address this concern is to freeze assets on an interim basis, until complete information is available including from the affected person, to assess whether a freezing order ought to be made. This would allow the minister to proceed to freeze assets initially in an ex parte fashion, while respecting the right to a fair hearing.

2.26 It should be noted that, in the absence of any provision for hearing prior to an order being made, the process for challenging a designation or declaration after a decision has been made becomes particularly important to the operation of the scheme. Again, the unavailability of merits review raises concerns in this regard.

2.27 In relation to reasons being available to a designated or declared person, the minister's response clarifies that section 13 of the ADJR Act applies to the regime to require the provision of reasons for a decision, on request, of an aggrieved person. The provision of reasons is likely to be an important mechanism to enable an individual to challenge a declaration or designation and, accordingly, an important factor in assessing the proportionality of the sanctions regimes.

2.28 The previous human rights analysis of the sanctions regimes noted that no guidance is available under the Acts, regulations or any other publicly available document setting out the basis on which the minister decides to designate or declare a person. The minister's response points to the principal legislative provisions and does not fully engage with the committee's concerns as set out in its analysis, which

18 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) [1.116] to [1.123].

is that those legislative provisions do not set out the basis on which the minister may decide to designate or declare a person.[19]

2.29 For example, the minister's response notes that the criteria for listing under Part 4 of the Charter of the United Nations Act are set out in section 20 of the Charter of the United Nations (Dealing with Assets) Regulations 2008 (Asset Regulation). Section 20 of the Asset Regulation states that the minister must list a person or entity if the minister is satisfied that the person or entity is a person or entity mentioned in paragraph 1(c) of Resolution 1373.[20] However, UN Security Council resolution 1373 paragraph 1(c) does not list individuals; rather, it requires states to freeze the funds or assets of anyone who commits, or attempts to commit, terrorist acts or participates in or facilitates the commission of terrorist acts, or anyone who acts on behalf of, or at the direction of, such a person.[21] As such, the reference to the UN Security Resolution 1373 is to a broad criterion for listing, and does not provide specific guidance on the threshold at which an individual may be declared by the minister and on what particular basis. This lack of clarity raises concerns as to whether the regime represents the least rights restrictive way of achieving its objective as the scope of the law is not made evident to those who may fall within the criterion for listing and who may seek in good faith to comply with the law.

2.30 In relation to the absence of reports to Parliament setting out the basis on which persons have been declared or designated, and what assets, or the amount of assets that have been frozen, the minister's response states that the public disclosure of assets frozen and/or the amount of assets frozen could risk undermining the administration of the sanctions regimes. The minister's response states that the small number of designated persons with known connections to Australia means that it may be easy to identify, even from aggregated data, whose assets had been frozen. However, the Department of Foreign Affairs publishes on its website a Consolidated List of all persons and entities who are subject to targeted

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19 See, Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) [1.114.], [1.133]

20 As at 2 September 2015, the list of countries from which people have been designated by the UN Security Council are the Central African Republic; Côte d'Ivoire; Democratic People's Republic of Korea; Democratic Republic of the Congo; Eritrea; Iran; Iraq; Lebanon; Liberia; Somalia; South Sudan; Sudan; and Yemen. Also listed are individuals said to be involved with Al-Qaida; the Taliban; and Libyan Arab Jamahiriya, as well as anyone the UN Security Council lists under Resolution 1373. As such these instruments implement Australia's international obligations under the UN Charter with respect to decisions by the UN Security Council.

21 See section 15 of the *Charter of the United Nations Act 1945*, s 20 of the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689] and resolution 1373 of the UN Security Council.

financial sanctions or travel bans under the sanctions regimes.[22] It is therefore difficult to accept the minister's justification for the lack of reporting to Parliament, as information identifying declared or designated persons is already publically available.

2.31 Accordingly, information provided by the minister does not appear to justify why reporting to Parliament on the basis on which persons have been declared or designated, and assets frozen, would not be an appropriate safeguard to protect the human rights of individuals subject to the sanctions regimes. The absence of such a safeguard therefore impacts upon the proportionality of the sanctions regimes.

2.32 The previous human rights analysis of the sanctions regimes noted that once the decision is made to designate or declare a person, the designation or declaration remains in force for three years and may be continued after that time. There is no requirement that if circumstances change or new evidence comes to light the designation or declaration will be reviewed before the three year period ends. In response, the minister states that designations and declarations may be reviewed at any time. The minister also notes that the sanctions regimes allows a person to request revocation of their designation or declaration in the event of changed circumstances or new evidence. While this is true, without an automatic requirement of reconsideration if circumstances change or new evidence comes to light, a person may continue to be subject to sanctions for an extended period notwithstanding that designation or declaration may no longer be required.

2.33 The previous human rights analysis of the sanctions regimes noted that a designated or declared person will only have their application for revocation considered once a year—if an application for review has been made within the year, the minister is not required to consider it. The minister's response states that section 11(3) of the Autonomous Sanctions Regulations and section 17(3) of the Charter of the United Nations Act are intended to ensure that the minister is not required to consider repeated, vexatious revocation requests. The response states that, while the minister is not required to consider an application made for revocation within one year of an earlier application, it is not correct to say that 'a designated or declared person will only have their application for revocation considered once a year', because the minister can choose to consider any number of revocation requests. While this may be true, the concern with the current formulation is that the minister is not *required* to consider such an application for revocation even in circumstances where new or compelling evidence has come to light. That is, the provision gives the minister a discretion that is broader than merely preventing vexatious applications and may affect meritorious applications for revocation.

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

2.34 The previous human rights analysis of the sanctions regimes noted there is no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister. The minister's response notes that the imposition of targeted financial sanctions is considered, internationally, to be a preventive measure that operates in parallel to complement the criminal law. While this can be accepted, it is unclear when and in what circumstances complementary 'targeted financial' action will be taken to be needed. Without further guidance there appears to be a risk that such action may not be the least restrictive of human rights in every case, in particular, that an easier administrative mechanism will be used in preference to the criminal law, with its attendant safeguards.

2.35 The previous human rights analysis of the sanctions regimes noted that the need for a person subject to a designation or declaration to get permission from the minister to access money for basic expenses could, in practice, impact greatly on a person's private and family life. For example, it could mean that a person whose assets are frozen would need to apply to the minister whenever they require funds to purchase medicines, travel or meet other basic expenses. In relation to the unrestricted power to impose conditions on a permit to access funds to meet basic expenses, the minister notes that the discretion to impose conditions on permits is appropriate as the personal circumstances of each designated person or entity are unique. However, it is clearly possible to provide for a permit to access funds that is tailored to individual circumstances, without conferring such an unlimited discretion on the minister to impose conditions on a permit to allow access to funds. A discretion that is overly broad may itself be incompatible with human rights.[23] In this case, there is no requirement that the conditions only be applied by the minister where strictly necessary. As such, the broad discretion to impose conditions on access to money for basic expenses does not appear to be the least rights restrictive way of achieving the legitimate objective.

2.36 The previous human rights analysis of the sanctions regimes noted that there is no requirement that, in making a designation or declaration, the minister must take into account whether it would be proportionate to the anticipated effect on an individual's private and family life. The minister's response states that the obligation to impose targeted financial sanctions against persons and entities associated with terrorist acts, in accordance with UN Security Council Resolution 1373, is a binding obligation under international law; and that Australia implements this obligation under Part 4 of the Charter of the United Nations Act. The minister's response argues that the impact on an individual's private or family life is not a relevant consideration for a decision to designate a person for their association with terrorist acts.

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23 See, Hasan and *Chaush v Bulgaria* (2000) ECHR (Application no. 30985/96) (26 October 2000), [84].

2.37 However, while it is acknowledged that Australia has obligations under UN Security Council Resolution 1373, this response does not address the potential scope and discretion for the minister to apply the UN Charter sanctions regime in respect of persons who are not specifically listed in UN Security Council Resolution 1373. It also fails to acknowledge that Australia has additional obligations under international law with respect to an individual's right to privacy and the right to protection of the family. In this respect, while there may be serious impacts on a listed, designated or declared person's family, the minister has not identified any safeguards in relation to family members. The absence of consideration of such matters is a further indication that the sanctions regimes may not be a proportionate limit on human rights.

2.38 The recent European Court of Human Rights decision in *Al-Dulimi and Montana Management Inc v Switzerland* provides further useful guidance on the interaction between UN Security Council sanctions and international human rights law.[24] This case confirmed the presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights. The European Court of Human Rights found that domestic courts should have the ability to exercise scrutiny so that arbitrariness can be avoided. This new case also indicated that, even in circumstances where an individual is specifically listed by the UN Security Council Committee, individuals should be afforded a genuine opportunity to submit evidence to a domestic court to seek to show that their inclusion on the UN Security Council list was arbitrary. That is, the state is still required to afford fair hearing rights in these circumstances. As designation occurs automatically under the UN Charter sanctions regime in such a situation,[25] there is no process for challenging a designation. Accordingly, based on this new case law, the current Australian model appears to be incompatible with the right to a fair hearing.

2.39 It is also noted that, in terms of comparative models, the United Kingdom (UK) has implemented its obligations in a manner that incorporates a number of safeguards not present in the Australian sanctions regimes, including:

- challenges to designations made by the executive can be made by way of full merits appeal rather than solely by way of judicial review;[26]
- quarterly reports must be made by the executive on the operation of the regime;[27]

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24 ECHR (Application no. 5809/08) (21 June 2016).

25 Under the UN Charter sanctions regime, a person specifically listed in a UNSC resolution will be subject to designation under Australian law without there being any process under Australian law to challenge that designation. That is, the minister does not have any discretion in these circumstances.

26 See section 26 of *Terrorist Asset-Freezing etc. Act 2010* (UK) (TAFA 2010).

27 See section 30 of TAFA 2010.

- an Independent Reviewer of Terrorism Legislation reviews each designation and has unrestricted access to relevant documents, government personnel, the police and intelligence agencies;[28]
- the executive provides a 'Designation Policy Statement' to Parliament setting out the factors used when deciding whether to designate a person;
- an Asset-Freezing Review sub-group annually reviews all existing designations, or earlier if new evidence comes to light or there is a significant change in circumstances, and the executive invites each designated person to respond to whether they should remain designated;[29]
- the prohibition on making funds available does not apply to social security benefits paid to family members of a designated person (even if the payment is made in respect of a designated person);[30] and
- when the executive is considering designating a person, operational partners are consulted, including the police, to determine whether there are options available other than designation—for example, prosecution or forfeiture of assets—to ensure that there is not a less rights restrictive alternative to achieve the objective.[31]

2.40 These kinds of safeguards in the UK asset-freezing regime are highly relevant indicia that there are more proportionate methods of achieving the legitimate objective of the Australian sanctions regimes. As noted above, a measure that limits human rights needs to be the least rights restrictive way of achieving the legitimate objective in order to be proportionate. Moreover, the absence of effective safeguards risks the arbitrary imposition of serious restrictions on individuals and their families, in circumstances where the measure, despite its laudable objective, ought not be applied.

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28 See David Anderson QC, Independent Reviewer of Terrorism Legislation, *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)* (December 2013) para 1.3.

29 See section 4 of TAFA 2010; David Anderson QC, Independent Reviewer of Terrorism Legislation, *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: December 2010 to September 2011)* (December 2011) para 6.5; and *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)* (December 2013) para 3.4.

30 See subs 16(3) of TAFA 2010.

31 David Anderson QC, Independent Reviewer of Terrorism Legislation, *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)* (December 2013) para 3.2.

Committee response

2.41 **The committee thanks the minister for her response and has concluded its examination of this issue.**

2.42 **However, noting the significant human rights concerns identified in the human rights assessment of the sanctions regimes, the committee draws these matters to the attention of the Parliament; and recommends that consideration be given to the following measures, several of which have been implemented in relation to the comparable regime in the United Kingdom, to ensure the compatibility of the regimes with human rights:**

- **the provision of publically available guidance in legislation setting out in detail the basis on which the minister decides to designate or declare a person;**
- **regular reports to Parliament in relation to the regimes including the basis on which persons have been declared or designated and what assets, or the amount of assets, that have been frozen;**
- **provision for merits review before a court or tribunal of the minister's decision to designate or declare a person;**
- **provision of merits review before a court or tribunal of an automatic designation where an individual is specifically listed by the UN Security Council Committee;**
- **regular periodic reviews of designations and declarations;**
- **automatic reconsideration of a designation or declaration if new evidence or information comes to light;**
- **limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;**
- **review of individual designations and declarations by the Independent National Security Legislation Monitor;**
- **provision that any prohibition on making funds available does not apply to social security payments to family members of a designated person (to protect those family members); and**
- **consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.**

Designations or declarations in relation to specified countries

2.43 The autonomous sanctions regime allows the minister to make a designation or declaration in relation to persons involved in some way with (currently) eight specified countries. The automatic designation under the UN Charter sanctions regime also lists a number of countries from which people have been designated.

2.44 The previous human rights analysis of the sanction regimes considered that the designation of persons in relation to specified countries limits the right to equality and non-discrimination. The committee therefore sought the advice of the minister as to how the designation or declaration of a person under the autonomous sanctions regime is a proportionate limitation on the right to equality and non-discrimination and, in particular, whether there are adequate safeguards in place to protect this right.

Minister's response

2.45 The minister's response states the regime does not refer to personal attributes such as race, sex or religion; and further notes that it would not be appropriate for the minister to take such matters into consideration when designating or declaring an individual or entity.

2.46 This is correct, however, the prohibited grounds of discrimination under international human rights law also include national origin.[32] Moreover, unlawful discrimination may be direct (that is, having the purpose of discriminating on a prohibited ground), or indirect (that is, having the effect of discriminating on a prohibited ground, even if this is not the intent of the measure).

2.47 The previous human rights analysis of the sanctions regimes acknowledged that the sanctions regimes did not require a person to be a national of a particular country and that the sanctions regimes did not directly discriminate against a person on the basis of their nationality. However, it raised concerns that it appears likely that nationals of listed countries are more likely to be considered to be 'associated with' or work for a specified government or regime than those from other nationalities. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.

2.48 A disproportionate effect on a particular group may be justifiable such that the measure does not constitute unlawful indirect discrimination. However, the minister's response does not engage with this point. It may be that the choice of countries, and the process by which individuals are identified for the potential designation, provide sufficient justification; however without being provided with this information from the minister, the committee is unable to reach this conclusion.

Committee response

2.49 **The committee thanks the minister for her response and has concluded its examination of this issue.**

32 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.

2.50 **However, the committee draws to the attention of the minister the requirements for the preparation of statements and responses set out in the committee's *Guidance Note 1* including its expectation that further information from the minister address the committee's specific requests (in this case queries raised in relation to indirect discrimination).**

Charter of the United Nations (Sanctions—Iran) Document List Amendment 2016 [F2016L00116]

Purpose	Amends the Charter of the United Nations (Sanctions—Iran) Document List 2014, which lists documents specified by the Minister for Foreign Affairs determining goods to be prohibited for export to, or importation from, Iran
Portfolio	Foreign Affairs
Authorising legislation	*Charter of the United Nations Act 1945*
Last day to disallow	7 November 2016
Right	Fair trial (see **Appendix 2**)
Previous report	*Thirty-sixth Report of the 44th Parliament*

Background

2.51 The committee previously examined the Charter of the United Nations (Sanctions—Iran) Document List 2014 (Iran List) in its *Thirty-sixth Report of the 44th Parliament*. This report entry considers this and other related instruments made under the *Charter of the United Nations Act 1945*.[1]

2.52 The minister's response to the committee's inquiries was received on 4 October 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

2.53 The minister advised that the Iran List was no longer in force, and that it had been replaced by section 6 of the Charter of the United Nations (Sanctions—Iran) Regulation 2016 (2016 Iran Sanctions Regulations). The 2016 Iran Sanctions Regulations, introduced on 30 August 2016, also replace the Charter of the United Nations (Sanctions—Iran) Regulations 2008 (2008 Iran Sanctions Regulations). The minister noted that the current provisions in respect of export sanctioned goods are not materially different to the provisions in the 2008 Iran Sanctions Regulations.

Offences of dealing with export and import sanctioned goods

2.54 The previous human rights assessment of the Iran List set out that the proposed criminal offence, arising as a breach of certain regulations addressing the supply of export sanctioned goods and the importation of import sanctioned goods in the 2008 Iran Sanctions Regulations, engaged and may have limited the right to a

1 Namely the Charter of the United Nations (Sanctions—Iran) Regulation 2016 [F2016L01181] and the United Nations (Sanctions—Iran) (Export Sanctioned Goods) List Determination 2016 [F2016L01208], which lists the export sanctioned goods as determined by the minister pursuant to subregulation 6(2) of the Regulation.

fair trial. This was based on an assessment that the definition of 'export sanctioned goods', by reference to goods mentioned in the five listed documents at Schedule 1, Part 1, lacked a clear legal basis. The 2008 Iran Sanctions Regulations defined 'export sanctioned goods' as including goods that are mentioned in a document specified by the minister by legislative instrument. The documents that were specified by the minister in the instrument took various forms, including letters and information circulars, rather than setting a clear and comprehensible list of goods that would meet the drafting standards for the framing of an offence.

2.55 Section 6 of the 2016 Iran Sanctions Regulations refers to three of those five documents in the Iran List. It also goes further than the Iran List to specify certain goods and materials, including goods that the minister is satisfied may contribute to the development of nuclear weapon delivery systems.

Minister's response

2.56 The committee's previous report raised concerns regarding the compatibility of the measure with the right to a fair trial, and specifically, the quality of law test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified. The committee sought the minister's advice as to whether the offences were drafted in a sufficiently precise manner to ensure a fair trial for the purposes of international human rights law, as well as advice as to the proportionality of the measures more generally.

2.57 The minister responded to the committee's questions in respect of the Iran List (now replaced by section 6 of the 2016 Iran Sanctions Regulations), stating that section 6 of the 2016 Iran Sanctions Regulations is aimed at achieving a range of legitimate objectives, such as implementing Australia's obligations under United Nations (UN) Security Council resolution 2231. It is acknowledged that Australia has certain obligations under UN Security Council Resolutions, and the objectives stated by the minister appear to satisfy the requirement of a legitimate objective under international human rights law.

2.58 In relation to the issue of whether the offence provisions are sufficiently precise to satisfy a requirement that a measure limiting rights is prescribed by law, the minister stated that she did not consider that section 6 of the 2016 Iran Regulations limits a defendant's right to a fair trial. Nonetheless, the minister's response later stated that the limitation on the right is reasonable and proportionate insofar as the measures reproduce into domestic law Australia's international obligations as exactly as possible.

2.59 Further, the minister stated that the offences are precise in their application on the basis that 'export sanctioned goods' are defined in the 2016 Iran Sanctions Regulations and include all goods set out in two International Atomic Energy Agency

Information Circulars and in a UN Security Council document containing a missile technology control regime list.[2] The minister noted that these documents contain annexures listing specific goods. On this basis, the minister contended that the annexures are a sufficient source of information for persons potentially subject to the offence provisions.

2.60 The minister's response also discussed the *Commonwealth Guide to Framing Offence Provisions*,[3] and referred to the exceptions to the principle that the content of an offence should only be delegated from an Act to an instrument where there is a demonstrated need to do so. The minister's response concluded that all of these exceptions apply to section 6 of the 2016 Iran Sanctions Regulations.

2.61 In order to be sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law, and as set out in the human rights analysis of the Iran List in the *Thirty-sixth Report of the 44th Parliament*, measures limiting rights must be precise enough so that persons potentially subject to the offence provisions are aware of the consequences of their actions.[4]

2.62 Subsection 6(1) of the 2016 Iran Sanctions Regulations defines 'export sanctioned goods' by listing three of the five documents that appeared in the Iran List, as well as specifying other goods and material which did not appear in the Iran List.

2.63 The other goods and materials specified at subsection 6(1) are a new addition and are sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law. This is because the type and category of goods and materials are listed in some detail, thereby ensuring that the measures are sufficiently certain and accessible to people whose rights may be infringed by the measure.

2.64 However, insofar as subsection 6(1) of the 2016 Iran Sanctions Regulations resembles the original Iran List by referring to three of the five documents in the Iran List, the human rights concerns with the limitation on the right to a fair trial remain. As stated in the human rights analysis in respect of the Iran List, persons potentially subject to the offence provisions under the 2016 Iran Sanctions Regulations may be

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2 See INFCIRC/254/Part 1; referred to in the minister's letter as INFCIRC/254/Rev. 12/Part 1, a 13 November 2013 document, but in the 2016 Iran Sanctions Regulations as 'in force from time to time'. See also INFCIRC/254/Part 2; referred to in the minister's letter as INFCIRC/254/Rev. 9/Part 2, a 13 November 2013 document, but in the 2016 Iran Sanctions Regulations as 'in force from time to time'. See also S/2015/546, a 16 July 2015 UN Security Council document.

3 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011).

4 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 12.

unable to determine, with sufficient precision, particular items that are export sanctioned goods for the purposes of these regulations.[5] The right to a fair trial is therefore engaged, and there does not appear to be sufficient justification for the limitation imposed on this right.

Committee response

2.65 **The committee thanks the minister for her response and has concluded its examination of the issue.**

2.66 **The committee notes that the Charter of the United Nations (Sanctions-Iran) (Export Sanctioned Goods) List Determination 2016 lists further export sanctioned goods to the Iran List which are sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law.**

2.67 **However, the committee observes that the preceding legal analysis indicates that the reference to the prohibition on the supply and importation of export sanctioned goods as including goods listed in International Atomic Energy Agency Information Circulars and a UN Security Council document containing a missile technology control regime list, may be insufficiently precise and lack a clear legal basis. Accordingly, the offences of dealing with export and import sanctioned goods engage and limit the right to a fair trial and may not meet the quality of law test.**

2.68 **Noting the human rights concerns identified in the preceding legal analysis in relation to the instrument, the committee draws the human rights implications of the instrument to the attention of the Parliament.**

Mr Ian Goodenough MP

Chair

5 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 12.

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Narcotic Drugs Regulation 2016 [F2016L01613];
- Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016 [F2016L01617];
- Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016 [F2016L01649];
- Transport Security Legislation Amendment (Identity Security) Regulation 2016 [F2016L01656]; and
- Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696].

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

- Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2016 (No. 1) [F2016L01444];[1]
- Australian Border Force (Secrecy and Disclosure) Amendment (2016 Measures No. 1) Rule 2016 [F2016L01461];[2]
- Defence Force Discipline Appeals Regulation 2016 [F2016L01452];[3]
- Defence Regulation 2016 [F2016L01568];[4] and
- Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016 [F2016L01390].[5]

3.3 In addition, the committee continues to defer its consideration of the Racial Discrimination Amendment Bill 2016 and Racial Discrimination Law Amendment

1 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 93.

2 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 93.

3 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 93.

4 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 93.

5 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 93.

(Free Speech) Bill 2016 until it completes its current inquiry into freedom of speech in Australia.[6]

6 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113. For more information on this inquiry, see the inquiry website at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia.

Appendix 2

Short guide to human rights

3.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

3.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

3.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [3.5]).

3.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

3.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015).

2 Parliamentary Joint Committee on Human Rights, *Guidance Note 1* (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

3.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

3.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [3.9] to [3.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

3.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [3.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

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

3.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

3.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

3.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

3.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

3.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

3.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

3.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

3.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

3.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [3.6] to [3.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

3.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

3.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

3.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

3.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

3.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [3.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [3.6] to [3.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

3.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

3.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

3.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

3.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);
- respect for family life (prohibiting interference with personal family relationships);

- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

3.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

3.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

3.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

3.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

3.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

3.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a

religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

3.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

3.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

3.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

3.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

3.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

3.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

3.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

3.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

3.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

3.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

3.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

3.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

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

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

3.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

3 The prohibited grounds of discrimination 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. The prohibited grounds of discrimination are often described as 'personal attributes'.

4 *Althammer v Austria* HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

3.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [3.29]).

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

Article 12 of the CRC

3.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

3.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

3.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

3.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

3.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

3.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

3.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

3.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

3.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

3.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

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

Right to health

Article 12 of the ICESCR

3.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

3.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

3.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

3.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

3.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

3.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear /Philip Chair

Thank you for your 2 February 2016 letter regarding instruments made under the *Autonomous Sanctions Act 2011* and *Charter of the United Nations Act 1945*. The attached document responds to the questions raised by the Parliamentary Joint Committee on Human Rights in their 2 February 2016 report.

I continue to be satisfied that Australia's implementation of United Nations Security Council sanctions and autonomous sanctions are proportionate to the objectives of each regime and include adequate safeguards.

I trust the attached information will assist you in concluding your consideration of the instruments made under the Autonomous Sanctions Act and the Charter of the United Nations Act.

Yours sincerely

Julie Bishop
21 MAR 2016

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Response to Parliamentary Joint Committee on Human Rights
Human Rights Scrutiny Report (2 February 2016)

Overarching issues

United Nations Security Council resolution 1373 (UNSCR 1373), is as binding under international law as other United Nations Security Council (UNSC) sanctions regimes. The criteria for designation of persons and entities are set out in UNSCR 1373. The exemptions to the targeted financial sanctions have been enumerated in resolution 1452. The distinction between UNSCR 1373 and other UNSC sanctions regimes is that UNSCR 1373 has been interpreted internationally as requiring each member state to maintain their own lists of designated persons and entities, as opposed to a centralised list maintained by the UNSC or its committees.

This interpretation is borne out by Standards of the Financial Action Task Force (FATF)[1]. The FATF and the global network of FATF-Style Regional Bodies enjoy nearly universal membership. The FATF is recognised as the international standard setter for combating money laundering, the financing of terrorism and the financing of the illicit proliferation of weapons of mass destruction. FATF Recommendation 6 sets the international standard for implementation of targeted financial sanctions to combat terrorism, including UNSCR 1373. The responses below will therefore refer to the FATF Standards and the 2015 FATF Mutual Evaluation of Australia[2]. The 2015 Mutual Evaluation of Australia found Australia to be fully compliant with the FATF Recommendations related to sanctions, including those elements related to due process.

It is important to note that the imposition of sanctions measures against designated persons and entities is a *preventive measure* not to be confused with penalties imposed following criminal or civil proceedings. As the Interpretive Note to FATF Recommendation 6 states: '[m]easures under Recommendation 6 may complement criminal proceedings against a designated person or entity...but are not conditional upon the existence of such proceedings'.

Requests for advice from the Committee

The Committee asked how the designation of a person is a proportionate limitation on the right to privacy, having regard to the matters set out at paragraph [1.87] and whether there are adequate safeguards to protect individuals potentially subject to designation.

The matters set out in paragraph 1.87 are addressed below.

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[1] Including the FATF's Forty Recommendations and the FATF Methodology for Assessing Compliance. The FATF Recommendations and Methodology are publicly available at http://www.fatf-gafi.org/

[2] The FATF Mutual Evaluation Report for Australia is publicly available at http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf

'The designation or declaration under the autonomous sanctions regime can be based solely on the basis that the Minister is 'satisfied' of a number of broadly defined matters'

The Minister's decision to designate or declare persons under the *Autonomous Sanctions Regulations 2011* is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and under common law. The decision must therefore satisfy the usual legal requirements including that such decisions not take into account irrelevant considerations or fail to take into account relevant considerations, or be so unreasonable that no reasonable person could have made the decision.

'The Minister can make the designation or declaration without hearing from the affected person before the decision is made'

A decision maker is bound by the rules of natural justice in making any decision to declare or designate a person. The degree to which procedural fairness is afforded depends upon balancing natural justice against the effective operation of the legislation.

Hearing from an affected person before designating or declaring them could defeat the very purpose of imposing targeted financial sanctions, and therefore also the intention of Parliament in imposing or authorising such measures. Providing prior notice to a person or entity that they are being considered for targeted financial sanctions would effectively 'tip off' the person and could lead to any assets they had in Australia being moved off-shore before the targeted financial sanctions took effect.

The inherent risks of undermining targeted financial sanctions measures by providing an opportunity to be heard before a decision is made have been recognised internationally as evidenced by the FATF Methodology which state that: '[t]he competent authority(ies) should have legal authorities and procedures or mechanisms to...operate ex parte against a person or entity who has been identified and whose (proposal for) designation is being considered'[3].

'There is no requirement that reasons be made available to the affected person as to why they have been designated or declared'

This is incorrect. Section 13 of the ADJR Act requires the provision, upon request by a person aggrieved by the decision, of a 'statement in writing...giving the reasons for [a] decision'.

'No guidance is available under the Act or regulations or any other publicly available document setting out the basis on which the Minister decides to designate or declare a person'

The criteria for designation and declaration for autonomous sanctions are set out in section 6 of the Autonomous Sanctions Regulations. The criteria for listing under Part 4 of the Charter of the United Nations Act are set out in s. 20 if the *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Dealing with Assets Regulations).

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[3] Refer to criterion 6.3 of the FATF Methodology.

'There is no report to Parliament setting out the basis on which persons have been declared or designated and what assets, or the amount of assets that have been frozen'

The Government complies with the requirements established by Parliament in the Autonomous Sanctions Act and the Charter of the United Nations Act. These do not include a requirement to report to Parliament on the basis for declarations or designations. The public disclosure of assets frozen and/or the amount of assets frozen could risk undermining the effective administration of both Acts. Given the small number of designated persons with known connections to Australia, it could be easy to surmise, even from aggregated data, whose assets had been frozen. Public disclosure of such information could prejudice investigations by law enforcement authorities.

'Once the decision is made to designate or declare a person, **[it]** ***remains in force for three years...There is no requirement that if circumstances change or new evidence comes to light that the designation or declaration will be reviewed before the three year period ends'***

The automatic ceasing of designations and declarations after three years, unless declared to continue in effect, ensures that all designations and declarations are reviewed at appropriate intervals. Designations may only be declared to continue where a person or entity continues to meet the criteria for designation. Designations and declarations may be reviewed at any time, including where circumstances change or new evidence comes to light.

Furthermore, under the Autonomous Sanctions Act and the Charter of the United Nations Act a person can request revocation of their designation or declaration in the event of changed circumstances or new evidence.

'A designated or declared person will only have their application for revocation considered once a year–if an application for review has been made within the year, the Minister is not required to consider it'

Subsection 11(3) of the Autonomous Sanctions Regulations and subsection 17(3) of the Charter of the United Nations Act are intended to ensure that the Minister is not required to consider repeated, vexatious revocation requests. While the Minister is not required to consider an application made for revocation within one year of an earlier application, it is not correct to say that 'a designated or declared person will only have their application for revocation considered once a year'. The Minister can choose to consider any number of revocation requests.

'There is no merits review before a court or tribunal of the Minister's decision'

This is correct. Nevertheless, the procedures for requesting revocation of designations and declarations, the availability of judicial review under the ADJR Act, and the safeguards against 'false positives' in section 41 of the Dealing with Assets Regulations are consistent with international standards for according due process to designated or declared persons and entities[4].

[4] Refer to criterion 6.6 of the FATF Methodology. Australia was assessed in 2015 to be fully compliant with Recommendation 6.

'There is no requirement to consider whether applying ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the Minister'

As noted above, the imposition of targeted financial sanctions is considered, internationally, to be a preventive measure that operates in parallel to complement the criminal law.

'The Minister has unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses'

The discretion to impose conditions on permits is appropriate as the personal circumstances of each designated person or entity are unique. If it were not possible to make a permit subject to conditions tailored to a particular case, the risks of granting an unconditional permit could in some cases weigh against the granting of a permit at all.

The imposition of conditions are an appropriate way to manage the risks associated with designated persons accessing assets, in terms of protecting the community and in providing legal protection and clarity for *bona fide* third parties holding frozen assets, such as Australian banks.

'There is no requirement that in making a designation or declaration the Minister needs to take into account whether in doing so, it would be proportionate to the anticipated effect on an individual's private and family life'

As noted above, the obligation to impose targeted financial sanctions against persons and entities associated with terrorist acts, in accordance with UNSCR 1373, is a binding obligation under international law. Australia implements this obligation under Part 4 of the Charter of the United Nations Act. The impact on an individual's private or family life is not a relevant consideration for a decision to designate a person for their association with terrorist acts. The possibility of such impacts has, however, been addressed through the exemptions to targeted financial sanctions established in UNSC resolution 1452 (2002).

Australia fully implements these exemptions in s. 22 of the Charter of the United Nations Act and Part 3 of the Dealing with Assets Regulations. The power to grant permits under Part 4 of the Autonomous Sanctions Regulations closely mirrors the exemptions established by the United Nations Security Council for its sanctions regimes. These provisions allow for adverse impacts on family members and *bona fide* third parties to be mitigated.

Other requests for advice

With respect to the Committee's request for advice in relation to the rights to equality and non-discrimination, as outlined above, the designation and declaration criteria set out in the Dealing with Assets Regulations and the Autonomous Sanctions Regulations do not refer to personal attributes such as race, sex or religion. It would not be appropriate for the Minister to take such matters into consideration when designating or declaring an individual or entity.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Chair
Parliamentary Joint Committee on Human Rights
PO Box 6022 House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for the letter of 16 March 2016 seeking my advice on the human rights compatibility of the *Charter of the United Nations (Sanctions - Iran) Document List Amendment 2016* [F2016L00116] (List) considered in the Thirty-Sixth Report of the 44th Parliament of the Parliamentary Joint Committee on Human Rights.

I note that the List has now been replaced by section 6 of the *Charter of the United Nations (Sanctions – Iran) Regulation 2016* (Iran Regulation 2016). I also note that the Iran Regulation 2016 replaced the *Charter of the United Nations (Sanctions – Iran) Regulations 2008*. This response will address the provisions currently in force given that those related to 'export sanctioned goods' in the Iran Regulation 2016 are not materially different from the earlier provisions.

I note also that the definition of 'import sanctioned goods' has now been narrowed under section 7 of the Iran Regulation 2016 to 'arms and related matériel' and therefore now falls outside the scope of the Committee's request for information.

For the reasons set out in the attached information, I am satisfied that the offences of dealing with export sanctioned goods under the *Charter of the United Nations Act 1945* and the Iran Regulation 2016 are compatible with human rights. The Iran Regulation 2016 does not limit a defendant's rights under Article 14 of the *International Covenant on Civil and Political Rights*. The Iran Regulation 2016 also achieves a range of legitimate objectives, including supporting United Nations Security Council resolution 2231 and the Joint Comprehensive Plan of Action nuclear agreement between Iran and the P5 plus Germany. The offences in the Iran Regulation 2016 are precise, reasonable and proportionate.

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I trust the attached information will assist the Committee in its further consideration of the issues raised in its Report.

Yours sincerely

Julie Bishop

28 SEP 2016

Annex

Are the proposed changes aimed at achieving a legitimate objective?

Yes. Section 6 of the *Charter of the United Nations (Sanctions – Iran) Regulation 2016* (Iran Regulation 2016) is aimed at achieving a range of legitimate objectives, principal among which are:

- implementing Australia's obligations under international law, specifically United Nations Security Council resolution 2231;
- supporting the United Nations Security Council endorsed Joint Comprehensive Plan of Action (JCPOA) nuclear agreement, which constrains Iran's nuclear program, and provides verifiable assurances to the international community that Iran's nuclear activities will remain exclusively peaceful; and
- protecting Australians and those outside Australia from the threat of nuclear proliferation.

Are the offence provisions sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law?

The laws do not limit a defendant's human rights referred to in Article 14 of the International Covenant on Civil and Political Rights. A defendant has the right to a fair and public hearing by a competent, independent and impartial tribunal established by law in accordance with the guarantees in Article 14(1) and enjoys the minimum guarantees provided by Articles 14(2)-(7) and 15. In the absence of a limitation placed on those rights the quality of law test referred to by the Committee does not apply.

That said, the offences are precise in their application. Subsection 6 of the Iran Regulation 2016 defines 'export sanctioned goods'. Paragraph 6(1)(a) to (c) include all goods set out in the following documents:

- International Atomic Energy Agency Information Circular, INFCIRC/254/Rev.12/Part 1;
- International Atomic Energy Agency Information Circular, INFCIRC/254/Rev.9/Part 2; and
- United Nations Security Council document S/2015/546.

The Committee queries whether the first two documents referred to above contain 'specific descriptions of particular goods that are prohibited'. It is true, as the Committee noted, that these documents contain guidelines for nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software, and related technology. However, we note that the annexes to INFCIRC/254/Rev.12/Part 1 and INFCIRC/254/Rev.9/Part 2 also contain lists of specific goods.

The Committee has also stated that the reference to the documents above 'appears inconsistent with the Commonwealth Guide to Framing Offence Provisions', specifically that '[i]t is normally desirable for the content of an offence to be clear from the offence provision itself...'. It should be noted, however, that the Guide further states that:

'Offence content should also only be delegated from an Act to an instrument where there is a demonstrated need to do so. For example, it may be appropriate to delegate offence content where:

- 'the relevant content involves a level of detail that is not appropriate for an Act...
- 'prescription by legislative instrument is necessary because of the changing nature of the subject matter...
- 'the relevant content involves material of such a technical nature that it is not appropriate to deal with it in the Act ..., or
- 'elements of the offence are to be determined by reference to treaties or conventions, in order to comply with Australia's obligations under international law or for consistency with international practice....'

Each of these exceptions applies in the case of defining the range of nuclear and nuclear-related dual use goods that fall within the definition of 'export sanctioned good' for the purposes of the Iran Regulation 2016.

The exception for offences determined by reference to treaties or conventions is particularly pertinent. Resolution 2231 explicitly refers to the list of documents cited in section 6 of the Iran Regulation 2016, see paragraphs 2 and 4 of Annex B to the Resolution. Incorporation of these international documents into definition of 'export sanctioned goods' ensures that Australia complies with its international obligations. It also provides certainty and a level playing field for businesses seeking to comply with Australian law by ensuring consistency with international practice.

Is the limitation a reasonable and proportionate measure to achieve the stated objective, including that there are sufficient safeguards in place and the measure is no more rights restrictive than necessary to achieve that objective?

Yes. The limitations imposed by the Iran Regulation 2016 are reasonable and proportionate to the objectives outlined above. They reproduce into Australian law as exactly as possible Australia's international obligations with respect to restricting certain exports to Iran.

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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

Background

Australia's human rights obligations

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

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

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

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

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

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

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

Civil and political rights

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

Economic, social and cultural rights

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

Limiting a human right

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

Prescribed by law

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

Legitimate objective

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

Rational connection

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

Proportionality

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

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

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

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

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

Retrogressive measures

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

The committee's approach to human rights scrutiny

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

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

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

The committee's expectations for statements of compatibility

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

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

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

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

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

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

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

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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

December 2014

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

Introduction

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

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

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

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

Reverse burden offences

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

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

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

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

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

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

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

Strict liability and absolute liability offences

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

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

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

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

Mandatory minimum sentencing

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

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

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

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

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

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

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

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

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

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

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

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

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

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

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

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

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

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

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

When a civil penalty provision is 'criminal'

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

a) Classification of the penalty under domestic law

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

b) The nature of the penalty

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

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

c) The severity of the penalty

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

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

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

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

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

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

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

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

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

Criminal process rights and civil penalty provisions

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

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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