

# Chapter 1

## New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 28 November 2016 and 9 February 2017 (consideration of eight bills from this period has been deferred);<sup>1</sup>
  - legislative instruments received between 11 November and 15 December 2016 (consideration of four legislative instruments from this period has been deferred);<sup>2</sup> 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*.<sup>3</sup> 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.
- 1.5 The committee has also concluded its examination of the previously deferred Australian Border Force (Secrecy and Disclosure) Amendment (2016 Measures No. 1) Rule 2016 [F2016L01461] and Defence Force Discipline Appeals Regulation 2016 [F2016L01452] and makes no further comment on the instruments.<sup>4</sup>

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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](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](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate).

4 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 17.

## Response required

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

### Treasury Laws Amendment (2016 Measures No. 1) Bill 2016

<b>Purpose</b>	Seeks to amend: the <i>Terrorism Insurance Act 2003</i> to clarify that losses attributable to terrorist attacks using chemical or biological means are covered by the terrorism insurance scheme; the <i>Corporations Act 2001</i> to provide that employee share scheme disclosure documents lodged with the Australian Securities and Investments Commission are not made publicly available for certain start-up companies, and provide protection for retail client money and property held by financial services licensees in relation to over-the-counter derivative products; the <i>Income Tax Assessment Act 1997</i> to update the list of deductible gift recipients; and the <i>Income Tax Assessment Act 1936</i> and <i>Income Tax Assessment Act 1997</i> to provide income tax relief to eligible New Zealand special category visa holders who are impacted by disasters in Australia
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives, 1 December 2016
<b>Rights</b>	Fair trial (see <b>Appendix 2</b> )

### Civil penalty provisions

1.7 Schedule 5 of the Treasury Laws Amendment (2016 Measures No. 1) Bill 2016 (the bill) introduces a power into the *Corporations Act 2001* for the Australian Securities and Investments Commission to make rules by legislative instrument in relation to derivative retail client money.<sup>1</sup> The client money reporting rules may include a penalty amount for a rule, which must not exceed \$1,000,000.<sup>2</sup> This penalty could apply to a natural person. Failure to comply with the rules is a civil penalty provision.<sup>3</sup>

### ***Compatibility of the measure with the right to a fair trial***

1.8 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

1 Schedule 5, item 14, proposed new section 981J.

2 Schedule 5, item 14, proposed new subsection 981K(3).

3 See Schedule 5, item 14, proposed new subsection 981M(1) in conjunction with existing section 1317E of the *Corporations Act 2001*.

'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; that is, proof is on the balance of probabilities.

1.9 However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) where the penalty may be regarded as 'criminal' for the purposes of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law (see Appendix 2). 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.

1.10 There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be considered 'criminal' for the purposes of human rights law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.

1.11 A civil penalty of up to \$1,000,000 penalty units is a substantial penalty. The measure in the bill therefore engages the right to a fair trial. However, the statement of compatibility states that Schedule 5 does not engage any of the applicable rights or freedoms.<sup>4</sup> The committee's expectations in relation to the preparation of statements of compatibility are set out in its *Guidance Note 1*.

1.12 When assessing the severity of a pecuniary penalty, regard must be had to the amount of the penalty, the nature of the industry or sector being regulated and the maximum amount of the civil penalty that may be imposed relative to the penalty that may be imposed for a corresponding criminal offence.

1.13 The explanatory memorandum provides that the maximum penalty that may be included in the rules is 'equivalent to the maximum penalty under the market integrity rules, which contain corresponding reporting and reconciliation requirements made in connection with dealings in exchange-traded derivatives', and that this proposed measure is 'consistent with the principle that penalties should be consistent for offences of a similar kind or level of seriousness.'<sup>5</sup> The explanatory memorandum goes on to state that the maximum penalty 'reflects that misuse of retail client money is a serious matter', and further states that:

[s]afekeeping of client monies is a critical factor in preserving investor confidence in financial and derivatives markets, and it is important that penalties for breaches of the law in this area (including the reporting rules) are sufficiently severe to have a genuine deterrent effect. In addition, the

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4 Explanatory memorandum (EM) 134.

5 EM 81.

amount of client money that is entrusted to licensees may be very large. For example, the collapse of the broker MF Global resulted in around \$320 million of client monies being placed at risk in Australia alone. As the cost to the individual investors and wider confidence in the financial system from a breach of the client money rules is potentially very significant, the proposed penalty amount is considered appropriate for ensuring a commensurate deterrent effect.<sup>6</sup>

1.14 However, the provision imposing a maximum civil penalty of \$1,000,000 appears to impose a particularly severe penalty, and for this reason may be considered to be 'criminal' for the purposes of international human rights law.

1.15 The consequence of this would be that the civil penalty provisions in the bill must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

1.16 Section 1317P of the *Corporations Act 2001* provides that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a penalty has been applied, except in limited circumstances.<sup>7</sup> If the civil penalty provision is considered criminal in nature, this raises concerns under article 14(7) of the ICCPR which provides that no one is to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted (double jeopardy).

### **Committee comment**

1.17 **The preceding analysis raises questions as to the compatibility of the measure with the right to a fair trial.**

1.18 **The committee notes that the statement of compatibility does not address the engagement of this right by the measure. The committee therefore seeks further information from the Treasurer as to whether the civil penalty provision may be considered to be criminal in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*) and, if so, whether the measure accords with the right to a fair trial.**

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6 EM 81.

7 Namely, if an infringement notice is issued to the person for an alleged contravention of subsection 674(2) or 675(2); and the infringement notice is not withdrawn under section 1317DAI – see: subsection 1317P(2).

## Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756]

<b>Purpose</b>	Provides safety protections and navigation requirements similar to those established by the <i>New South Wales Marine Act 1998</i> to apply in the Jervis Bay Territory. Sets minimum safety equipment standards, prescribes requirements for wearing lifejackets and creates offences, including for operating vessels while under the influence of alcohol and drugs in the Jervis Bay Territory
<b>Portfolio</b>	Infrastructure and Regional Development
<b>Authorising legislation</b>	<i>Jervis Bay Territory Acceptance Act 1915</i>
<b>Last day to disallow</b>	20 March 2017
<b>Rights</b>	Presumption of innocence; liberty; privacy (see <b>Appendix 2</b> )

### Reverse legal burden of proof

1.19 Section 56 of the Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756] (the Ordinance) makes it an offence for a person under the age of 18 to either operate a vessel in Territory waters or supervise a junior operator, where there is present in his or her breath or blood the youth range prescribed concentration of alcohol. Section 63 makes it a defence for this offence if the defendant proves that, at the time the defendant was operating a vessel or supervising a juvenile operator of the vessel, the presence of alcohol in the defendant's breath or blood of the youth was not caused (in whole or in part) by either the consumption of an alcoholic beverage (other than for religious observance) or consumption or use of any other substance (such as food or medicine) for the purpose of consuming alcohol. This has the effect of reversing the legal burden of proof applying to the section 56 offence pursuant to section 13.4 of the Commonwealth *Criminal Code*.<sup>1</sup>

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

1.20 The right to a fair trial 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 (see Appendix 2).

1.21 The measure at section 63 of the Ordinance engages and limits the right to a fair trial by requiring the defendant to prove the legal burden.

<sup>1</sup> Although the legislation does not expressly note this, as is the common practice where legislation imposes a legal burden on a defendant, see for example subsection 3UC(3) of the *Crimes Act 1914*.

1.22 Where the right to the presumption of innocence is engaged and limited by a measure, in order for this limitation to be justifiable under international human rights law, it must be demonstrated that the measure pursues a legitimate objective and that the limitation on the right is rationally connected and proportionate to the stated objective.

1.23 The statement of compatibility does not identify that the right to the presumption of innocence is engaged and limited by these measures. However the explanatory statement provides that:

[t]he religious or medicinal consumption of alcohol is likely to be exclusively within the knowledge of the defendant, and thus it would be unworkable if the prosecution bore the legal burden in relation to this.

It is appropriate that the defendant bears the legal burden in relation to this defence because of the potentially significant risks to public safety posed by a person affected by alcohol who is in charge of a vessel.<sup>2</sup>

1.24 It therefore appears that the objective of the measure is to ensure public safety. This appears to be a legitimate objective for the purposes of international human rights law. However, there is no discussion of whether this measure is rationally connected or proportionate to the apparent objective. In particular, while the explanatory statement sets out a possible basis for reversing the *evidential* burden of proof (i.e. that the matters are peculiarly in the knowledge of the defendant) it does not explain why it is necessary to reverse the *legal* burden of proof. Additionally, while the explanatory statement states that it is appropriate to reverse the legal burden of proof because of the risks to public safety posed by people affected by alcohol in charge of vessels, there is no explanation as to how reversing the legal burden of proof for the offence would be more effective in reducing such risks as opposed to having the offence in place without any reverse legal burden of proof.

1.25 As set out the committee's *Guidance Note 2*,<sup>3</sup> reverse burden offences are likely to be compatible with the presumption of innocence where they are shown by the legislation proponent to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent. This is particularly the case in relation to the reversal of the *legal* burden of proof. A defendant's right to be presumed innocent is a key principle of the criminal justice system, as it safeguards the defendant's rights not to be wrongfully convicted. Reversing the legal burden of proof undermines this principle by requiring the defendant to prove his or her innocence on the balance of probabilities.

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2 Explanatory statement (ES) 20.

3 Appendix 2; see Parliamentary Joint Committee on Human Rights, *Guidance Note 2 – Offence provisions, civil penalties and human rights* (December 2014).

1.26 It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with the committee's *Guidance Note 1*.<sup>4</sup>

### **Committee comment**

1.27 **The committee considers that the measure in section 63, which reverses the legal burden of proof, engages and limits the right to be presumed innocent, as it requires the defendant to prove elements of the offence. As set out above, the statement of compatibility does not justify that limitation for the purpose of international human rights law. The committee therefore seeks the advice of the Minister for Infrastructure and Regional Development as to whether the limitation on the presumption of innocence is rationally connected to, and a proportionate approach to achieving, the stated objective.**

### **Alcohol and drug testing**

1.28 Section 64 of the Ordinance provides that the *Road Transport (Alcohol and Drugs) Act 1977* (Australian Capital Territory)<sup>5</sup> (the ACT Act) applies in relation to a person who operates a vessel in Territory waters.

1.29 As the ACT Act applies to the detection of people who drive motor vehicles after consuming alcohol or drugs, offences by those people, and measures for the treatment and rehabilitation of those people, the Ordinance sets out how the ACT Act applies specifically to vessel owners and operators.<sup>6</sup>

1.30 As the Ordinance directly incorporates the law set out in the ACT Act, in assessing the compatibility of the Ordinance with human rights, the committee is required to assess the compatibility of the incorporated law with human rights.

### ***Compatibility of the measure with multiple rights***

1.31 The right to liberty, which prohibits arbitrary detention, requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability (see Appendix 2).

1.32 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes protection of our physical selves against invasive action, including the right to personal autonomy and physical and psychological integrity, including respect for

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4 Appendix 2; see Parliamentary Joint Committee on Human Rights, *Guidance Note 1 – Drafting Statements of Compatibility* (December 2014).

5 Subject to certain exclusions, as set out at subsection 64(2).

6 Subsection 64(1). For example, paragraph 64(1)(a) provides that 'a reference to a driver of a motor vehicle on a road in the Territory included a reference to a person operating a vessel in Territory waters'.

reproductive autonomy and autonomy over one's own body (including in relation to medical testing) (see Appendix 2).

1.33 The provisions of the ACT Act engage and limit a number of rights, including the right to liberty and the right to privacy.<sup>7</sup>

1.34 The statement of compatibility recognises that the incorporation of the ACT Act engages and limits the right to liberty and the right to privacy, and provides some human rights analysis of the incorporation of the ACT Act.

1.35 In respect of the right to liberty, the statement of compatibility recognises that the ACT Act, in enabling a police officer to take a person into custody if they have a positive result or refuse to take a screening test,<sup>8</sup> engages and limits this right.<sup>9</sup> However, the statement of compatibility states that while it limits the right to liberty it does so 'in circumstances where the person may cause danger to others if they operate a vessel while under the influence of alcohol or drugs.'<sup>10</sup>

1.36 Ensuring public safety is a legitimate objective for the purposes of international human rights law, however, the statement of compatibility does not provide further analysis of how the limitation is rationally connected to or proportionate to the achievement of the stated objective.<sup>11</sup> In response to a review of the ACT Act, the ACT Human Rights Commission identified that the right not to be arbitrarily detained and arrested may be unlawfully restricted by random drug-testing which is not predicated on the relevant police officer having a 'reasonable suspicion' on which to ground the request for a sample to test.<sup>12</sup>

1.37 The statement of compatibility also recognises<sup>13</sup> that the right to privacy is engaged and limited by the incorporation of the ACT Act, specifically in relation to provisions that:

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7 For a discussion of the rights engaged and limited by the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) (ACT Act), see: ACT Human Rights Commission, Submission to the *Review of the Road Transport (Alcohol and Drugs) Act 1977* (25 July 2008); and Human Rights and Discrimination Commissioner, Submission to Discussion Paper: Drug Driving in the Territory: an overview of issues and options (6 May 2010).

8 See sections 11 and 13D of the ACT Act.

9 ES, statement of compatibility (SOC) 3-4.

10 ES, SOC 4.

11 ES, SOC 4. The statement does quote the UN Human Rights Committee, which states that 'sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws' – see: UN Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014) [10].

12 ACT Human Rights Commission, Submission to the Review of the Road Transport (Alcohol and Drugs) Act 1977 (25 July 2008) 3.

13 ES, SOC 5.

- require people to give samples of breath, blood and oral fluid when requested;<sup>14</sup>
- require a person to undergo a medical examination in some circumstances,<sup>15</sup> and create offences of refusing to undergo a drug or alcohol screening test,<sup>16</sup> or a blood test;<sup>17</sup>
- give police the power to enter premises to administer an alcohol or drug screening test;<sup>18</sup> and
- give police the power to search a person who is taken into custody, and to search their clothing. In this case, a police officer may request the assistance of another police officer of the same sex as the person being searched.<sup>19</sup>

1.38 The statement of compatibility, in recognising that the right to privacy may be limited by applying these provisions in the Ordinance, identifies that '[t]he public safety benefits offered by random breath testing drivers have been established in Australia over decades<sup>20</sup> and that the limitations are 'consistent with existing marine safety legislation in the adjoining NSW waters'.<sup>21</sup> Accordingly, the measures appear to be rationally connected to the legitimate objective of ensuring public safety.

1.39 In terms of whether the limitation on the right to privacy is proportionate to the stated objective, the statement of compatibility identifies that:

[t]he provisions from the ACT Act offer some privacy protections: sections 13 and 13F require that reasonably practicable steps be taken so that it is not readily apparent to the public that breath or oral fluid analysis are being carried out. Section 14 also limits the circumstances in which alcohol and drug tests can be carried out, particularly where conducting the test may be detrimental to the health of the subject.<sup>22</sup>

1.40 However, there are questions over whether the limitation on the right to privacy is proportionate to the stated objective. For example, the ACT Human Rights Commission identified that where saliva and blood samples are collected, there need

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14 Sections 12, 13A, 13B, 13E and 15, of the ACT Act.

15 Section 16, of the ACT Act.

16 Section 22C, ACT Act.

17 Section 22C, ACT Act.

18 Sections 10A and 13CA of the ACT Act.

19 Section 18C.

20 ES, SOC 5.

21 ES, SOC 5.

22 ES, SOC 5.

to be measures in place to protect against the possibility that these samples could become public knowledge through their tender in court in criminal proceedings.<sup>23</sup>

1.41 Further, the statement of compatibility does not examine how other rights, such as the right to a fair trial, are engaged and limited by the measure. For example, there is no discussion of the strict liability offence in the ACT Act for a refusal to undergo drug, alcohol and blood screening tests, which carries a maximum of 30 penalty units.<sup>24</sup> The ACT Human Rights Commission also identified concerns with the operation or effect of the ACT Act in respect of this right.<sup>25</sup>

### **Committee comment**

1.42 **The committee notes that the right to liberty is engaged and limited by the measure through the reference in the Ordinance to the ACT Act, but notes that the statement of compatibility does not provide an analysis of how the limitation is rationally connected to or proportionate to the achievement of the stated objective.**

1.43 **The committee also notes that the right to privacy is engaged through the reference in the Ordinance to the ACT Act and the ACT Human Rights Commission has raised concerns with the ACT Act, in relation to the right to privacy and other rights that may be engaged and limited by the ACT Act.**

1.44 **Accordingly, the committee seeks the advice of the Minister for Infrastructure and Regional Development as to the extent to which the ACT Act complies with international human rights law.**

### **Search and entry powers**

1.45 Section 83 of the Ordinance empowers a police officer to board a vessel and exercise monitoring powers<sup>26</sup> for the purpose of: finding out whether the Ordinance and the rules<sup>27</sup> are being, or have been complied with; investigating a marine accident; conducting a marine safety operation; or asking questions about the nature and operations of the vessel.<sup>28</sup>

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23 ACT Human Rights Commission, Submission to the *Review of the Road Transport (Alcohol and Drugs) Act 1977* (25 July 2008) 5.

24 Pursuant to section 22C of the ACT Act.

25 ACT Human Rights Commission, Submission to the *Review of the Road Transport (Alcohol and Drugs) Act 1977* (25 July 2008) 5: namely, the potential use of samples in other criminal proceedings, and subsequent charges arising as a result of a test, which detracts from the harm minimisation approach to drug treatment and rehabilitation.

26 Set out at section 87.

27 Made pursuant to section 118.

28 The power to require the master of the vessel to answer questions are set out at section 86.

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**Compatibility of the measure with the right to privacy**

1.46 The search and entry powers engage and limit the right to privacy by empowering police officers, without the need to obtain a warrant, to board and search a person's vessel (which could, in some cases, include a person's place of abode).

1.47 The statement of compatibility recognises that this right is engaged by the measure.<sup>29</sup> It states that these are coercive powers and that, as vessels are inherently mobile, investigation and enforcement activities need to be undertaken when an opportunity arises.<sup>30</sup> As such, it states that obtaining a warrant for a vessel for the purposes of an investigation 'may be impractical, and may limit police officers' capacity to carry out their investigative functions under the Ordinance effectively'.<sup>31</sup>

1.48 The objective of enabling police officers to carry out investigations and enforcement activities effectively is likely to be regarded as a legitimate objective for the purposes of international human rights law. While the limitation on the right to privacy of allowing police officers to board, inspect and detain vessels may be effective in achieving that objective (rationally connected), the question arises as to whether the limitation is proportionate to the stated objective, in particular, whether it is the least rights restrictive approach.

1.49 The statement of compatibility provides that the search and entry powers under the Ordinance are limited to the Australian Federal Police, and may only be exercised in limited circumstances.<sup>32</sup> However, section 92 of the Ordinance provides that a police officer may be 'assisted by other persons in exercising powers or performing functions or duties under this Part, if that assistance is necessary and reasonable'. Such a person can also board the vessel and exercise the powers and perform the functions or duties conferred on the police officer, in accordance with a direction given by the officer. This would appear to allow the police to confer on *any* person the power to assist in the exercise of these coercive powers.

1.50 In addition, while the statement of compatibility states that the search and entry powers can only be exercised in limited circumstances, section 83 in fact confers a range of broad purposes for the exercise of these powers, including 'finding out whether this Ordinance and the rules are being, or have been, complied with' and 'asking questions' about the nature or operations of the vessel.<sup>33</sup> These are broad purposes that do not require the police officer to have any suspicion at all as

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29 ES, SOC 4.

30 ES, SOC 4.

31 ES, SOC 5.

32 Set out in subsection 83(1).

33 See paragraphs 83(1)(a) and (d) and 86(1)(a).

to whether an offence or a breach of the rules may have been, or may be being, committed.

1.51 Additionally, there is also no requirement that the police officer first seek the consent of the occupier before boarding. There is also no requirement that, if consent is not granted, a warrant be sought before search and entry powers are exercised where it is reasonably practicable to do so. While it may be accepted that vessels are mobile and operating in areas where there is limited or no mobile telephone coverage,<sup>34</sup> there may be circumstances where it is possible to quickly obtain a warrant before these coercive powers are exercised.

### **Committee comment**

1.52 **The committee notes that the right to privacy is engaged and limited by the search and entry powers contained in the Ordinance and the above analysis raises questions as to whether the measure is the least rights restrictive way to achieve the stated aim.**

1.53 **Accordingly, the committee requests the advice of the Minister for Infrastructure and Regional Development as to whether the limitation is proportionate to achieving its objective, including whether there are less rights restrictive ways to achieve the stated objective, such as:**

- **limiting the exercise of the powers to police officers (and not 'persons assisting' as under section 92); and**
- **requiring a police officer to seek the consent of the occupier of the vessel before exercising the search and entry powers; and**
- **if consent is not granted, ensuring the search and entry powers can only be exercised when the police officer holds a reasonable suspicion that the Ordinance and rules may not be being complied with and to investigate accidents or conduct investigations; and**
- **that the default position is that a warrant be obtained to exercise these powers if consent is not granted, unless it is not reasonably practicable to obtain a search warrant.**

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34 ES, SOC 4.

## Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696]

<b>Purpose</b>	Amends the Migration Regulations 1994 to make various changes to the immigration citizenship policy, including changing the definition of member of the family unit for most visas except protection, refugee and humanitarian visas
<b>Portfolio</b>	Immigration and Border Protection
<b>Authorising legislation</b>	<i>Migration Act 1958</i>
<b>Last day to disallow</b>	13 February 2017
<b>Right</b>	Protection of the family (see <b>Appendix 2</b> )

### **Narrowing the definition of the member of a family unit**

1.54 Schedule 4 of the Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696] (the regulation) changes the general definition of 'member of the family unit' such that extended family members are no longer included in this definition. A member of a family unit will therefore only include the spouse or de facto partner of a primary applicant, and the dependent children, under the age of 23 or who are over this age but incapacitated, of the primary applicant or their partner (previously there was no age limit for the children of an applicant).<sup>1</sup> A child over 23 who is not incapacitated will therefore be considered an extended family member, and would not fall within the definition of a 'member of the family unit' (and therefore not entitled to family reunion).

1.55 In respect of protection, refugee and humanitarian visas,<sup>2</sup> a person will continue to be a member of the family unit of another person (the family head) if the person meets the criteria for the general definition of a member of a family unit, as well as if the person is a dependent child of any age or a single dependent relative of any age who is usually resident in the household of the family head.<sup>3</sup>

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

1.56 The right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another (see Appendix 2). Human rights gives a broad definition of what constitutes 'family'; it

1 Schedule 4, subregulation 1.12(2).

2 As defined at schedule 4, subregulation 1.12(3).

3 Schedule 4, subregulation 1.12(4).

refers not only to spouses, parents and children, but also to unmarried and same-sex couples and extended family members.<sup>4</sup>

1.57 This measure engages and limits the right to protection of the family for visa holders, other than holders of protection, refugee and humanitarian visas,<sup>5</sup> as it could operate to separate parents and their adult children and extended members of the same family by excluding those family members from being considered a 'member of the family unit'. This would apply regardless of the circumstances of an individual family.

1.58 Where a measure limits a human right, in order to be a permissible limitation, it must be demonstrated that the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.59 The statement of compatibility identifies that the protection of the family unit is engaged by the measure, however, it also states that:

...protection of the family unit under articles 17 and 23 [of the ICCPR] does not amount to a right to enter and remain in Australia where there is no other right to do so. Nor do they give rise to an obligation on a State to take positive steps to facilitate family reunification.<sup>6</sup>

1.60 Although Australia's obligations under international human rights law do not extend to non-citizens over whom Australia has no jurisdiction, where a person is under Australia's jurisdiction for the purposes of international human rights law, human rights obligations will apply. As such, Australia is required not to arbitrarily or unlawfully (for the purposes of international human rights law) interfere in the family life of visa holders. For example, if a visa holder is residing in Australia, the government must respect, protect and fulfil this person's right to protection of their family. This includes ensuring family members are not involuntarily separated from one another.

1.61 The statement of compatibility does not explicitly identify a legitimate objective that is supported by the measure; however, it does note that the new provisions are intended to better align 'migration pathways for relatives of new migrants with those for Australian citizens and existing permanent residents'.<sup>7</sup> For a

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4 See, for example, UN Human Rights Committee, General Comment 16: Article 17 (Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation) 1988 at [5] which stated that the term 'family' should 'be given a broad interpretation to include all those comprising the family as understood in the society of the State Party concerned'. See also UN Human Rights Committee, General Comment 19: Article 23 (The Family), 1990 at [2].

5 The previous definition of member of the same family unit will continue to apply to these visa classes – see: explanatory statement (ES), statement of compatibility (SOC) 11.

6 ES, SOC 12.

7 ES, SOC 12.

limitation on a right to seek to achieve a legitimate objective, it must be demonstrated that it is one that is necessary and addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right.

1.62 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's *Guidance Note 1*,<sup>8</sup> and the Attorney-General's Department's guidance on the preparation of statements of compatibility, which states that the objective 'must be shown to be a pressing and substantial concern. Where possible, provide empirical data that demonstrates that the objectives being sought are important'.<sup>9</sup>

1.63 The statement of compatibility has not demonstrated that better aligning conditions imposed on certain classes of visa holders with those conditions imposed on citizens and permanent residents seeks to address an area of pressing or social concern. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law. The statement of compatibility identifies that extended family members who are now excluded from being a member of the family unit are nevertheless able to apply for other visa classes where they meet the eligibility criteria in their own right. However, there is no explanation in the statement of compatibility as to whether there is sufficient flexibility to treat individual cases differently, based on their merits.

### **Committee comment**

**1.64 The committee notes that the narrowing of the definition of 'member of the family unit' engages and limits the right to protection of the family. The statement of compatibility has not sufficiently justified this limitation for the purposes of international human rights law.**

**1.65 The committee notes that the preceding analysis raises questions as to whether the limitation on the right to protection of the family seeks to achieve a legitimate objective, whether it has a rational connection to that objective, and whether it is proportionate to that objective.**

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8 Appendix 4; see Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014).

9 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Documents/Template2.pdf>.

**1.66 Accordingly, the committee requests the advice of the Minister for Immigration and Border Protection as to:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

## Narcotic Drugs Regulation 2016 [F2016L01613]

<b>Purpose</b>	Makes regulations that are necessary for the carrying out, or giving effect to, the regulatory framework for the licencing of the cultivation of cannabis and the production of cannabis and cannabis resins for medicinal and scientific purposes, as well as in relation to the manufacture of drugs
<b>Portfolio</b>	Health
<b>Authorising legislation</b>	<i>Narcotic Drugs Act 1967</i>
<b>Last day to disallow</b>	13 February 2017
<b>Rights</b>	Work; equality and non-discrimination (see <b>Appendix 2</b> )

### Requirement to only engage 'suitable persons'

1.67 The Narcotic Drugs Regulation 2016 [F2016L01613] (the regulation) implements part of the regulatory framework for licensing the cultivation, production and manufacture of medicinal cannabis under the *Narcotic Drugs Act 1967*<sup>1</sup> (the Act).

1.68 The regulation prescribes a class of 'unsuitable persons' whom a licence holder (with authority to cultivate, produce or manufacture medical cannabis) must take all reasonable steps not to employ or engage to carry out activities authorised by the licence.<sup>2</sup> These include persons who are undertaking or have undertaken treatment for drug addiction, persons who have a drug addiction, or persons who are undischarged bankrupts. In the context of employing or engaging suitable staff, the regulation also prescribes circumstances in which a person is taken not to be suitable to carry out activities authorised by a cannabis licence at a particular time.<sup>3</sup> These include where, in the five years before the person is to be employed, the person has used illicit drugs; been convicted of a drug related offence; or been convicted of an offence against a law of the Commonwealth or a state or territory that involved theft, or that was punishable by a maximum penalty of imprisonment of three months or more.

1 Amended by the *Narcotic Drugs Amendment Act 2016* to introduce the new framework.

2 See: new subregulation 18(1), prescribed pursuant to subsection 10F(1) of the Act.

3 See: new subregulation 18(2), prescribed pursuant to subsection 10F(2) of the Act. A 'drug related offence' is defined at regulation 4.

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

1.69 The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work (see Appendix 2). The right to work also requires that states provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory way.<sup>4</sup>

1.70 By prohibiting medicinal cannabis licence holders from employing or engaging prescribed 'unsuitable persons', and by preventing certain persons (who in the 5 years prior to employment or engagement have been subject to certain prescribed circumstances) from carrying out activities authorised by a cannabis licence, the measure engages and limits the right to work and the right to equality and non-discrimination.

1.71 The statement of compatibility does not discuss this measure, or the rights that are engaged and limited by the measure.

1.72 The committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee's *Guidance Note 1*,<sup>5</sup> and the Attorney-General's Department's guidance on the preparation of statements of compatibility.<sup>6</sup>

1.73 To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

**Committee comment**

1.74 **The committee notes that the right to work and the right to equality and non-discrimination are engaged and limited by:**

- **the requirement not to employ or engage prescribed 'unsuitable persons'; and**

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4 Pursuant to article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

5 Appendix 4; see Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014).

6 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Documents/Template2.pdf>.

- the prevention of persons, who in the 5 years prior to employment or engagement have been subject to prescribed circumstances, from carrying out activities authorised by a cannabis licence.

1.75 The statement of compatibility has not identified or addressed these limitations. The committee therefore seeks the advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

## Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016 [F2016L01649]

<b>Purpose</b>	Amends the Parliamentary Service Determination 2013 to remove the requirement for the Commissioner to endorse a particular certification in relation to the selection process for SES vacancies, remove the requirement for the Commissioner to be satisfied that certain requirements have been met before a Secretary may give notice to an SES employee, and remove the requirement that certain employment decisions are to be notified in the Public Service Gazette
<b>Portfolio</b>	Prime Minister and Cabinet
<b>Authorising legislation</b>	<i>Parliamentary Service Act 1999</i>
<b>Last day to disallow</b>	13 February 2017
<b>Right</b>	Privacy (see <b>Appendix 2</b> )

### Background

1.76 The Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016 [F2016L01649] (the 2016 Determination) was made partly in response to issues identified in relation to the Parliamentary Service Determination 2013 [F2013L01201] (2013 Determination).

1.77 The 2016 Determination raises similar issues to those recently considered by the committee in relation to the Australian Public Service Commissioner's Directions 2016 [F2016L01430] (the 2016 APS Directions).<sup>1</sup>

### **2013 and 2016 APS Directions**

1.78 The committee reported on the Australian Public Service Commissioner's Directions 2013 [F2013L00448] (the 2013 APS Directions) in its *Sixth Report of 2013*;<sup>2</sup> and on the Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] (the amendment direction) in its *Eighteenth* and *Twenty-first Reports of the 44<sup>th</sup> Parliament*.<sup>3</sup>

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

2 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 133-134.

3 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 65-67; and *Twenty-first Report of the 44th Parliament* (24 March 2015) 25-28.

1.79 The 2013 APS Directions provided, among other things, for the notification in the Public Service Gazette (the Gazette) of certain employment decisions. The committee raised concerns about the compatibility of these measures, particularly in relation to the publication of decisions to terminate employment and the grounds for termination, with the right to privacy and the rights under the Convention on the Rights of Persons with Disabilities (CRPD).

1.80 In response to these concerns, the Australian Public Service Commissioner (the Commissioner) conducted a review of the 2013 APS Directions. As a result, the 2013 APS Directions were amended to remove most of the requirements to publish termination decisions in respect of Australian Public Service (APS) employees. However, the requirement to notify termination on the grounds of the breach of the Code of Conduct in the Gazette was retained.

1.81 The committee subsequently reported on the 2016 APS Directions,<sup>4</sup> in particular the measure that decisions to terminate the employment of an ongoing APS employee for breach of the Code of Conduct must be published in the Gazette.<sup>5</sup> The committee concluded its examination of this measure in its *Report 10 of 2016*,<sup>6</sup> noting that the Commissioner has committed to undertake a review into the necessity of publicly notifying information about termination decisions on the grounds of breach of the Code of Conduct, and will notify the committee of the findings by June 2017.<sup>7</sup>

### **2013 Determination**

1.82 In respect of Parliamentary Service employees, the Parliamentary Service Determination 2013 [F2013L01201] (2013 Determination) introduced similar measures to the 2013 APS Directions. The committee reported on the 2013 Determination in its *First Report of the 44<sup>th</sup> Parliament*,<sup>8</sup> raising substantially the same issues as the committee had raised in respect of the 2013 APS Directions.

1.83 The President of the Senate and the President of the House of Representatives provided a response on 13 February 2014, and wrote again to the committee on this issue on 25 January 2016. The January 2016 letter noted the outcome of the review of the 2013 APS Directions, and stated the decision to similarly remove most of the requirements to publish termination decisions in respect of Parliamentary Service employees, but ensure the continual notification in

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4 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 12-15.

5 At paragraph 34(1)(e).

6 Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 13-16.

7 Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 16.

8 Parliamentary Joint Committee on Human Rights, *First Report of the 44<sup>th</sup> Parliament* (10 December 2013) 157-159.

the Gazette of the termination of an employee's employment where they have breached the Code of Conduct.

1.84 The amendments in the 2016 Determination replicate those amendments to the 2013 APS Directions.

### **Publishing termination decision for breach of the Code of Conduct**

#### ***Compatibility of the measure with the right to privacy***

1.85 The amendments by the 2016 Determination to the 2013 Determination are welcome as it addresses many of the concerns raised by the committee in its *First Report of the 44<sup>th</sup> Parliament* about the limitation on the right to privacy and the rights of persons with disabilities (in relation to the notification of the termination of employment on the ground of physical or mental incapacity).<sup>9</sup>

1.86 However, the 2016 Determination continues the requirement to publish in the Gazette details of a Parliamentary Service employee when their employment has been terminated on the grounds of breach of the Code of Conduct. This engages and limits the right to privacy.

1.87 The statement of compatibility for the 2016 determination states that the measure is not an arbitrary interference with privacy and that it:

...serves the public interest by enabling Parliamentary Service departments, APS agencies and other employers to check the employment record of applicants for employment for any history of serious misconduct. Publishing these decisions also creates a public record that shows that serious misconduct is dealt with properly.

1.88 The statement of compatibility goes on to state that the measure is reasonable, necessary and proportionate with respect to the right to privacy.

1.89 In its *Report 10 of 2016*, the committee considered the compatibility of a similar measure under the 2016 APS Directions. It identified that there are other methods by which an employer could determine whether a person has been dismissed from the APS for breach of the Code of Conduct, rather than publishing an employee's personal details in the Gazette,<sup>10</sup> for example, maintaining a centralised, internal record of dismissed employees, or to use references to ensure that a previously dismissed APS employee is not rehired by the APS. It was stated that these measures may be more likely to be of use in the hiring process than an employer searching past editions of the Gazette.<sup>11</sup>

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9 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 157-159.

10 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 14.

11 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 14.

1.90 The report in respect of the 2016 APS Directions also noted that it would be possible to publish information in relation to the termination of employment for breaches of the Code of Conduct without the need to name the affected employee, which could serve to maintain public confidence that serious misconduct is dealt with properly.<sup>12</sup>

1.91 In response to the committee's concerns about the 2016 APS Directions, the Commissioner has advised the committee that:

- The committee raised valid questions about whether the limitation is a reasonable or proportionate measure in upholding integrity in the APS, and as such, further investigation into the requirement is warranted. As the provisions relating to the publication of details of employment termination decisions were last reviewed in 2014, it is timely to consider the continued publication of terminations of employment and whether there may be a less rights restrictive means of achieving the same objective; and
- A review will be undertaken into the necessity of publicly notifying information about termination decisions on the grounds of breach of the Code of Conduct, and will include appropriate consultation and examination of evidence regarding the deterrent effects and impact on public confidence in the good management and integrity of the APS. The committee will be notified of these findings by June 2017.<sup>13</sup>

### **Committee comment**

1.92 **The committee welcomes the amendments by the 2016 Determination to the 2013 Determination, which address many of the concerns previously raised by the committee in relation to the right to privacy and rights of persons with disabilities.**

1.93 **The committee notes that publishing details of a Parliamentary Service employee when their employment has been terminated for breach of the Code of Conduct engages and limits the right to privacy. The committee notes that it has raised questions in relation a similar measure in the 2016 APS Directions with the Australian Public Service Commissioner.**

1.94 **Noting the advice of the Australian Public Service Commissioner with respect to the Australian Public Service Commissioner's Directions 2016, the committee seeks advice as to whether the 2016 Determination will also be reviewed in line with the review into the 2016 APS Directions.**

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12 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 14.

13 Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 13-16.

## Transport Security Legislation Amendment (Identity Security) Regulation 2016 [F2016L01656]

<b>Purpose</b>	Amends the Aviation Transport Security Regulations 2005 and the Maritime Transport and Offshore Facilities Security Regulations 2003 with respect to the aviation security identification card and the maritime security identification card schemes
<b>Portfolio</b>	Infrastructure and Regional Development
<b>Authorising legislation</b>	<i>Aviation Transport Security Act 2004 and Maritime Transport and Offshore Facilities Security Act 2003</i>
<b>Last day to disallow</b>	13 February 2017
<b>Right</b>	Presumption of innocence (see <b>Appendix 2</b> )

### Strict liability offences

1.95 The Aviation Transport Security Regulations 2005 and the Maritime Transport and Offshore Facilities Security Regulations 2003 establish the regulatory frameworks for the aviation security identification card (ASIC) and the maritime security identification card (MSIC) schemes.

1.96 Subregulation 6.06(5) of Schedule 1, Part 1 to the Transport Security Legislation Amendment (Identity Security) Regulation 2016 (the regulation) imposes a strict liability offence of 20 penalty units on an issuing body<sup>1</sup> in respect of an ASIC program where the issuing body becomes aware of a change in a specified detail<sup>2</sup> and the issuing body does not, within 5 working days after becoming aware of the change, notify the Secretary in writing of the detail as changed.

1.97 An equivalent offence is imposed on an issuing body<sup>3</sup> by Schedule 2, Part 1, subregulation 6.07Q(5) of the regulation in respect of an MSIC plan.

1.98 For the purposes of the regulations, an issuing body can be a natural person.

1 Defined in regulation 6.01 of the Aviation Transport Security Regulations 2005 as a person or agency that is authorised to issue ASICs; or that is a transitional issuing body.

2 Such as the issuing body's name, or ABN, CAN or ARBN.

3 Defined in regulation 6.07B of the Maritime Transport and Offshore Facilities Security Regulations 2003 as a person or body that is authorised to issue MSICs; or that is a transitional issuing body.

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

1.99 The right to the presumption of innocence requires that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law (see Appendix 2).

1.100 The regulation therefore engages and limits the right to the presumption of innocence by imposing strict liability offences.

1.101 Strict liability offences limit the right to be presumed innocent until proven guilty because they allow for the imposition of criminal liability without the need to prove fault. However, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence.

1.102 The statement of compatibility for the regulation does not recognise that the regulation engages 'any of the applicable rights or freedoms',<sup>4</sup> and does not address the human rights implications of the strict liability offences.

1.103 Where an instrument provides for a strict liability offence, the committee's usual expectation is that the statement of compatibility provide an assessment of whether such limitations on the presumption of innocence are proposed in pursuit of a legitimate objective, and are a reasonable, necessary and proportionate means to achieving that objective.

**Committee comment**

1.104 **The committee draws to the attention of the Minister for Infrastructure and Regional Development the requirement for the preparation of statements of compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011*, and the committee's expectations in relation to the preparation of such statements as set out in its *Guidance Note 1*.**

1.105 **The committee also notes that its *Guidance Note 2* sets out information specific to strict liability and absolute liability offences.**

1.106 **The committee therefore seeks the advice of the Minister for Infrastructure and Regional Development as to:**

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

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4 Explanatory statement, statement of compatibility 4.

## Advice only

1.107 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.

### Commonwealth Electoral Amendment (Protect the Eureka Flag) Bill 2016

<b>Purpose</b>	Seeks to amend the <i>Commonwealth Electoral Act 1918</i> to allow the Australian Electoral Commission to consider the historical and cultural context of flags and other symbols when assessing their use in political party logos
<b>Sponsor</b>	Catherine King MP
<b>Introduced</b>	House of Representatives, 21 November 2016
<b>Rights</b>	Freedom of expression; public affairs (see <b>Appendix 2</b> )

#### Restrictions on political debate

1.108 The Commonwealth Electoral Amendment (Protect the Eureka Flag) Bill 2016 (the bill) introduces a new provision into the *Commonwealth Electoral Act 1918* (the Act) to allow any person to write to the Australian Electoral Commission (AEC) and object to the continued use of a logo of a registered political party, if that person believes that the use of a flag or symbol as, or in, the logo is inconsistent with the history or cultural significance of the flag or symbol.<sup>1</sup>

1.109 If the AEC is satisfied that this use is inconsistent with the history or cultural significance of the flag or symbol, it is required to uphold the objection; and notify the registered officer of the party that the party will be deregistered under section 137 of the Act, should the party fail to meet certain requirements.<sup>2</sup>

#### ***Compatibility of the measure with the right to freedom of expression and the right to take part in public affairs***

1.110 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate (see Appendix 2). It protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression, such as

1 Schedule 1, item 1, proposed subsection 134B(1). Consequential amendments are also made to subsection 141(1) in respect to the meaning of 'reviewable decision'.

2 Namely, if the party does not make an application under section 134 for a change of logo within 1 month of the date of the notice; or it makes such an application, but the application is refused – see: Schedule 1, item 1, proposed subsection 134B(2). The bill also inserts proposed paragraph 137(1)(caa) to give effect to this new section.

images and objects of art.<sup>3</sup> This right embraces expression that may be regarded as deeply offensive, subject to the provisions of article 19(3) and article 20 of the *International Covenant on Civil and Political Rights*.<sup>4</sup>

1.111 The right to take part in public affairs applies only to citizens. In order for this right to be meaningful, other rights such as freedom of expression, association and assembly must also be respected, given the importance of free speech and protest in a free and open democracy. This right is an essential part of a democratic government that is accountable to the people. It applies to all levels of government, including local government (see Appendix 2).

1.112 The right to freedom of expression and the right to take part in public affairs are engaged and limited by this measure, as the proposed amendments seek to restrict the use of logos by registered political parties, and in so doing impose restrictions upon non-verbal expression and direct participation in the conduct of public affairs.

1.113 Measures limiting human rights may be permissible providing certain criteria are satisfied. To be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective, and be a proportionate way to achieve that objective.

1.114 The statement of compatibility for the bill recognises that the measure engages and limits the rights to freedom of opinion and expression and the right to take part in public affairs.<sup>5</sup> It is notable that the AEC has existing powers under the Act to uphold an objection and deregister a party under section 137, for reasons of a second party using the same, or relevantly similar logo or name, to a registered political party.<sup>6</sup>

1.115 The stated objective of the measure is to protect the rights and reputations of others, as their symbols will not be aligned with inappropriate causes.<sup>7</sup> This appears to be a legitimate objective for the purposes of international human rights law. It also appears that there is a rational connection between the limitation and the objective, as the measure is likely to be effective to achieve the stated objective.

1.116 In relation to whether or not the limitation is proportionate to the objective sought to be achieved, in respect of the right to freedom of expression, the statement of compatibility provides:

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3 UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression (2011) paragraph [12].

4 UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression (2011) paragraph [11].

5 Explanatory memorandum (EM), statement of compatibility (SOC) [3].

6 Pursuant to existing section 134A of the Act.

7 EM, SOC [7].

[t]he Bill is reasonable as it seeks only to limit communications in regards to official political party logos registered with the [AEC]. It would not impact upon communications in any broader context or situation.<sup>8</sup>

1.117 In relation to whether or not the limitation is proportionate to the objective sought to be achieved in respect of the right to take part in public affairs, the statement of compatibility provides:

[t]he Bill takes the least restrictive approach in any possible limitation as it does not infringe upon a party's right to participate in elections or the images they use generally but instead gives the [AEC] the ability to consider whether a party's chosen symbol is in fact representative of that party's ideals, prohibiting the use of that symbol only if it is culturally or historically inappropriate.<sup>9</sup>

1.118 The statement of compatibility also notes that the bill may in fact positively contribute to the right to take part in public affairs by ensuring that logo symbols are culturally and historically appropriate.<sup>10</sup>

1.119 In this particular context, and as the application of the measure is restricted insofar as it reflects the AEC's existing powers and is limited to the use of logos, the limitations on the right to freedom of expression and the right to take part in public affairs are likely to be proportionate to the stated objective.

### **Committee comment**

**1.120 The committee notes the limitations on the right to freedom of expression and the right to take part in public affairs, and the explanation provided in the statement of compatibility. The committee brings the matter to the attention of the Parliament for information.**

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8 EM, SOC [6].

9 EM, SOC [10].

10 EM, SOC [11].

## Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016 [F2016L01617]

<b>Purpose</b>	This regulation amends the Proceeds of Crime Regulations 2002 to reflect changes to the process for appointment of approved proceeds of crime examiners, update references to state and territory proceeds of crime-related orders, and increase the rate of remuneration and the annual management fee for the Official Trustee.
<b>Portfolio</b>	Attorney-General's
<b>Authorising legislation</b>	<i>Proceeds of Crime Act 2002</i>
<b>Last day to disallow</b>	13 February 2017
<b>Rights</b>	Fair trial; fair hearing (see <b>Appendix 2</b> )

### Prescription of state and territory 'corresponding laws' for the purposes of the *Proceeds of Crime Act 2002*

1.121 The Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016 [F2016L01617] (the regulation) amends the Proceeds of Crime Regulations 2002 (POC regulations) in response to changes to the *Proceeds of Crime Act 2002* (POC Act) made by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* and changes to corresponding state and territory legislation. In particular, the regulation specifies certain orders under the *Criminal Property Forfeiture Act* (NT) and the *Confiscation Act* (Vic) to be 'corresponding laws' for the purposes of the POC Act.

1.122 Under the 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 POC Act and regulations also enable orders made under state and territory proceeds of crime schemes to be recognised and enforced under the POC Act by providing that prescribed state and territory laws are 'corresponding laws'.

1.123 The regulation therefore has the effect of broadening the circumstances in which a person's assets 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***

1.124 The statement of compatibility acknowledges that the POC Act scheme engages the right to a fair trial and fair hearing,<sup>1</sup> but notes that as the proceedings

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

under the POC Act are civil proceedings, the POC Act scheme engages the fair hearing rights provided for in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), but not the guarantees conferred by articles 14(2) to (7).

1.125 The committee previously examined the POC Act, most recently in its consideration of the *Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016* (the bill).<sup>2</sup> The committee has previously raised concerns about the right to a fair hearing and noted that asset confiscation may be considered criminal for the purposes of international human rights law, and in particular the right to a fair trial, even if the penalty is classified as civil or administrative under domestic law.<sup>3</sup> The POC Act was legislated prior to the establishment of the committee, and for that reason, the scheme has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.126 As the committee has previously noted, 'it is clear that the POC Act provides law enforcement agencies [with] important and necessary tools in the fight against crime in Australia'.<sup>4</sup> If forfeiture orders are assessed as involving the determination of a criminal charge, this does not suggest that such measures cannot be taken; rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the ICCPR.

1.127 The committee has previously recommended that the Minister for Justice undertake an 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.<sup>5</sup> The committee came to this conclusion on the basis that 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. Without this assessment of the POC Act, the committee is faced with the difficult task of assessing the human rights compatibility of an amendment to the POC regulations without the benefit of a foundational human rights assessment of the POC Act from the Minister for Justice.

1.128 The statement of compatibility discusses various safeguards under the POC Act 'that ensure that a person's procedural rights are protected with respect to an examination and these safeguards are not affected by this Regulation'.

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2 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 2-8.

3 This is set out in the committee's *Guidance Note 2* – see Appendix 4.

4 Parliamentary Joint Committee on Human Rights, *31st Report of the 44th Parliament* (24 November 2015) 37-44 at 43-44.

5 Parliamentary Joint Committee on Human Rights, *Thirty-first Report of the 44th Parliament* (24 November 2015) 44. It also comes to this conclusion in respect of the *Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016* in Chapter 2 of this report.

1.129 The statement of compatibility concludes that the regulation does not change either the scope or safeguards attached to fair hearing rights, including the privilege against self-incrimination, and on this basis, does not limit or promote human rights with respect to a fair hearing. However, and as noted above, the committee has previously raised concerns regarding the sufficiency of existing POC Act safeguards.

1.130 The committee previously recommended that the Minister of Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing. In his recent response to the committee in respect of the bill, the minister stated he did not consider it necessary to conduct an assessment of the POC Act to determine its compatibility with the right to a fair trial and fair hearing as legislation enacted prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment, and the government continually reviews the POC Act as it is amended [see concluding entry for the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016 at page 35 of this report].

### **Committee comment**

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

**1.132 The committee notes that the regulation has the effect of broadening the circumstances in which a person's assets may be subject to being frozen, restrained or forfeited under the POC Act. The committee reiterates its earlier comments that the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. However, it also raises concerns regarding the right to a fair hearing and the right to a fair trial, as although 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 reiterates its previous view that the POC Act would benefit from a full review of the human rights compatibility of the legislation.**

## **Bills not raising human rights concerns**

1.133 Of the bills introduced into the Parliament between 28 November and 1 December 2016, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Agriculture and Water Resources Legislation Amendment Bill 2016;
- Airports Amendment Bill 2016;
- Air Services Amendment Bill 2016;
- Australian Meat and Live-stock Industry (Amendment) (Tagging Live-stock) Bill 2016;
- Building and Construction Industry (Improving Productivity) Amendment Bill 2017;
- Charter of Budget Honesty Amendment (Regional Australia Statements) Bill 2016;
- Commonwealth Electoral Amendment (Donation Reform and Transparency) Bill 2016;
- Competition and Consumer Amendment (Misuse of Market Power) Bill 2016;
- Customs and Other Legislation Amendment Bill 2016;
- Customs Tariff Amendment Bill 2016;
- Diverted Profits Tax Bill 2017;
- Enhancing Online Safety for Children Amendment Bill 2017;
- Excise Levies Legislation Amendment (Honey) Bill 2016;
- Fair Work Amendment (Pay Protection) Bill 2016;
- Farm Household Support Amendment Bill 2017;
- Fisheries Legislation Amendment (Representation) Bill 2017;
- Health Insurance Amendment (National Rural Health Commissioner) Bill 2017;
- Independent Parliamentary Expenses Authority (Consequential Amendments) Bill 2017;
- Independent Parliamentary Expenses Authority Bill 2017;
- Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (No. 2);
- Parliamentary Entitlements Legislation Amendment Bill 2017;
- Passenger Movement Charge Amendment Bill (No. 2) 2016;

- Statute Update (ACT Self-Government (Consequential Provisions) Regulations) Bill 2016;
- Superannuation (Departing Australia Superannuation Payments Tax) Amendment Bill (No. 2) 2016;
- Superannuation Amendment (PSSAP Membership) Bill 2016;
- Transport Security Legislation Amendment Bill 2016;
- Treasury Laws Amendment (Bourke Street Fund) Bill 2017; and
- Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017.

