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 28 November 2016 and 9 February 2017 (consideration of eight bills from this period has been deferred);[1]
- legislative instruments received between 11 November and 15 December 2016 (consideration of four 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.

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.[4]

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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.

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

Purpose	Seeks to amend: the *Terrorism Insurance Act 2003* to clarify that losses attributable to terrorist attacks using chemical or biological means are covered by the terrorism insurance scheme; the *Corporations Act 2001* 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 *Income Tax Assessment Act 1997* to update the list of deductible gift recipients; and the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to provide income tax relief to eligible New Zealand special category visa holders who are impacted by disasters in Australia
Portfolio	Treasury
Introduced	House of Representatives, 1 December 2016
Rights	Fair trial (see **Appendix 2**)

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.[1] The client money reporting rules may include a penalty amount for a rule, which must not exceed $1,000,000.[2] This penalty could apply to a natural person. Failure to comply with the rules is a civil penalty provision.[3]

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.[4] 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.'[5] 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

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.[6]

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.[7] 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 Minister for Revenue and Financial Services 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.**

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]

Purpose	Provides safety protections and navigation requirements similar to those established by the *New South Wales Marine Act 1998* 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
Portfolio	Infrastructure and Regional Development
Authorising legislation	*Jervis Bay Territory Acceptance Act 1915*
Last day to disallow	20 March 2017
Rights	Presumption of innocence; liberty; privacy (see **Appendix 2**)

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*.[1]

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.

1 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.[2]

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*,[3] 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*.[4]

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 Local Government and Territories 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)[5] (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.[6]

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

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.[7]

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,[8] engages and limits this right.[9] 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.'[10]

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.[11] 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.[12]

1.37 The statement of compatibility also recognises[13] 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;[14]
- require a person to undergo a medical examination in some circumstances,[15] and create offences of refusing to undergo a drug or alcohol screening test,[16] or a blood test;[17]
- give police the power to enter premises to administer an alcohol or drug screening test;[18] 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.[19]

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'[20] and that the limitations are 'consistent with existing marine safety legislation in the adjoining NSW waters'.[21] 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.[22]

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

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.[23]

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.[24] The ACT Human Rights Commission also identified concerns with the operation or effect of the ACT Act in respect of this right.[25]

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 Local Government and Territories 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[26] for the purpose of: finding out whether the Ordinance and the rules[27] 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.[28]

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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.

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.[29] 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.[30] 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'.[31]

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.[32] 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.[33] These are broad purposes that do not require the police officer to have any suspicion at all as

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,[34] 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 Local Government and Territories 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.**

34 ES, SOC 4.

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

Purpose	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
Portfolio	Immigration and Border Protection
Authorising legislation	*Migration Act 1958*
Last day to disallow	13 February 2017
Right	Protection of the family (see **Appendix 2**)

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).[1] 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,[2] 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.[3]

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.[4]

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,[5] 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.[6]

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'.[7] 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*,[8] 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'.[9]

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.**

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]

Purpose	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
Portfolio	Health
Authorising legislation	*Narcotic Drugs Act 1967*
Last day to disallow	13 February 2017
Rights	Work; equality and non-discrimination (see **Appendix 2**)

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*[1] (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.[2] 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.[3] 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.[4]

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*,[5] and the Attorney-General's Department's guidance on the preparation of statements of compatibility.[6]

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**

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 for Health 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]

Purpose	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
Portfolio	Prime Minister and Cabinet
Authorising legislation	*Parliamentary Service Act 1999*
Last day to disallow	13 February 2017
Right	Privacy (see **Appendix 2**)

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).[1]

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*;[2] 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 44th Parliament*.[3]

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,[4] 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.[5] The committee concluded its examination of this measure in its *Report 10 of 2016*,[6] 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.[7]

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 44th Parliament*,[8] 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 Speaker 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

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 44th 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 44th 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).[9]

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,[10] 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.[11]

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.[12]

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.[13]

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 from the Presiding Officers as to whether the 2016 Determination will also be reviewed in line with the review into the 2016 APS Directions.**

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]

Purpose	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
Portfolio	Infrastructure and Regional Development
Authorising legislation	*Aviation Transport Security Act 2004* and *Maritime Transport and Offshore Facilities Security Act 2003*
Last day to disallow	13 February 2017
Right	Presumption of innocence (see **Appendix 2**)

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[1] in respect of an ASIC program where the issuing body becomes aware of a change in a specified detail[2] 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[3] 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.

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',[4] 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 Transport 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 Transport 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.**

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

Purpose	Seeks to amend the *Commonwealth Electoral Act 1918* 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
Sponsor	Catherine King MP
Introduced	House of Representatives, 21 November 2016
Rights	Freedom of expression; public affairs (see **Appendix 2**)

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.[1]

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.[2]

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.[3] 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.*[4]

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.[5] 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.[6]

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.[7] 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.[8]

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.[9]

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.[10]

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.**

8 EM, SOC [6].

9 EM, SOC [10].

10 EM, SOC [11].

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

Purpose	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.
Portfolio	Attorney-General
Authorising legislation	*Proceeds of Crime Act 2002*
Last day to disallow	13 February 2017
Rights	Fair trial; fair hearing (see **Appendix 2**)

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,[1] 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).[2] 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.[3] 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'.[4] 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.[5] 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.

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**.

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

Purpose	Amends 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 to 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**)
Previous report	9 of 2016

Background

2.3 The committee first reported on the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016 (the bill) in its *Report 9 of 2016*, and requested responses from the Attorney-General and Minister for Justice by 16 December 2016.[1]

2.4 The bill passed both Houses of Parliament on 24 November 2016 and received Royal Assent on 30 November 2016.

2.5 The Minister for Justice's response to the committee's inquiries, which included a response on behalf of the Attorney-General, was received on 4 January 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

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

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

2.6 The amendments include the NSW Law Enforcement Conduct Commission (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'.[2] Additionally, the LECC has been 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 permit LECC officers to carry out a range of activities, such as applying for a warrant to access stored communications content[3] and self-authorising access to metadata.[4]

2.7 The previous analysis noted that, 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 in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Human Rights Act). It was noted that the committee was 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 Act.

2.8 The previous analysis noted that the statement of compatibility identified that the measures engage the right to privacy and were stated that they were proportionate to the stated objective of providing effective frameworks to identify, investigate and punish corruption and to protect public order through enforcing the law. It was noted that this appeared to be a legitimate objective for the purposes of international human rights law, and that access to telecommunications data and communications would appear to be rationally connected to this objective.

2.9 However, as to whether the measure is proportionate to the objective being sought, the previous analysis discussed that the committee had formerly examined chapter 4 of the TIA Act,[5] and raised concerns with respect to: whether the internal self-authorisation process for access to telecommunications data by 'enforcement agencies' provided sufficient safeguards in relation to the right to privacy; accessed data subsequently being used for an unrelated purpose; and safeguards around the

2 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).

3 See section 109 of the TIA Act.

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

5 In the context of its consideration of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (which amended the TIA Act) – see: Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 39-74.

period of retention of such data and the absence of a warrant process.[6] It was noted that the statement of compatibility for the bill did not address these concerns.[7]

2.10 The previous analysis also identified that allowing the LECC to be declared an 'interception agency'[8] also has implications in relation to the right to privacy, and although access to private communication is via a warrant regime which itself may be sufficiently circumscribed, 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.[9] It was noted that 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.[10]

2.11 The committee therefore sought the advice of the Attorney-General on:

- 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).

Minister's response

2.12 The Minister for Justice provided the committee with the Attorney-General's response.

2.13 The Attorney-General's response stated that the Australian government considers that restricting access under the TIA Act to specified national security and law enforcement agencies 'supports both the protection of privacy and needs of criminal law-enforcement agencies given the early stage at which such disclosures are sought.'

2.14 The Attorney-General also referred to the government's previous response to the committee in respect of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Data Retention Bill), which sought to address the committee's concerns that warrantless access to telecommunications data be

6 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 4-5.

7 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 5.

8 Which would enable it to access the content of private communications via warrant under chapter 2 and chapter 3 of the TIA Act.

9 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 5.

10 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 5.

limited to certain categories of serious crimes.[11] The Attorney-General noted that self-authorisation by an officer of a criminal law-enforcement agency to access telecommunications data may only occur where:

> (1) it is reasonably necessary for the enforcement of the criminal law, a law imposing a pecuniary penalty or for the protection of the public revenue; and
>
> (2) the authorising officer of an agency is satisfied on reasonable grounds that any interference with privacy is justifiable and proportionate.

2.15 However, the Attorney-General's response does not discuss why there is no limit on the type of criminal offence being investigated for which telecommunications data can be accessed. As the committee previously noted in respect of the Data Retention Bill, the scheme allows access to metadata for the investigation of minor offences, not all of which appear to be sufficiently serious to justify the interference with the right to privacy that the scheme imposes.[12] In the case of the LECC, the Attorney-General's response stated that authorised officers will 'only be able to authorise the disclosure of data for investigations into corruption, misconduct and maladministration on the part of New South Wales law enforcement where that investigation also meets the TIA Act thresholds'.[13] However, the Attorney-General's response does not refer to the NSW legislation which establishes the LECC under the *Law Enforcement Conduct Commission Act 2016* (NSW) and the scope of the LECC's complaint handling and investigative powers under that Act. Pursuant to that Act, investigations can be carried out in respect of serious maladministration, which is defined as including that the conduct is unlawful as it constitutes 'an offence'. There does not appear to be any limit on the level of seriousness of the type of offence that could be considered to be maladministration.

2.16 The committee previously recommended in respect of the Data Retention Bill that the TIA Act limit disclosure authorisation for existing data to instances where it is reasonably necessary for the investigation of specified serious crimes, categories of serious crimes or the investigation of serious matters by the Australian Securities and Investments Commission, the Australian Taxation Office and the Australian Competition and Consumer Commission.[14] The committee considered this would

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11 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) Appendix 1 *Australian Government response to the 15th report of the Parliamentary Joint Committee on Human Rights to the 44th Parliament, Telecommunications (Interception and Access) Amendment (Data Retention) Bill* 8-10.

12 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 58.

13 See Appendix 3, letter from the Hon Michael Keenan MP, Minister for Justice, to the Hon Ian Goodenough MP (received 4 January 2017) 2.

14 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 59.

avoid the disproportionate limitation on the right to privacy that would result from disclosing telecommunications data for the investigation of *any* offence.[15] As this issue is also unaddressed by the current bill, these concerns therefore remain.

2.17 The Attorney-General also discussed other existing safeguards: that agencies, such as the LECC, are restricted by their enabling legislation; and that in its consideration of the Data Retention Bill, the majority of the committee noted that the existing requirements in the TIA Act regarding internal agency authorisation for disclosure of telecommunications data 'provide a sufficient safeguard to address privacy concerns.' It should be noted, however, that this split conclusion by the committee was confined to the committee's consideration of oversight and accountability of the mandatory data retention scheme, and not the broader issues in respect of the Data Retention Bill.[16]

2.18 The Attorney-General's response also noted that:

> [o]nce accessed, telecommunications data may only be communicated for a purpose connected with the functions of the accessing agency for the purposes of enforcing the criminal law, a law imposing a pecuniary penalty or protecting the public revenue. Both the TIA Act and the LECC's enabling legislation impose criminal liability on LECC officers who communicate information relating to the disclosure of data for unauthorised purposes.[17]

2.19 The Attorney-General's response also discussed oversight of the access to and use of telecommunications data by the Commonwealth Ombudsman. It was stated that this is an effective accountability mechanism that does not risk delaying law enforcement investigations, or harming the ability of agencies to investigate crime and safeguard national security in the way that a warrant regime, proposed by the committee in its consideration of the Data Retention Bill, would do. It was also noted that the powers within the TIA Act, which are subject to a warrant, are used in the latter stages of an investigation, and that access to telecommunications data in the first instance assists in determining who should be subject to a warrant.

2.20 The Attorney-General's response therefore concluded that 'given the existing safeguards within the Act, access to the content of private communications by the LECC is a reasonable and proportionate limitation on the right to privacy.' In respect of the committee's concerns about the absence of a warrant process, the Attorney-General concluded that:

> [a]lthough warrants may relate to a broad range of services and devices, a warrant may only be issued for the purpose of investigating specific

15 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 59.

16 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 65-71.

17 See Appendix 3, letter from the Hon Michael Keenan MP, Minister for Justice, to the Hon Ian Goodenough MP (received 4 January 2017) 3.

> offences that meet thresholds identified in the [TIA] Act and in relation to services or devices likely to be used by the target.[18]

2.21 While the response therefore discussed some of the committee's previous concerns and recommendations, the Attorney-General has not identified how the Ombudsman as an oversight mechanism (which only applies after the exercise of the power) offers comparable, adequate protections in respect of the right to privacy as a warrant process. As such, it cannot be determined that the limitation on the right to privacy is proportionate to the stated objective of the measure.

2.22 In respect of the committee's query over whether an assessment of the TIA Act could be undertaken to determine its compatibility with the right to privacy, the Attorney-General responded that, as the TIA Act was enacted before the Human Rights Act, there is no requirement that the TIA Act be subject to a human rights compatibility assessment. It was noted that the Attorney-General's Department has 'provided extensive advice regarding the operation of the TIA Act to this Committee and other Parliamentary bodies' including the committee in its consideration of the Data Retention Bill. Further, it was noted that:

> …in response to recommendation 18 of the *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* by the Parliamentary Joint Committee on Intelligence and Security in 2013, the Australian Government agreed to comprehensively revise the [TIA] Act in a progressive manner. If legislation is introduced to reform the Act, the Department will undertake a human rights compatibility assessment. The Australian Government continually reviews the TIA Act to ensure that adequate safeguards are in place to protect privacy.[19]

2.23 Despite this response, and as noted in the previous analysis, as the committee has not previously considered chapters 2 and 3 of the TIA Act in detail, 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 response

2.24 **The committee thanks the Attorney-General for his response and has concluded its examination of this issue.**

2.25 **The committee notes the Attorney-General's response that there is no requirement under the Human Rights Act to subject pre-existing legislation to a human rights compatibility assessment and that the Attorney-General gave no commitment to publicly undertake a human rights assessment of the TIA Act.**

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18 See Appendix 3, letter from the Hon Michael Keenan MP, Minister for Justice, to the Hon Ian Goodenough MP (received 4 January 2017) 4.

19 See Appendix 3, letter from the Hon Michael Keenan MP, Minister for Justice, to the Hon Ian Goodenough MP (received 4 January 2017) 4.

2.26 **The committee considers that while there are certain internal and external safeguards in place in respect of the access to and subsequent use of telecommunications data, these are insufficient to protect the right to privacy for the purposes of international human rights law.**

2.27 **The committee is therefore unable to conclude that the measure, in extending access to these coercive powers to an additional body, justifiably limits the right to privacy.**

Definition of 'lawfully acquired' under the POC Act

2.28 The bill amended section 336A of the *Proceeds of Crime Act 2002* (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 has the effect of broadening the class of assets that may be subject to being frozen, restrained or forfeited under the POC Act.

2.29 The previous analysis noted that, 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. It was also noted that the committee's reports have previously raised concerns that parts of the POC Act may involve the determination of a criminal charge.[20]

2.30 Although not addressed in the statement of compatibility, the previous analysis identified that the right to be presumed innocent is engaged and limited by the measure.[21] It also identified that the forfeiture of property of a person who has already been sentenced for an offence may raise concerns regarding the imposition of double punishment;[22] and as the 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, the right to a fair trial and fair hearing are engaged.[23]

2.31 The committee therefore sought the advice of the Minister for Justice on:

- 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

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20 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.

21 Pursuant to article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).

22 Contrary to article 14(7) of the ICCPR.

23 See generally, article 14 of the ICCPR.

- 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.

Minister's response

2.32 The minister's response stated that, contrary to the committee's concern, the measure is not intended to broaden the class of assets that may be subject to being frozen, restrained or forfeited under Schedule 3 of the POC Act. The minister stated that, rather, the measure clarifies the intended meaning of the section in light of the Supreme Court of Western Australia's decision in *Commissioner of the Australian Federal Police v Huang*.[24]

2.33 However, the minister stated that if the practical effect of the amendment is to broaden the scope of assets that can be frozen, restrained or forfeited, Schedule 3 would engage the right to a fair hearing for civil hearings. As proceedings under the POC Act are heard by Commonwealth, State and Territory courts, the minister stated that such proceedings are carried out in accordance with the relevant procedures in these courts, affording affected persons adequate opportunity to present his or her case and therefore not limiting the right to a fair hearing.

2.34 The minister reiterated the government's position that 'proceeds of crime orders are classified as civil under section 315 of the POC Act and do not involve the determination of a criminal charge or the imposition of a criminal penalty.' The minister stated that, for this reason, these orders do not engage the rights set out in the International Covenant on Civil and Political Rights (ICCPR) that relate to minimum guarantees in criminal proceedings. The minister stated that as proceedings under the POC Act provide for a right to a fair hearing, the amendments do not limit the right to a fair trial under article 14 of the ICCPR.

2.35 However, as noted in the previous analysis, and as stated above, even where a penalty is classified as civil or administrative under domestic law, its content may nevertheless be considered 'criminal' under international human rights law.[25] If a measure is considered criminal for the purposes of international human rights law, it must comply with the minimum guarantees that apply in criminal proceedings, such as the right to be presumed innocent and the prohibition of double punishment.

2.36 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'.[26] If forfeiture orders are assessed as involving the determination of a criminal charge, this does not suggest that such measures cannot be taken –

24 [2016] WASC 5.

25 See Parliamentary Joint Committee on Human Rights, *Guidance Note 2* (December 2014) at Appendix 4.

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

rather, it requires that such measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the ICCPR.

2.37 The minister's response has not responded to the assessment regarding the determination of a criminal charge, or described how the measure is proportionate to the stated objective of ensuring that criminals are not able to maintain ownership over property or wealth that is obtained, either directly or indirectly, using proceeds of crime'.[27]

2.38 In respect of the committee's query over 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, the minister stated:

> [l]egislation established prior to the enactment of the [Human Rights Act] is not required to be subject to a human rights compatibility assessment. The Australian Government continually reviews the POC Act to ensure that it addresses emerging trends in criminal conduct and will continue to undertake a human rights compatibility assessment where a Bill amends the Act.[28]

2.39 As noted in the previous analysis, in light of the committee's previously raised concerns about the sufficiency of safeguards in the POC Act to protect the right to a fair trial and the right to a fair hearing, in order to fully assess the compatibility of the proposed measures it is necessary for a detailed assessment of the POC Act in respect of these concerns to be undertaken.

Committee response

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

2.41 **The committee notes that the bill may have the effect of broadening the scope of assets that can be frozen, restrained or forfeited under the POC Act, and therefore expands the operation of 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.**

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27 Explanatory memorandum, statement of compatibility 13.

28 See Appendix 3, letter from the Hon Michael Keenan MP, Minister for Justice, to the Hon Ian Goodenough MP (received 4 January 2017) 5.

2.42 **Noting the preceding analysis, the committee draws the human rights implications of the provisions relating to the proceeds of crime to the attention of the Parliament.**

Privacy Amendment (Notifiable Data Breaches) Bill 2016

Purpose	Proposes to amend the *Privacy Act 1988* to impose a data breach notification requirement on entities regulated by the Act
Portfolio	Attorney-General
Introduced	House of Representatives, 19 October 2016
Rights	Privacy; effective remedy (see **Appendix 2**)
Previous report	8 of 2016

Background

2.43 The committee first reported on the Privacy Amendment (Notifiable Data Breaches) Bill 2016 (the bill) in its *Report 8 of 2016*, and requested a response from the Attorney-General by 8 December 2016.[1]

2.44 The bill remains before the House of Representatives.

2.45 The Attorney-General's response to the committee's inquiries was received on 28 November 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Accessing personal data and the right to an effective remedy

2.46 The bill seeks to impose a mandatory data breach notification requirement on entities regulated by the *Privacy Act 1988* (Privacy Act).[2] A data breach will arise where there has been unauthorised access to, or unauthorised disclosure of, personal information about one or more individuals, or data is lost in circumstances likely to give rise to unauthorised access or disclosure. Failure to comply with these obligations is deemed to be an interference with the privacy of an individual for the purposes of the Privacy Act. The bill allows for a number of exceptions to this mandatory notification requirement.[3]

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 6-8.

2 Pursuant to Schedule 1, item 3, proposed section 26WL in respect of an 'eligible data breach', as defined by section 26WE.

3 As set out in the explanatory memorandum (EM), statement of compatibility (SOC) 60-63. The exceptions address remedial action by the entity; circumstances where another entity notifies an agency of the data breach; where notification would prejudice the activities of a law enforcement body; where the Australian Information Commissioner makes a declaration for an exception; where disclosure would be inconsistent with other laws of the Commonwealth; and notification under both the bill and the *My Health Records Act 2012*.

2.47 The bill appears to address the government's intention[4] to introduce legislation to enact a mandatory data breach notification scheme.[5] In the committee's consideration of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (TIA bill) in its *Thirtieth report of the 44th Parliament*, the committee welcomed the Attorney-General's advice that such legislation would be introduced. The committee noted that, depending on the extent of the notification scheme, such a bill could address many of the committee's concerns in relation to that bill as to whether a person could seek redress in respect of breaches of their right to privacy and freedom of expression relating to the interception of their telecommunications data.

2.48 At the time, the committee also noted that it would assess any such proposed legislation in future to determine whether it addresses these concerns.[6] However, the current bill applies only to unauthorised access to, or disclosure of, personal information or data loss. It does not apply to lawful interception of telecommunications data pursuant to the *Telecommunications (Interception and Access) Act 1979* (TIA Act), which was also considered by the committee at the time.

2.49 The committee therefore sought the advice of the Attorney-General as to whether the bill could be amended to ensure that individuals are notified when their telecommunications data has been lawfully accessed (noting that there may be circumstances where such notification would need to be delayed in order to avoid jeopardising an ongoing investigation).

Attorney-General's response

2.50 In his response, the Attorney-General referred the committee to the February 2015 Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 by the Parliamentary Joint Committee on Intelligence and Security (PJCIS). In that report, and on the basis of concern about data breaches compromising the security of retained telecommunications data and the absence of a broad-based mandatory data breach notification requirement in Australia, the PJCIS recommended the introduction of a mandatory data breach notification scheme.

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4 Earlier expressed to the committee in the context of the committee's consideration of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (TIA bill).

5 See Parliamentary Joint Committee of Human Rights, *Fifteenth Report of the 44th Parliament* (14 November 2014) 10-22; *Twentieth Report of the 44th Parliament* (18 March 2015) 39-74; and *Thirtieth report of the 44th Parliament* (10 November 2015) 138. The TIA bill amended the *Telecommunications (Interception and Access) Act 1979* to introduce a mandatory data retention scheme. It passed both Houses of Parliament on 26 March 2015 and received Royal Assent on 13 April 2015.

6 Parliamentary Joint Committee of Human Rights, *Thirtieth report of the 44th Parliament* (10 November 2015) 139.

2.51 The Attorney-General stated that investigations would be hampered by a requirement to notify individuals when their telecommunications data had been accessed for law enforcement or national security purposes. The Attorney-General further stated that:

> [t]he covert investigative powers contained in the Act are generally used where the integrity of an investigation would be compromised by revealing its existence.

2.52 In response to the committee's suggestion that in some circumstances notifications be delayed, the Attorney-General stated that this would carry similar risks, as:

> [i]nvestigations into serious criminality (such as counter terrorism, child exploitation or serious and organised crime) can be protracted, and would be difficult to determine when data might be appropriately disclosed. Notification, delayed or otherwise, could expose police methodologies. The existing law reflects that policy position.

2.53 In his response, the Attorney-General also referred to the 'stringent safeguards' in place in respect of lawful access to telecommunications data, including that:

- direct covert access to telecommunications data is limited to a defined set of law enforcement and security agencies and authorised officers within those agencies will only disclose such data where it is 'reasonably necessary for the enforcement of criminal law, a law imposing a pecuniary penalty or the protection of the public revenue';
- the Australian Security Intelligence Organisation may authorise access to telecommunications data for the performance of its functions, subject to a statutory requirement that an authorising officer must be satisfied on reasonable grounds that any interference with privacy is justifiable and proportionate; and
- agency access is subject to oversight by the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security.

2.54 The committee has previously stated that, in the context of the accessing of telecommunications data, the right to an effective remedy would be supported by a notification requirement. This is because, for example, it would be impossible for an individual to seek redress for breach of their right to privacy if they did not know that data pertaining to them had been subject to an access authorisation.[7] It is noted that this bill, in applying only to unauthorised access to, or disclosure of, personal information or data loss, does not apply to lawful interception of telecommunications data pursuant to the TIA Act. As such, this bill does not address

7 See Parliamentary Joint Committee on Human Rights, *Twentieth report of the 44th Parliament* (18 March 2015) 39-74 at 73.

the committee's previous concerns in relation to the TIA bill as to whether a person could seek redress in respect of breaches of their right to privacy and freedom of expression relating to the interception of their telecommunications data.

2.55 However, the bill itself, as noted in the initial human rights analysis, does broadly promote the right to privacy and is likely to be compatible with international human rights law.

Committee response

2.56 **The committee thanks the Attorney-General for his response and has concluded its examination of this issue.**

2.57 **The committee notes that the bill promotes the right to privacy. The committee notes that the bill does not address the committee's previous concerns in relation to the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 as it applies only to unauthorised access to, or disclosure of, personal information or data loss and does not apply to the lawful interception of telecommunications data.**

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 as exempt 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**)
Previous report	9 of 2016

Background

2.58 The committee first reported on the instrument in its *Report 9 of 2016*, and requested a response from the Attorney-General by 16 December 2016.[1]

2.59 The Attorney-General's response to the committee's inquiries was received on 21 December 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Extension of prescription period

2.60 Section 5 of the Sex Discrimination Regulations 1984 (the regulations) provided that all Commonwealth, state and territory laws as in force at 1 August 2013 were initially prescribed by the regulations as exempt from complying with provisions of the *Sex Discrimination Act 1984* prohibiting discrimination on the grounds of sexual orientation, gender identity of intersex status until 31 July 2014. This was to allow time for jurisdictions to review their laws and assess compliance with the new protections against these forms of discrimination, and provide protections against discrimination for same-sex de facto couples which were introduced in 2013.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 27-29.

2 The amendments to the *Sex Discrimination Act 1984* that introduced these new protections were made by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*.

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

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

2.63 As the regulation further extends the period in which actions that would otherwise constitute unlawful discrimination under the prescribed legislation would be exempted from these protections, the committee noted that the measure engages and limits the right to equality and non-discrimination. The committee identified that questions arise as to whether this measure is rationally connected and/or proportionate to this stated objective.

2.64 The committee therefore sought the advice of the Attorney-General as to whether the further 12-month prescription period in respect of the WA Acts 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.

Attorney-General's response

2.65 In his response, the Attorney-General stated that the Western Australian Government indicated the further extension of time was required to facilitate the amendment of the two WA Acts.[3]

2.66 The Attorney-General stated that while the government does not consider that a state should continue to discriminate against people on the basis of their sexual orientation, gender identity and/or intersex status, the government:

> …acknowledges that the regulation of assisted reproductive technology and surrogacy is a sensitive issue that is primarily a matter for states and territories and that the Western Australian government should be granted additional time to properly consult the Western Australian community about options for reform in this area.

3 The Attorney-General identified that section 23 of the *Human Reproductive Technology Act* (WA) has the effect of prohibiting male same-sex couples, and potentially transgender persons or persons of intersex status, from accessing IVF procedures-including for the purpose of a surrogacy arrangement; and that section 19 of the *Surrogacy Act* (WA) has the effect of prohibiting male same-sex couples, and potentially transgender persons or persons of intersex status, from seeking a parentage order for a child born under a surrogacy arrangement.

2.67 The Attorney-General stated that the limitation is proportionate on the basis that it allows a 'sufficient yet not overly lengthy time' for the Western Australian Government to properly consult with the Western Australian community on options for reform to its legislation. The Attorney-General noted that the Western Australian Government has advised that it does not propose any further extensions of this exemption after 31 July 2017.

2.68 However, the response does not indicate why the preceding three-year period has been inadequate to perform such consultation. As noted in the previous human rights analysis, at the end of the 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, preventing individuals who may continue to be subject to discrimination under these WA Acts from accessing legal recourse.

2.69 As noted in the previous human rights analysis, 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.

Committee response

2.70 **The committee thanks the Attorney-General for his response and has concluded its examination of this issue.**

2.71 **As the committee previously acknowledged, the measure appears to pursue the apparent objective of allowing states and territories adequate time in which to review their legislation and assess compliance with the new protections, and amend relevant laws accordingly.**

2.72 **While 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, the committee notes the Attorney-General's response that more time is needed to allow consultation on options for reform and that no extension after 31 July 2017 is proposed.**

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

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

- Appropriation Bill (No. 3) 2016-2017;
- Appropriation Bill (No. 4) 2016-2017;
- Australian Human Rights Commission Amendment (Preliminary Assessment Process) Bill 2017;
- Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017;
- Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017;
- Migration Amendment (Putting Local Workers First) Bill 2016;
- Migration Legislation Amendment (Code of Procedure Harmonisation) Bill 2016;
- Therapeutic Goods Amendment (2016 Measures No. 1) Bill 2016;
- Australian Citizenship Regulation 2016 [F2016L01916];
- Autonomous Sanctions (Designated Persons and Entities—Democratic People's Republic of Korea) Amendment List 2016 (No 2) [F2016L01861];
- Autonomous Sanctions (Designated Persons and Entities—Democratic People's Republic of Korea) Amendment List 2016 (No 3) [F2016L01862];
- Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment Regulation 2016 [2016L01829];
- Code for the Tendering and Performance of Building Work 2016 [F2016L01859];
- Federal Financial Relations (General purpose financial assistance) Determination No. 92 (November 2016) [F2016L01938];
- Federal Financial Relations (National Partnership Payments) Determination No. 113 (November 2016) [F2016L01937];
- Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 [F2016L01934]; and
- Social Security (Class of Visas—Qualifying Residence Exemption) Determination 2016[F2016L01858].

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

- Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016;[1]
- Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016;[2]
- Federal Financial Relations (National Partnership payments) Determination No. 112 (October 2016) [F2016L01724];[3]
- Federal Financial Relations (General purpose financial assistance) Determination No. 91 (October 2016) [F2016L01725].[4]

3.3 In addition, the committee continues to defer its consideration of the Racial Discrimination Amendment Bill 2016 and Racial Discrimination Law Amendment (Free Speech) Bill 2016 until it completes its current inquiry into freedom of speech in Australia.[5]

1 See Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 17.

2 See Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 17.

3 See Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 17.

4 See Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) 17.

5 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

4.1 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]

4.2 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*

4.3 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, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 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**)*

4.6 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.

4.7 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, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 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, [4.18]).

Non-refoulement obligations

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

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

4.10 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.

4.11 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

4.12 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.

4.13 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.

4.14 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).

4.15 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

4.16 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

4.17 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

4.18 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, [4.6] to [4.8]). 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

4.19 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

4.20 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.

4.21 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

4.22 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

4.23 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, [4.22]);
- 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, [4.6] to [4.8]);
- 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

4.24 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).

4.25 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

4.26 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).

4.27 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**)*

4.28 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.

4.29 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

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

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

4.32 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).

4.33 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**)*

4.34 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.

4.35 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

4.36 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

4.37 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.

4.38 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.

4.39 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

4.40 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.

4.41 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**)*

4.42 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.

4.43 '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]

4.44 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

4.45 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

4.46 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.

4.47 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, [4.29]).

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

Article 12 of the CRC

4.48 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.

4.49 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

4.50 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.

4.51 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

4.52 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.

4.53 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

4.54 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

4.55 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

4.56 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.

4.57 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

4.58 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

4.59 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

4.60 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

4.61 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.

4.62 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

4.63 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.

4.64 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 MICHAEL KEENAN MP
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MS16-018127

Chair
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Dear Chair

I refer to the letter from the Committee Secretary of the Parliamentary Joint Committee on Human Rights (the Committee) dated 23 November 2016. This letter brought to my attention the comments contained in the Committee' *Report 9 of 2016*. In this Report, the Committee identified a number of human rights compatibility issues with the Law Enforcement Legislation Amendments (State Bodies and Other Measures) Bill 2016 (the Bill).

I have consulted the Attorney-General, Senator the Hon George Brandis QC, in providing the below response

Compatibility of measures in Schedule 1

The committee 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).*

Attorney-General's response

Right to privacy

The provisions in Schedule 1 of the Act engage the right to privacy under Article 17 of the ICCPR. To the extent that Schedule 1 limits the right to privacy, these limitations are not arbitrary and are necessary, reasonable and proportionate to the achievement of the legitimate objective of enabling the Law Enforcement Conduct Commission (LECC) to identify, investigate and punish corruption.

Limitations on access to and use of telecommunications data

The Committee has raised concerns about:

(a) the broad nature of telecommunications data authorisations

(b) the ability to subsequently use such information, and

(c) whether the internal self-authorisation process for access to data provides sufficient safeguards in relation to the right to privacy.

Telecommunications data is critical to the investigation of criminal activity, including corruption investigations, and is used at the early stages of investigations to build a picture of a target and the target's network of associates. Access under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) is limited to specified national security and law enforcement agencies (of which the LECC is replacing an existing body). The Australian Government considers restricting access to specified agencies supports both the protection of privacy and needs of criminal law-enforcement agencies given the early stage at which such disclosures are sought. The Australian Government has previously provided a response addressing concerns that access to data be limited to certain categories of serious crimes.[1]

There is a two-fold test that must be met before an officer of a criminal law-enforcement agency may authorise the disclosure of data. Disclosure may only occur where:

(1) it is reasonably necessary for the enforcement of the criminal law, a law imposing a pecuniary penalty or for the protection of the public revenue, and

(2) the authorising officer of an agency is satisfied on reasonable grounds that any interference with privacy is justifiable and proportionate.[2]

Agencies are further restricted by their enabling legislation. In the case of the LECC, authorised officers will only be able to authorise the disclosure of data for investigations into corruption, misconduct and maladministration on the part of New South Wales law enforcement where that investigation also meets the TIA Act thresholds. As discussed below, any further restrictions (such as the requirement to apply for a warrant to access data) would fundamentally undermine the utility of data as an investigative tool.

The internal safeguard provisions were previously considered as a part of the Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* in March 2015. At this time, the Committee considered the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 and the majority of the Committee observed that existing requirements for internal agency authorisations provided sufficient safeguards to address privacy concerns.[3]

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[1] Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) Appendix 1 *Australian Government response to the 15th report of the Parliamentary Joint Committee on Human Rights to the 44th Parliament, Telecommunications (Interception and Access) Amendment (Data Retention) Bill* 8-10.

[2] This requirement was included in response to a recommendation from the Parliamentary Joint Committee on Intelligence and Security *Advisory report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015) 251.

[3] Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) at [1.237].

Once accessed, telecommunications data may only be communicated for a purpose connected with the functions of the accessing agency for the purposes of enforcing the criminal law, a law imposing a pecuniary penalty or protecting the public revenue. Both the TIA Act and the LECC's enabling legislation impose criminal liability on LECC officers who communicate information relating to the disclosure of data for unauthorised purposes.

Oversight through a warrant process or the Commonwealth Ombudsman

Access to and use of telecommunications data is subject to stringent reporting requirements and independent oversight by the Commonwealth Ombudsman. New record-keeping and reporting obligations introduced through the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* increase transparency of the use of telecommunications data by criminal law enforcement agencies.

The LECC will be required to keep comprehensive records to assist the Ombudsman in its inspection of the access and use of data by the agency. The Ombudsman has extensive powers under the TIA Act to compel the disclosure of information relating to agency activities. Furthermore, agencies are now required to report annually on the:

- types of data accessed in investigations,
- length of time data was retained by the service provider prior to an authorisation by an agency, and
- type of offences investigated with the use of data.

Both the Ombudsman's report and TIA Act annual report will be tabled in Parliament each year to enable public scrutiny.

The Australian Government considers that introducing a warrant regime for telecommunications data to augment existing safeguards would risk serious harm to the ability of agencies to investigate crime and safeguard national security. Warrant applications are lengthy processes and telecommunications data is commonly used at the early stages of an investigation, when delays can result in the loss of evidence. Current arrangements, such as external oversight by the Commonwealth Ombudsman, serve as an effective accountability mechanism without delaying law enforcement investigations. In addition, an oversight body has the advantage of reviewing how an agency has accessed and used telecommunications data from end-to-end.

Finally, the powers within the TIA Act which are subject to a warrant are used in the latter stages of an investigation. Access to telecommunications data often provides foundational information commonly used to exclude others from suspicion, ensuring they are not targeted by more intrusive investigative techniques such as telecommunications interception or surveillance (which require a warrant). Accordingly, there is a clear distinction between the privacy impact of access to telecommunications data and the execution of a telecommunications interception warrant. Further detail on this distinction can be found in the February 2015 response the Australian Government supplied addressing a previous recommendation from the Committee that access to data be subject to a warrant process.[4]

[4] Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) Appendix 1 *Australian Government response to the 15th report of the Parliamentary Joint Committee on Human Rights to the 44th Parliament, Telecommunications (Interception and Access) Amendment (Data Retention) Bill* 12-14. .

Access to content of communications given the services and devices which can be impacted

The Australian Government considers that, given the existing safeguards within the Act, access to the content of private communications by the LECC is a reasonable and proportionate limitation on the right to privacy. Before the LECC, or any eligible agency, is able to access the content of private communications it must apply to an independent issuing authority for a warrant. Issuing authorities are required to consider the proportionality of the agency's request in every instance, including how the privacy of any person may be impacted.

Although warrants may relate to a broad range of services and devices, a warrant may only be issued for the purpose of investigating specific offences that meet thresholds identified in the Act and in relation to services or devices likely to be used by the target. Interception warrants may only be obtained to assist in the investigation of defined serious offences, generally attracting a maximum penalty of at least seven years imprisonment for interception warrants or offences of at least three years imprisonment for access to stored communications. Similar to the oversight arrangements for telecommunications data, the Commonwealth Ombudsman and state oversight bodies inspect and report on agency access to private communications to ensure law enforcement agencies exercise their authority appropriately.

The measures within Schedule 1 broadly engage the right to privacy. However, the safeguards within the TIA Act discussed above ensure that any limitations on that right are reasonable, necessary and proportionate to the legitimate goals of promoting accountability in law enforcement, investigating corruption and protecting public order through enforcing the law.

Assessment of the TIA Act

Legislation established prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment. However, the Attorney-General's Department has provided extensive advice regarding the operation of the TIA Act to this Committee and other Parliamentary bodies. The privacy implications of the TIA Act were discussed in detail in Government responses to the Committee's scrutiny of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014.

Further, in response to recommendation 18 of the *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* by the Parliamentary Joint Committee on Intelligence and Security in 2013, the Australian Government agreed to comprehensively revise the Act in a progressive manner. If legislation is introduced to reform the Act, the Department will undertake a human rights compatibility assessment. The Australian Government continually reviews the TIA Act to ensure that adequate safeguards are in place to protect privacy.

The relevant contact in the Attorney-General's Office is Timothy Roy who can be contacted on 6277 7300.

Compatibility of measures in Schedule 3

The committee 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.

Minister's response

Right to a fair trial and fair hearing

The Committee has stated that Schedule 3, which amends the definition of 'lawfully acquired' under section 336A of the *Proceeds of Crime Act 2002* (the POC Act), broadens the class of assets that can be frozen, restrained or forfeited, limiting the right to a fair trial and hearing under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

Schedule 3, however, is not intended to broaden the scope of section 336A, but instead clarifies the intended meaning of section 336A in light of the Supreme Court of Western Australia's decision in *Commissioner of the Australian Federal Police v Huang* [2016] WASC 5.

If Schedule 3 has the practical effect of broadening the scope of assets that can be frozen, restrained or forfeited under a proceeds of crime order, this Schedule will engage the right to a fair hearing for civil hearings under Article 14(1) of the ICCPR. This right guarantees equality before courts and tribunals, and, in the determination of criminal charges, or any suit at law, the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law. Proceedings under the POC Act are proceedings heard by Commonwealth, State and Territory courts in accordance with relevant procedures of those courts. This affords an affected person adequate opportunity to present his or her case, such that the right to a fair hearing is not limited.

The Australian Government reiterates that proceeds of crime orders are classified as civil under section 315 of the POC Act and do not involve the determination of a criminal charge or the imposition of a criminal penalty. These orders therefore do not engage the rights in Articles 14(2)-(7) of the ICCPR relating to minimum guarantees in criminal proceedings. As proceedings under the POC Act provide for a right to a fair hearing consistent with Article 14(1), the items under Schedule 3 do not limit the right to a fair trial under Article 14.[5]

Assessment of the POC Act

The Committee has requested that I engage in a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and a fair hearing. Legislation established prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment. The Australian Government continually reviews the POC Act to ensure that it addresses emerging trends in criminal conduct and will continue to undertake a human rights compatibility assessment where a Bill amends the Act.

The relevant contact in my office for this matter is Talitha Try, who can be contacted on 6277 7290.

I trust this information has been of assistance.

Yours sincerely

Michael Keenan

[5] See Parliamentary Joint Committee on Human Rights *Thirty-first Report of the 44th Parliament* (24 November 2015) 39-42.

ATTORNEY-GENERAL

CANBERRA

MS16-018150

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear Chair Ian

I am writing in response to the letter from the Committee Secretary of the Parliamentary Joint Committee on Human Rights, Ms Toni Dawes, dated 9 November 2016. The letter refers to the Committee's *Report 8 of 2016* and seeks my advice in relation to whether the Privacy Amendment (Notifiable Data Breaches) Bill 2016 could be amended to require notification to individuals following access to their telecommunications data under the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

In February 2015, the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (the Advisory Report) recommended the introduction of a mandatory data breach notification scheme. The PJCIS' recommendation was based on concern about data breaches compromising the security of retained telecommunications data, and the absence of a broad-based mandatory data breach notification requirement in Australia.

The Government's response to the Advisory Report on 3 March 2015 supported this recommendation. Consistent with the Government's response, the Bill would introduce a data breach notification requirement following unauthorised access to, unauthorised disclosure of or loss of, personal information that would cause a likely risk of serious harm to individuals. The notification requirement would apply to data breaches of this kind involving telecommunications data retained by service providers under the TIA Act. However, lawful access to retained telecommunications data by law enforcement and security agencies under the Act would not fall within the Bill's notification requirement.

If individuals were notified when their telecommunications data is accessed for law enforcement or national security purposes it would hamper investigations. The covert investigative powers contained in the Act are generally used where the integrity of an investigation would be compromised by revealing its existence. The Committee's suggestion that, in some circumstances, notifications be delayed would carry similar risks. Investigations into serious criminality (such as counter terrorism, child exploitation or serious and organised crime) can be protracted, and would be difficult to determine when data might be appropriately disclosed. Notification, delayed or otherwise, could expose police methodologies. The existing law reflects that policy position. It is an offence to disclose the existence of an authorisation for the access to telecommunications data under Division 6 of Part 4-1 of Chapter 4 of the Act.

Lawful access to telecommunications data is subject to stringent safeguards. Direct covert access to telecommunications data is limited to a defined set of law enforcement and security agencies. Authorised officers within those agencies may only allow the disclosure of telecommunications data where reasonably necessary for the enforcement of criminal law, a law imposing a pecuniary penalty or the protection of the public revenue. The Australian Security Intelligence Organisation may authorise access to telecommunications data for the performance of its functions. The Act requires that the authorising officer be satisfied on reasonable grounds that any interference with privacy is justifiable and proportionate. Agency access is also subject to comprehensive independent oversight by the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security.

The responsible adviser for this matter in my Office is Jules Moxon who can be contacted on 02 6277 7300.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

ATTORNEY-GENERAL

MC16-143309

CANBERRA

Mr Ian Goodenough MP
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21 DEC 2016

Dear Mr Goodenough

Thank you for the letter of 23 November 2016 in relation to Report 9 of 2016, in which the Parliamentary Joint Committee on Human Rights sought comment on the Privacy Amendment (Re-identification Offence) Bill 2016 andf the Sex Discrimination Amendment (Exemptions) Regulation 2016. My response to the issues raised by the committee is set out below.

Sex Discrimination Amendment (Exemptions) Regulation 2016

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. The committee requests advice on whether extending the exemption for two Western Australian laws for a further 12 month period is effective and proportionate in achieving the stated objective of allowing states and territories adequate time to review their legislation and assess compliance with the new protections, particularly in light of the fact that an exemption has already been in place for a previous three-year period.

Western Australia indicated that a further extension of time was required to facilitate the amendment of the *Human Reproductive Technology Act* (WA) and *Surrogacy Act* (WA). Section 23 of the Human Reproductive Technology Act has the effect of prohibiting male same-sex couples, and potentially transgender persons or persons of intersex status, from accessing IVF procedures—including for the purpose of a surrogacy arrangement. Section 19 of the Surrogacy Act has the effect of prohibiting male same-sex couples, and potentially transgender persons or persons of intersex status, from seeking a parentage order for a child born under a surrogacy arrangement.

The Government does not consider that a state should continue to discriminate against people on the basis of their sexual orientation, gender identity and/or intersex status. However, the Government acknowledges that the regulation of assisted reproductive technology and surrogacy is a sensitive issue that is primarily a matter for states and territories and that the Western Australian government should be granted additional time to properly consult the Western Australian community about options for reform in this area.

The limitation is proportionate, allowing a sufficient yet not overly lengthy time for Western Australia to properly consult on options for reform to its legislation The Government has advised the Western Australia government that it does not propose any further extensions of this exemption after 31 July 2017.

I trust this information will assist you in concluding your consideration of this legislation.

Yours faithfully

(George Brandis)

Cc: <human.rights@aph.gov.au>

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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