

## Foreign Affairs Portfolio Miscellaneous Measures Bill 2013

*Introduced into the House of Representatives on 13 March 2013*

*Portfolio: Foreign Affairs*

### Summary of committee view

1.41 The committee seeks further information as to why it is necessary to enable the Director-General of the Australian Secret Intelligence Service (ASIS) to disapply any provision of the *Work Health and Safety Act 2011* and whether there would be any less restrictive means available to achieve the stated objective.

### Overview

1.42 This bill seeks to amend the *Intelligence Services Act 2001* and the *Work Health and Safety Act 2011* to:

- create a mechanism for Australian Secret Intelligence Service (ASIS) employees to move to an Australian Public Service (APS) agency in the same way that APS employees can voluntarily transfer from one APS agency to another under section 26 of the *Public Service Act 1999* (the PS Act);
- enable the Director-General of ASIS, with Ministerial approval, to make a declaration that specified provisions of the *Work Health and Safety Act 2011* do not apply, or apply subject to modification in relation to persons carrying out work for the Director-General of ASIS.

### Compatibility with human rights

1.43 The bill is accompanied by a self-contained statement of compatibility which identifies that the bill engages the right to work under articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

1.44 Article 6 of the ICESCR recognises the right to work and 'the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' and article 7 recognises the right of everyone to the 'just and favourable conditions of work' which includes ensuring 'safe and healthy working conditions'.

1.45 The amendments which create a mechanism for ASIS employees to move to an APS agency in the same way that APS employees can do, promotes the right to work as it broadens the opportunities for ASIS employees to choose the type of work they wish to do.

1.46 In contrast, the amendments to the *Work Health and Safety Act 2011* (WHS Act) appear to limit the right to work under article 7 of the ICESCR, in particular the right to 'safe and healthy working conditions' of work. The statement of compatibility explains this limitation in this way:

While on its face these amendments may appear to restrict the right to safe and healthy work conditions, these amendments are intended to provide legal clarification to the operation of existing provisions of the WHS Act to people who perform work for the Director-General of ASIS. Section 12C of the WHS Act already provides that nothing in that Act requires or permits a person to take any action or refrain from taking any action that would be, or could reasonably be expected to be, prejudicial to national security. This is a long standing component of work health and safety obligations in Australia, as an identical provision existed in the predecessor to the WHS Act, the *Occupational Health and Safety Act 1991*.

However, currently under section 12C of the WHS Act, the Director-General of ASIS is unable to make a declaration that specified provisions of the WHS Act do not apply, or apply subject to modifications set out in the declaration, in relation to persons carrying out work for him or her. This means legal uncertainty currently exists around the application of section 12C to people who perform work for the Director-General of ASIS. These amendments will provide this certainty.<sup>20</sup>

1.47 The statement of compatibility goes on to note that the existing provisions of the WHS Act enable the Australian Security Intelligence Organisation (ASIO) and the Australian Defence Force (ADF) to declare by instrument that provisions of the WHS Act do not apply to persons carrying out work for ASIO or the ADF.<sup>21</sup> It goes on to state:

The circumstances in which ASIS operates overseas are very similar to those faced by ASIO and the ADF. These circumstances mean that the requirements of national security may not always be compatible with full compliance with all the obligations under the WHS Act. Indeed full compliance could in some circumstances place people who work for the Director-General of ASIS at risk and prejudice national security.<sup>22</sup>

1.48 The statement of compatibility concludes that the bill is compatible with human rights as it promotes the right to work and 'will provide legal clarification to existing work health and safety obligations'. However, describing other like organisations that have access to this exemption and arguing the need for legal certainty does not explain whether this is a reasonable and proportionate limitation on the right to work.

1.49 In addition, a number of provisions of the WHS Act relate to workplace representation and consultation and the role of trade unions in promoting work health and safety. The objects of the WHS Act state that the Act is intended to secure the health and safety of workers and workplaces, including by:

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20 Statement of compatibility, p 4.

21 See sections 12C and 12D of the *Work Health and Safety Act 2011*.

22 Statement of compatibility, p 4.

(b) providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety; and

(c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment...<sup>23</sup>

1.50 Enabling the Director-General of ASIS to declare in an instrument that any provision of the WHS Act does not apply, or applies subject to modification, would allow the Director-General to declare that unions do not have the right to make representations. This therefore would engage the right to freedom of association and the rights of trade unions under article 22 of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the ICESCR.

1.51 In addition, in enabling the Director-General of ASIS to declare any provision of the WHS Act to not apply to people carrying out work for ASIS, could potentially lead to highly dangerous work places and therefore raise issues around State obligations to promote the right to life under article 6 of the ICCPR.

**1.52 The committee accepts that seeking to protect national security is a legitimate objective. However, the Minister has not explained why giving such broad powers to the Director-General to exempt all people performing work for ASIS, including those working in offices in Australia, from the entirety of the WHS Act is a reasonable and proportionate limitation on the right to work, the rights to representation by trade unions and the right to life.**

**1.53 The committee intends to write to the Minister for Foreign Affairs and ask for further information as to why it is necessary to enable the Director-General of ASIS to disapply any provision of the WHS Act and whether there would be any less restrictive means available to achieve the stated objective. The committee would be aided in its consideration of this if examples were given – on a confidential basis if necessary – as to the likely circumstances in which the Director-General would use this power.**

**1.54 The committee also intends to write to the Minister for Foreign Affairs to ask for clarification as to whether omitting provisions of the WHS Act in relation to people working for ASIS would have any effect on any worker's compensation claims those employees might have for any workplace injuries or diseases.**

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23 Section 3 of the *Work Health and Safety Act 2011*.