Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two Principal Research Officers with specialised expertise in international human rights law. LSU officers, including the Committee Secretary, regularly work across multiple scrutiny committee secretariats.

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.[2] **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**).

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2 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 4 and 7 December (consideration of 3 bills from this period has been deferred);[1]
- legislative instruments received between 3 November and 14 December (consideration of 14 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 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

Response required

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

Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017

Purpose	Amends the *Broadcasting Services Act 1992* to: establish a Register of Foreign Ownership of Media Assets to be administered by the Australian Communications and Media Authority (ACMA); provide for new assessment criteria for the applications for, and renewals of, community radio broadcasting licences relating to material of local significance; amends the *Australian Communications and Media Authority Act 2005* to enable the ACMA to delegate certain powers
Portfolio	Communications and the Arts
Introduced	Senate, 6 December 2017
Right	Privacy, criminal process rights (see **Appendix 2**)
Status	Seeking additional information

Establishment of the Register of Foreign Owned Media Assets

1.6 The Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017 (the bill) would establish a Register of Foreign Ownership of Media Assets (the register). The register will be overseen and maintained by the Australian Communications and Media Authority (ACMA), will be available publicly on the ACMA's website, and would provide information about each 'foreign stakeholder'[1] in an Australian media company, including the name of the foreign

1 A 'foreign stakeholder' is a foreign person who has a company interest in an Australian media company of 2.5% or more: proposed section 74C. 'Foreign person' has the same meaning as under the *Foreign Acquisitions and Takeovers Act 1975* and includes, relevantly, an individual not ordinarily resident in Australia.

stakeholder, the foreign stakeholder's company interests[2] in the Australian media company and the country in which the foreign stakeholder is ordinarily resident.[3]

1.7 Where a person is a foreign stakeholder in an Australian media company at the end of a financial year, or becomes a foreign stakeholder, the person must within 30 days notify the ACMA in writing of certain information, including the person's name, the circumstances that resulted in the person being or becoming a foreign stakeholder in the company, the person's company interests in the company, 'designated information' relating to the person,[4] and 'such other information (if any) relating to the person as is specified' by legislative instrument.[5] The ACMA may also, by written notice to a foreign stakeholder, require the foreign stakeholder to notify the ACMA of the foreign stakeholder's company interest's in the company, the method used to determine such interests and 'such other information' relating to the foreign stakeholder as specified by legislative instrument.[6]

Compatibility of the measure with the right to privacy

1.8 The right to privacy encompasses respect for informational privacy, including the right to respect private information and private life, particularly the storing, use and sharing of personal information.

1.9 As noted in the statement of compatibility, the bill engages the right to privacy because it requires the provision of information by, and authorises the use and disclosure of certain information about, individuals (including personal information) for inclusion on the register.[7] However, the statement of compatibility further states that to the extent that the right to privacy is limited by the bill, the limitations are reasonable, necessary and proportionate.

1.10 The objective of the bill is described in the statement of compatibility as 'to promote increased scrutiny of foreign investment in Australian media companies, and increase transparency of the levels and sources of foreign ownership in these

2 'Company interest' is defined in the bill using the definition in section 6 of the *Broadcasting Services Act 1992* and means, in relation to a person who has a shareholding interest, a voting interest, a dividend interest or a winding-up interest in a company, the percentage of that interest or, if the person has two or more of those interests, whichever of those interests has the greater percentage.

3 Proposed section 74E of the bill. If the ACMA is satisfied that the disclosure of the information could reasonably be expected to prejudice materially the commercial interests of a person, the Register must not set out that particular information: section 74E(2).

4 'Designated information' means, relevantly, the person's date of birth and the country in which the person is ordinarily resident: proposed section 74B.

5 Proposed section 74F and 74H. See also proposed section 74J, which introduces a transitional provision for disclosure for foreign stakeholders who are required to register at the commencement of this Division of the bill.

6 Proposed section 74K(1) and (2).

7 Statement of Compatibility (SOC), p. 20.

companies'.[8] This is likely to be a legitimate objective for the purpose of international human rights law. Similarly, requiring certain information about foreign stakeholders to be available on a publicly-accessible register appears to be rationally connected to this objective.

1.11 However, in order to be a proportionate limitation on the right to privacy, regimes that permit the collection and disclosure of personal information need to be sufficiently circumscribed. In this respect, the power in proposed sections 74F(2),74H(2),74J(2), and74K(2) to specify by legislative instrument additional information that foreign stakeholders must provide to the ACMA is broadly worded. It is not clear whether such an instrument would require the collection of further personal information and, if so, what safeguards would be in place to protect the right to privacy. International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[9] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights.

1.12 It is also not clear from the statement of compatibility what safeguards are in place relating to the access, storage and disclosure of any personal or confidential information that is notified to the ACMA but not disclosed on the register (such as a person's date of birth, or information considered to prejudice materially the commercial interests of a person pursuant to section 74E(2)). For example, no information is provided in the statement of compatibility as to whether there are any penalties for unlawfully disclosing personal information, and who within the ACMA is entitled to access such information.

Committee comment

1.13 The preceding analysis raises questions as to whether the notification and disclosure requirements for the register of foreign owners of media assets are a proportionate limitation on the right to privacy.

1.14 The committee therefore seeks the advice of the minister as to whether the limitation on the right to privacy is proportionate to the stated objective of the measure (including whether the power to determine by legislative instrument the information that must be notified is sufficiently circumscribed, and what safeguards apply relating to the collection, storage and disclosure of personal and confidential information).

8 SOC, p. 18.

9 *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84]

Civil penalties for failing to comply with notification requirements

1.15 Proposed sections 74F(3), 74H(3), 74J(3) and 74K(4) provide that a foreign person who fails to properly notify the ACMA of being a foreign stakeholder is liable to a civil penalty. Similarly, a person who fails to notify the ACMA when they cease to be a foreign stakeholder is liable to a civil penalty.[10] The amount of penalty unit for a non-body corporate is 60 penalty units (currently $12,600). Further, if a person fails to comply with the section, it would be a separate contravention for each day that the person has failed to comply with the notification obligation.[11]

Compatibility of the measure with criminal process rights

1.16 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the new civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

1.17 The committee's *Guidance Note 2* sets out detailed guidance in relation to civil penalty provisions and provides that 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 international human rights law.

1.18 However, the statement of compatibility has not addressed whether the civil penalty provisions might be considered 'criminal' for the purposes of international human rights law.

1.19 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look at its classification in domestic law. As the civil penalty provisions are not classified as 'criminal' under domestic law they will not automatically be considered 'criminal' for the purposes of international human rights law.

1.20 The second step in assessing whether the civil penalties are 'criminal' under international human rights law is to look at the nature and purpose of the penalties. Civil penalty provisions are more likely to be considered 'criminal' in nature if they are intended to punish or deter, irrespective of their severity, and if they apply to the public in general. Here, there is no indication that the civil penalties are intended to be punitive and the penalties only apply to 'foreign stakeholders' rather than the public in general. However, no information is otherwise provided in the statement of

10 Proposed section 74G(2) of the bill.

11 Proposed sections 74F(4), 74G(3), 74H(4), 74J(4) and 74K(5) of the bill.

compatibility as to the nature and purpose of the penalties save for describing the penalties as an 'administrative' penalty.[12]

1.21 The third step in assessing whether the penalties are 'criminal' under international human rights law is to look at their severity. In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the maximum amount of the pecuniary penalty that may be imposed under the civil provision in context is relevant. Here, it is not clear whether the maximum civil penalty (60 penalty units) is, of itself, severe in the particular regulatory context. However, as each day that a person fails to properly notify the ACMA is a separate contravention, there is a potential that the overall penalty imposed could be substantial. These issues were not addressed in the statement of compatibility.

Committee comment

1.22 The committee seeks the advice of the minister as to whether the civil penalty provisions in the bill 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*), addressing in particular:

- **whether the nature and purpose of the penalties is such that the penalties may be considered 'criminal';**
- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be considered 'criminal', having regard to the regulatory context; and**
- **if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measure accords with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge, such as the presumption of innocence (article 14(2)).**

12 SOC, p. 20.

Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) (Documents) Amendment Instrument 2017 (No. 1) [F2017L01456]

Purpose	Amends the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 to list documents specified by the Minister for Foreign Affairs that list goods prohibited for export to, or importation from, the Democratic People's Republic of Korea under the Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008
Portfolio	Foreign Affairs and Trade
Authorising legislation	Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Regulations 2008
Last day to disallow	15 sitting days after tabling (tabled in the Senate 13 June 2017)
Rights	Fair trial; quality of law; liberty (see **Appendix 2**)
Status	Seeking additional information

Background

1.23 The committee has examined offence provisions arising out of sanctions regulations on a number of previous occasions.[1] The human rights assessment of these regulations noted that proposed criminal offences arising from the breach of such regulations on the supply of 'export sanctioned goods' and the importation of 'import sanctioned goods' raised concerns in relation to the right to a fair trial and the right to liberty. Specifically, the offences did not appear to meet the quality of law test, which provides that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified. The Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) (Documents) Amendment Instrument 2017 (No. 1) [F2017L01456] (the instrument) raises similar human rights concerns.

1 See, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 11; *Thirty-Seventh Report of the 44th Parliament* (19 April 2016); *Report 9 of 2016* (22 November 2016) p. 56; *Report 7 of 2017* (8 August 2017) p. 21 (which examined the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 that is amended by the current instrument); *Report 11 of 2017* (17 October 2017) pp. 46-48.

Offences of dealing with export and import sanctioned goods

1.24 The instrument lists documents that are specified by the Minister for Foreign Affairs as documents mentioning goods to be prohibited for export to, or importation from, the Democratic People's Republic of Korea (DPRK).[2] Goods mentioned in the listed documents are incorporated into the definition of 'export sanctioned goods' and 'import sanctioned goods' for the purposes of the Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008 [F2016C01044] (2008 DPRK sanctions regulations).[3] The instrument re-lists a number of documents as well as adding some additional documents to the list.[4]

1.25 The 2008 DPRK sanctions regulations define 'export sanctioned goods' as including goods that are mentioned in a document specified by the minister by legislative instrument.[5] The documents that are specified by the minister through the instrument take various forms, including letters and information circulars.

1.26 Sections 9 and 10 of the DPRK sanctions regulations, respectively, prohibit supply of export sanctioned goods to the DPRK, and importation of import sanctioned goods from the DPRK. The Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2017C00214] (the declaration) provides that contravention of sections 9 and 10 of the DPRK sanctions regulations are contraventions of a 'UN sanction enforcement law'. The effect of this is to make a breach of those provisions a criminal offence under the *Charter of the United Nations Act 1945* (the United Nations Act). Therefore, a person commits an offence under the United Nations Act by engaging in conduct (including doing an act or omitting to do an act) that contravenes the provisions in the 2008 DPRK sanctions regulations. This is then punishable by up to 10 years' imprisonment and/or a fine of up to 2,500 penalty units (or $525,000).

Compatibility of the measure with human rights

1.27 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings. Article 9 of the ICCPR protects the right to liberty including the right not to be arbitrarily detrained. The prohibition against 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.

2 2008 DPRK regulations section 5.

3 See 2008 DPRK sanctions regulations section 5.

4 Compare, Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539].

5 See 2008 DPRK sanctions regulations section 5(1)(c).

1.28 Human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

1.29 The instrument, by amending the list of documents setting out goods to be 'export sanctioned goods' and ultimately making supply of these goods a criminal offence under the United Nations Act subject to a penalty of imprisonment, engages and may limit the right to liberty.

1.30 In particular, as the definition of 'export sanctioned goods' may lack sufficient certainty, the measure engages the right not to be arbitrarily detained and the right to a fair trial. The definition of 'export sanctioned goods', which is an important element of whether a person has engaged in prohibited conduct such as export, import or supply under the 2008 DPRK regulations, may be determined, as occurred here, through reference to goods contained in documents listed in a legislative instrument.[6] In this case the list of documents contained in the instrument incorporates documents, including letters and information circulars, into the definition of 'export and import sanctioned goods' for the purposes of prohibited conduct in the 2008 DPRK regulations. Accordingly, as noted in previous human rights analysis for similar related regulations, as the definition of an important element of offences is determined by reference to goods 'mentioned' in the listed documents the offence appears to lack a clear legal basis as the definition is vaguely drafted and imprecise.[7] In particular there appears to be a lack of clarity about what is and what is not prohibited for export and import. This raises specific concerns that, by making a breach of such regulations a criminal offence, the application of such an offence provision may not be a permissible limitation on the right to liberty as it may result in arbitrary detention.

1.31 In this respect it is noted that measures limiting the right to liberty must be precise enough that persons potentially subject to the offence provisions are aware of the consequences of their actions.[8] The United Nations Human Rights Committee has also noted that any substantive grounds for detention 'must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.[9] It is unclear whether the documents listed in the instrument contain sufficiently precise descriptions of goods, such as would meet appropriate drafting standards for the framing of an offence. For example, the sixth

6 2008 DPRK regulations section 5.

7 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 21.

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

9 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, (16 December 2014) [22].

and seventh documents, INFCIRC/254/Rev.12/Part 1 and INFCIRC/254/Rev.9/Part 2, which have been re-listed, appear to be circulars that provide guidelines for nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software and related technology, as opposed to specific descriptions of particular goods that are prohibited. Two of the new documents listed, S/2017/760 and S/2017/728, are letters from the chair of the United Nations Security Council and contain a long list of materials, technology and equipment. However, some of the goods are defined quite broadly by reference to, for example, 'technology' for the 'development' or 'production' of other goods. Further, given the potential difficulty in determining whether an item is prohibited from export or import, it is unclear whether there are any applicable safeguards or mechanisms that may assist persons to understand or seek advice on their export and import obligations including the content of the documents.

1.32 Despite the related human rights concerns raised in the committee's previous reports, the statement of compatibility merely states that the instrument 'is compatible with the human rights'.[10] It provides no assessment of the engagement of particular rights and only provides a general description of what the instrument does. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*.

Committee comment

1.33 The statement of compatibility for the instrument provides no assessment of the compatibility of the instrument with the right to a fair trial, the right to liberty, and quality of law test.

1.34 The preceding analysis raises questions as to the human rights compatibility of the instrument with the right not to be arbitrarily detained, the right to a fair trial and the quality of law test.

1.35 Accordingly, the committee requests the advice of the minister as to:

- **whether the instrument is compatible with the right to a fair trial, the right to liberty and the quality of law test (including whether there are mechanisms in place for individuals to seek advice on their export and import obligations); and**
- **whether a substantive assessment of the human rights compatibility of such instruments with the right to liberty and the right to a fair hearing could be included in statements of compatibility going forward noting the requirements of the *Human Rights (Parliamentary Scrutiny Act) 2011* and the concerns raised in the committee's previous reports.**

10 Statement of compatibility, p. 1.

Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

Purpose	Seeks to amend the funding and disclosure provisions of the *Commonwealth Electoral Act 1918*, including the establishment of public registers for certain non-political persons and entities, amendments to the financial disclosure scheme, and a prohibition on donations from foreign governments and state-owned enterprises
Portfolio	Finance
Introduced	Senate, 7 December 2017
Rights	Right to take part in public affairs, freedom of expression, right to privacy, freedom of association (see **Appendix 2**)
Status	Seeking additional information

Registration requirement for political campaigners, third party campaigners or associated entities

1.36 The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the bill) introduces a requirement for persons to be registered as a 'political campaigner' if their 'political expenditure' (that is, expenditure incurred for a 'political purpose'[1]) during the current, or in any of the previous three, financial years was $100,000 or more.[2] A person is required to register as a 'third party campaigner' if the amount of political expenditure incurred by or with the authority

1 Proposed section 287(1). 'Political purpose' is defined in subsection 287(1) to mean: (a) the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate; (b) the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election); (c) the communicating of any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D; (d) the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*; (e) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors; except if: (f) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media; or (g) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.

2 Section 287F of the bill. An entity must register as a political campaigner if their political campaigner in the current financial year is $50,000 or more, and their political expenditure during the previous financial year was at least 50 per cent of their allowable amount.

of the person or entity during the financial year is more than the 'disclosure threshold' ($13,200);[3] the person or entity is not required to be registered as a political campaigner; and the person or entity is not registered as a political campaigner.[4] Additionally, an entity[5] is required to register as an 'associated entity' where any of the following apply:

- the entity is controlled by one or more of the registered political parties;
- the entity operates 'wholly, or to a significant extent, for the benefit of' one or more of the registered political parties;
- the entity is a financial member of a registered political party;
- another person is a financial member of a registered political party on behalf of the entity;
- the entity has voting rights in a registered political party; or
- another person has voting rights in a registered political party on behalf of the entity.[6]

1.37 Section 287H(5) provides that an entity will operate 'wholly, or to a significant extent, for the benefit of' one or more registered political parties if:

> (a) the entity, or an officer of the entity acting in his or her actual or apparent authority, has stated (in any form and whether publicly or privately) that the entity is to operate:
>
> (i) for the benefit of one or more registered political parties; or
>
> (ii) to the detriment of one or more registered political parties in a way that benefits one or more other registered political parties; or
>
> (iii) for the benefit of a candidate in an election who is endorsed by a registered political party; or
>
> (iv) to the detriment of a candidate in an election in a way that benefits one or more registered political parties; or
>
> (b) the expenditure incurred by or with the authority of the entity during the relevant financial year is wholly or predominantly political expenditure, and that political expenditure is used wholly or predominantly:
>
> (i) to promote one or more registered political parties, or the policies of one or more registered political parties; or

3 The 'disclosure threshold' is defined in section 287(1) of the bill to be $13,200.

4 Section 287G(1).

5 Except a registered political party or a State branch of a registered political party: section 287H(1) of the bill.

6 Section 287H(1).

> (ii) to oppose one or more of the registered political parties, or the policies of one or more registered political parties, in a way that benefits one or more registered political parties; or
>
> (iii) to promote a candidate in an election who is endorsed by a registered political party; or
>
> (iv) to oppose a candidate in an election in a way that benefits one or more registered political parties.

1.38 The registers of political campaigners, third party campaigners and of associated entities are established and maintained by the electoral commissioner.[7] The registers must include the name of each person or entity registered, the name of the financial controller of the person or entity and, in the case of associated entities, the names of any registered political parties with which the entity is associated. Each of the registers may include any other information determined by the electoral commissioner by legislative instrument.[8] The registers must be maintained electronically and be publicly available.[9]

Compatibility of the measure with multiple rights

1.39 The obligation to register as a 'political campaigner', 'third party campaigner' and 'associated entity' engages the freedom of expression, the freedom of association, the right to take part in the conduct of public affairs, and the right to privacy.

1.40 The right to freedom of expression in Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) includes freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice. As acknowledged in the statement of compatibility, imposing compulsory registration obligations on certain persons interferes with those persons' freedom to disseminate ideas and information, and therefore limits the freedom of expression.[10] However, the bill also promotes the freedom of expression insofar as it allows the public to receive information about the source of political communication.[11]

1.41 The right to freedom of association in Article 22 of the ICCPR protects the right to join with others in a group to pursue common interests. The right prevents States parties from imposing unreasonable and disproportionate restrictions on the right to form associations, including imposing procedures that may effectively prevent or discourage people from forming an association. The statement of

7 Proposed section 287N of the bill.

8 Proposed section 287N(5)-(7).

9 Proposed section 287Q.

10 Statement of Compatibility (SOC) [4].

11 SOC [6].

compatibility acknowledges that Article 22 is engaged and limited by the bill by requiring entities (who may be associations of individuals who join together as a group to pursue common interests) to publicly register as 'associated entities'.[12]

1.42 The right to take part in public affairs includes the right of every citizen to take part in the conduct of public affairs by exerting influence through public debate and dialogues with representatives either individually or through bodies established to represent citizens.[13] The statement of compatibility acknowledges that placing registration obligations on persons who take part in exerting influence through debate and dialogue with representatives may limit the right to take part in public affairs.[14]

1.43 The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation, and also includes respect for information privacy, including the right to control the dissemination of information about one's private life. The statement of compatibility acknowledges that the right to privacy is limited by the requirement that persons and entities register as a 'political campaigner', 'third party campaigner' or an 'associated entity', as this would publicly disclose personal information.[15]

1.44 For each of these rights engaged and limited, the statement of compatibility states the limitations are permissible as the bill serves a legitimate objective and is proportionate.

1.45 The statement of compatibility states that the 'genuine public interest' that is served by the bill is two-fold: first, that it protects the free, fair and informed voting essential to Australia's system of representative government, and secondly, that it protects national security.[16] The statement of compatibility elaborates on these objectives as follows:

> Registration of key non-party political actors promotes the rights of citizens to participate meaningfully in elections by assisting them to understand the source of political communication… Registration will complement the [*Electoral and Other Legislation Amendment Act 2017*] transparency reforms by:
>
> a) allowing voters to distinguish between political opinions popular because of their merits, and those that are common in public debate because their promoters incurred significant political expenditure;

12 SOC [4].

13 Article 25 of the ICCPR; UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) para [1],[5]-[6].

14 SOC [4].

15 SOC [4], [8].

16 SOC [5].

b) allowing voters to form a view on the effect that political expenditure is having on the promotion of a particular political opinion, as opposed to opinions that are being debated without financial backing; and

c) discouraging corruption and activities that may pose a threat to national security.

1.46 These are likely to be legitimate objectives for the purposes of international human rights law. Requiring persons and entities who are closely associated with registered political parties or who have incurred political expenditure above a certain threshold for particular purposes to register those relationships also appears to be rationally connected to this objective.

1.47 The statement of compatibility states that the registration requirements introduced by the bill are proportionate because the provisions:

> …apply to an objectively defined group of entities who freely choose to play a prominent role in public debate, and provide financial or administrative support to those who do.[17]

1.48 In order for a limitation on human rights to be proportionate, the limitation must be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective. In this respect, concerns arise in relation to the breadth of the definition of 'political expenditure'. As noted earlier, the definition of 'political expenditure' broadly refers to expenditure for political purposes. 'Political purpose' is in turn defined broadly, including 'the public expression by any means of views on an issue that is, or is likely to be, before electors in an election', regardless of whether or not a writ has been issued for the election.[18]

1.49 This would appear to require, for example, an individual or civil society organisation to register as a 'third party campaigner' if they expended funds amounting to the disclosure threshold ($13,500) on a public awareness campaign relating to a human rights issue or other important issue of public interest (such as a public health awareness campaign) that was also an issue at an election. This would appear to be the case regardless of how insignificant or incidental the issue is at an election, as no distinction appears to be drawn between whether an issue was one common to all political parties, or an issue that is only raised by one candidate in an election. It is also not clear the basis on which it is, or could be, determined whether an issue is 'likely to be an issue' before electors at an election, and what criteria are in place to make such a determination.

1.50 It is noted that there is a limitation to the definition of 'political purpose', namely that the expression of views will not be for a 'political purpose' if the sole or predominant purpose of the expression is the reporting of news, the presenting of current affairs or any editorial content in news media, or the expression is solely for

17 SOC [5].

18 Section 287(1) of the bill.

genuine satirical, academic or artistic purposes.[19] The explanatory memorandum explains that these exemptions are intended to 'ensure that the press, media, academia, artists and entertainers are not required to register as a political actor by virtue of carrying on their core business'.[20] However, that safeguard does not appear to apply to the examples provided in [1.48] above.

1.51 There are also related concerns about the definition of 'political expenditure' as it relates to the definition of 'associated entity'. As noted earlier, the bill requires an entity to register as an 'associated entity' where the expenditure incurred by or with the authority of the entity is wholly or predominantly 'political expenditure' and that expenditure is used to promote or to oppose one of the registered political parties or endorsed candidates, or the policies of one or more of the registered political parties. The concerns in relation to the definition of 'political expenditure' discussed above therefore apply equally to the registration requirement for associated entities. Moreover, the concern is heightened in relation to associated entities because, as the explanatory memorandum explains, an association can be inferred from negative campaign techniques in some circumstances:

> Where an entity operates to the detriment of, or to oppose, a candidate or registered political party, they must do so in a way that benefits one or more political parties in order to be deemed an associated entity under subsection (5). The entity is associated with the party or parties that benefited from the entity's negative campaigning. For an entity to be associated with a registered political party because of negative campaign techniques (that is, the entity opposes a party, or operates to its detriment), intent to benefit is not required for an association to exist. For example, if an election is contested by a limited number of parties, and an entity operates predominantly to the detriment of a contesting party, the entity may be an associated entity of the other party or parties.[21]

1.52 This would appear to capture a broad variety of circumstances. For example, it appears an entity whose expenditure is wholly or predominantly directed towards a public health issue may have to register as an 'associated entity'. This could potentially occur where the public health issue features in an election because a policy of a registered political party is to de-fund services related to the issue, and the entity expends funds to campaign actively against the policy of de-funding of the service due to its impact on public health. This could benefit an opposing political party whose policy is to keep the service funded, even if that is not the intent of the entity's campaign.

1.53 Thus, the ambiguity in the definition of 'political expenditure' and potential breadth of the definition of 'associated entity' could lead to considerable uncertainty

19 Proposed section 287.

20 Explanatory Memorandum (EM), [39].

21 EM, [61].

for persons and entities who may be liable to register. As such, this raises concerns as to whether the proposed registration requirements for individuals and entities are sufficiently circumscribed. The measure could also act as a potential disincentive for some individuals and civil society organisations to run important campaigns, or could act as a disincentive for individuals to form organisations to run such campaigns. In other words, the registration requirement may have a particular 'chilling effect' on the freedom of expression, freedom of association and right to take part in public affairs for some groups and individuals.[22]

1.54 An additional issue in relation to the proportionality of the limitation on the right to privacy is that, as a consequence of registration, personal information about individuals may be publicly available. There is a risk that registration may have negative reputational consequences for individuals or entities required to register, such as criticism that the individual or entity is political, partisan or not independent. In circumstances where the definition of 'political expenditure' is very broad and may capture a wide range of individuals and groups, this raises additional concerns that the bill goes further than what is strictly necessary to serve the legitimate objective, and may insufficiently protect against attacks on reputation that may result from individuals and entities being required to register.[23] It also raises potential concerns that rather than providing greater transparency the measure may create confusion in certain circumstances about degrees of political connection.

Committee comment

1.55 The preceding analysis raises questions about the compatibility of the registration requirement for political campaigners, third party campaigners or associated entities with the right to freedom of expression, the right to freedom of association, the right to take part in public affairs and the right to privacy.

1.56 The committee therefore requests the advice of the minister as to whether the limitation on these rights is proportionate to the stated objective, in particular whether the registration requirements for political campaigners, third party campaigners and associated entities are sufficiently circumscribed, having regard to the breadth of the definitions of 'political expenditure' and 'associated entities'.

1.57 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of

22 See also, in relation to the freedom of association for human rights defenders, *Report of the Special Rapporteur on the situation of human rights defenders* (A/64/226) (2009).

23 It is also noted that proposed section 287N of the bill gives a broad power to the electoral commissioner to determine, by legislative instrument, additional information to be published on the register. This is accompanied by a safeguard, namely that the legislative instrument is subject to mandatory consultation with the Privacy Commissioner. The committee will consider the human rights compatibility of any legislative instrument enacted pursuant to section 287N, and the sufficiency of the safeguards, once it is received.

the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

Civil penalties for failure to register as a political campaigner, third party campaigner or associated entity

1.58 Subsection 287F(3) of the bill provides that a 'political campaigner' who incurs political expenditure without being registered for a financial year is subject to a maximum civil penalty of 240 penalty units ($50,400) per contravention. Subsection 287F(4) provides that each day that a person or entity is required to register as a political campaigner and has not, including the day of registration, is a separate contravention of subsection (3). The effect of this is that the maximum applicable penalty is 240 penalty units for each day the person is in breach of subsection (3).

1.59 Similarly, where a person incurs political expenditure and is required to be registered as a 'third party campaigner' and fails to register, the person is subject to a maximum civil penalty of 120 penalty units ($25,200) per day for each day the person is in breach of the subsection;[24] and incurring political expenditure where an 'associated entity' has failed to register is subject to a maximum civil penalty of 240 penalty units per day ($50,400) for each day the associated entity is in breach.[25]

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

1.60 Under Australian law, civil penalties 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. 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 is characterised as 'criminal' for the purposes of international human rights law. Such civil penalties are not necessarily illegitimate or unjustified. Rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the prohibition against double jeopardy apply. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create civil penalties.

1.61 The explanatory memorandum explains that the potential civil penalty units that may apply for failing to register may be substantial. The following example is provided in the explanatory memorandum in the context of failing to register as a 'political campaigner':

> Joseph's deadline for registration as a political campaigner was 14 December 2017. He misses this deadline, applying for registration on 25 January 2018. He is registered on 30 January 2018.

24 Section 287G(3) and (4).

25 Section 287H(3) and (4).

> Joseph contravened section 287F for 47 days, and so may be subject to a maximum civil penalty of 11,280 penalty units (47 days x 240 penalty units, approximately $2.4 million).[26]

1.62 The statement of compatibility states that the new civil penalty provisions 'do not constitute criminal penalties for the purpose of human rights law as they are not classified as criminal under Australian law and are restricted to people in a specific regulatory context'.[27]

1.63 As set out in the committee's *Guidance Note 2,* the domestic classification of the penalty is a relevant factor in determining whether a penalty is classified as 'criminal'. However, the term 'criminal' has an 'autonomous' meaning in human rights law, such that the classification of a penalty as a civil penalty in domestic law does not automatically mean the penalty will be considered as such for the purposes of international 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.

1.64 The next step in assessing whether the civil penalties are 'criminal' under international human rights law is to look at the nature and purpose of the penalties. A civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context. Relevantly, the statement of compatibility asserts that an additional reason these civil penalty provisions do not constitute criminal penalties is because they 'are restricted to people in a specific regulatory context'. However, while the proposed regime applies to regulate electoral funding and disclosure, it could apply quite broadly to include individual donors who satisfy the definition of 'political campaigner' or 'third party campaigner', or associations that fulfil the definition of 'associated entity'. It is unclear therefore whether the regime can categorically be said not to apply to the public in general.

1.65 Civil penalty provisions are also more likely to be considered 'criminal' in nature if they are intended to punish or deter, irrespective of their severity. No information has been provided in the statement of compatibility as to the purpose of the civil penalties in this regard.

1.66 The third step in assessing whether penalties are 'criminal' under international human rights law is to look at their severity. In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision in context is relevant. This must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. The severity of the

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26 EM, p. 19.

27 SOC [16].

penalty in this particular regulatory context is unclear due to the lack of information in the statement of compatibility.

1.67 In any event, as noted above, the potential maximum amount that may be proposed for breaching the registration requirement is 240 penalty units (for political campaigners and associated entities) or 120 penalty units (for third party campaigners). However, as the provisions operate such that each day a person or entity is required to register and has not constitutes a separate contravention of the subsection, the potential maximum penalty could be substantial, as demonstrated by the example provided in the explanatory memorandum quoted at [1.61] above.

1.68 If the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, they must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. For example, as noted above, the application of a civil rather than a criminal standard of proof would raise concerns in relation to the right to be presumed innocent, which generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be questions about whether they are compatible with criminal process rights, and whether any limitations on these rights are permissible.

Committee comment

1.69 The committee draws the attention of the minister to its *Guidance Note 2* and seeks the advice of the minister as to whether the civil penalty provisions for failing to register as a political campaigner, third party campaigner or associated entity may be considered to be 'criminal' in nature for the purposes of international human rights law, in particular:

- **information regarding the regulatory context in which the civil penalty provisions operate, including the nature of the sector being regulated and the relative size of the pecuniary penalties being imposed in context; and**
- **information regarding the purpose of the penalties (including whether they are designed to deter or punish); and**
- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be 'criminal' in nature.**

1.70 If the penalties were to be considered 'criminal' for the purposes of international human rights law, the committee seeks the advice of the minister as to how, and whether, the measures could be amended to accord with criminal process rights including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

1.71 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

Restrictions on and penalties relating to foreign political donations

1.72 Section 302D makes it unlawful for a person who is an agent of a political entity (that is, registered political parties, state branches of registered political parties, candidates, and Senate groups) or a financial controller of certain political campaigners[28] to receive a gift of over $250 from a donor that is not an 'allowable donor'. An allowable donor is a person who has a connection to Australia, such as an Australian citizen or an entity incorporated in Australia.[29] A person who contravenes section 302D commits an offence punishable by 10 years imprisonment or 600 penalty units, or both, or is liable to a civil penalty of 1000 penalty units ($210,000).[30]

1.73 Section 302E makes it unlawful for third party campaigners or political campaigners who are registered charities or registered organisations to receive a gift of over $250 from a non-allowable donor if that gift is expressly made (whether wholly or partly) for one or more 'political purposes'.[31] A person who contravenes section 302E commits a criminal offence with a penalty of 10 years imprisonment or 600 penalty units, or both, or is liable to a civil penalty of 1000 penalty units.[32] A person also commits a criminal offence or is liable to a civil penalty where non-allowable donations to political campaigners that are registered charities and registered organisations are paid into the same account as that which is used for domestic political purposes.[33]

1.74 Section 302G prohibits a person soliciting gifts from non-allowable donors intending that all or part of the gift be transferred to a political entity, a political campaigner (except a registered charity or registered organisation),[34] or 'any other person for one or more political purposes'. There is an exception where the person solicited the gift in a private capacity for his or her personal use.[35] A person who

28 Section 302D excludes political campaigners who are registered charities under the *Australian Charities and Not-for-Profits Commission Act 2012* or registered organisations under the *Fair Work (Registered Organisations) Act 2009*: see section 302D(g).

29 Section 287AA of the bill.

30 Section 302D(2) and (3)

31 Section 302E(2)(b).

32 Section 302E(4) and (5).

33 Section 302F.

34 Section 302G(1)(d). The effect of this is that a fundraiser can solicit foreign gifts for registered organisations or registered charities but can only use them subject to the requirements in section 302E: see EM [175].

35 Section 302G(2).

contravenes section 302G commits a criminal offence with a penalty of 5 years imprisonment or 300 penalty units, or both, or is liable to a civil penalty of 500 penalty units. There are also provisions imposing criminal and civil penalties of the same amount as in section 302G where a person forms a body corporate for the purposes of avoiding the foreign donation restrictions,[36] and where a person receives a gift from a non-allowable donor in order to transfer the gift to a political entity, a political campaigner (except a registered charity or registered organisation), or 'any other person for one or more political purposes'.[37]

1.75 Section 302K introduces a criminal offence and civil penalty where a person who is an agent of a political entity or financial controller of a political campaigner (except registered charities or registered organisations) receives a gift from a foreign bank account or by transfer by a person while in a foreign country. The offence is punishable by 10 years imprisonment or 600 penalty units, or both, or a civil penalty of 1000 penalty units.[38]

1.76 Finally, section 302L makes it unlawful for a person who is the agent of a political entity or the financial controller of a political campaigner (except a registered charity or registered organisation) to receive a gift of over $250 in circumstances where, before the end of 6 weeks after the gift is made, appropriate donor information has not been obtained to establish the donor is an allowable donor.[39] A person who contravenes section 302L commits a criminal offence with a penalty of 10 years imprisonment or 600 penalty units, or both, or is liable to a civil penalty of 1000 penalty units.[40]

Compatibility of the measure with the right to freedom of expression, the right to freedom of association and the right to participate in public affairs

1.77 The statement of compatibility acknowledges that the right to freedom of expression, the right to freedom of association and the right to participate in public affairs are engaged and limited by the foreign donations restrictions.[41] Each of these rights is summarised at [1.40] to [1.42] above.

1.78 In relation to the restrictions on foreign political funding to registered political parties, state branches of registered political parties, candidates, and Senate

36 Section 302J.

37 Section 302H.

38 Section 302K(2) and (3).

39 A person obtains 'appropriate donor information' where a statutory declaration is obtained from the donor declaring the person is an allowable donor, unless the regulations provide otherwise: section 302P(1)(a) and (2). The regulations may also determine information that must be sought from the donor in order to establish other forms of appropriate donor information: section 302P(1)(b).

40 Section 302L(2) and(3).

41 SOC [4].

groups in section 302D, it is likely that this restriction will be a proportionate limitation on the right to freedom of expression, the right to freedom of association and the right to participate in public affairs. A number of countries place restrictions or prohibitions on foreign funding of political parties, and international human rights jurisprudence confirms that such restrictions may be necessary in a democratic society to ensure financial transparency in political life.[42]

1.79 However, concerns remain as to the proportionality of the limitation insofar as the foreign donations restrictions are placed on third party campaigners and political campaigners in section 302E. The statement of compatibility states that the foreign donations restrictions are proportionate for the following reasons:

> The right to take part in public affairs by donating to key political actors must be balanced against the need for transparency and accountability in the political system and the overarching confidence in, and the integrity of, political institutions and the democratic system. It is also worth noting that, as this measure targets those without strong links to Australia, very few people within Australia's jurisdiction will be impacted by the foreign donations restrictions.[43]

1.80 However, for the reasons discussed above at [1.48] to [1.53] in relation to the registration requirements for these persons or entities, there are questions as to whether the breadth of the obligation for persons and entities to register as 'third party campaigners' or 'political campaigners' is sufficiently circumscribed, due to the broad definitions of 'political expenditure' and in particular 'political purposes'.

1.81 Equally, the prohibition on foreign donations to third party campaigners or certain political campaigners where those donations are for 'political purposes' is equally broad. Given the breadth of matters that may be considered as a 'political purpose', there appears to be a risk that legitimate fundraising activities for third party campaigners and political campaigners concerning matters of public importance may be significantly restricted.

1.82 There also appears to be a risk that requiring persons who donate over $250 to political campaigners or political entities to provide 'appropriate donor information' in the form of a statutory declaration[44] may create a significant administrative burden for local donors, potentially reducing the likelihood of donations from persons who are not the target of the proposed laws. In this respect, it is noted that the United Nations Special Rapporteur on the Right of Freedom of Assembly and Association has stated that access to funding and resources for associations (including foreign and international funding) is an 'integral and vital part

42 See *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France,* no.71251/01, ECHR 2007-II, [45]-[47].

43 SOC [14].

44 See sections 302L and 302P.

of the right to freedom of association'.[45] The Special Rapporteur also noted that legitimate public interest objectives, such as responding to national security, should not be used in such a way as to 'undermine the credibility of the concerned association, or to unduly impede its legitimate work'.[46]

1.83 The concerns that flow from the breadth of the expression 'political purpose' also arise in relation to proposed section 302G, insofar as a person contravenes the section if they solicit a foreign donation for the purpose of transferring that donation to 'any other person for one or more political purposes'. As set out above, 'political purpose' means 'the public expression by any means of views on an issue that is, or is likely to be, before electors in an election', regardless of whether or not a writ has been issued for the election.[47] Again, given the scope of the concept of 'political purposes', it appears this could apply to persons who solicit overseas funds for a broad variety of activities and purposes that may be classified as 'political purposes' because they arise (whether significantly or incidentally) as an issue in an election.

Committee comment

1.84 The preceding analysis raises questions about the compatibility of the foreign donations restrictions in section 302E and the prohibition on soliciting foreign donations in section 302G with the right to freedom of expression, the right to freedom of association and the right to take part in public affairs. This is because the breadth of the concept of 'political purpose' as it applies to those sections may be insufficiently circumscribed so as to be a proportionate limitation on these rights.

1.85 The committee therefore seeks the advice of the minister as to the proportionality of the foreign donation restrictions as they apply to third party campaigners and political campaigners (in section 302E) and 'any other person' (in section 302G), having regard to the breadth of the concept of 'political purpose' (including whether the measures are sufficiently circumscribed).

1.86 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

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

1.87 As noted earlier in relation to the civil penalties regime for failure to register as a political campaigner, third party campaigner or associated entity, civil penalty

45 *Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association* (A/HRC/20/27) (2012) [67]-[68].

46 *Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association* (A/HRC/20/27) (2012) [70].

47 Section 287(1) of the bill.

provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty is characterised as 'criminal' for the purposes of international human rights law. The relevant principles are summarised above at [1.60] to [1.66].

1.88 The statement of compatibility states that the 'new civil penalty provisions do not constitute criminal penalties for the purposes of human rights law as they are not classified as criminal under Australian law and are restricted to people in a specific regulatory context'.

1.89 However, as noted earlier and as set out in the committee's *Guidance Note 2,* 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. Further, as with the civil penalties for failing to register as a political campaigner, third party campaigner or associated entity, no information available in the statement of compatibility to ascertain the nature and purpose of the civil penalty in accordance with the second step in *Guidance Note 2*, for example whether the penalties are intended to punish or deter.

1.90 As to the severity of the penalty, it is noted that the penalties applicable for breaching the foreign donations restrictions are significant, ranging from 500 penalty units to 1000 penalty units for the various offences. However, noting that the severity of the penalty must be assessed with due regard to the regulatory context, it is not possible to determine whether the pecuniary penalty is sufficiently severe to amount to a 'criminal penalty' at this stage due to the lack of information in the statement of compatibility.

1.91 As noted earlier, if the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, they must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

Committee comment

1.92 The committee draws the attention of the minister to its *Guidance Note 2* and seeks the advice of the minister as to whether the civil penalty provisions in relation to the foreign donations restrictions may be considered to be 'criminal' in nature for the purposes of international human rights law, in particular:

- **information regarding the regulatory context in which the civil penalty provisions operate, including the nature of the sector being regulated and the relative size of the pecuniary penalties being imposed in context;**
- **information regarding the purpose of the penalties (including whether they are designed to deter or punish); and**
- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be 'criminal' in nature.**

1.93 If the penalties could be considered 'criminal' for the purposes of international human rights law, the committee seeks the advice of the minister as to how, and whether, the measures could be amended to accord with criminal process rights including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

1.94 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

Reporting of non-financial particulars in returns

1.95 Proposed section 314AB introduces new requirements for political parties and political campaigners to disclose in their annual returns to the Electoral Commission the details of senior staff employed or engaged by or on behalf of the party or branch, or by or on behalf of the campaigner in its capacity as a political campaigner, and any membership of any registered political party that any of those members of staff have. Proposed section 309(4) imposes the same obligation on election or by-election candidates to disclose in their returns the name and party membership of senior staff, and proposed section 314AEB imposes the same requirement on third party campaigners. 'Senior staff' is defined in proposed section 287(1) to mean the directors of a person or entity or any person who makes or participates in making decisions that affect the whole or a substantial part of the operations of the person or entity.

1.96 Failure to provide the relevant return results in liability to civil penalties. Candidates who fail to provide returns in accordance with section 309, and third party campaigners who fail to provide returns in accordance with section 314AEB, are liable to a civil penalty of 180 penalty units per day for each day the return is not provided within the required timeframe.[48] Failure to provide an annual return in accordance with section 314AB attracts liability to a civil penalty of 360 penalty units per day for each day the annual return is not provided within the required timeframe (that is, within 16 weeks after the end of the financial year).[49]

Compatibility of the measure with the right to privacy

1.97 As noted earlier, the right to privacy includes respect for informational privacy, including the right to control the dissemination of information about one's private life. As acknowledged in the statement of compatibility, the disclosure of the

48 See the note at the end of proposed section 309(2) and (3) and section 314AEB(1).

49 See proposed section 314AB(1).

names of senior staff of candidates, third party campaigners and of political parties in returns engages and limits the right to privacy.[50]

1.98 The statement of compatibility states that these limitations on the right to privacy are 'justifiable on the basis that they promote transparency of the electoral system' and further states that:

> It is important to remember that the individuals whose privacy is impacted freely choose to play a prominent role in public debate and put themselves, or those they represent, forward for public office. It is therefore appropriate, objective, legitimate and proportional that the public has access to this information.[51]

1.99 While the objective of transparency in the electoral system is likely to be legitimate for the purpose of international human rights law, particularly in light of the breadth of the concept of 'third party campaigners' discussed above, it is unclear how disclosure of the names of senior staff and any political party affiliation they may have is rationally connected to (that is effective to achieve) that objective. No information is provided in the statement of compatibility explaining this aspect of the bill.

1.100 There are also concerns as to the proportionality of the measure. Limitations on the right to privacy must only be as extensive as is strictly necessary to achieve its legitimate objective. The definition of 'senior staff' is very broad, and is not limited to senior decision-makers but also extends to any person who 'participates in making decisions that affect the whole or a substantial part of the operations of the person or entity'. It is not clear that persons who merely participate in making, but do not make, decisions can be said to 'play a prominent role in public debate'.[52] The breadth of this definition, coupled with the breadth of the concept of 'third party campaigner', raises concerns that the measure may be broader than necessary to achieve the objective, and that other, less rights-restrictive options, may be available.

Committee comment

1.101 The preceding analysis raises concerns as to whether the requirement to disclose the name and any political party affiliation of senior staff in returns to the Electoral Commission is compatible with the right to privacy.

1.102 The committee therefore seeks the advice of the minister as to the compatibility of the measure with this right, in particular:

- **how the measure is rationally connected to (that is, effective to achieve) the legitimate objective; and**

50 SOC, [10].

51 SOC, [10]-[11].

52 SOC, [11].

- **whether the measure is a proportionate limitation on the right to privacy (including whether the measure is sufficiently circumscribed, and whether there are any less rights-restrictive measures available).**

1.103 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

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

1.104 Similar issues arise in relation to the civil penalties associated with failing to file a return as those discussed earlier, namely, whether the civil penalties may be classified as 'criminal' for the purposes of international human rights law. The relevant principles are summarised above at [1.60] to [1.66].

1.105 The statement of compatibility provides the same justification for the civil penalties as discussed previously, namely that the provisions do not constitute criminal penalties for the purposes of human rights law as they are not classified as criminal under Australian law and are restricted to people in a specific regulatory context. As noted earlier, the classification of a civil penalty under domestic law is one relevant factor in determining whether a measure is 'criminal' for the purposes of international human rights law.

1.106 As to the second step outlined in *Guidance Note 2,* no information is provided as to the purpose or nature of the penalty, including whether the penalty is designed to deter or punish.

1.107 As to the severity of the penalty, as the provisions operate such that each day a person or entity is required to submit a return but has not constitutes a continuing contravention of the subsection, the potential maximum civil penalty could be substantial. This raises concerns that the penalties may be 'criminal' for the purposes of international human rights law in light of the severity of the penalty. However, the severity of the penalty in this particular regulatory context is unclear due to the lack of information in the statement of compatibility.

Committee comment

1.108 The committee draws the attention of the minister to its *Guidance Note 2* and seeks the advice of the minister as to whether the civil penalty provisions in reporting of non-financial particulars in returns may be considered to be 'criminal' in nature for the purposes of international human rights law, in particular:

- **information regarding the regulatory context in which the civil penalty provisions operate, including the nature of the sector being regulated and the relative size of the pecuniary penalties being imposed in context;**
- **information regarding the purpose of the penalties (including whether they are designed to deter or punish); and**

- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be 'criminal' in nature.**

1.109 If the penalties could be considered 'criminal' for the purposes of international human rights law, the committee seeks the advice of the minister as to how, and whether, the measures could be amended to accord with criminal process rights including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

1.110 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017

Purpose	Amends the *Enhancing Online Safety Act 2015* to prohibit the posting of, or threatening to post, an intimate image without consent on a social media service, relevant electronic service or a designated internet service; establish a complaints and objections system to be administered by the eSafety Commissioner; provide the commissioner with powers to issue removal notices or remedial directions; establish a civil penalty regime to be administered by the commissioner; and enable the commissioner to seek a civil penalty order from a relevant court, issue an infringement notice, obtain an injunction or enforce an undertaking, or issue a formal warning for contraventions of the civil penalty provisions; and makes a consequential amendment to the *Broadcasting Services Act 1992*
Portfolio	Communications and the Arts
Introduced	Senate, 6 December 2017
Rights	Fair trial; criminal process (see **Appendix 2**)
Status	Seeking additional information

Civil penalty provision

1.111 Proposed section 44B of the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017 (the bill) would prohibit posting, or threatening to post, an intimate image without consent on a social media service, relevant electronic service or a designated internet service.[1]

1.112 Under the bill, the e-Safety Commissioner may issue a removal notice, requiring removal of the intimate image, to: a provider of a social media service or relevant electronic service,[2] an end-user who posts an intimate image on the service,[3] or a hosting service provider which hosts the intimate image.[4] If a person has contravened or is contravening proposed section 44B, then the e-Safety Commissioner may give that person a written direction ('remedial direction') to take specified action to ensure they do not contravene section 44B in future.[5]

1 See, Item 3; Statement of compatibility (SOC), p. 10.

2 See proposed section 44D of the *Enhancing Online Safety Act 2015.*

3 See proposed section 44E of the *Enhancing Online Safety Act 2015.*

4 See proposed section 44F of the *Enhancing Online Safety Act 2015*.

5 See proposed section 44K of the *Enhancing Online Safety Act 2015*.

1.113 The bill is framed so that it triggers the civil penalty provisions of the *Regulatory Powers (Standard Provisions) Act 2014* in relation to a contravention of the prohibition on the non-consensual sharing of intimate images, and in relation to failure to comply with a removal notice or remedial direction. This means that a civil penalty of up to 500 penalty units ($105,000) applies to such a contravention.[6]

Compatibility of the measure with criminal process rights

1.114 As set out in the statement of compatibility, the civil penalty provisions in the bill are 'aimed at protecting the privacy and reputation of vulnerable people'.[7]

1.115 Under Australian domestic law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, civil penalty provisions engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) where the penalty is regarded as 'criminal' for the purposes 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 described as 'civil' under Australian domestic law.

1.116 Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is necessarily illegitimate or unjustified. Rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the right not to be tried and punished twice (the prohibition against double jeopardy) and the right not to incriminate oneself apply.

1.117 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. The statement of compatibility for the bill usefully provides an assessment of whether the civil penalty provisions may be considered 'criminal' for the purposes of international human rights law.[8]

1.118 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under domestic law. In this instance, as noted in the statement of compatibility, the penalties are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law.

1.119 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be 'criminal' if the purpose of the penalty is to

6 SOC, p. 10.

7 SOC, p. 9.

8 SOC, p. 10.

punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). As the penalties under the bill may apply to a broad range of internet and social media users it appears that the penalties apply to the public in general. However, in relation to the purpose of the penalty, the statement of compatibility states that the purpose of the penalty is to encourage compliance rather than to punish. To the extent that this is the purpose of the penalty, this indicates that the penalty should not be considered 'criminal' under this step of the test.

1.120 The third step is to consider the severity of the penalty. A penalty is likely to be considered 'criminal' where it carries a penalty of a substantial pecuniary sanction. This must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. In this case an individual could be exposed to a significant penalty of up to $105,000. The statement of compatibility states that this 'reflects the extremely serious nature of the non-consensual sharing of intimate images.'[9] However, the potential application of such a large penalty to an individual in this context raises significant questions about whether this particular measure ought to be considered 'criminal' for the purposes of international human rights law. The statement of compatibility points to the court's discretion in the amount of penalty to be imposed as a reason why the penalty should not be considered criminal. Yet, it is the maximum penalty that may be imposed which is relevant to considering whether a civil penalty is 'criminal' for the purposes of international human rights law.

1.121 If the penalty is considered to be 'criminal' for the purposes of international human rights law, the 'civil penalty' provisions in the bill must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. In this case, the measure does not appear to accord with criminal process guarantees. For example, the burden of proof is on the civil standard of the balance of probabilities rather than the criminal standard of beyond reasonable doubt as required by the right to be presumed innocent.

Committee comment

1.122 The preceding analysis raises questions about whether the civil penalties may be considered 'criminal' for the purposes of international human rights law.

1.123 The committee seeks the advice of the minister as to:

- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and**

9 SOC, p. 10.

- **if the penalties are considered 'criminal' for the purposes of international human rights law:**
  - **whether they are compatible with criminal process rights including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1));**
  - **whether any limitations on these rights imposed by the measures are permissible;[10] and**
  - **whether the measures could be amended to accord with criminal process rights.**

10 Some criminal process rights may be subject to permissible limitations where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. However, other criminal process rights are absolute and cannot be subject to permissible limitations.

Foreign Influence Transparency Scheme Bill 2017; and Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017

Purpose	Seeks to establish the Foreign Influence Transparency Scheme, which introduces registration obligations for persons or entities who have arrangements with, or undertake certain activities on behalf of, foreign principals
Portfolio	Attorney-General
Introduced	House of Representatives, 7 December 2017
Rights	Freedom of expression, freedom of association, right to take part in public affairs, privacy (see **Appendix 2**)
Status	Seeking additional information

Registration and disclosure scheme for persons undertaking activities on behalf of a foreign principal

1.124 The Foreign Influence Transparency Scheme Bill 2017 (the bill) seeks to establish a scheme requiring persons to register where those persons undertake activities on behalf of a 'foreign principal'[1] that are 'registrable' in relation to the foreign principal. Section 21 of the bill provides that an activity on behalf of a foreign principal is 'registrable' if the activity is Parliamentary lobbying,[2] general political lobbying,[3] communications activity,[4] or donor activity,[5] and the activity is in Australia

1 Foreign principal is defined in section 10 of the bill to mean: (a) a foreign government; (b) a foreign public enterprise; (c) a foreign political organisation; (d) a foreign business; (e) an individual who is neither an Australian citizen nor a permanent Australian resident.

2 For Parliamentary lobbying, section 21 only applies to foreign principals who are a foreign public enterprise, foreign political organisation, foreign businesses, or individuals. Where the foreign principal is a foreign government, the activity is registrable if it is parliamentary lobbying in Australia whether or not the purpose is political or governmental influence: section 20 of the bill. 'Parliamentary lobbying' is defined in section 10 of the bill to mean lobbying a member of parliament or a person employed under section 13 or 20 of the *Members of Parliament (Staff) Act 1984*.

3 'General political lobbying' is defined in section 10 to mean lobbying any one or more of the following: (a) a Commonwealth public official; (b) a Department, agency or authority of the Commonwealth; (c) a registered political party; (d) a candidate in a federal election; other than lobbying that is Parliamentary lobbying.

4 Section 13 of the bill provides that a person undertakes 'communications activity' if the person communicates or distributes information or material.

5 For donor activity, section 21 only applies to foreign principals who are a foreign government, foreign public enterprise, or a foreign political organisation.

for the purpose of political or governmental influence.[6] Additional registration requirements and broader activities requiring registration apply to recent Cabinet Ministers, recent Ministers, members of Parliament and other senior Commonwealth position holders.[7]

1.125 Section 11 of the bill provides that a person will undertake activity 'on behalf of' a foreign principal if the person undertakes the activity:

> (a) under an arrangement with the foreign principal; or
>
> (b) in the service of the foreign principal; or
>
> (c) on the order or at the request of the foreign principal; or
>
> (d) under the control or direction of the foreign principal; or
>
> (e) with funding or supervision by the foreign principal; or
>
> (f) in collaboration with the foreign principal.

1.126 Section 12 provides that a person undertakes an activity for the purpose of political or governmental influence if:

> (1) …. a purpose of the activity (whether or not there are other purposes) is to influence, directly or indirectly, any aspect (including the outcome) of any one or more of the following:
>
> (a) a process in relation to a federal election or a designated vote;
>
> (b) a process in relation to a federal government decision;
>
> (c) proceedings of a House of the Parliament;
>
> (d) a process in relation to a registered political party;
>
> (e) a process in relation to a member of the Parliament who is not a member of a registered political party;
>
> (f) a process in relation to a candidate in a federal election who is not endorsed by a registered political party.

1.127 Section 22 of the bill imposes registration requirements on recent cabinet ministers who undertake activities on behalf of a foreign principal.[8] 'Recent cabinet minister' is defined in proposed section 10 to mean, at a particular time, a person who was a Minister and member of the Cabinet at any time in the three years before that time, but who is not at the particular time a Minister, member of the Parliament or a holder of a senior Commonwealth position. The bill does not specify the kinds of

6 Section 21 of the bill.

7 See sections 22 and 23 of the bill.

8 The requirement does not apply where the foreign principal is an individual, the activity is not registrable in relation to the foreign principal under another provision of the division, and the person is not exempt: section 22(b).

activities a recent Cabinet minister needs to undertake in order to be required to register.

1.128 Proposed section 23 imposes a registration obligation on recent ministers, members of Parliament[9] and other holders of senior Commonwealth positions[10] who undertake activity on behalf of a foreign principal where, in undertaking the activity, the person 'contributes experience, knowledge, skills or contacts gained in the person's former capacity as a Minister, member of Parliament or holder of a senior Commonwealth position'.[11] As with the registration requirement for cabinet ministers, proposed section 23 does not specify the kinds of activities that a recent minister, member of Parliament or holder of senior Commonwealth position needs to undertake, save that the person has used their experience gained in their former capacity in undertaking that activity.

1.129 There are several exemptions from registration for certain types of activity undertaken on behalf of a foreign principal, including activities undertaken for the provision of humanitarian aid or humanitarian assistance,[12] legal advice or representation,[13] diplomatic, consular or similar activities,[14] or where the person is acting in accordance with a particular religion of a foreign government,[15] where the activity is for the purpose of reporting news,[16] or where the activity is the pursuit of bona fide business or commercial interests.[17] There is also a broad power to make rules to prescribe activities as being exempt from registration.[18] The penalty for non-compliance is a criminal offence punishable by 7 years imprisonment where a person

9 'Recent Minister or member of Parliament' is defined in proposed section 10 to mean a person who was (but is no longer) a Minister or a member of the Parliament at any time in the previous 3 years: section 10.

10 'Recent holder of a senior Commonwealth position' is defined in section 10 to mean a person who held a senior Commonwealth position at any time in the 18 months before the time, and is not at the time a Minister, member of the Parliament or a holder of a senior Commonwealth position. 'Senior Commonwealth position' covers positions at the agency head and deputy agency head levels.

11 The requirement does not apply where the foreign principal is an individual, the activity is registrable in relation to the foreign principal under another provision of the division, and the person is exempt: section 23.

12 Section 24 of the bill.

13 Section 25 of the bill.

14 Section 26 of the bill.

15 Section 27 of the bill.

16 Section 28 of the bill.

17 Section 29 of the bill.

18 Section 30 of the bill.

intentionally omits to apply or renew registration when undertaking registrable activity.[19]

1.130 Section 43(1) of the bill provides that the Secretary must make available to the public, on a website, certain information in relation to persons registered in relation to a foreign principal. This includes the name of the person and the foreign principal, a description of the kind of registrable activities the person undertakes on behalf of a foreign principal, and 'any other information prescribed by the rules'.[20] Section 43(2) qualifies this obligation by clarifying that the Secretary may decide not to make particular information available to the public if the Secretary is satisfied the particular information is commercially sensitive, affects national security or is of a kind prescribed by the rules for the purposes of this scheme.

1.131 The *Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017* (the Charges Bill) imposes charges in relation to the foreign influence transparency scheme, and provides that the amount of charge payable upon applying to register under the scheme or renewing registration under the scheme is 'the amount prescribed by the regulations'.[21]

Compatibility of the measure with the freedom of expression, the freedom of association, the right to take part in the conduct of public affairs, and the right to privacy

1.132 The obligation to publicly disclose, by way of registration, information about a person's relationship with a foreign principal and activities undertaken pursuant to that relationship engages the freedom of expression, the freedom of association, the right to take part in the conduct of public affairs and the right to privacy.[22]

1.133 The right to freedom of expression in Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) includes freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of her or his choice. As acknowledged in the statement of compatibility, attaching compulsory registration and public reporting obligations on persons acting on behalf of foreign principals (as well as criminal penalties for non-compliance) interferes with that person's freedom to disseminate ideas and information, and therefore limits the freedom of expression.[23] However,

19 Section 57 of the bill.

20 Section 43(1)(c) of the bill.

21 Section 6 of the Charges Bill.

22 Statement of Compatibility (SOC) [62] and [72].

23 SOC [62].

the bill also promotes the freedom of expression insofar as it allows the public to receive information with transparency about the source of that information.[24]

1.134 The right to freedom of association in Article 22 of the ICCPR protects the right to join with others in a group to pursue common interests. The right prevents States parties from imposing unreasonable and disproportionate restrictions on the right to form associations, including imposing procedures that may effectively prevent or discourage people from forming an association. The statement of compatibility acknowledges that the bill regulates activities which may fall within the scope of Article 22, and may limit the right to freedom of association by requiring associations acting on behalf of foreign principals to register and disclose their activities.[25]

1.135 The right to take part in public affairs includes the right of every citizen to take part in the conduct of public affairs by exerting influence through public debate and dialogues with representatives either individually or through bodies established to represent citizens.[26] The statement of compatibility acknowledges that registration and disclosure obligations concerning activities that may be described as 'influencing through public debate and dialogues' may limit the right to take part in public affairs.[27]

1.136 The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy, and recognises that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy also includes respect for information privacy, including the right to control the dissemination of information about one's private life. The statement of compatibility acknowledges

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24 SOC [64]. In the United States, the registration requirements under the US *Foreign Agents Registration Act* have been found to be compatible with the First Amendment (freedom of expression) on the basis it promotes the freedom of expression: "Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment. No strained interpretation should frustrate its essential purpose": *Attorney-General of the United States of America v The Irish People Inc.,* 684 F.2d 928 (1982) (United States Court of Appeals, District of Columbia Circuit) [71]; see also *Meese v Keene,* 481 U.S. 465 (1987) (United States Supreme Court) 481-483 ("By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech").

25 SOC [71]-[73].

26 Article 25 of the ICCPR; UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [1],[5]-[6].

27 SOC [81].

that the right to privacy is limited by the requirement that persons publicly disclose information pertaining to the activities and relationships undertaken on behalf of a foreign principal.[28]

1.137 For each of the rights engaged, the statement of compatibility states that to the extent these rights are limited, the limitations are reasonable, necessary and proportionate to the legitimate objective of the bill.

1.138 The statement of compatibility describes the objective of the bill as follows:

> The objective of the Bill is to introduce a transparency scheme to enhance government and public knowledge of the level and extent to which foreign sources may, through intermediaries acting on their behalf, influence the conduct of Australia's elections, government and parliamentary decision-making, and the creation and implementation of laws and policies.[29]

1.139 This is likely to be a legitimate objective for the purposes of human rights law.[30] Requiring persons who have acted on behalf of foreign principals to register also appears to be rationally connected to the achievement of this objective.

1.140 In order for a limitation on human rights to be proportionate, the limitation must be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective. Limitations on human rights must also be accompanied by adequate and effective safeguards to protect against arbitrary application. Here, questions arise as to the breadth of the definitions of 'foreign principal', 'on behalf of' and 'for the purpose of political or governmental influence' creating an uncertain and potentially very broad range of conduct falling within the scope of the scheme. For example, concerns have been expressed as to the implications for academic freedom and reputation where an Australian university academic would be required to register upon receipt of a scholarship or grant wholly or partially from foreign sources, where that funding is conditional on the researcher undertaking and publishing research that is intended to influence Australian policy-making.[31] Such behaviour would appear to fall within the types of registrable

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28 SOC [55].

29 SOC [21], [85].

30 UN Human Rights Committee, *General Comment No. 34: Article 19, Freedom of Opinion and Expression* (2011), [3]. See also *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France,* no.71251/01, ECHR 2007-II, [43]-[44], where the European Court of Human Rights accepted that prohibiting foreign States and foreign legal entities from funding national political parties pursued the legitimate aim of protecting institutional order; *Attorney-General of the United States of America v The Irish People Inc.,* 684 F.2d 928 (1982) (United States Court of Appeals, District of Columbia Circuit); *Meese v Keene,* 481 U.S. 465 (1987) (United States Supreme Court).

31 Primrose Riordan, 'Universities alarmed new treason laws could target academics', http://www.theaustralian.com.au/higher-education/universities-alarmed-new-treason-laws-could-target-academics/news-story/af896886be03dd1c9517536e4cd70be1 (15 December 2017)

activities that a person may undertake 'on behalf of' a foreign principal, as it is an activity undertaken 'with funding or supervision by the foreign principal'[32] for the purpose of influencing 'a process in relation to a federal government decision'.[33]

1.141 Similarly, the definition of 'foreign principal' is very broad, and includes individuals who are neither an Australian citizen nor a permanent Australian resident.[34] This definition, coupled with the definition of 'on behalf of', appears to be broad enough to mean that section 21 of the bill imposes a registration requirement on domestic civil society, arts or sporting organisations which may have non-Australian members (such as individuals residing in Australia under a non-permanent resident visa, or foreign members) who may be considered as acting 'on behalf of' a foreign principal where they have undertaken activity 'in collaboration with' or 'in the service of' their membership (including foreign members) when seeking funding from government, engaging in advocacy work, or pursuing policy reform. In this respect the measures also engage the right to equality and non-discrimination, discussed further below. The uncertainty is heightened by the fact that the amount of the charge payable upon registration is not contained in the Charges Bill but instead will be prescribed by regulation,[35] as well as the significant criminal penalties imposed for non-compliance.[36]

1.142 In relation to proposed sections 22 and 23 of the bill, the application of the provisions is even broader as *any* kinds of activities falling within this provision undertaken 'on behalf of' a foreign principal gives rise to a registration requirement. In this respect, the explanatory memorandum states in relation to recent cabinet ministers that:

> Given recent Cabinet Ministers have occupied a significant position of influence, are likely to have a range of influential contacts with decision making authority in the political process and have had access to classified and sensitive information concerning current and recent Australian Government priorities, it is in the public interest to know when such persons have an arrangement with a foreign principal.[37]

1.143 Similarly in relation to recent ministers, members of parliament and persons holding senior commonwealth positions, the explanatory memorandum states that registration is justified because 'these persons bring significant influence to bear in any activities undertaken on behalf of a foreign principal' and that it is 'in the public interest to require transparency of such individuals where the person is contributing

32 See section 11(1)(e) of the bill.

33 See section 12(1)(b) of the bill.

34 Section 10 of the bill.

35 Section 6 of the Charges Bill.

36 See section 57 of the bill.

37 Explanatory Memorandum, [303].

skills, knowledge, contacts and experience gained through their previous public role'. However, for the reasons earlier stated, the definition of 'on behalf of' is very broad, and creates uncertainty as to what activities fall within the scope of the scheme.

1.144 The breadth of these definitions, their potential application, the cost of compliance and the consequence of non-compliance raise concerns that the bill may be insufficiently circumscribed, and may unduly obstruct the exercise of the freedom of expression, association and right to take part in public affairs.[38]

1.145 It is acknowledged that the bill includes several exemptions from registration requirements for certain types of activities (including exemptions for activities undertaken on behalf of foreign principals solely, or solely for the purposes of, reporting news, presenting current affairs or expressing editorial content in news media[39]), as well as a provision allowing for rules to be made specifying additional exemptions from registration. It is not clear, however, whether these safeguards in this bill are, of themselves, sufficient. It is also noted that comparable international schemes contain exemptions in the primary legislation to cover matters such as academic freedom, where agents of foreign principals who engage in activities to further *bona fide* scholastic, academic or scientific pursuits or the fine arts are not subject to registration obligations.[40]

1.146 Further, in relation to the right to privacy, it is noted that the Secretary's power in section 43(1)(c) of the bill to make available to the public 'any other information prescribed by the rules' is very broad. While the statement of compatibility notes that disclosure of information relevant to the scheme is limited and carefully regulated,[41] no information is provided in the statement of compatibility as to the safeguards in place to protect the right to privacy where the Secretary enacts rules pursuant to section 43(1)(c), and whether there would be any less rights-restrictive ways to achieve the objective. Noting that limitations on the right to privacy must be no more extensive than is strictly necessary, additional questions arise as to whether this aspect of the measure is proportionate.

Committee comment

1.147 The preceding analysis raises questions as to the compatibility of the proposed foreign influence transparency scheme with the freedom of expression,

38 See UN Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association,* A/HRC.20/27 (21 May 2012) [64]-[65].

39 See proposed section 28 of the bill. Section 28 only applies if the foreign principal is a foreign business or an individual, and does not apply in relation to activities that are registrable in relation to a foreign principal for recent cabinet ministers or recent Ministers, members of Parliament and other holders of senior Commonwealth positions: section 28(2). See also the exemptions listed in sections 24,25,26,27 and 29.

40 See the United States' Foreign Agents Registration Act, 22 USC 611-621, section 613(e).

41 SOC [58].

the freedom of association, the right to take part in the conduct of public affairs, and the right to privacy.

1.148 The committee seeks the advice of the minister as to whether the measure is proportionate to the legitimate objective of the measure, including:

- **whether the proposed obligation on persons to register where they act 'on behalf' of a 'foreign principal' is sufficiently circumscribed to ensure that the limitation on human rights is only as extensive as strictly necessary;**
- **whether the measure is accompanied by adequate safeguards (with particular reference to the exemptions from registration, including the exemption to news media in section 28 of the bill); and**
- **in relation to the right to privacy, whether the Secretary's power in section 43(1) to make available to the public 'any other information prescribed by the rules' is sufficiently circumscribed and accompanied by adequate safeguards.**

1.149 Mr Leeser deliberately did not participate in consideration of this report entry as he wished to reserve his position pending further consideration of the bills by the Parliamentary Joint Committee on Intelligence and Security, of which he is also a member.

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

1.150 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.

1.151 'Discrimination' under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination).[42] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively or disproportionately affects people with a particular personal attribute.[43]

42 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'.

43 *Althammer v Austria*, Human Rights Committee Communication no. 998/01 [10.2].

1.152 While Australia maintains a discretion under international law with respect to its treatment of non-nationals, Australia has obligations under article 26 of the ICCPR not to discriminate on grounds of nationality or national origin.[44]

1.153 The definition of 'foreign principal' is very broad, and includes individuals who are neither an Australian citizen nor a permanent Australian resident.[45] As noted earlier, this definition, coupled with the definition of 'on behalf of', appears to be broad enough to require domestic civil society, arts or sporting organisations which may have non-Australian members (such as individuals residing in Australia under a non-permanent resident visa, or foreign members) to register where they have undertaken activity 'in collaboration with' or 'in the service of' their membership (including foreign members) when seeking funding from government, engaging in advocacy work, or pursuing policy reform. This raises concerns that the registration requirement may have a disproportionate negative effect on persons or entities that have a foreign membership base. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. The statement of compatibility does not acknowledge that the right to equality and non-discrimination is raised by the registration requirement, so does not provide an assessment as to whether the limitation is justifiable under international human rights law.

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

1.155 As discussed at [1.139] above, it is likely that the objective of the bill will be a legitimate objective for the purposes of international human rights law, and that the registration requirements are rationally connected to this objective. However for the reasons earlier stated, questions remain as to whether the consequence of the broad definitions of 'foreign principal' coupled with 'on behalf of' (that is, requiring a range of civil society or other organisations acting 'in the service of' or 'in collaboration with' their foreign membership to register) are overly broad such that this does not appear to be the least rights-restrictive approach.

Committee comment

1.156 The committee notes that the breadth of the definition of 'foreign principal', coupled with the definition of 'on behalf of', raises concerns that the registration requirement may have a disproportionate negative effect on persons

44 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens* (2004).

45 Section 10 of the bill.

or entities that have a foreign membership base, and could therefore amount to indirect discrimination on the basis of nationality.

1.157 The statement of compatibility does not acknowledge that the foreign influence transparency scheme engages the right to equality and non-discrimination and therefore does not provide an assessment of whether the scheme is compatible with this right.

1.158 The committee therefore seeks the advice of the minister as to the compatibility of the foreign influence transparency scheme with the right to equality and non-discrimination.

1.159 Mr Leeser deliberately did not participate in consideration of this report entry as he wished to reserve his position pending further consideration of the bills by the Parliamentary Joint Committee on Intelligence and Security, of which he is also a member.

My Health Records (National Application) Rules 2017 [F2017L01558]

Purpose	Provides for the nationwide implementation of the My Health Record system on an opt-out basis
Portfolio	Health
Authorising legislation	*My Health Records Act 2012*
Last day to disallow	Tabled in the House of Representatives on 4 December 2017; tabled in the Senate on 5 December 2017. Last day to disallow currently 26 March 2018 (Senate)
Right	Privacy (see **Appendix 2**)
Status	Seeking additional information

Background

1.160 The My Health Record system, previously referred to as the personally controlled electronic health record (PCEHR), is an electronic summary of an individual's health records. The system currently operates on an opt-in basis, meaning that persons register to obtain a My Health Record.

1.161 The *Health Legislation Amendment (eHealth) Act 2015* enables trials to be undertaken in defined locations on an opt-out basis, with an individual's health records automatically uploaded onto the My Health Record system unless that individual takes steps to request that their information not be uploaded. The Act also allows the opt-out process to be applied nationwide following the trial. The committee previously assessed this legislation in its *Twenty-ninth Report of the 44th Parliament* and *Thirty-second report of the 44th Parliament*.[1]

Automatic inclusion of health information on the My Health Record system

1.162 The My Health Records (National Application) Rules 2017 [F2017L01558] (the instrument) provides for the implementation of the My Health Record system nationwide on an opt-out basis. Under the scheme, a My Health Record will automatically be created for all healthcare recipients,[2] unless they choose to opt-out.

1.163 Under the instrument, all people with an Individual Healthcare Identifier (IHI), which includes all people enrolled in Medicare or with a Department of

1 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (13 October 2015) pp. 9-24 and *Thirty-second report of the 44th Parliament* (1 December 2015) pp. 64-86.

2 Under the *My Health Records Act 2012*, 'healthcare recipient' is defined as 'an individual who has received, receives, or may receive, healthcare'.

Veterans' Affairs file number, will be provided the opportunity to opt-out during a three-month 'opt-out period' before their record is automatically created.[3] Healthcare recipients can also choose to cancel or suspend their registration at any time after their My Health Record is created.[4]

Compatibility of the measure with the right to privacy

1.164 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life. By enabling the uploading of the personal health records of all healthcare recipients onto the My Health Record system, the instrument engages and limits the right to privacy. In this respect, as explained on the Department of Health website, My Health Records may contain very extensive health information such as records of 'medical consultations, blood tests and x-ray reports and prescriptions filled.'[5]

1.165 The statement of compatibility acknowledges that the instrument engages and limits the right to privacy but concludes that any limitation is necessary, reasonable and proportionate to achieving the objective of improving healthcare for Australians. The statement of compatibility also sets out that the measure promotes the right to health by 'improving the sharing of health information between treating healthcare providers, leading to quicker and safer treatment decisions and reducing repetition of information for patients and duplication of tests'.[6]

1.166 The broad objective of improving healthcare for all Australians is likely to be considered a legitimate objective for the purposes of international law. It may also be accepted that the sharing of health information between health practitioners

3 The three-month period will begin on a date to be specified by the minister. See, explanatory statement (ES) pp. 4-5.

4 ES, p. 5.

5 According to the Department of Health Website, the information stored on My Health Record can include: 'Clinical documents about your health – added by healthcare providers including: Shared Health Summary; Hospital discharge summaries; Pathology and diagnostic imaging reports; Prescribed and dispensed medication; Specialist and referral documents; Medicare and PBS information stored by the Department of Human Services, Medicare and RPBS information stored by the Department of Veterans' Affairs; Organ Donor decisions; Immunisations that are included in the Australian Immunisation Register. This may include childhood immunisations and other immunisations given to you by a healthcare provider; Personal health notes written by you or an authorised representative including: Contact numbers and emergency contact details; Current medications; Allergy information and any previous adverse reactions; Indigenous status; Veteran or ADF status; living will or advance care planning documents". Department of Health, My Health Record, https://myhealthrecord.gov.au/internet/mhr/publishing.nsf/Content/find-out-more?OpenDocument&cat=Managing%20your%20My%20Health%20Record

6 ES, statement of compatibility (SOC), p. 8.

through the My Health Record system may help enable more efficient and informed treatment of patients, therefore contributing to improved healthcare. The measure would therefore appear to be rationally connected to the objective.

1.167 In order to be a proportionate limitation on the right to privacy, a limitation should only be as extensive as is strictly necessary to achieve its objective. In this respect, there are concerns as to whether the measure is the least rights restrictive way to achieve the stated objective for the purposes of international human rights law. In particular, the blanket application of the system nationwide on an opt-out basis may be overly broad. It is noted that opt-in arrangements, where an individual expressly consents to having their health information uploaded to the online register, appears to constitute a less rights restrictive alternative. The statement of compatibility explains that the current arrangements are not effective to encourage broader participation, 'creating a barrier to achieving the full benefits of the system for individuals'.[7]

1.168 While increasing the number of people using the My Health Record system may potentially assist to achieve the objective of improving health outcomes, it is not clear whether a less rights restrictive approach to increasing the number of people using the system may be reasonably available. This may include, for example, measures promoting public awareness of and participation in the system in its current opt-in form or encouraging individuals with complex or serious health needs to opt-in. Further, information as to why, and the extent to which, the current opt-in system has not succeeded and is not a reasonably available alternative on an ongoing basis would assist in assessing whether the limitation on the right to privacy is proportionate. It is also possible that some people may not have opted-in to the My Heath Record system on the basis of reasonable concerns about their privacy. Further, it is unclear that automatically uploading key aspects of the medical records of all health care recipients is necessary to improve health outcomes for each individual. For example, it is unclear whether individuals who do not have ongoing or complex health needs will benefit from the proposed system.

1.169 Another relevant consideration in determining the proportionality of the measure is whether there are adequate safeguards in place to ensure that the limitation on the right to privacy is no more extensive than is strictly necessary. The statement of compatibility sets out a range of measures aimed at safeguarding informational privacy, including that individuals can restrict access to certain information, including Medicare information; effectively remove certain documents from the system; request their healthcare provider not upload certain information; monitor login activity in relation to their My Health Record; and cancel their registration at any time.[8] These points appear to provide individuals some measure of control over their electronic record. However, based on the information provided,

7 ES, SOC, p. 8.

8 ES, SOC, p. 10.

it is unclear as to the process for individuals to opt-out or control what is accessible through the My Health Record.

1.170 Other aspects of the system may not be sufficiently circumscribed, including in relation to the retention of data. The explanatory memorandum for the Health Legislation Amendment (eHealth) Bill 2015 explains that, when an individual cancels their existing My Health Record, information compiled on the individual up to that point will be retained, but cannot be accessed by any entity.[9] This apparently open-ended practice of retention raises further questions as to whether the limitation on the right to privacy is the least rights restrictive alternative to meet its objective.

1.171 The statement of compatibility also explains that healthcare recipients will have a 'reasonable period of time' to opt-out of the system, which is a three month window beginning from a future date to be specified by the minister.[10] The explanatory statement explains that:

> [i]n order to opt-out, a person must give notice to the System Operator in a particular manner. In practice, a person will be able to give this notice in a number of ways and at a time or period specified by the Minister, depending on their circumstances.

1.172 However, no specific information is set out in the explanatory materials as to how a person opts out in practice. Of particular concern is how the process would cater for people with communication difficulties or those without internet access.

1.173 A related question concerns how individuals will be made aware of the national opt-out arrangements and other relevant information about the My Health Record system. The importance of this aspect of the proposed rollout was noted in the final evaluation report of participation trials in the My Health Record system, commissioned by the Department of Health and conducted by Siggins Miller Consultants in 2016, which emphasised 'the need for any future national change and adoption strategy to include a much bigger emphasis on awareness and education'.[11] The statement of compatibility states that:

> [c]omprehensive information and communication activities are being planned to ensure all affected individuals, including parents, guardians and carers, are aware of the opt-out arrangements, what they need to do to participate, how to adjust privacy controls associated with their My Health Record, or opt-out if they choose.[12]

1.174 However, no further information is provided as to what these communication initiatives will entail and how they will be effective to ensure all

9 Health Legislation Amendment (eHealth) Bill 2015, explanatory memorandum, p. 95.

10 ES, SOC, p. 9.

11 Siggins Miller Consultants, *Evaluation of the Participation Trials for the My Health Record: Final Report* (November 2016) p. vii.

12 ES, SOC, pp. 9-10.

individuals are made aware of the My Health Record system including their ability to opt-out or control disclosure of information via the system. It is further noted that, as health recipients subject to the scheme will include a range of individuals with specific needs, including children[13] and persons with disabilities, any information and communication activities about the system would likely need to be appropriately tailored.

Committee comment

1.175 The preceding analysis raises questions as to whether the measure is a permissible limitation on the right to privacy. The committee therefore seeks the advice of the minister as to whether the measure is reasonable and proportionate to achieve the stated objective and, in particular:

- **whether the measure is the least rights restrictive way of achieving its stated objective (including why current opt-in arrangements could not be pursued on an ongoing basis, why it is necessary to automatically include the health record of all Australians and healthcare recipients on the My Health Record (rather than, for example, only those with complex or ongoing health conditions), and whether the retention of data after cancellation of a My Health Record account is adequately circumscribed); and**
- **whether there are sufficient processes and safeguards in place to ensure awareness and information in relation to the system, including the ability to opt-out or control information disclosure, will be adequately conveyed to the public, including in relation to children and persons with a disability.**

13 The explanatory statement states that individuals aged 14 years or older will be able to opt themselves out. Persons with parental or legal authority for another person may also opt out that other person. See ES, p. 5.

National Broadcasters Legislation Amendment (Enhanced Transparency Bill) 2017

Purpose	Amends the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991* to require annual reporting of employees whose combined salary and allowances are in excess of $200,000 annually
Portfolio	Communications and the Arts
Introduced	Senate, 6 December 2017
Right	Privacy (see **Appendix 2**)
Status	Seeking additional information

Disclosure of employee and on-air talent salaries in excess of $200,000

1.176 The National Broadcasters Legislation Amendment (Enhanced Transparency Bill) 2017 (the bill) seeks to amend the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991* to require the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) to disclose in their annual reports the names, position, salary and allowances for employees whose combined salary and allowances exceed $200,000 annually.[1] Similarly, for individuals who are not employees but are subject to an 'on air talent contract',[2] the bill requires that the total amount paid to the individual, the name of the individual and the nature of services performed by the individual be disclosed in the annual report.[3]

Compatibility of the measure with the right to privacy

1.177 The right to privacy encompasses respect for informational privacy, including the right to respect a person's private information and private life, particularly the storing, use and sharing of personal information.

1.178 The bill engages and limits the right to privacy by requiring the public disclosure of the names and amounts of remuneration of employees and on-air talent who are paid in excess of $200,000.

1 See proposed section 80A in Schedule 1, item 3 and proposed section 73A in Schedule 2, item 3 of the bill.

2 'On-air talent contract' refers to a contract between the ABC or SBS and an individual under which the individual performs services for the ABC or SBS including appearing on a television program or speaking or performing on a radio program: proposed section 80A(3) in Schedule 1, item 3 and proposed section 73A(3) in Schedule 2, item 3 of the bill.

3 See proposed section 80A(1)(b) in Schedule 1, item 3 and proposed section 73A(1)(b) in Schedule 2, item 3 of the bill.

1.179 The statement of compatibility acknowledges that the right to privacy is engaged and limited by the measure, but states that any limitation is reasonable, necessary and proportionate.[4]

1.180 The statement of compatibility explains the objective of the bill:

> There is a strong public interest in ensuring the Australian people can scrutinise the spending by publicly funded national broadcasters for the engagement of on-air talent contactors and employees. The amendments that would be made by the Bill will allow the public to hold the national broadcasters to account regarding the spending of public monies, and achieving appropriate value for money, in relation to remuneration for employees and on-air talent.
>
> …
>
> This reporting obligation will allow the public to have visibility of how proactive the national broadcasters are in closing any identified gender salary gaps.[5]

1.181 Promoting public transparency and scrutiny relating to the use of public revenues is likely to be a legitimate objective for the purposes of international human rights law,[6] as is the objective of reducing any gender salary gap. Insofar as the national broadcasters' expenditure on salaries of employees and on-air talent comes from public funds, disclosure of such salaries appears to be rationally connected to these objectives.

1.182 However, concerns arise as to whether the public disclosure of the names and remuneration of employees and on-air talent earning over $200,000 is proportionate to the legitimate objectives being pursued. Notwithstanding that persons employed or engaged by the ABC and SBS are remunerated for undertaking a public role, disclosure of a person's salary reveals a person's financial standing to the public at large and therefore constitutes a significant intrusion on a person's

4 Statement of Compatibility (SOC), p. 6.

5 SOC, p. 6.

6 See *Rechnungshof v Österreichischer Rundfunk and others*, Court of Justice of the European Union C-465/00, C-138/01, C-139/01, 20 May 2003, [85], where the Court of Justice of the European Union noted in a case concerning public disclosure of salaries that 'in a democratic society, taxpayers and public opinion generally have the right to be kept informed of the use of public revenues, in particular as regards the expenditure on staff. Such information….may make a contribution to the public debate on a question of general interest, and thus serves the public interest'. See also, the United Kingdom Information Commissioner's Office, *Freedom of Information Act Decision Notice* (26 September 2011), relating to disclosure of salary details of senior managers at the BBC: 'taxpayers will have a natural, and legitimate, interest in knowing how a publicly funded organisation allocates its funding' ([27]).

personal circumstances and private life.[7] For this to be proportionate, the measure should only be as extensive as is strictly necessary to achieve its legitimate objective.

1.183 In this respect, the minister explains in the statement of compatibility:

> The publication of de-identified and potentially aggregate information about these employees' and salaries and allowances, and the payments made to contractors in key on-air roles, is considered inadequate because it would not provide the transparency required to not only allow the public to see how its money is being spent, but also in identifying if there is a gender salary gap across similar roles or level of talent. This reporting obligation will allow the public to have visibility of how proactive the national broadcasters are in closing any identified gender salary gaps.
>
> …
>
> Publication of the employee or individual's name will allow the Australian public to identify the person and the role they perform, and assess whether the national broadcasters have achieved appropriate value for money in relation to the spending of public monies. Accordingly, the amendments are considered reasonable and proportionate to the objective of promoting public transparency and scrutiny and reducing the gender salary gap.[8]

1.184 While the minister explains that de-identified and aggregate information would be insufficient to determine how the ABC and SBS are spending their money and to identify any gender salary gap, it is not clear from the statement of compatibility why this should be the case. There appear to be other, less rights-restrictive, measures available that would be sufficient to allow members of the public to hold the national broadcasters accountable for how they spend public funds, without limiting the right to privacy of employees and on-air talent. For example, de-identified or anonymised information as to the number of employees and on-air talent earning over certain amounts, such as setting out the number of employees paid more than a certain amount in pay bands, would also reveal how the ABC and SBS are spending public money. Additionally, a disparity in gender pay gap could be revealed through requiring disclosure of the number or proportion of female employees and on-air talent earning over $200,000 compared to male employees and on-air talent in the same position.

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7 See *Rechnungshof v Österreichischer Rundfunk and others*, Court of Justice of the European Union C-465/00, C-138/01, C-139/01, 20 May 2003, [73]-[75]; Information Commissioner's Office, *Freedom of Information Act 2000 Decision Notice: British Broadcasting Corporation* (26 September 2011), available at: https://ico.org.uk/media/action-weve-taken/decision-notices/2011/648762/fs_50363389.pdf, [25].

8 SOC, pp. 6-7.

Committee comment

1.185 The committee notes that the right to privacy is engaged and limited by the measure and the preceding analysis raises questions as to whether it is the least rights-restrictive way of achieving the stated aim.

1.186 The committee therefore requests the advice of the minister as to whether the limitation is proportionate to achieving the stated objectives, including whether there are less rights restrictive ways to achieve the stated objectives, such as:

- **requiring the ABC and SBS in their annual reports to disclose the number or proportion of female employees and on-air talent earning over $200,000 compared to male employees and on-air talent in the same position; or**
- **requiring disclosure of de-identified or anonymised information as to the number of employees and on-air talent earning over certain amounts (as specific figures or in pay bands).**

Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures) Determination 2017 [F2017L01353]

Purpose	Amends the Parliamentary Service Determination 2013 [F2013L00448] relating to certain employment processes, measures and notification requirements
Portfolio	Prime Minister and Cabinet
Authorising legislation	*Parliamentary Service Act 1999*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 17 October 2017, tabled Senate 18 October 2017)
Rights	Privacy (see **Appendix 2**)
Status	Seeking additional information

Background

1.187 The Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures) Determination 2017 [F2017L01353] (2017 Determination), which amends the 2013 Determination,[1] raises issues similar to those recently considered by the committee in relation to the Australian Public Service Commissioner's Directions 2016 [F2016L01430] (the APS 2016 Directions).[2]

APS Directions: 2013 and 2016

1.188 The committee previously reported on issues related to the current APS 2016 Directions when its predecessor, the APS 2013 Directions, were first made as well as in relation to subsequent amendments.[3]

1.189 The APS 2013 directions provided, among other things, for notification in the Public Service Gazette (the Gazette) of certain employment decisions for Australian Public Service (APS) employees. The committee raised concerns about the human rights compatibility of these measures, particularly in relation to the publication of decisions to terminate employment and the grounds for termination. These concerns

1 Parliamentary Service Determination 2013 [F2013L00448] (2013 Determination).

2 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) pp. 12-15; *Report 10 of 2016* (30 November 2016) pp. 13-16; *Report 1 of 2017* (16 February 2017) pp. 20-23.

3 Australian Public Service Commissioner's Directions 2013 [F2013L00448] (APS 2013 Directions) reported in Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) pp. 133-134; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 65-67; and *Twenty-first Report of the 44th Parliament* (24 March 2015) pp. 25-28.

related to the right to privacy and the rights under the Convention on the Rights of Persons with Disabilities in relation to notification of termination of employment on the ground of physical or mental incapacity. Additionally, there were right to privacy concerns in relation to the requirement to notify in the Gazette of termination decisions on the basis of a breach of the Code of Conduct.

1.190 In response to these concerns, the Australian Public Service Commissioner (the Commissioner) conducted a review of the measures. As a result, the APS 2013 directions were amended in 2014 to remove most requirements to publish termination decisions in respect of APS employees. This addressed many of the concerns in relation to the right to privacy and the rights of persons with disabilities.[4]

1.191 However, the requirement to notify termination on the grounds of the breach of the Code of Conduct in the Gazette was retained. The committee considered that this retained measure remained of concern as it engaged and limited the right to privacy and appeared not to be a proportionate limitation on this right.[5]

1.192 In 2016, new APS directions (APS 2016 Directions) were made and reported on by the committee,[6] including in relation to the continuing requirement that decisions to terminate the employment of an ongoing APS employee for breach of the Code of Conduct must be published in the Gazette.[7] In response, noting that the committee had raised valid concerns, the Commissioner undertook a further review into the necessity of publicly notifying this information.[8]

1.193 On 22 June 2017, the Commissioner informed the committee that, after consultation with APS agencies, he had concluded that these publication arrangements should not continue. Instead, the Commissioner intended to establish a new secure database of employment terminations for breaches of the Code of Conduct which would not be accessible to the general public. As outlined in the Commissioner's response, this would enable agencies to access the database and maintain the integrity of their respective workforces, while appropriately respecting the privacy of affected employees. The Commissioner stated that relevant amendments to the APS 2016 Directions would also be made.[9] The committee

4 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) pp. 25-28.

5 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) pp. 25-28.

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

7 See section 34(1)(e).

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

9 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (8 August 2017) p. 40.

welcomed this response and noted that this approach would substantially address the right to privacy concerns in relation to the measure.[10]

Parliamentary Determinations: 2013 and 2016

1.194 In respect of Parliamentary Service employees, the 2013 Determination contained measures relating to notification in the Gazette of certain employment decisions similar to those contained in the APS 2013 Directions. The committee therefore reported on the 2013 Determination raising substantially the same issues.[11]

1.195 Although the APS 2013 Directions were initially amended in 2014, the 2013 Determination remained in place until the 2016 Determination was made.[12] Consistent with the approach taken by the Commissioner in the APS 2014 Amendment Determination, the 2016 Determination removed most of the requirements to publish termination decisions in the Gazette in respect of Parliamentary Service employees, but retained the requirement to notify termination on the grounds of a breach of the Code of Conduct in the Gazette.

1.196 In *Report 1 of 2017* the committee welcomed the amendments made, but again raised concerns about compatibility of the publication requirement for breaches of the Code of Conduct with the right to privacy.[13] The committee requested advice as to whether the 2016 Determination would be reviewed in line with the review being undertaken in relation to the APS 2016 Directions.[14] The legislation proponents (the presiding officers), advised the committee that they would further examine the 2016 Determination in light of the Commissioner's review into the APS 2016 Directions.[15]

Publishing a decision to terminate for breach of the Code of Conduct

1.197 The 2017 Determination introduces a number of new measures and also remakes many requirements from the 2016 determination, including 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.[16]

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10 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (8 August 2017) p. 40.

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

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

13 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) pp. 20-23.

14 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) p. 110.

15 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (16 February 2017) p. 23.

16 See section 39(1)(e).

Compatibility of the measure with the right to privacy

1.198 The statement of compatibility noted that the 2017 Determination replicates changes previously made to address the committee's concerns in respect of the 2013 Determination.[17] As outlined above, while the 2016 amendments addressed a number of matters, concerns remain about the remade requirement to publish notification of termination on the grounds of a breach of the Code of Conduct. The statement of compatibility does not address this limitation on the right to privacy.

1.199 As outlined in the committee's previous reports, this limitation is unlikely to be permissible as a matter of international human rights law. In order to be a proportionate limitation on the right to privacy the measure must be the least rights restrictive way of achieving a legitimate objective. Other methods by which an employer could determine whether a person has been dismissed from employment for breach of the Code of Conduct include maintaining a centralised, internal record of dismissed employees, or to use references to ensure that a previously dismissed employee is not rehired by the Australian Parliamentary Service. The previous report also noted that it would be possible to publish information without naming the employee, which could serve to maintain public confidence that serious misconduct is being dealt with properly.[18]

1.200 Previous correspondence from the presiding officers indicated that they would consider the outcome of the APS Commissioner's review. The APS Commissioner's review has since concluded that the current arrangements for publishing terminations of employment for breaching the Code of Conduct in the Gazette should be discontinued and replaced with a new secure database of relevant information not accessible to the general public. However, the statement of compatibility for the 2017 Determination does not indicate whether this outcome has been considered by the presiding officers.

Committee comment

1.201 Publishing the details of a Parliamentary Service employee whose employment has been terminated for breach of the Code of Conduct engages and limits the right to privacy.

1.202 The committee previously raised questions in relation to a substantively identical measure in the APS 2016 directions, which was reviewed by the Australian Public Service Commissioner who found it should be discontinued. Instead, a new secure database of employment terminations for breaches of the Code of Conduct, not accessible to the public, would be established and relevant amendments to the APS 2016 Directions would also be made.

17 Statement of compatibility, Attachment B.

18 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) p. 14; *Report 1 of 2017* (16 February 2017) pp. 22-23.

1.203 Noting this outcome, the committee seeks advice from the presiding officers as to whether a similar approach will be implemented with respect to the Australian Parliamentary Service and whether the 2017 Determination will be amended to reflect this approach.

Further response required

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

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

Purpose	Amends the *Fair Work Act 2009* to: prohibit terms of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity; prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund for an industrial association; and prohibit any action with the intent to coerce an employer to pay amounts to a particular worker entitlement fund, superannuation fund, training fund, welfare fund or employee insurance scheme. Amends the *Fair Work (Registered Organisations) Act 2009* to: require registered organisations to adopt, and periodically review, financial management policies; require registered organisations to keep credit card records and report certain loans, grants and donations; require specific disclosure by registered organisations and employers of the financial benefits obtained by them and persons linked to them in connection with employee insurance products, welfare fund arrangements and training fund arrangements; and introduce a range of new penalties relating to compliance with financial management, disclosure and reporting requirements
Portfolio	Employment
Introduced	House of Representatives, 19 October 2017
Rights	Freedom of association; collectively bargain (see **Appendix 2**)
Previous report	12 of 2017
Status	Seeking further additional information

Background

1.205 The committee first reported on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Employment by 13 December 2017.[1]

1.206 The minister's response to the committee's inquiries was received on 19 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Prohibiting terms of industrial agreements requiring or permitting payments to worker entitlement funds

1.207 Schedule 2 of the bill would amend the *Fair Work Act 2009* (Fair Work Act) to prohibit any term of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity.[2]

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

1.208 The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. The right to just and favourable conditions of work includes the right to safe working conditions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

1.209 The interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.[4] The principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 16-24.

2 Statement of Compatibility (SOC), p. xi.

3 See, article 22 of the ICCPR and articles7, 8 of the ICESCR.

4 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

element' of Article 4 of ILO Convention No. 98 which envisages that parties will be free to reach their own settlement of a collective agreement without interference.[5]

1.210 Prohibiting the inclusion of particular terms in an enterprise agreement interferes with the outcomes of the bargaining process. Accordingly, the initial human rights analysis stated that the measure engages and may limit the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association.

1.211 Measures limiting the right to freedom of association including the right to collectively bargain may be permissible providing certain criteria are satisfied. Generally, 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.[6] Further, Article 22(3) of the ICCPR and article 8 of the ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.

1.212 The ILO's Committee on Freedom of Association (CFA Committee), which is a supervisory mechanism that examines complaints about violations of the right to freedom of association and the right to collectively bargain, has stated that 'measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98'.[7] The CFA Committee has noted that there are some circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, stating that 'any limitation on collective bargaining on the part of the authorities should be preceded

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5 ILO, *General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994) [248];ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897). See, also, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR),Direct Request (CEACR) - adopted 2016, published 106th International Labour Conference (ILC) session (2017) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3299912; ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

6 See ICCPR article 22.

7 See ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897, [473]).

by consultations with the workers' and employers' organizations in an effort to obtain their agreement'.[8]

1.213 Indeed, international supervisory mechanisms have previously raised specific concerns in relation to current restrictions imposed on bargaining outcomes under Australian domestic law.[9] In relation to restrictions on the scope of collective bargaining and bargaining outcomes, CFA Committee noted that:

> …the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes.[10]

1.214 In this respect the statement of compatibility acknowledges that the measure engages the right to freedom of association, the right to voluntarily reach bargaining outcomes, and the right to just and favourable conditions at work. However, the statement of compatibility asserts that the limitation on these rights is permissible. It states that the measure pursues the legitimate objectives of addressing 'the potential for misappropriation of funds and [to] avoid conflicts of interest and possible coercion.'[11] It points to the Final Report of the Royal Commission into Trade Union Governance and Corruption (Heydon Royal Commission) in support of this objective.[12] While the stated objectives may be capable of constituting a legitimate objective for the purposes of international human rights law, the initial analysis noted that it would have been useful if the statement of compatibility had more fully explained how any findings from the

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8 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 330th Report, Case No. 2194, [791]; and 335th Report, Case No. 2293, [1237]).

9 See, for example, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Australia http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3299912,102544,Australia,2016.

10 ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

11 SOC, p. xi.

12 SOC, p. x.

Heydon Royal Commission supported the importance of this objective as a substantial or pressing concern.

1.215 The statement of compatibility provides some information as to whether the measure is rationally connected to (that is, effective to achieve) its stated objectives. It notes that the measure does not prohibit contributions to worker entitlement funds but requires any contributions 'to be made to registered worker entitlement funds that are subject to basic governance and disclosure requirements designed to address potential conflicts of interest, breaches of fiduciary duty and the potential for coercion'.[13] As such the measure would appear to be rationally connected to its stated objective.

1.216 However, the statement of compatibility provides limited information as to whether the limitation is proportionate. In order to be a proportionate limitation on human rights a measure must be the least rights restrictive way of achieving its stated objective.

1.217 Accordingly, the committee sought the advice of the Minister for Employment as to:

- whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible); and
- whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.

Minister's response

1.218 The minister's response describes the current restrictions on bargaining outcomes imposed by the Fair Work Act and restates the scope of the new restrictions. The minister's response notes that the committee's initial report stated that the limitation imposed by the measure appeared to be rationally connected to its stated objective.

1.219 In relation to whether the limitation is reasonable and proportionate to achieve the stated objective, the minister's response states:

> Any worker entitlement fund, including those controlled by any industrial association, can be registered provided it meets basic governance and disclosure requirements. These requirements are designed to address potential conflicts of interest, breaches of fiduciary duty and coercive conduct. There is no restriction on who can be a member of a fund. The provisions enhance the right to just and favourable conditions of work by ensuring that money held by worker entitlement funds is used to benefit workers. The amendments will provide employees with a guarantee that

13 SOC, p. xi.

> any contributions they voluntarily make to a worker entitlement fund is subject to appropriate scrutiny and oversight.
>
> To the extent that the prohibition may engage any of these rights, the measure is reasonable and proportionate and enhances workers' rights by ensuring that money held on their behalf is protected. The amendments are the least rights restrictive possible in that they do not represent an unqualified prohibition on terms of industrial agreements that provide for contributions to worker entitlement funds. Rather, they require such contributions to be made to registered worker entitlement funds that are subject to basic governance and disclosure obligations.
>
> The International Labour Organization (ILO) has stated that 'Restrictions on [the] principle [of leaving the greatest possible autonomy to organizations in their functioning and administration] should have the sole objective of protecting the interests of members'.
>
> To the extent the proposed provisions may engage with these rights they do so only to protect the rights of workers by ensuring that their money is properly managed and their interests protected.
>
> The provisions support the basic governance and disclosure requirements of the Bill that are designed to address potential conflicts of interest, breaches of fiduciary duty and potential for coercive conduct that were found by the Royal Commission into Trade Union Governance and Corruption (Royal Commission) in examining the operation in Australia of worker entitlement funds. As such, the amendment protects the interests of workers.

1.220 The minister's response provides a range of information about the scope of the limitation on bargaining outcomes. In this respect, it is relevant to the proportionality of the measure that it will still be possible to negotiate clauses in enterprise agreements which require or permit payments to be made to registered workers' entitlement funds, superannuation funds or charities. However, prohibiting any term of an enterprise agreement that otherwise requires or permits contributions for the benefit of an employee may still have significant effects on voluntarily negotiated outcomes.

1.221 As discussed further below, there are a range of restrictions on registered worker entitlement funds and who can operate them. Under the proposed bill, registered organisations including unions are prohibited from operating registered workers' entitlement funds and there are restrictions on how funds can be spent. This means that, for example, even if an employer and employees agreed through an enterprise agreement to set up an occupational health and safety training fund to be administered and run by the relevant union, this would not be permissible. It is unclear from the minister's response how prohibiting this kind of voluntarily negotiated clause in general is the least rights restrictive approach to achieving the stated objective. Further, while the minister's response refers to ILO comments about when it may be legitimate to limit particular rights, it does not address the

specific concerns raised by international monitoring bodies in relation to Australia's restrictions on bargaining outcomes through prohibiting particular matters in enterprise agreements (discussed at [1.213] above). In light of the concerns raised by these international monitoring bodies as to the existing restrictions on bargaining outcomes in Australia, it is likely that any amendments which further restrict such matters would also raise concerns.

1.222 Finally, the minister's response outlined consultation which occurred with worker entitlement funds and employee and employer organisations prior to introduction. Consultation processes are relevant to an assessment of the measure, and may assist in determining whether a limitation is the least rights restrictive means of pursuing a legitimate objective on the available evidence. However, the fact of consultation alone is not sufficient to address the human rights concerns in relation to the measure.

Committee response

1.223 The committee thanks the minister for her response.

1.224 The International Labour Organization's Committee on Freedom of Association has raised concerns in relation to Australia's restrictions on bargaining outcomes through prohibiting particular matters in enterprise agreements. The provisions introduced by the bill prohibiting terms of industrial agreements that require or permit payments to worker entitlement funds is a further restriction on bargaining outcomes.

1.225 The committee considers that, in the absence of additional information addressing these concerns, prohibiting terms of industrial agreements that require or permit payments to worker entitlement funds is likely to be incompatible with the right to collectively bargain.

1.226 The committee therefore seeks further advice from the minister in relation to the compatibility of the measure with the right to collectively bargain, in particular any information in light of findings by relevant international supervisory mechanisms.

Regulation of worker entitlement funds

1.227 Schedule 2 of the bill would require 'worker entitlement funds' to meet requirements for registration and meet certain conditions relating to financial management, board composition, disclosure and how money is spent. A 'worker entitlement fund' is defined in proposed section 329HC of the *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act) as a fund whose purposes include paying worker entitlements to members, dependents or legal representatives of fund members or a fund prescribed by the minister.

1.228 Under proposed new section 329LA of the Registered Organisations Act a 'worker entitlement fund' will only be able to be operated by a corporation and cannot be operated by a registered organisation (that is, a trade union or employer

organisation.) Under proposed sections 329JA-B of the Registered Organisations Act it will be an offence to operate an unregistered fund and a civil penalty provision for employers to contribute to such a fund.

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

1.229 As described above, the interpretation of the right to freedom of association and the right to just and favourable conditions of work is informed by the ILO treaties.[14] ILO Convention 87 specifically protects the right of workers to autonomy of union processes, organising their administration and activities and formulating their own programs without interference.[15] Providing that registered organisations cannot administer 'worker entitlement funds' and limiting the purposes for which such money may be used appears to engage and limit these rights. However, the statement of compatibility does not acknowledge this limitation so does not provide an assessment of whether the limitation is permissible as a matter of international human rights law.[16]

1.230 The committee therefore requested the further advice of the minister as to:

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

Minister's response

1.231 The minister's response explains the scope of current provisions and proposed amendments:

> *Current provisions*
>
> An ASIC class order currently exempts worker entitlement funds from regulation under the Corporations Act 2001.
>
> Contributions to 'approved worker entitlement funds' under the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act 1986) are exempt from fringe benefits tax. Funds can be approved if they meet certain minimum criteria,

14 See, article 22 of the ICCPR and article 8 of the ICESCR. The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

15 See ILO Convention N.87 article 3.

16 SOC, p. x.

> largely concerned with how fund money can be spent. This imposes a degree of indirect regulation on these funds.
>
> *Changes proposed through the Bill*
>
> The Bill will amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to insert new Part 3C of Chapter 11 to apply governance, financial reporting and financial disclosure requirements to worker entitlement funds. As noted by the Committee, Schedule 2 of the Bill would require worker entitlement funds to meet requirements for registration and meet certain conditions relating to financial management, board composition, disclosure and how money is spent. These conditions include that a worker entitlement fund will only be able to be operated by a corporation and cannot be operated by a registered organisation (proposed new section 329LA condition 2).

1.232 The minister also provides a range of information as to whether the limitation on human rights imposed by the measure is permissible. In relation to whether the measure is aimed at pursuing a legitimate objective for the purposes of international human rights law, the minister's response states:

> The objective of the Bill in relation to the administration of worker entitlement funds and limiting the purposes for which worker entitlement fund income and contributions can be used is to ensure that workers' entitlements are managed responsibly and transparently and in their interests. Funds will have to be run by trained professionals of good fame and character and fund money will be restricted from being re-characterised and spent for unauthorised purposes. These measures are intended to prohibit what the Royal Commission found were substantial payments flowing out of worker entitlement funds to other parties for purposes other than paying members.

1.233 This would appear to be a legitimate objective for the purposes of international human rights law.

1.234 As to how the measure is effective to achieve the stated objective, the minister's response states:

> Requiring the registration of worker entitlement funds and placing conditions on that registration are measures that are rationally connected to the objective of ensuring that workers' entitlements are managed responsibly and transparently in their interests.
>
> Requiring a fund operator to be a constitutional corporation is necessary to ensure that the provisions regulating such funds are valid. A similar requirement applies to superannuation funds under the *Superannuation Industry (Supervision) Act 1993*.

1.235 This information indicates that the regulation of worker entitlement funds is likely to be rationally connected to the stated objective of the measure.

1.236 The requirement that registered workers' entitlement funds cannot be operated by a registered organisation such as a trade union or employers' organisation raises questions in relation to the proportionality of the limitation. In this respect the minister's response explains that:

> Requiring that a fund operator cannot be an organisation is designed to prevent conflicts of interest for worker entitlement funds that also make substantial payments to those organisations for purposes other than paying members worker entitlements.
>
> In this respect, the Royal Commission stated that:
>
> > The very substantial revenue flows to unions generate significant conflicts of interest and potential breaches of fiduciary duty on the part of unions and union officials negotiating enterprise agreements … In short, the union and union officials owe a duty to act in the interests of union member employees when negotiating enterprise agreements. At the same time, there is a significant potential and incentive for the union to act in its own interests to generate revenue.
>
> The worker entitlement fund, Incolink, provides an example of the substantial revenue that flows to unions and employer groups. Between 2011 and 2015, the Construction, Forestry, Mining and Energy Union (CFMEU), the Master Builders Association of Victoria and the Plumbing Joint Training Fund together received over $85 million from Incolink. These organisations are all represented on the board of lncolink.
>
> In addition, none of the existing worker entitlement funds that are approved under the FBTA Act 1986 are operated by registered organisations; most worker entitlement funds are run by corporations with a mix of representatives from employer and employee associations on their boards. The Bill does not alter this position. Officers of registered organisations can still sit on the board of worker entitlement funds.

1.237 The minister's response articulates that there is a potential for conflicts of interest in relation to the administration of such funds as well as the potentially large sums of money involved. It is also relevant to the proportionality of the measure that none of the funds registered under the existing FBTA Act are operated by registered organisations. However, it is unclear whether there are funds that are not registered under the FBTA Act which are currently administered by registered organisations. Accordingly, based on the information provided there is some uncertainty as to the potential impact of the measure. The measure may still therefore be a significant limitation on the right for a union to organise its internal affairs and formulate its own program. For example, notwithstanding the issues raised in the minister's response, it may be the preference of some union members that money paid for their benefit is administered by their union.

1.238 The minister's response further states, in relation to whether the measure is proportionate to achieve its stated objective, that:

> The Bill also retains the existing legal limits on how contributions and income of a fund can be spent under the FBTA Act 1986.
>
> To the extent that these measures may limit human rights, any limitation is reasonable and proportionate in achieving the objectives of the Bill. Commensurate with this, the measures are the least rights restrictive as they do not prevent contributions to worker entitlement funds but provide appropriate governance and transparency to ensure that workers' entitlements are managed responsibly and transparently in their interests. They also take into account the feedback provided by funds during consultation, including to allow funds to use income to pay for training and welfare services, subject to appropriate criteria, and the provision of a separate regulatory scheme for single employer worker entitlement funds.

1.239 While noting that contributions will still be able to be made to registered workers' entitlement funds, it is unclear from the information provided that this necessarily means that the measure is the least rights restrictive approach. It is unclear from the response whether there are any other reasonably available less rights restrictive alternatives to prohibiting registered organisations from operating such funds in general. Accordingly, it is uncertain whether the measure constitutes a proportionate limitation on the right to freedom of association.

Committee response

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

1.241 Based on the information provided and the above analysis, the committee is unable to conclude that the measure is a proportionate limitation on the right to freedom of association and the right to just and favourable conditions at work.

Prohibiting terms of industrial instruments requiring payments to election funds

1.242 Schedule 3 of the bill would amend the Fair Work Act to prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund.[17]

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

1.243 As set out above, the right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. Prohibiting the inclusion of particular terms in an enterprise agreement interferes with the outcomes of the bargaining process. Accordingly, the initial analysis stated that the measure engages and limits the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to

17 SOC, p. x.

freedom of association. The statement of compatibility acknowledges that the measure engages the right to negotiate terms and conditions of employment voluntarily.[18] However, the statement of compatibility appears to indicate that the limitation is permissible.

1.244 The statement of compatibility identifies one objective of the measure as being to 'remove any legal or practical compulsion on an employee to contribute to election funds'.[19] This appears to be a description of what the measure does rather than articulating the pressing or substantial concern the measure addresses as required to constitute a legitimate objective for the purposes of international human rights law. The statement of compatibility identifies a second objective as addressing 'the possibility of contributions made in accordance with a relevant instrument being used to avoid the intent of the prohibition on organisations using their resources to favour a particular candidate'. While this could be capable of constituting a legitimate objective, limited explanation or reasoning is provided as to why this objective is important. Further, in relation to whether the measure is rationally connected (that is, effective to achieve) and proportionate to the stated objectives, the statement of compatibility provides no reasoning or evidence and only asserts that the measure 'is reasonable, necessary and proportionate'.[20]

1.245 The committee therefore requested the further advice of the minister 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) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is the least rights restrictive way of achieving its stated objective).

Minister's response

1.246 The minister's response provides the following information about the proposed amendments:

> *Current provisions*
>
> There are currently no provisions in the FW Act or RO Act that deal with terms of industrial instruments requiring or permitting employees to pay into election funds. This is despite the fact that section 190 of the RO Act prohibits an organisation from using its resources for the purposes of the

18 SOC, p. x.

19 SOC, p. x.

20 SOC, p. x.

election of a particular candidate. Because election funds are structurally separate from the organisation, they are not captured by this provision.

Changes proposed through the Bill

Schedule 3 of the Bill would amend section 194 of the FW Act to prohibit any term of an enterprise agreement or contract of employment requiring or permitting employee contributions for a regulated election purpose.

Schedule 3 would also amend Part 2-9 of the FW Act to provide that any term of a contract of employment requiring or permitting payments for a regulated election purpose will have no effect.

A 'regulated election purpose' is one that includes the purpose of funding, supporting or promoting the election of candidates for election to office in an industrial association.

1.247 The minister's response provided some further information about whether the limitation on human rights was permissible. In relation to whether the measure addresses a substantial or pressing concern, the minister's response explains:

> Election funds are established to fund election campaigns for office within registered organisations and are regularly sourced from contributions from employees of such organisations. These funds are usually managed by one or more individuals who hold elected office within the organisation. They are not established in the interests of workers who are subject to the collective agreement but rather the interests of officials of the bargaining representative. The Royal Commission found that such arrangements unfairly disadvantage candidates who are not already in office and have been misused by officials controlling the funds where there are no contested elections. The Royal Commission also found a lack of oversight of election funds, with information about revenue and expenditure sometimes hidden, or not kept at all.
>
> The amendments remove any legal or practical compulsion on employees to contribute to a particular election fund. They ensure employees have a choice about whether to contribute to the particular fund.

1.248 Based on this information provided, ensuring that non-incumbent candidates for elected union positions are not disadvantaged and that employees have a free choice about whether to contribute to a particular fund in the particular circumstances, would appear to constitute legitimate objectives for the purposes of international human rights law. The measures would also appear to be rationally connected to these objectives.

1.249 In relation to whether the measure is reasonable and proportionate, the minister's response states that registered organisation employees will still be able to make genuine contributions, voluntarily and independently of an industrial instrument. On balance, this would appear to be a proportionate limitation on bargaining outcomes.

Committee response

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

1.251 The committee notes that the measure appears to be compatible with the right to freedom of association and the right to just and favourable conditions of work.

Prohibiting any action with the intent to coerce a person or employer to pay amounts to a particular fund

1.252 Schedule 4 of the bill would introduce a civil penalty into section 355A of the Fair Work Act prohibiting a person from organising, taking or threatening to take any action, other than protected industrial action, with the intent to coerce a person to pay amounts to a particular worker entitlement fund, super fund, training fund, welfare fund or employee insurance scheme.[21]

Compatibility of the measure with the right to freedom of association

1.253 The right to strike is protected as an aspect of the right to freedom of association and the right to form and join trade unions under article 8 of ICESCR. The right to strike, however, is not absolute and may be limited in certain circumstances.

1.254 By prohibiting action (other than protected industrial action) intended to coerce a person to pay amounts into a particular fund, the initial analysis assessed that the measure further engages and limits the right to strike. This is because it may impose an additional penalty or disincentive to taking unprotected industrial action with the intent of influencing the conduct of an employer. The existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond what is permissible.[22] While the statement of compatibility acknowledges that the measure

21 See, Schedule 4, item 355, proposed section 355A of the Fair Work Act.

22 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (23 June 2017) [29]-30]: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8).The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action'. See, also, ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 103rd ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, *Individual Observation Concerning the Right to Organise and Collective Bargain Convention*, 1949, (No. 98), Australia, 99th session, 2009. See also, UNCESCR, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) p. 5.

engages work-related rights it does not expressly acknowledge that the right to strike is an aspect of the right to freedom of association.

1.255 Beyond providing a description of the measure, the statement of compatibility does not identify the legitimate objective of the measure. While the statement of compatibility appears to argue that the measure in fact supports freedom of association and human rights, it provides no explanation of the reasoning for this.[23] The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that where a limitation on a right is proposed the statement of compatibility provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

1.256 The committee therefore requested the further advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international 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 (including any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).

Minister's response

1.257 The minister's response provides the following information about the proposed amendments:

> *Current provisions*
>
> Part 3-1 of the FW Act provides for general workplace protections. It contains specific prohibitions against coercive behaviour in relation to workplace rights (section 343) and industrial activities (348). However, the Part does not specifically prohibit coercive action in relation to the making [of] payments to certain funds, particularly where such action occurs outside of the enterprise bargaining process. These funds include superannuation funds, training and welfare funds, worker entitlement funds and insurance arrangements and are collectively referred to by the Royal Commission as 'worker benefit funds'.
>
> *Changes proposed through the Bill*
>
> Schedule 4 of the Bill would amend Part 3-1 of the FW Act to insert a new section 355A to prohibit a person from taking coercive action in relation to the making of payments to a particular worker benefit fund. This would fix an existing gap in the Act, which prohibits coercion in relation to a wide range of other conduct, but not in relation to contributions to funds.

23 SOC, p. xi.

1.258 In relation to the current law, the minister's response states that 'compelling contributions to a particular worker benefit fund infringes basic principles of freedom of association and, by prohibiting mandatory contributions, the amendment is in fact promoting human rights'. However, the response does not specifically explain how 'compelling' a contribution through, for example, protest or strike action would 'infringe' principles of freedom of association or promote human rights. As noted in the initial analysis, the measure, by prohibiting action (other than protected industrial action) intended to influence or 'coerce' a person to pay amounts into a particular fund, the measure further engages and limits the right to strike. This is because it may impose an additional penalty or disincentive to taking unprotected industrial action with the intent of influencing the conduct of an employer.

1.259 In relation to whether the measure imposes permissible limitations on the right to strike, the minister's response states that the measure pursues the 'legitimate objective of reducing the potential for coercive behaviour outside the enterprise bargaining process, for example in side deals'. In this respect, the minister's response discusses examples of pressure being applied to employers, potential conflicts of interest and the findings of the Heydon Royal Commission. While not articulated in this way in the minister's response, it may be that the measure pursues the objective of providing protection for employers or other people from particular forms of action. To the extent that the measure is aimed at protecting the rights and freedoms of others this is capable of constituting a legitimate objective for the purposes of international human rights law.

1.260 The minister's response further notes that 'the Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for failures to comply with Part 3-3 of the FW Act, dealing with industrial action'. However, as set out above, the existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond

what is permissible.[24] Such findings call into serious question whether any further restrictions on the right to strike, such as this one, are permissible. While the minister's response identifies that the measure addresses a gap in current restrictions, it does not explain how such restrictions are proportionate in view of the stated objective including whether they represent the least rights restrictive approach. Accordingly, based on the information available, the measure does not appear to be a proportionate limitation on the right to strike as an aspect of the right to freedom of association.

Committee response

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

1.262 Based on the information available and the above analysis, the measure is likely to be incompatible with the right to freedom of association.

Compatibility of the measure with the right to freedom of assembly and expression

1.263 The right to freedom of assembly and the right to freedom of expression are protected by articles 19 and 21 of the ICCPR. The right to freedom of assembly and the right to freedom of expression may be limited for certain prescribed purposes. That is, that the limitation is necessary to respect the rights of others, to protect national security, public safety, public order, public health or morals. Additionally, such limitations must be prescribed by law, reasonable, necessary and proportionate to achieving the prescribed purpose.

1.264 The initial analysis stated that it appears that the measure may extend to prohibiting forms of expression or assembly. As such, it may engage and limit the right to freedom of expression and assembly. The prohibition on forms of protest action appears to be potentially quite broad. This issue was not addressed in the

24 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), *Concluding Observations on Australia*, E/C.12/AUS/CO/5 (23 June 2017) [29]-30]: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8).The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action'. See, also, ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 103rd ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, *Observation Concerning Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, *Individual Observation Concerning the Right to Organise and Collective Bargain Convention*, 1949, (No. 98), Australia, 99th session, 2009. See also, UNCESCR, *Concluding Observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) p. 5.

statement of compatibility and as such it is unclear whether the measure is compatible with these rights.

1.265 The committee therefore sought the advice of the minister as to:

- the scope of any restriction on the right to freedom of expression and assembly;
- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed, any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).

Minister's response

1.266 In relation to the right to freedom of assembly and the right to freedom of expression, the minister's response states:

> The Committee is also concerned that the measure circumscribes the right to freedom of expression as set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and the right of peaceful assembly set out in Article 21 of the ICCPR. It is not clear how the relevant rights are engaged as the measure does not interfere with an individual's right to hold opinions without interference, the right to freedom of expression or the freedom to seek, receive and impart information and ideas of any kind or the right of peaceful assembly. In any event, the amendment pursues the legitimate objective of ensuring that a person cannot coerce another person to make payments into certain worker benefit funds and is reasonable and proportionate.

1.267 The particular concern articulated in the initial human rights analysis was that the prohibited forms of action may extend to forms of expression and assembly. For example, protest activities outside of a workplace or a boycott of goods that is aimed at influencing or 'coercing' a person to make payments into a particular fund. It is noted in this respect that the right of freedom of expression extends to the expression of ideas through a range of conduct including speech and public protest. It would have been useful if the minister's response provided an explanation of why she does not consider that these rights were engaged and limited. There is also a question about the breadth of the provision, noting it could potentially apply broadly beyond the employer-employee relationship. As such, it is unclear whether the breadth of this provision may be overly broad with respect to an objective, for example, of protecting the rights and freedoms of other. As the information provided to the committee does not include a substantive assessment as to whether any

limitation on the right to freedom of expression and assembly is permissible, it is not possible to conclude that the measure is proportionate.

Committee response

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

1.269 Based on the information provided, it is not possible to conclude that the measure is compatible with the right to freedom of assembly and the right to freedom of expression.

1.270 The committee invites any further comments from the minister in relation to the above.

Bills not raising human rights concerns

1.271 Of the bills introduced into the Parliament between 4 and 7 December, 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):

- Aboriginal Land Rights (Northern Territory) Amendment Bill 2017;
- Australian Capital Territory (Planning and Land Management) Amendment Bill 2017;
- Broadcasting Legislation Amendment (Digital Radio) Bill 2017;
- Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017;
- Communications Legislation Amendment (Regional and Small Publishers Innovation Fund) Bill 2017;
- Copyright Amendment (Service Providers) Bill 2017;
- Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017;
- Family Law Amendment (Family Violence and Other Measures) Bill 2017;
- Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017;
- Home Affairs and Integrity Agencies Legislation Amendment Bill 2017;
- Security of Critical Infrastructure Bill 2017;
- Security of Critical Infrastructure (Consequential and Transitional Provisions) Bill 2017; and
- Treasury Laws Amendment (Enhancing Whistleblower Protections) 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**.

Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017

Purpose	Amends the *Australian Broadcasting Corporation Act 1983* to introduce a requirement in the Australian Broadcasting Corporation's (ABC) Charter that the ABC's news services be 'fair' and 'balanced'
Portfolio	Communications
Introduced	Senate, 18 October 2017
Right	Freedom of Expression (see **Appendix 2**)
Previous report	12 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Communications by 13 December 2017.[1]

2.4 The minister's response to the committee's inquiries was received on 14 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Addition of the words 'fair' and 'balanced' to the ABC Charter

2.5 The bill seeks to insert the words 'fair, balanced' into the existing section 8(1)(c) of the *Australian Broadcasting Corporation Act 1983* (the ABC Act) requirement that news and information is 'accurate and impartial'. The effect of the amendment would therefore be to broaden the duties of the Board of the Australian Broadcasting Corporation (ABC) such that the Board has a duty 'to ensure that the

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 6-9.

gathering and presentation by the Corporation of news and information is fair, balanced, accurate and impartial according to the recognized standards of objective journalism'.[2] Neither of these terms is defined in the bill.

Compatibility of the measure with the right to freedom of expression

2.6 The right to freedom of expression requires states parties to the International Covenant on Civil and Political Rights (ICCPR) to ensure that broadcasting services operate in an independent manner and should guarantee their editorial freedom.[3] By introducing new duties on the ABC Board relating to the gathering and presentation of news and information, the bill engages and limits editorial freedom, and therefore may limit the freedom of expression.

2.7 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.[4]

2.8 As set out in the initial human rights analysis, the statement of compatibility acknowledges that the right to freedom of expression is engaged, however, it further notes that to the extent the bill limits or restricts this freedom, it does so for a legitimate objective and is reasonable, necessary and proportionate.[5]

2.9 In relation to the objective of the measure, the statement of compatibility states:

> [Requiring] [t]he ABC to be fair and balanced according to the recognised standards of objective journalism is a necessary and legitimate objective. The Australian people expect a publicly funded broadcaster to canvass a broad range of issues, and report on those issues in a fair and balanced manner. There is also a strong public interest in ensuring that Australians have confidence that they can rely on the ABC as a source of information to inform their views on significant issues. A statutory requirement for fair and balanced reporting will promote such confidence by the Australian people.
>
> The fair and balanced requirement is also necessary to protect the rights and reputations of those who are the subject of ABC reporting. The Bill will require the ABC Board to ensure that any news or information relating to, for example, a particular person or group, is presented to the public in a

2 Section 8(1)(c) of the ABC Act.

3 See Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, [16] (2011).

4 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34 (2011) [21-36].

5 Statement of Compatibility (SOC), p. 5.

> fair and balanced manner, thereby ensuring that an impartial view, supported by evidence, is put forward in relation to that person or group. The fair and balanced requirement would not require every perspective of an issue to receive equal time, nor every facet of an argument to be explored. However, it will require openness and impartiality in relation to the pertinent issues.[6]

2.10 The initial analysis stated that these objectives are capable of constituting legitimate objectives for the purposes of international human rights law. However, the statement of compatibility provides limited information as to the importance of these objectives in the context of the particular measure. 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.

2.11 A relevant factor in determining whether a limitation on the freedom of expression is proportionate is whether the law specifies the precise circumstances in which interferences may be permitted. The words 'fair' and 'balanced' are not defined in the bill and it is not clear from the explanatory memorandum the intended meaning of the proposed amendments, and how the words 'fair' and 'balanced' differ from the existing requirement that ABC reporting be 'accurate and impartial'.

2.12 It was noted that the ABC's editorial policy on impartiality states that the concept of 'impartiality' includes the principles of 'fair treatment' and 'balance that follows the weight of the evidence'.[7] The editorial policy notes that requiring 'balance that follows the weight of the evidence' prevents 'false balance' that may occur if the ABC was required to provide equal time to every facet of every argument regardless of the weight of evidence attached to each argument.[8] The principle of 'fair treatment' under the editorial policy requires the ABC to be fair-minded in its treatment of people and ideas, including for example refraining from taking unfair advantage of a participant who is distressed or vulnerable.[9]

2.13 The statement of compatibility explains that the 'fair and balanced requirement in legislation would complement these current Editorial Policies',[10] and additionally notes that 'the fair and balanced requirement would not require every perspective of an issue to receive equal time, nor every facet of an argument to be

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6 SOC, p. 5.

7 ABC Editorial Policies, *Editorial Guidance Note: Impartiality* (2014) https://edpols.abc.net.au/guidance/impartiality/.

8 ABC Editorial Policies, *Editorial Guidance Note: Impartiality* (2014) https://edpols.abc.net.au/guidance/impartiality/.

9 ABC Editorial Policies, *Editorial Guidance Note: Impartiality* (2014) https://edpols.abc.net.au/guidance/impartiality/.

10 SOC, p. 5.

explored'.[11] However, as the terms are not defined, it is unclear on the face of the legislation whether it is proposed that the words 'fair' and 'balanced' bear the same or a different meaning as the context in which they are used in the ABC editorial policies relating to impartiality.

2.14 If the words 'fair' and 'balanced' are taken to have the same meaning as the context in which they are used in the ABC editorial policy on impartiality, it is not clear why the measure is necessary or addresses a pressing or substantial concern. If the words have a different meaning, questions arise as to whether the law is sufficiently circumscribed to constitute a proportionate limitation on editorial freedom. For example, there is a risk that the concept of 'balance' could be construed to require differing viewpoints be presented in a way that is not consistent with the weight of evidence when it supports one perspective over another.

2.15 The committee therefore sought the advice of the minister 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 proportionate, including information as to the meaning of the words 'fair' and 'balanced', and whether those words are intended to have the same meaning in the bill as those words used in the ABC's editorial policy on impartiality.

Minister's response

2.16 The minister's response provides the following information on whether there is reasoning or evidence that the stated objective addresses a pressing or substantial concern, and whether the measure is effective to achieve the objective:

> While the Australian Broadcasting Corporation's (ABC) Editorial Policies cover 'fair treatment' and 'a balance that follows the weight of evidence', these are only internal policies that can be amended at any time. The legitimate object[ive] of the Bill is to give certainty that it is a duty of the Board to ensure that the ABC's gathering and presentation of news and information is 'fair' and 'balanced' according to the recognised standards of objective journalism.
>
> The purpose of the Bill is to provide certainty that the ABC continues to present its news and information in a 'fair' and 'balanced' manner. There is no other way to achieve this obligation in respect of the Board's duty, other than through legislation. The ABC's Editorial Policies, while a robust document, could be amended at any time to disregard such an important part of providing professional and steadfast journalistic news and

11 SOC, p. 5.

> information services. The Bill will ensure that 'fair' and 'balanced' reporting will be a duty of the Board as the obligation will be embedded in legislation.

2.17 As noted in the initial analysis, a legitimate objective must be one that addresses a pressing or substantial concern, and not merely an outcome that is desirable or convenient. The minister's response clarifies that embedding the requirement of 'fair' and 'balanced' reporting in legislation provides greater certainty of the ABC Board's duties than if those requirements remain in editorial policies, as such policies are able to be changed at any time. On balance and in light of the minister's response, this is likely to be a legitimate objective for the purposes of international human rights law.

2.18 In relation to whether the limitation is proportionate and in particular the intended meaning of the words 'fair' and 'balanced' in the legislation, the minister's response states:

> The ABC's own Editorial Policies require the ABC to adhere to fair treatment in the gathering and presentation of news and information, and a balance in its news reporting that follows the weight of evidence. The measure contained in this Bill aims to create unity between the ABC Act and the ABC Editorial Policies; it merely protects this obligation in legislation.

2.19 The statement of compatibility and the minister's response indicate that the words 'fair' and 'balanced' are intended to have the same meaning as those words as they are used in the ABC editorial policy, such that the amendments 'create unity' between the legislation and editorial policies by protecting the obligation in legislation in addition to the editorial policy. The minister's clarification, coupled with the existing obligations in the ABC Act that 'fair' and 'balanced' reporting must also be 'accurate and impartial *according to the recognized standards of objective journalism*',[12] supports a conclusion that on balance the measures are likely to be proportionate for the purposes of international human rights law.

Committee response

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

2.21 On balance and in light of the information provided by the minister, the committee considers that the measures are likely to be compatible with the right to freedom of expression.

12 Section 8(1)(c) of the ABC Act.

Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 [F2017L01311]

Purpose	Provides for matters necessary for the effective operation and administration of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
Portfolio	Prime Minister and Cabinet
Authorising legislation	*Corporations (Aboriginal and Torres Strait Islander) Act 2006*
Last day to disallow	7 December 2017
Right	Privacy (see **Appendix 2**)
Previous report	13 of 2017
Status	Concluded examination

Background

2.22 The committee first reported on the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (the regulations) in its *Report 13 of 2017*, and requested a response from the Minister for Indigenous Affairs by 20 December 2017.[1]

2.23 The minister's response to the committee's inquiries was received on 18 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Disclosure of certain documents and information to the public by the Registrar of Aboriginal and Torres Strait Islander Corporations

2.24 Subregulation 55(1) of the regulations provides that, for the purposes of paragraph 658-1(1)(k) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), the Registrar of Aboriginal and Torres Strait Islander Corporations (registrar) has the function of making certain documents, and information in those documents, available to the public. Subregulation 55(3) provides that these documents may include documents containing personal information within the meaning given by subsection 6(1) of the *Privacy Act 1988* (Privacy Act).[2]

1 Parliamentary Joint Committee on Human Rights, *Report 13 of 2017* (5 December 2017) pp. 17-18.

2 'Personal Information' as defined in section 6(1) of the Privacy Act means information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not.

Compatibility of the measure with the right to privacy

2.25 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information about one's private life.

2.26 The statement of compatibility states that the regulations are operative in nature and therefore do not raise any human rights issues. However, the initial human rights analysis noted that, in allowing for a person's personal information to be made available to the public, the measure may engage and limit the right to privacy.

2.27 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

2.28 In the absence of further information in the explanatory statement or statement of compatibility, the initial analysis stated that it was not possible to determine whether the power given to the registrar to make information (including personal information) available to the public is in pursuit of a legitimate objective and is rationally connected to that objective.

2.29 The initial analysis stated that questions also arise as to whether the measure is proportionate. In order to be proportionate, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, and be accompanied by adequate safeguards to protect the right to privacy. It was noted that the registrar may make documents available to the public that (relevantly) the registrar 'considers appropriate to make available to the public'.[3] The initial analysis set out that it was not clear from the explanatory statement or statement of compatibility as to how, and under what circumstances, the registrar may consider it appropriate that documents (which may contain personal information) should be disclosed to the public. For example, it was not clear whether the registrar's state of satisfaction is subject to any objective criteria, such as a requirement that the registrar's consideration of appropriateness is reasonable.

2.30 The committee therefore sought the advice of the minister as to:

- whether the measure pursues a legitimate objective;
- whether the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the measure is a proportionate means of achieving the objective (including whether any limitation on the right to privacy is the least rights-

3 Clause 55(1)(b) of the instrument.

restrictive measure available, and whether there are adequate safeguards in place to protect the right to privacy).

Minister's response

2.31 The minister's response acknowledges that the right to privacy is engaged by the measure, but explains that safeguards are in place to ensure protection of individuals' privacy whilst ensuring that Aboriginal and Torres Strait Islander corporations are properly supported and regulated. Ensuring the proper regulation and support mechanisms for Aboriginal and Torres Strait Islander corporations is likely to be a legitimate objective.

2.32 The minister explains that documents and information that would be made public pursuant to subregulation 55(1) only relate to those documents and information that were created in the context of the predecessor to the CATSI Act, namely the *Aboriginal Councils and Associations Act 1976* (ACA Act), and includes documents or information filed or lodged with the registrar or served on the Registrar under the ACA Act, that are kept by the registrar under the ACA Act, or are given or served on a person by the Registrar under the ACA Act.

2.33 The minister's response provides a detailed explanation of the nature of the information the Registrar may make public, by reference to the Registrar's policy statements *PS-12: Registers and the use and disclosure of information held by the Registrar* and *PS-01: Providing information and advice. PS-01: Providing information and advice* provides that the nature of the information that the Registrar may make public is 'by its nature uncontroversial' and includes:

- the name or Indigenous Corporation Number of a corporation;
- publicly available details about a corporation appearing on the Registrar's website;
- publicly available information or documents on the Register of Aboriginal and Torres Strait Islander Corporations;
- providing copies of a corporation's rule book to its members;
- the address and contact details of the Registrar or staff;
- general information about what functions the Registrar performs;
- information about the Registrar's public education programs;
- official publications produced by the Registrar; and
- standard responses covered by the Registrar's publications.

2.34 The minister's response further explains that, in determining whether it is appropriate to make the information public, the Registrar will consider:

- whether the information or document would be exempt from disclosure under the CATSI Act (in which case the documents will not be disclosed);

- whether a third party gave the information to the Registrar and the information related to a particular corporation (such as information provided by a liquidator or administrator); and
- whether there is a public interest in releasing the information.

2.35 The minister also advises that as an additional safeguard, personal information in documents may be removed before release.

2.36 The minister's response explains other safeguards in place relating to the disclosure of personal information:

> Paragraph 4.15 of PS-01: *Providing information and advice* states that: 'The Registrar is also bound by the Australian Privacy Principles in the *Privacy Act 1988* (Privacy Act), which regulate the collection, use, and storage and collection of personal information. Information received from individuals will be dealt with in accordance with these statutory requirements... '
>
> Paragraphs 7.1 to 7.8 of the Registrar's policy statement PS-15: *Privacy*, outlines the privacy obligations of the Registrar with respect to the use and disclosure of protected information. This applies to any equivalent material contained in documents created under the ACA Act that are held by the Registrar.
>
> The Office of the Registrar of Indigenous Corporations (ORIC) has also published a privacy statement on its website to demonstrate its commitment to protect the privacy of officers of Aboriginal and Torres Strait Islander corporations. This statement can be found at http://www.oric.gov.au/privacy-statement. As ORIC is part of the Department of the Prime Minister and Cabinet (PM&C), it is also bound by PM&C's Privacy Policy.
>
> Through the matters outlined in the relevant policy statements and the published privacy statements of ORIC and PM&C (published for the purposes of Australian Privacy Principles 1.3-1.5) as outlined above, the Registrar and ORIC are committed to the protection of the privacy of individuals in accordance with the Privacy Act. This includes any documents or information falling within the scope of section 55 of the CATSI Regulations.

2.37 It is noted that the Australian Privacy Principles in the *Privacy Act 1988* are not a complete answer to concerns about interference with the right to privacy in this context, as those principles contain a number of exceptions to the prohibition on disclosure of personal information.[4] It is also noted that policy guidance in the form of policy statements and privacy statements offer less protection than statutory processes, as they can be amended at any time. However, having regard to the

4 For example an agency may disclose personal information or a government related identifier of an individual where its use or disclosure is required or authorised by or under an Australian Law: Australian Privacy Principles 6.2(b) and 9.

limited nature of the information that is likely to be disclosed and the requirements to which the Registrar must have regard before disclosing the information (including that disclosure be in the public interest), on balance the measure is likely to be compatible with the right to privacy.

Committee response

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

2.39 The preceding analysis indicates that the measure is likely to be compatible with the right to privacy.

Defence Legislation Amendment (Instrument Making) Bill 2017

Purpose	Amends the instrument making powers in the *Defence Act 1903,* including replacing a number of inquiry-specific regulation-making powers with a consolidated provision relating to inquiries concerning the Defence Force; enabling the minister to declare an area to be a defence aviation area in which buildings and objects can be regulated for the purposes of removing and reducing hazards to defence aviation; subjecting certain regulations to monitoring under the *Regulatory Powers (Standard Provisions) Act 2014*; establishing an infringement notice scheme in declared public areas
Portfolio	Defence
Introduced	House of Representatives, 14 September 2017
Rights	Multiple Rights (see **Appendix 2**)
Previous report	12 of 2017
Status	Concluded examination

Background

2.40 The committee first reported on the Defence Legislation Amendment (Instrument Making) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Defence by 13 December 2017.[1]

2.41 The bill passed both Houses of Parliament on 16 November 2017 and received Royal Assent on 30 November 2017.

2.42 The minister's response to the committee's inquiries was received on 19 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Amendment to the power to make regulations for inquiries

2.43 At present, the Defence (Inquiry) Regulations 1985 (the Inquiry Regulations) set out the different types of inquiries that can be undertaken in the Defence Force. These currently include General Courts of Inquiry, Boards of Inquiry, Combined Boards of Inquiry, Chief of the Defence Force Commissions of Inquiry, and Inquiry Officer Inquiries.

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 10-15.

2.44 The power to make those regulations is presently set out in section 124(1)(gc) of the *Defence Act 1903* (Defence Act), which provides that the Governor-General may make regulations providing for and in relation to 'the appointment, procedures and powers of courts of inquiry, boards of inquiry, Chief of the Defence Force commissions of inquiry, inquiry officers and inquiry assistants'. The bill amends this provision of the Defence Act and replaces it with a general power to make regulations relating to 'inquiries concerning the defence force'.[2]

2.45 The bill also amends several provisions that deal with the other powers included within the power to make regulations for inquiries, so as to replace the references to specific types of inquiry with a more general reference to 'an inquiry'. This includes amendments to the use and derivative use immunity provisions in the Defence Act.[3]

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

2.46 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings and to cases before both courts and tribunals, whether ordinary or specialised, civilian or military.[4] The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

2.47 The statement of compatibility states that the amendment allows greater flexibility in naming inquiries in the regulations, but does not change the substance of the regulation-making power. However, the initial analysis noted that the power to make regulations in relation to inquiries remains very broad, extending to the 'appointment, procedures and powers' of inquiries. Matters currently dealt with by the Inquiry Regulations include the conduct of inquiries, the manner of taking evidence, and the duties of witnesses (including obligations to answer questions).[5] The committee has previously commented that the Inquiry Regulations engage fair trial and fair hearing rights.[6] It is likely therefore that any new regulations enacted

2 See item 2 of the Bill. Proposed section 124(1)(gc) goes on to note several exceptions to this regulation-making power in relation to certain inquiries, namely inquiries conducted by the Defence Force Remuneration Tribunal under Part IIIA of the Act; or the Inspector-General ADF under Part VIIIB; or the Defence Honours and Awards Appeals Tribunal under Part VIIIC.

3 See sections 124(2A) and 124(2C) of the Defence Act.

4 UN Human Rights Council, *General Comment No.32: Article 14, Right to equality before courts and tribunals and to fair trial* (2006) [22].

5 See, *Defence (Inquiry) Regulations 1985.* See also Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44th Parliament* (18 June 2015) pp. 18-21.

6 See also, Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44th Parliament* (18 June 2015) pp. 18-21.

pursuant to the broad regulation-making power proposed by the bill would also engage fair trial and fair hearing rights.

2.48 The committee has previously commented on some of the safeguards contained in the current Inquiry Regulations. In particular, the committee concluded that the use and derivative immunity use provisions in the current Inquiry Regulations appear to be consistent with the right not to incriminate oneself under international human rights law.[7] However, the initial analysis noted that it is not clear whether other safeguards will be in place to ensure that the inquiries established pursuant to the broader regulation-making power proposed by the bill are compatible with the right to a fair trial and fair hearing. International human rights law generally requires that states have sufficient safeguards in place to prevent violations of human rights occurring. Without adequate safeguards, it is possible that the broad regulation-making power may be exercised in such a way as to be incompatible with the right to a fair trial and a fair hearing.[8]

2.49 The initial analysis stated that any proposed legislative instrument revising the Inquiry Regulations will need to ensure that the powers in relation to defence inquiries are applied in a manner compatible with human rights. This includes safeguards to ensure that, where the rights of individuals may arise from an inquiry, the inquiries are established to ensure the equitable, impartial and independent administration of justice so as to ensure that such an inquiry takes place under conditions that genuinely afford the guarantees stipulated in the ICCPR.[9]

2.50 In its initial analysis in *Report 12 of 2017*, the committee stated that it will consider the human rights compatibility of any proposed regulations in relation to defence inquiries once they are received.

Use of force in executing warrants

2.51 The bill additionally seeks to incorporate the standard provisions in Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) for monitoring whether the regulations in relation to 'defence aviation areas' are being complied with.[10] This includes monitoring powers such as powers of entry and inspection,[11] and the requirement that a warrant may be issued if an issuing officer is

7 See, Parliamentary Joint Committee on Human Rights, *Twenty-Third Report of the 44th Parliament* (18 June 2015) p. 21.

8 See, for example, Human Rights Committee, Freedom of movement (Art.12), UN DocCCPR/C/21/Rev.1/Add.9, General Comment No.27, *Pinkney v Canada* HRC Communication No. 27/1977, UN Doc CCPR/C/14/D/27/1977; *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

9 UN Human Rights Council, *General Comment No.32: Article 14, Right to equality before courts and tribunals and to fair trial* (2006) [22].

10 Within defence aviation areas, buildings and objects can be regulated for the purposes of removing and reducing hazards to defence aviation.

11 See for example sections 18 and 19 of the *Regulatory Powers (Standard Provisions) Act 2014.*

satisfied, by information on oath or affirmation, that it is reasonably necessary that one or more authorised persons have access to a premises.[12]

2.52 The bill would also introduce a new section setting out modifications to the application of the Regulatory Powers Act in relation to defence aviation areas, including powers for authorised persons to enter land to take action such as the removal, destruction or modification of a building, structure or objects within a defence aviation area, for the purpose of ensuring compliance with the regulations. The bill also introduces new section 117AF(3) which provides:

> (3) In executing a monitoring warrant for the purposes mentioned in paragraph (1)(a) [i.e. the purpose of ensuring compliance with the monitored provision]:
>
> (a) an authorised person may use such force against persons and things as is necessary and reasonable in the circumstances; and
>
> (b) a person assisting the authorised person may use such force against things as is necessary and reasonable in the circumstances.

2.53 An 'authorised person' is a 'defence aviation area inspector',[13] who is a person appointed as such by the Secretary or Chief of Defence Force and may include an APS employee in the Department and a member of the Defence Force.[14]

Compatibility with the right to life

2.54 The right to life is protected by article 6(1) of the ICCPR and article 1 of the Second Optional Protocol to the ICCPR. The right to life has three core elements to it:

- 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 requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

2.55 The statement of compatibility states that this aspect of the bill does not engage any applicable rights and freedoms.[15] However, empowering authorised persons to use force against persons may engage and limit the right to life, as force may be used in a manner that could lead to a loss of life.

2.56 A measure that limits the right to life may be justifiable if it is demonstrated that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. As no information was provided in the statement of compatibility, the initial analysis assessed that it was not possible

12 Section 32(2) of the *Regulatory Powers (Standard Provisions) Act 2014*.

13 See proposed section 117AE(2)(b) of the bill.

14 See proposed section 117AG(1) of the bill.

15 SOC [6].

to determine the extent to which the right to life may be engaged and limited, and whether such a limitation is permissible.

2.57 Questions arise because there is no definition of what constitutes 'force' (including whether it includes lethal force) and what safeguards are in place governing the use of force. It is noted that there is a requirement that a person not be appointed a defence aviation area inspector unless the appointer 'is satisfied that the person has the knowledge, training or experience necessary to properly exercise the powers of a defence aviation area inspector',[16] but there is no information as to whether that knowledge, training or experience includes specific training in relation to the use of force in the context of executing warrants. Further, while the use of force is limited to 'such force against persons as is necessary and reasonable in the circumstances',[17] no information is provided in the statement of compatibility as to whether there is any oversight over the exercise of that power, such as consideration of any particular vulnerabilities of the person who is subjected to the use of force, and any access to review to challenge the use of force.

2.58 The committee therefore sought the advice of the minister as to the compatibility of the measure with this right, including:

- 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.

Compatibility with the right to freedom from torture, cruel, inhuman and degrading treatment or punishment

2.59 Article 7 of the ICCPR and the Convention against Torture provide an absolute prohibition against torture, cruel, inhuman or degrading treatment or punishment. This means torture can never be justified under any circumstances, regardless of the objective sought to be achieved. The aim of the prohibition is to protect the dignity of the person and relates not only to acts causing physical pain but also those that cause mental suffering.

2.60 As noted above, the statement of compatibility states that this aspect of the bill does not engage any applicable rights and freedoms.[18] However, empowering persons to use force against other persons may engage these rights, as force may be used in such a way that causes pain (physical or mental) in such a way that it amounts to a violation of Article 7.

16 Proposed section 117AG(2) of the bill.

17 See proposed section 117AF(3) of the bill.

18 SOC [6].

2.61 The initial analysis noted that there are concerns as to whether the breadth of the proposed powers may lead to an authorised person taking action that may constitute degrading treatment for the purposes of international human rights law. As set out above at [2.56] and [2.57], questions arise as to what constitutes 'force', whether there are adequate safeguards in place in relation to the use of force, and whether there is any monitoring or oversight over the exercise of the use of force, such as consideration of any particular vulnerabilities of the person who is subjected to the use of force, and any access to review to challenge the use of force.

2.62 The committee therefore sought the advice of the minister as to the compatibility of the measure with this right, including any safeguards in place governing the use of force, and any monitoring or oversight in relation to the use of force.

Minister's response

2.63 The minister's response provides the following information in relation to the committee's inquiries:

> While in most cases Defence can reach agreement with landowners regarding aviation hazards, the powers referred to in the new provisions of the Bill are important because they provide guidance in the event that agreement is not possible. The provision relating to use of force is aimed at achieving a legitimate objective, being the removal or reduction of hazards to defence aviation to enhance the safety of defence aviation.
>
> Under new subsection 117AF(3), use of force against a person is limited to defence aviation area inspectors. Before appointing a defence aviation area inspector, the Secretary or the Chief of the Defence Force must be satisfied that the person has the knowledge, training or experience necessary to properly exercise the powers of a defence aviation area inspector. Since those powers include the power to use necessary and reasonable force, this will require the person to have sufficient knowledge, training or experience necessary to properly exercise the power to use force.
>
> Importantly, the use of force is limited to what is necessary and reasonable. Factors that may be relevant in determining what is reasonable include the urgency of the aviation situation, other avenues that may be available to remove or reduce the hazard, the effect not removing or reducing the hazard will have on safety or operational requirements, and the particular circumstances of the person in question. Apart from a situation involving self-defence, it is difficult to imagine a scenario which would justify the deliberate use of lethal force or force that would cause serious injury to a person.
>
> If a defence aviation area inspector used force beyond what was necessary or reasonable, they would be subject to the ordinary criminal law, and could be investigated and prosecuted the same as any other person. A

person subjected to the use of force would be able to report to the police or complain to Defence.

In this context, Defence considers that the chances of this provision limiting the right to life or the right to freedom from torture, cruel, inhuman and degrading treatment or punishment, extremely remote.

2.64 The objective of enhancing the safety of defence aviation is likely to be a legitimate objective for the purpose of human rights law, and providing for defence aviation inspectors to use force to remove or reduce hazards appears to be rationally connected to this objective.

2.65 The minister's explanation of the factors relevant to determining whether (and the extent to which) to use force, and the clarification that the Secretary or the Chief of the Defence Force must be satisfied that a defence aviation inspector has the knowledge, training or experience necessary to properly exercise the powers of a defence aviation area inspector (including adequate training in relation to the use of force), assists in determining compatibility with the right to life and the right to freedom from torture, cruel, inhuman and degrading treatment. This information provided by the minister, coupled with the requirement in the bill that any force used may only be that which is reasonable and necessary in the circumstances, tends to suggest that the risk of the use of force being lethal force or force that would cause serious injury to a person, is very low. On balance and in light of the information provided by the minister, the measure appears to be compatible with the right to life and the right to freedom from torture, cruel, inhuman and degrading treatment.

Committee response

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

2.67 In light of the information provided by the minister, the measure appears to be compatible with the right to life and the right to freedom from torture, cruel, inhuman and degrading treatment.

Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017

Purpose	Amends the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995* and five other Acts to give the Australian Prudential Regulation Authority additional powers for crisis resolution, and resolution planning, in relation to regulated entities
Portfolio	Treasury
Introduced	House of Representatives, 19 October 2017
Rights	Right not to incriminate oneself; privacy (see **Appendix 2**)
Previous report	12 of 2017
Status	Concluded examination

Background

2.68 The committee first reported on the Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Treasurer by 13 December 2017.[1]

2.69 The Treasurer's response to the committee's inquiries was received on 14 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Information gathering powers of statutory managers

2.70 The bill would insert a new section 62ZOD into the *Insurance Act 1973* (Insurance Act) and a new section 179AD into the *Life Insurance Act 1995* (Life Insurance Act) which set out the powers and functions of statutory managers under the Insurance Act and Life Insurance Act respectively.[2]

2.71 This includes a new power to require a person who has, at any time, been an officer of the body corporate to give the statutory manager information relating to the business of the body corporate that the statutory manager requires.[3] A person

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 25-30.

2 An Insurance Act and Life Insurance Act 'statutory manager' is either the Australian Prudential Regulation Authority (APRA) or an administrator appointed by APRA to control a body corporate's business: see Schedule 2, item 58, proposed section 62ZOA(8) to the Insurance Act; see Schedule 3, item 52, proposed section 179AA(8) to the Life Insurance Act.

3 Schedule 2, item 58, proposed section 62ZOD(2) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(2) to the Life Insurance Act.

commits an offence punishable by 12 months imprisonment if the person fails to comply with this requirement to give information.[4] An individual is not excused from complying with the requirement to give information on the ground that doing so would tend to incriminate the individual or make the individual liable to a penalty.[5]

2.72 However, information given in compliance with the requirement is not admissible in evidence against the individual in a criminal proceeding or a proceeding for the imposition of a penalty, other than proceedings in respect of the falsity of the information, provided the person has claimed the privilege against self-incrimination before giving that information and that giving the information might in fact incriminate the individual.[6]

Compatibility of the measure with the right not to incriminate oneself

2.73 The specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the ICCPR include the right not to incriminate oneself (article 14(3)(g)).

2.74 The right to a fair trial, and in particular the right not to incriminate oneself, is engaged where a person is required to give information to the Insurance Act or Life Insurance Act statutory manager which may incriminate them and that incriminating information can be used to investigate criminal charges. The statement of compatibility acknowledges the privilege against self-incrimination is engaged by the bill.[7]

2.75 The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective. The statement of compatibility states that the limitation on the right not to incriminate oneself is permissible on the basis that:

> Engaging the right against self-incrimination in this way is necessary and justified as only the key personnel of a relevant entity will have access to

4 Schedule 2, item 58, proposed section 62ZOD(3) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(3) to the Life Insurance Act.

5 Schedule 2, item 58, proposed section 62ZOD(4) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(4) to the Life Insurance Act.

6 Schedule 2, item 58, proposed section 62ZOD(5) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(5) to the Life Insurance Act.

7 The statement of compatibility also addresses the privilege against self-incrimination in relation to the new information gathering powers to allow APRA to obtain information from current and past officers of an insurer and a life insurance entity that is under statutory management: see Statement of Compatibility (SOC), 224-225. The provisions relating to APRA's powers to obtain information include a use and a derivative use immunity provision and therefore do not raise human rights concerns: Schedule 2, item 58, proposed section 62ZOI(5) and (6) of the *Insurance Act 1973*; Schedule 3, item 52, proposed section 179AI(5) and (6) of the *Life Insurance Act 1995.*

> information and documents relating to that entity's financial condition. It is essential for APRA or a statutory manager to be able to obtain this information quickly to assist with the management and crisis resolution of an insurance or life insurance entity that is financially distressed.
>
> By compelling relevant officers to provide the required information and documents, APRA and other statutory managers will be able to maximise their ability to rehabilitate a distressed insurance or life insurance entity. This will benefit the entity's customers, creditors and other suppliers...[8]

2.76 A legitimate objective – that is, one that is capable of justifying a proposed limitation on human rights – must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. The initial analysis stated that the statement of compatibility does not provide any information or evidence as to the pressing or substantial need to be able to obtain information quickly to assist with the management and crisis resolution of an insurance or life insurance entity. The administrative convenience, in and of itself, is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law.

2.77 Further, the availability of 'use' and 'derivative use' immunities can be one important factor in determining whether the limit on the right not to incriminate oneself is proportionate. That is, they may act as a relevant safeguard. In this respect, the initial assessment noted that information gathering powers in proposed sections 62ZOD and 179AD relating to statutory managers include a 'use' immunity provision, such that incriminating information or documents provided cannot be directly used against a person in criminal proceedings or in proceedings where the person may be liable to a penalty.[9] However, no 'derivative use' immunity is provided for proposed sections 62ZOD and 179AD, which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person.

2.78 In contrast, it is noted that in relation to APRA's information gathering powers which are also introduced by this bill in proposed sections 62ZOI and 179AI, both a 'use' and a 'derivative' use immunity provision are included, such that information or documents obtained 'as a direct or indirect consequence' of providing information are not admissible against the person.[10]

2.79 The lack of derivative use immunity in relation to the information gathering powers of statutory managers in proposed sections 62ZOD and 179AD raises

8 SOC, pp. 224-225.

9 See, Schedule 2, item 58, proposed section 62ZOD(5) to the Insurance Act; Schedule 3, item 52, proposed section 179AD(5) to the Life Insurance Act.

10 Schedule 2, item 58, proposed section 62ZOI(5) and (6) of the *Insurance Act 1973*; Schedule 3, item 52, proposed section 179AI(5) and (6) of the *Life Insurance Act 1995.*

questions about whether the measure is the least rights restrictive way of achieving its objective. It was acknowledged that a 'derivative use' immunity will not be appropriate in all cases because it is not reasonably available as a less rights restrictive alternative (for example, because it would undermine the purpose of the measure or be unworkable). In this respect, it was noted that the availability or lack of availability of a 'derivative use' immunity needs to be considered in the regulatory context of the proposed powers. The extent of interference that may be permissible as a matter of international human rights law may be, for example, greater in contexts where there are difficulties regulating specific conduct, persons subject to the powers are not particularly vulnerable or powers are otherwise circumscribed with respect to the scope of information which may be sought. That is, there are a range of matters which influence whether the limitation is proportionate. However, no information is provided in the statement of compatibility to explain why a 'derivative use' immunity is provided in relation to persons who give information in compliance with APRA's information gathering powers, but not to persons who give information in compliance with statutory manager's information gathering powers.

2.80 Noting the preceding analysis, the committee sought the advice of the Treasurer 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 for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is proportionate to achieve the stated objective;
- whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and
- whether a derivative use immunity is reasonably available as a less rights restrictive alternative in sections 62ZOD of the *Insurance Act 1973* and 179AD of the *Life Insurance Act 1995* to ensure information or evidence indirectly obtained from a person compelled to give information or documents cannot be used in evidence against that person.

Treasurer's response

2.81 The Treasurer's response first explains the broader objectives, context and necessity for the bill:

> … [the amendments proposed by the bill] will enable APRA to appoint a statutory manager to an insurer or, in certain circumstances, a related body corporate. Appointment of a statutory manager will generally only

> occur in situations of urgency, for example where the failing insurer poses a threat to financial system stability.
>
> There is a pressing need for such a measure because of the lack of a statutory management regime for insurers as compared with the Banking Act and consequently, a substantial gap in APRA's resolution regime for insurers to effectively and efficiently manage and resolve a distressed or failing insurer. Statutory management powers will be exercised with the broad objectives of protecting the interests of policyholders of insurers and ensuring the stability of Australia's financial system, both of which are such pressing or substantial concerns for most Australians that the limitation upon the right to claim privilege against self-incrimination in the measure is warranted and justified.

2.82 In relation to whether there is reasoning or evidence that the stated objective addresses a pressing or substantial concern, and how the measure is effective to achieve the stated objective, the Treasurer's response explains:

> It is critical that a statutory manager, having taken over what will often be an insolvent or near insolvent financial institution or related entity, be in a position to obtain all relevant information relating to the business of the body corporate from officers (and former officers) in order for the statutory manager to control, stabilise, investigate and (to the extent possible) resolve the body corporate or resolve a related entity.
>
> Overriding the privilege against self-incrimination is justified in this context because only the key personnel of an insurer will have access to information and documents relating to the insurer's business, including its financial condition. It is essential for a statutory manager to be able to obtain this information quickly to assist with the management and crisis resolution of an insurer that is financially distressed. In circumstances where an insurer is distressed or failing, especially where its failure may have an adverse effect on financial stability, time is of the essence in ensuring the orderly resolution of the insurer. By compelling relevant officers or ex-officers promptly to provide required information and documents relating to the business of the body corporate, statutory managers will be able to maximise their ability to rehabilitate a distressed insurer, or to ensure an orderly resolution and exit of a failing insurer. This will ultimately benefit the insurer's customers, creditors and other suppliers. In the event of a significant crisis, APRA would also be able to use the information gathered to support decision making and prevent contagion in the financial system, ensuring that financial system stability is maintained.

2.83 The Treasurer's response provides an explanation as to the pressing or substantial need to be able to obtain information quickly to assist with the management and crisis resolution of an insurance or life insurance entity, and it is likely that in this case the information gathering powers pursue a legitimate objective

for the purposes of international human rights law, and are rationally connected to that objective.

2.84 As to the proportionality of the proposed measure, the Treasurer's response explains that the information gathering powers can only be used in limited circumstances in a particular regulatory context, namely, where a statutory manager has been appointed. The Treasurer explains that there is a high threshold for triggering such an appointment to an insurer or related body corporate. For example, the Treasurer explains that certain conditions for the appointment must first be met (such as insolvency) and that at least one of a number of conditions must be satisfied before such an appointment to an insurer or body corporate is made, including that the failure of the insurer poses a threat to the stability of the financial system.

2.85 The Treasurer further explains that the information gathering applies to a narrow group of persons. In particular, the Treasurer explains that the powers apply only in relation to an 'officer' as defined in section 9 of the *Corporations Act 2001* (the Corporations Act) (e.g. a director or other senior person with significant strategic responsibilities in relation to the failing entity), and a person who has been such an officer. The Treasurer explains the rationale for applying the information-gathering powers to officers as follows:

> Circumstances may exist where the failure of the insurer can be attributed to a failure by one or more officers to comply with their statutory responsibilities, including where there has been a breach of Corporations Act provisions carrying an offence. This raises the real possibility of the statutory manager's ability to fulfil his or her duties being hampered by a refusal to provide information on self-incrimination grounds, making the override of the privilege against self-incrimination necessary in this instance.

2.86 The Treasurer further explains that, in this particular regulatory context, the absence of a derivative use immunity is necessary for the following reasons:

> …if derivative use immunity is applied, it would often be very difficult for the prosecution to show that the evidence they rely on to prove a criminal case against an officer relating to the failure of the financial institution was uncovered through an absolutely independent and separate investigation process. This may in turn lead to hesitation on the part of a statutory manager to exercise the information gathering power, undermining the purpose for which the power was conferred.
>
> If derivative use immunity applied, then further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered through independent investigative processes. Also, where the information-obtaining power is exercised against officers or ex-officers who may have been responsible for the deterioration or failure of a financial institution, for example, a director implicated in a failure such as

> HIH, a derivative use immunity would not be helpful in building a case against the director for breach of their duties under law.
>
> These provisions are consistent with the majority of existing self-incrimination provisions in other APRA-administered legislation, including provisions in the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) and *Private Health Insurance (Prudential Supervision) Act 2015* (PHI Act).

2.87 Finally, the Treasurer explains the rationale for why a 'derivative use' immunity is provided in relation to persons who give information in compliance with APRA's information gathering powers, but not to persons who give information in compliance with statutory manager's information gathering powers:

> The committee has also noted the difference between APRA's proposed information gathering powers (in proposed sections 62ZOI of the Insurance Act and 179AI of the Life Insurance Act), which includes derivative use immunity, and the proposed statutory manager's powers to require officers to provide information (in proposed sections 62ZOD and 179AD), which do not. …
>
> APRA's information gathering power applies in respect of any person while the statutory manager's information gathering power is more circumscribed in scope and applies only in respect of officers (and ex-officers) of an insurer. This is a crucial distinction. Officers are in a different situation to ordinary persons in that they are the key personnel of the insurer with greater access to the relevant information and documents relating to the insurer. Also, an officer may well have breached directors' duties in connection with the failure of the insurer. Therefore, while use immunity is appropriate in this context, derivative use immunity may impede any prosecution or penalty proceedings against these officers for breach of their duties, especially given the issues identified above relating to the application of derivative use immunity. By contrast, APRA's information gathering power extends to any person, including an ordinary citizen, and the greater protection afforded by derivative use immunity is justified in this particular context because of the wider scope of the power.

2.88 As noted in the initial analysis, there are a range of matters which influence whether a limitation on the right not to incriminate oneself is permissible. In the present case, the Treasurer has explained in detail the regulatory context of the proposed powers and the application of the powers to officers and former officers who may have greatest access to relevant information and documents relating to insurers (rather than all persons). The Treasurer's therefore response suggests that a 'derivative use' immunity is not reasonably available in this context. In light of the further information provided by the Treasurer, it is likely that the limitation on the right not to incriminate oneself is proportionate to the legitimate objective of the measure.

Committee response

2.89 The committee thanks the Treasurer for his response and has concluded its examination of this issue.

2.90 In light of the information provided by the Treasurer and in the particular regulatory context of the measure, the committee considers that the limitation on the right not to incriminate oneself is proportionate to the legitimate objective of the measure.

Information sharing provisions

2.91 Schedule 4 of the bill includes a number of proposed amendments to the *Financial Sector (Business Transfer Group Restructure) Act 1999* (Transfer Act) to extend the scope of section 42 of the Transfer Act to allow APRA to provide information (including personal information) to a body that receives the shares of another body as part of a compulsory transfer of business.[11]

Compatibility of the measure with the right to privacy

2.92 The right to privacy encompasses respect for informational privacy, including the right to respect private information and private life, particularly the storing, use and sharing of personal information. Schedule 4 of the bill engages and limits the right to privacy by enabling APRA to provide information, which includes personal information, to a receiving body.

2.93 The statement of compatibility acknowledges that the right to privacy is engaged and limited by the proposed amendment to section 42 of the Transfer Act. As to the objective of the proposed amendment, the statement of compatibility explains:

> The provision is necessary because under the compulsory transfer provisions a receiving body's board must consent to the transfer. In order to facilitate this it will be necessary and appropriate for APRA to provide information to the receiving body about the business, including confidential information and information relating to staff and executives of the body being transferred. It will also be necessary for APRA to share such information in the process of settling the detail of the transfer, including the schedule of assets and liabilities, and in documentation relating to transferred staff.[12]

2.94 As noted earlier in relation to the right against self-incrimination, a legitimate objective must address a pressing or substantial concern. While the statement of compatibility states that the provision is necessary, it is not clear from the information provided how this aspect of the bill addresses a pressing or substantial concern that would justify a limitation on the right to privacy.

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11 Schedule 4, item 92, proposed section 42 of the Transfer Act.

12 SOC, p. 226.

2.95 The statement of compatibility then sets out safeguards that are contained in the bill to protect the right to privacy, namely that:

- the *Privacy Act 1998* (Privacy Act) would apply to the information;
- where information is provided to APRA, the existing APRA confidentiality provisions would apply; and
- where information is provided to other statutory managers, the statutory manager would be responsible for the relevant entity and as such their access to the information would be no different to the previous manager's access to the information.[13]

2.96 However, the initial analysis stated that these safeguards do not demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved. For example, while the Privacy Act contains a range of general safeguards it is not a complete answer because the Privacy Act and the Australian Privacy Principles (APPs) contain a number of exceptions to the prohibition on disclosure of personal information. Relevantly, for example, an agency may disclose personal information or a government related identifier of an individual where its use or disclosure is required or authorised by or under an Australian Law.[14] This means that the Privacy Act and the APPs may not operate as an effective safeguard of the right to privacy in these circumstances.

2.97 Further, the initial analysis noted that no information is provided setting out the content of APRA's confidentiality provisions, and how these provisions would apply to safeguard personal information. It was stated that it is not possible to determine at this stage whether the APRA confidentiality provisions provide an adequate safeguard. Similarly, while the amendments will place the statutory manager in no different position to the previous manager's access to information, it is not clear from the information provided the extent of the previous manager's access to information. Therefore, it is not possible to conclude based on the information provided whether the measure is sufficiently circumscribed to constitute a proportionate limitation on the right to privacy.

2.98 The committee therefore sought the advice of the Treasurer 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 for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is proportionate to achieve the stated objective.

13 SOC, p. 227.

14 APP 9; APP 6.2(b).

Treasurer's response

2.99 The Treasurer's response provides an overview of the current transfer powers under the Transfer Act, and explains the amendments introduced by the bill and their objective as follows:

> The Bill supplements the Transfer Act by providing that, as an alternative to requiring a transfer of business, APRA may transfer the shares (ownership) of the failing entity to a new owner. The ability to transfer the shares of a failing regulated entity could, in some circumstances, provide a more efficient and simpler means of achieving an orderly resolution, than affecting a full transfer of all of the assets and liabilities of the entity. This is an enhancement of the Transfer Act to provide APRA with greater flexibility and certainty when considering the resolution options available to address and resolve a failing entity. The enhancement will enable APRA to more quickly achieve an orderly resolution of a distressed entity which is in the interests of most Australians as it helps prevent contagion in the financial system, ensuring that financial system stability is maintained.
>
> As with other resolution powers to be exercised by APRA, compulsory transfer powers are exercised with the broad objectives of protecting the interests of depositors and policyholders and maintaining the stability of Australia's financial system, both of which are such pressing or substantial concerns for most Australians that the limitation to privacy in the measure is warranted and justified.

2.100 The stated objective of protecting the interests of depositors and policyholders and maintaining the stability of Australia's financial system is likely to be legitimate for the purposes of international human rights law.

2.101 The Treasurer's response also explains how the proposed information sharing powers are rationally connected to this objective as follows:

> As explained in the statement of compatibility referred to by the committee, the proposed information sharing provisions (in particular, the amended section 42, applicable to both transfer of shares and transfer of business) are a necessary component of the framework for transfers under the Transfer Act.
>
> In order for APRA to require a compulsory transfer, a receiving body's board must consent to the transfer from the transferring body (as is currently the case with a transfer of business). As with a transfer of business, in order for the receiving body's board to consent, it must be apprised of relevant knowledge of what is to be transferred to it, including all relevant information and documentation pertaining to the transferring body which may contain personal information relating to staff or individuals who have insurance or other arrangements with the failed entity. Without being so informed, it is impossible for the board to reach a decision as to whether to consent to the transfer. Therefore the information sharing provisions ensure that the receiving body can be

> provided relevant information about the staff, management and insurance arrangements as part of their due diligence when they are deciding whether or not to consent to the transfer.

2.102 The Treasurer's response also provides further information as to the safeguards in place to protect the right to privacy. The Treasurer explains that section 56 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act) imposes confidentiality upon APRA officers in respect of 'protected information' and 'protected documents'. Documents and information become 'protected' by virtue of both having been received by APRA and relating to the affairs of entities that APRA regulates, or customers of those entities, or entities that APRA registers or collects data from under the *Financial Sector (Collection of Data) Act 2001* (FSCODA). The Treasurer's response continues:

> Subsection 56(2) of the APRA Act makes it an offence for a person who is, or has been, an APRA officer to disclose protected information or a protected document to any person or to a court, subject to certain exceptions. Information relating to a transferring body subject to the proposed information sharing provisions under the measure would be protected information under section 56 of the APRA Act as having been received by APRA and relating to the affairs of entities regulated by APRA.
>
> The secrecy regime under section 56 extends to the receiving body's officers because they fall within paragraph (c) of the definition of 'officer' in subsection 56(1) of the APRA Act (received in course of their employment). As such, onward disclosure of the information by the receiving body to other persons is restricted under section 56.
>
> Also, as noted in section 42 of the Transfer Act, subsection 56(9) of the APRA Act allows for conditions to be imposed on disclosure of protected information to restrict the use to which the receiving body may put the information to. Failure to comply with any condition so imposed is an offence. For example, if APRA were to disclose information about staff or insurance contracts of a failed insurer to a body corporate that was considering taking on ownership of the failed insurer via a transfer of shares, APRA could impose conditions under subsection 56(9) on the body corporate and its officers at the time of disclosing the information. Such conditions might require the recipients to only use the information for the purposes of deciding whether or not to accept the transfer, and not to further disclose the information.
>
> As such, the secrecy regime under section 56 of the APRA Act affords an effective and appropriate degree of protection to any personal information that may be included within protected information. Where the information is provided to a statutory manager, it is important to note that a statutory manager is, in any case, subject to the secrecy regime under section 56 of the APRA Act, as signposted under subsection 14C(5) of the Banking Act, and proposed subsections 62ZOK(4) and 179AK(4) of the Insurance Act and Life Insurance Act respectively.

2.103 Based on the information provided in the Treasurer's response, it appears that there are a number of safeguards in place in order to protect any personal information that may be disclosed. On balance, it is likely the measure will be compatible with the right to privacy.

Committee response

2.104 The committee thanks the Treasurer for his response and has concluded its examination of this issue.

2.105 In light of the information provided in the Treasurer's response, the committee considers that the measure is likely to be compatible with the right to privacy.

Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017 [F2017L01090]

Purpose	Amends the *Health Insurance (General Medical Services Table) Regulations 2017* to introduce a requirement that during the planning and management of a pregnancy a mental health assessment be performed by a medical practitioner or other qualified health professional, including screening for drug and alcohol use and domestic violence
Portfolio	Health
Authorising legislation	*Health Insurance Act 1973*
Last day to disallow	16 November 2017
Right	Privacy (see **Appendix 2**)
Previous report	12 of 2017
Status	Concluded examination

Background

2.106 The committee first reported on the Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017 [F2017L01090] (the regulations) in its *Report 12 of 2017*, and requested a response from the Minister for Health by 13 December 2017.[1]

2.107 The minister's response to the committee's inquiries was received on 8 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Mental health assessments during pregnancy

2.108 The regulations introduce changes to the Medicare Benefits Schedule (MBS). The MBS provides for the payment of Medicare benefits for professional services rendered to eligible persons, and for the calculation of Medicare benefits by reference to the fees for medical services which are set out in prescribed tables. The regulations include the introduction of a new requirement during the planning and management of a pregnancy for a mental health assessment to be performed by the medical practitioner or another suitably qualified health professional. The mental health assessment includes 'screening for drug and alcohol use and domestic violence of the patient'.[2] A mental health assessment (including screening for drug

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 31-33.

2 See item 24 of the Regulations, amendment to Schedule 1 (items 16590 and 16591).

and alcohol use and domestic violence) is also required in postnatal consultations between 4 and 8 weeks after birth.[3]

Compatibility of the measure with the right to privacy

2.109 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (including in relation to medical testing). The statement of compatibility does not consider whether the right to privacy is engaged or limited by the bill.

2.110 The initial human rights assessment stated that, based on the information provided, it was not clear as to the extent to which the mental health assessment will be compulsory, and what 'screening' entails. If a patient may refuse to take the test, and if 'screening' is minimally invasive (such as being limited to asking questions), the analysis noted that it may be that a patient's right to personal autonomy and physical and psychological integrity is not limited. However, if 'screening' includes more invasive procedures, such as a blood test to test for alcohol or drugs, the right to personal autonomy and physical and psychological integrity as an aspect of the right to privacy may be engaged and limited.

2.111 Limitations on the right to privacy will be permissible where they are not arbitrary, they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. The explanatory statement and the statement of compatibility note that the objective of the regulations is to improve obstetrics care for patients and to implement the recommendations of the MBS Review Taskforce so as to reflect current best clinical practice in light of the latest evidence and to improve health outcomes. The initial analysis stated that these are likely to be legitimate objectives for the purposes of international human rights law. Screening for mental health issues during and immediately following pregnancy appears also to be rationally connected to those objectives.

2.112 However, as noted earlier, it is unclear based on the information provided what 'screening' of a patient for drugs or alcohol or domestic violence entails, and whether the screening is mandatory for the patient. If the screening is mandatory or involves the collection of blood samples or other tests for drug or alcohol use, such that the measure places a limitation on the right to privacy, then it will need to be demonstrated that this is the least rights-restrictive approach to achieve the legitimate objective, and that adequate safeguards are in place in relation to the use of samples and test results.

2.113 The committee therefore sought the advice of the minister as to:

3 See item 9 of the Regulations, amendment to Schedule 1 (item 16407).

- what is meant by 'screening for drug and alcohol use and domestic violence', including whether it includes taking a blood test or related procedures;
- whether it is compulsory for a patient to undertake a mental health assessment (including screening for drug and alcohol use and domestic violence);
- what are the consequences for a refusal to undertake such an assessment; and
- whether the screening for drug and alcohol use and domestic violence is proportionate, including whether the measure is the least rights-restrictive means reasonably available to achieve the stated objective, and the effectiveness of any safeguards to protect a patient's privacy.

Minister's response

2.114 The minister's response provides the following information to the committee:

> - The mental health assessment can be met if the medical practitioner enquires about the mental wellbeing of the patient. This is a mandatory requirement.
> - If the patient consents to a comprehensive assessment, the medical practitioner can discuss significant risk factors to the patient's wellbeing (such as drug and alcohol use and domestic violence).
> - If the patient does not consent to a comprehensive assessment, a Medicare benefit is still payable for the service. This ensures that all patients will continue to have access to Medicare-subsidised obstetrics services.
>
> …
>
> The provision of a comprehensive mental health assessment, subject to the patient's consent, is intended to enable the prevention or early detection of mental health disorders. These disorders, which affect one in 10 women during pregnancy and one in seven women after birth, have the potential to have a negative impact on the physical and mental wellbeing of mothers and their children.

2.115 In relation to the meaning of 'screening for drug and alcohol use and domestic violence', the minister explains:

> …the word 'screening' in items 16590 and 16591 and new postnatal item 16407. In the context of these items, screening does not involve the use of any diagnostic techniques such as diagnostic imaging or pathology tests. Screening is simply asking patients a series of questions on certain risks [sic] factors. In other words, it is part of the comprehensive mental health assessment which the patient may or may not consent to. This terminology would be understood by medical practitioners and is

consistent with the relevant clinical guidelines, *Mental Health Care in the Perinatal Period: Australian Clinical Practice Guideline*.

As noted above, if the patient does not consent to a comprehensive assessment, a Medicare benefit is still payable for the service.

2.116 The minister's response explains that the proposed mental health screening is minimally invasive, does not involve diagnostic techniques such as pathology tests, and can only be undertaken with the patient's consent. Based on the further information provided by the minister, it is likely that the measure will be compatible with the right to privacy.

Committee response

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

2.118 In light of the further information provided by the minister, the committee considers that the measure is likely to be compatible with the right to privacy.

Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017

Purpose	Seeks to amend the *Proceeds of Crime Act 2002*, including to align the unexplained wealth regime with other types of orders, so that it covers situations where wealth is 'derived or realised, directly or indirectly' from certain offences; clarifies that property becomes 'proceeds' or an 'instrument' of an offence under the Act when 'proceeds' or an 'instrument' are used to improve the property or discharge an encumbrance security or liability incurred in relation to the property; and clarifies that property or wealth will only be 'lawfully acquired' in situations where the property or wealth is not 'proceeds' or an 'instrument' of an offence
Portfolio	Justice
Introduced	House of Representatives, 18 October 2017
Rights	Right to a fair trial; right to a fair hearing; privacy (see **Appendix 2**)
Previous report	12 of 2017
Status	Concluded examination

Background

2.119 The committee first reported on the Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Justice by 13 December 2017.[1]

2.120 The minister's response to the committee's inquiries was received on 19 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Changes to the definition of 'proceeds' and an 'instrument' in the Proceeds of Crime Act

2.121 The bill seeks to amend the definitions of 'proceeds' and 'instrument' in the *Proceeds of Crime Act 2002* (the POC Act). The bill seeks to provide that property will be considered to become 'proceeds' or an 'instrument' (and therefore be liable to being restrained or forfeited under the POC Act) where proceeds or instruments of crime are used to make improvements on property, service mortgage repayments on

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 34-42.

property and/or service loans taken out in relation to property.[2] It also introduces a definition of 'improvements' to clarify that where proceeds or instruments are used to renovate property, demolish structures, or repair or maintain assets, the property will become 'proceeds' or an 'instrument'.[3]

2.122 The bill also seeks to provide that wealth or property will only be 'lawfully acquired' (and therefore not liable to restraint, freezing or forfeiture) in situations where property or wealth is not 'proceeds' or an 'instrument' of an offence.[4] The explanatory memorandum explains that this amendment would ensure a court, when determining whether property is 'lawfully acquired', examines the origins of property or wealth used to discharge securities or encumbrances or to make improvements to property, as well as situations where property may be gifted to another person.[5]

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

2.123 The right to a fair trial and fair hearing is protected by articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The rights are concerned with procedural fairness, and encompass notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Specific guarantees of the right to a fair trial in relation to a criminal charge include the presumption of innocence,[6] the right not to incriminate oneself,[7] and the guarantee against retrospective criminal laws.[8]

Previous committee comment on the Proceeds of Crime Act

2.124 The committee has previously raised concerns that the underlying regime established by the POC Act for the freezing, restraint or forfeiture of property may be considered 'criminal' for the purposes of international human rights law.[9] For example, a forfeiture order may be made against property where (relevantly) a court is satisfied that the property is 'proceeds' of an indictable offence or an

2 Item 6 of the bill; Explanatory Memorandum (EM) [19].

3 Item 13 of the bill; EM [22].

4 Item 12 of the bill.

5 EM [37].

6 Article 14(2) of the ICCPR.

7 Article 14(3)(g) of the ICCPR.

8 Article 15(1) of the ICCPR.

9 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43-44; *Twenty-Sixth Report of the 44th Parliament Report 1 of 2017* (16 February 2017); *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92-93.

'instrument' of one or more serious offences.[10] The fact a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make such a forfeiture order.[11] Further, a finding need not be based on a finding that a particular person committed any offence.[12] A finding that a court is satisfied that the property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences appears to entail 'blameworthiness' or 'culpability' which the committee has previously considered would suggest that the provisions may be criminal in character, and therefore may engage criminal process rights which must be complied with in order for the measures to be compatible with fair trial and fair hearing rights.[13]

2.125 The committee has also previously noted:

> …the POC Act was introduced prior to the establishment of the committee and therefore before the requirement for bills to contain a statement of compatibility with human rights. It is clear that the POC Act provides law enforcement agencies important and necessary tools in the fight against crime in Australia. Assessing the forfeiture orders under the POC Act as involving the determination of a criminal charge 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.[14]

2.126 The committee has previously recommended that the Minister for Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and right to a fair hearing. It is noted that in his response to the committee's inquiries relating to the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016*,* the minister stated that 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. However, noting the concerns raised in relation to the POC Act, it would be of considerable assistance if the POC Act were subject to a foundational human rights assessment.

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10 Section 49 of the POC Act.

11 Sections 51 and 80 of the POC Act.

12 Section 49(2)(a) of the POC Act.

13 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) p. 43.

14 Parliamentary Joint Committee on Human Rights, *Thirty-First Report of the 44th Parliament* (24 November 2015) pp. 43-44; *Twenty-Sixth Report of the 44th Parliament Report 1 of 2017* (16 February 2017); *Report 2 of 2017* (21 March 2017) p. 6; *Report 4 of 2017* (9 May 2017) pp. 92-93.

Compatibility of the amendments

2.127 The existing human rights concerns with the POC Act mean that any extensions of the provisions in that Act by this bill may raise similar concerns. In particular, as outlined in the initial analysis, applying a broader basis on which a person's assets may be frozen, restrained or forfeited to include property subject to a mortgage in which mortgage payments have been serviced by illicit funds, without a finding of criminal guilt beyond reasonable doubt, may limit the right to be presumed innocent and the prohibition against double punishment should the POC Act provision be criminal in nature. Further, several aspects of the bill operate retrospectively, which may engage the absolute prohibition against retrospective punishment in criminal proceedings.[15]

2.128 The statement of compatibility states that the POC Act is civil in character, and on this basis the criminal process rights do not apply.[16] However, as noted in the committee's *Guidance Note 2,* the term 'criminal' has an autonomous meaning in international human rights law, such that even if a penalty or other sanction is classified as civil in character domestically it may nevertheless be considered 'criminal' for the purposes of international human rights law.[17]

2.129 In addition to the domestic classification of the offence, the committee's *Guidance Note 2* explains that two other relevant factors in determining whether the provisions should be characterised as 'criminal' in character concern the nature and purpose of the measure and the severity of the penalty. The purpose of the bill is described in the statement of compatibility as to ensure that proceeds of crime authorities can restrain and confiscate property or wealth in certain circumstances, so that 'criminals are not able to deliberately restructure their affairs to avoid the operation of the Act and retain their ill-gotten gains'.[18] The broader purpose of the POC Act is outlined in section 5 of the Act and includes to punish and deter persons from breaching laws. The initial analysis noted that this raises concerns that the freezing, restraint or forfeiture proceedings that are expanded by the bill may be characterised as a form of punishment.[19] As to the severity of the penalty, it was noted that the freezing, restraint or forfeiture orders can involve significant sums of

15 See, in this respect, the report of the United Kingdom Parliamentary Joint Committee on Human Rights, *Joint Committee on Human Rights Third Report* (26 November 2001), [40]-[41] where similar concerns were raised in relation to the UK *Proceeds of Crime Bill*.

16 Statement of Compatibility (SOC) [21]-[23]. See section 315 of the POC Act which relevantly provides that '[p]roceedings on an application order or a confiscation order are not criminal proceedings', that the rules of construction applicable only in criminal law do not apply, and that rules of evidence applicable in civil proceedings do apply.

17 Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) p. 3.

18 SOC [15].

19 See *R v Green* [1983] 9 CRR 78; *Johnston v British Columbia* [1987] 27 CRR 206.

money, which raises concerns that the cumulative effect of the purpose and severity of the measures would lead to the provisions being characterised as 'criminal'.

2.130 If the provisions were to be characterised as 'criminal' for the purposes of human rights law, this does not mean that the provisions are necessarily illegitimate, nor does it convert the provisions into a criminal offence in domestic law. Rather, it means that the provisions in question must be shown to be consistent with the criminal process guarantees set out in Articles 14 and 15 of the ICCPR, including any justifications for any limitations of these rights.

2.131 The committee therefore sought the advice of the minister as to whether these amendments to the POC Act are compatible with these rights, including:

- By reference to the committee's *Guidance Note 2,* whether the freezing, restraint or forfeiture powers that are broadened by the amendments to the definitions of 'proceedings' and an 'instrument' in the bill may be characterised as 'criminal' for the purposes of international human rights law, having regard to the nature, purpose and severity of those powers; and
- The extent to which the provisions are compatible with the criminal process guarantees set out in Articles 14 and 15, including any justification for any limitations of these rights where applicable.

2.132 As the POC Act was introduced prior to the establishment of the committee and no statement of compatibility was provided for that legislation, the committee recommended in its *Report 12 of 2017* that the minister 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. This would inform the committee's consideration of the compatibility of the amendments in the context of the legislative scheme as a whole.

Minister's response

2.133 In relation to whether the amendments may be characterised as civil or criminal for the purposes of international human rights law, the minister's response analyses the POC Act in light of *Guidance Note 2* and considers the freezing, restraint or forfeiture powers that are broadened by the amendments to the definitions of 'proceedings' and an 'instrument' in the bill should not be characterised as 'criminal' for the purposes of international human rights law. The minister's response states:

> On the first criterion, it is clear that asset recovery actions, including those under the unexplained wealth regime, are characterised as civil in nature under Australian domestic law.
>
> On the second criterion, the *Proceeds of Crime Act 2002* (POC Act) is not solely focused on deterring or punishing persons for breaching laws, but is primarily focused on remedying the unjust enrichment of criminals who profit at society's expense. Actions under the POC Act also make no determination of a person's guilt or innocence and can be taken against assets without a finding of any form of culpability against a particular individual.

> On the third criterion, Guidance Note 2 provides that a penalty is likely to be considered criminal for the purposes of human rights law if the penalty is imprisonment or a substantial pecuniary sanction. Proceedings under the POC Act cannot in themselves create any criminal liability and do not expose people to any criminal sanction (or a subsequent criminal record). Further, penalties under the POC Act cannot be commuted into a period of imprisonment.
>
> On whether the sanction is substantial, it also remains open to a court to decrease the quantum to be forfeited under the Act to accurately reflect the quantum that has been derived or realised from crime, ensuring that orders are aimed primarily at preventing the retention of ill-gotten gains, rather than the imposition of a punishment or sanction.

2.134 While the POC Act cannot in itself create criminal liability under domestic law, as noted in the initial analysis, the broader purpose of the POC Act is outlined in section 5 of the Act and includes to punish and deter persons from breaching laws, which raises concerns that the freezing, restraint or forfeiture proceedings that are expanded by the bill may be characterised as a form of punishment. Further, while it remains open to a court to decrease the quantum to be forfeited, it remains the case that significant sums of money may be frozen, restrained or forfeited, raising concerns that the cumulative effect of the purpose and severity of the measures would lead to the provisions being characterised as 'criminal'.

2.135 In relation to the committee's recommendation that the minister 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, the minister's response states:

> I note this recommendation and reiterate my previous comments as outlined at paragraph 1.115 of the Committee's report, namely that 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 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 when developing Bills to amend the Act.

2.136 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

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

2.138 The committee notes that the amendments to the definitions of 'proceedings' and an 'instrument' in the bill have 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.

2.139 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, the amendments also raise concerns regarding the right to a fair hearing and the right to a fair trial, as although the regime established by the POC Act for the freezing, restraint or forfeiture of property is classified as civil or administrative under domestic law, its content may nevertheless be considered 'criminal' under international human rights law.

2.140 The committee reiterates its previous view that the POC Act would benefit from a full review of the human rights compatibility of the legislation.

Compatibility of the measure with the right to privacy

2.141 The right to privacy includes the right not to be subject to arbitrary or unlawful interference with a person's privacy, family, home or correspondence. As noted in the statement of compatibility, the amendments to the bill may engage and limit the right not to be subject to arbitrary or unlawful interference with a person's home, as the amendments affect orders that can be used to restrain and forfeit real property.[20]

2.142 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, and be rationally connected and proportionate to achieving that objective.

2.143 As noted earlier, the objective of the bill is stated to be to ensure that criminals are not able to restructure their affairs to avoid the operation of the proceeds of crime legislation.[21] This would appear to be a legitimate objective for the purposes of international human rights law, and the measures would appear to be rationally connected to that objective.

2.144 In relation to the proportionality of the measure, the statement of compatibility outlines several safeguards and protections in place to protect individuals whose property may be subject to other orders affected by the amendments in the bill. This includes, where a person's property is subject to a restraining order, a court may be able to make allowances for expenses to be met out of property covered by the restraining order,[22] or refuse to make an order where

20 SOC [27].

21 The amendments were introduced following several court cases where doubts had been raised as to whether it was possible to consider the origins of payments made on property in order to determine whether the property could be forfeited: see *Commissioner of Australian Federal Police v Huang* [2016] WASC 5; *Commissioner of Australian Federal Police v Hart & Ors* [2016] QCA 215

22 Section 24 of the POC Act.

it is not in the public interest to do so.[23] Property will also cease to be 'proceeds' of an offence or an 'instrument' of an offence in certain circumstances, including if it is acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence.[24] A person may also seek a compensation order for the proportion of the value of the property they did not derive or realise from the commission of an offence.[25]

2.145 Notwithstanding these safeguards, the initial analysis noted that a person may still be liable for their property to be forfeited where a person has been acquitted of an offence, or where their conviction has been subsequently quashed.[26] This appears to leave open the possibility that a person may be acquitted of an offence, but nonetheless be liable to have their real property forfeited because they have made mortgage payments, or made improvements on that property, using funds that the court considers on the balance of probabilities are 'proceeds' from that offence.[27] There does not appear to be a safeguard in place to allow the court to revoke the forfeiture order upon an acquittal. The initial assessment stated that this raises questions both as to whether there are adequate safeguards in place to protect a person's home as well as whether the amendments are the least rights-restrictive means of achieving the objective.

2.146 The committee therefore sought the advice of the minister as to whether the limitation on the right to privacy is proportionate to the objective of the measure (including whether there are adequate safeguards in place to protect persons' property from being forfeited where they have been acquitted of the offence, and whether there are other less-rights restrictive means of achieving the objective).

Minister's response

2.147 In response, the minister provided the following information:

> This concern… only arises in relation to non-conviction based forfeiture orders under the POC Act. This method of forfeiture is specifically designed to allow proceeds authorities to seize and forfeit property where they can establish a link to criminal conduct on the balance of probabilities (the civil standard of proof). This system of forfeiture functions independently of any criminal finding of guilt, which is established on the higher standard of 'beyond reasonable doubt'.
>
> The Australian Law Reform Commission previously recommended the adoption of a non-conviction based forfeiture regime in its review of the

23 Sections 17(4) and 19(3) of the POC Act, and also sections 47(4), 48(2) and 49(4).

24 Section 330(4) of the Act.

25 Sections 77 and 94A.

26 Section 80 of the POC Act.

27 Section 48(1)(c) of the POC Act.

> *Proceeds of Crime Act 1987*, which found that the previous system of conviction-based forfeiture was ineffective at confiscating criminal assets and undermining the profitability of criminal enterprises.
>
> As noted in the Explanatory Memorandum to the Bill, the Act already contains safeguards and protections that ensure the measures are no more onerous than necessary to achieve their objectives. I also note that the civil forfeiture orders under the Act make no determination of a person's guilt or innocence and impose no criminal penalties upon an individual. Allowing these orders to be revoked where it is found that a person did not commit an offence beyond reasonable doubt, as is the case with an acquittal, would therefore be inappropriate and counterproductive to the underlying aims of non-conviction based forfeiture.

2.148 As noted earlier, the objective of confiscating criminal assets is an important objective and the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. However, the effect of a non-conviction based forfeiture order where a person has been acquitted of an offence is that a person may have their property seized even though they have been found not to have committed a crime by the criminal justice system. This raises concerns as to the compatibility of this measure with the right not to be arbitrarily subjected to interferences with a person's home. As noted in the previous analysis, in light of the committee's previously raised concerns about the sufficiency of safeguards in the POC Act, 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

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

2.150 The preceding analysis raises concerns as to the compatibility of the measure with the right to privacy, in particular, the right not to be arbitrarily subjected to interferences with a person's home. This is because a non-conviction based forfeiture order may apply to a person's real property because a person has made mortgage payments, or made improvements on that property, using funds that the court considers on the balance of probabilities are 'proceeds' from that offence, notwithstanding that a person has been acquitted of an offence to the criminal standard of proof.

2.151 The committee reiterates its previous view that the POC Act would benefit from a full review of the human rights compatibility of the legislation.

Amendments to the unexplained wealth regime

2.152 The POC Act also currently requires a court to make an 'unexplained wealth'[28] order where (relevantly) the court is not satisfied that the whole or any part of the person's wealth was not 'derived from' one or more relevant offences.[29] The bill seeks to amend the POC Act so that it additionally covers wealth that is 'derived or realised, directly or indirectly' from certain offences. In particular, the bill would amend section 179E of the POC Act to provide that an unexplained wealth order must be made where the court is not satisfied the whole or any part of a person's wealth is not 'derived or realised, directly or indirectly' from the commission of certain offences.[30] According to the statement of compatibility, this would align the unexplained wealth provisions with the revised definition of 'proceeds' and an 'instrument', discussed above. The burden of proving that a person's wealth is not derived or realised, directly or indirectly, from one or more of the relevant offences would lie on the person against which an order is being sought.[31]

Compatibility of the amendments to the unexplained wealth regime with the right to a fair trial and the right to a fair hearing

2.153 The committee has previously commented on the human rights compatibility of the unexplained wealth regime. In those reports, the committee raised concerns that the unexplained wealth provisions in the POC Act may involve the determination of a criminal charge, and that the operation of the reverse burden placed on a respondent effectively gives rise to a presumption of unlawful conduct, which may constitute a significant limitation on the right to be presumed innocent until proven guilty (if the POC Act were to be considered criminal for the purposes of international human rights law).[32] Concerns have also been raised insofar as a preliminary unexplained wealth order may be made against a person who does not appear at hearing, and so may not have an opportunity to be heard.[33] The amendments to the unexplained wealth regime, which broaden the basis on which unexplained wealth orders may be made, means that those matters raised in previous analyses are of equal relevance here. It is also noted that these

28 'Unexplained wealth' refers to an amount that is the difference between a person's total wealth and the wealth shown to have been derived lawfully: see section 179E(2) of the Act.

29 See section 179E(1) of the POC Act.

30 See proposed amendment to section 179E(1) of the POC Act.

31 See proposed amendment to section 179E(3) of the POC Act.

32 See, Parliamentary Joint Committee on Human Rights, *First Report of 2013,* p. 27; *Third Report of 2013,* p. 120; *Sixth Report of 2013,* p. 189; *Fourth Report of the 44th Parliament* (March 2014) p. 1; *Ninth Report of the 44th Parliament* (July 2014), p. 133.

33 See, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (March 2014) p. 6.

amendments are intended to operate retrospectively to a degree,[34] which additionally raises the issue of compatibility of the amendments with the absolute prohibition on retrospective criminal laws.

2.154 As discussed above in relation to the amendments to the definitions of 'proceeds' and an 'instrument', relevant factors in determining whether a measure is characterised as 'criminal' in nature are the domestic characterisation of the measure, the nature and purpose of the measure and the severity of the measure.[35] As the minister considers that the measures are not criminal in nature based on the domestic characterisation of the measure, no explanation is provided as to whether the measure is criminal by reference to the nature, purpose and severity of the measure, and further whether any potential limitations on fair trial and fair hearing rights are permissible.

2.155 The committee therefore sought the advice of the minister as to whether these amendments are compatible with fair trial and fair hearing rights, including:

- By reference to the committee's *Guidance Note 2,* whether the proposed amendments to the unexplained wealth regime in the bill may be characterised as 'criminal' for the purposes of international human rights law, having regard to the nature, purpose and severity of the measures; and
- The extent to which the amendments are compatible with the criminal process guarantees set out in Articles 14 and 15, including any justification for any limitations of these rights where applicable.

Minister's response

2.156 The minister's response answered these queries together with the identical queries raised regarding the amendments to the definition of 'proceeds' and an 'instrument'. This response was discussed and analysed at [2.133] to [2.136] above, and the same analysis applies in the context of the unexplained wealth regime.

Committee response

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

2.158 The committee notes that the amendments to the unexplained wealth regime raise concerns regarding the compatibility of the measure with the right to a fair hearing and the right to a fair trial. 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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34 The amendments apply after the commencement in relation to property derived or realised after commencement, from the commission of an offence occurring before or after that commencement: see item 14(1).

35 Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) p. 3.

Social Services Legislation Amendment (Housing Affordability) Bill 2017

Purpose	Seeks to amend the *Social Security (Administration) Act 1999, Social Security Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999* to incorporate a scheme for automatic deduction of rent and other household payments from social security or family tax benefit payments of tenants in social housing
Portfolio	Social Services
Introduced	House of Representatives, 14 September 2017
Rights	Multiple Rights (see **Appendix 2**)
Previous report	12 of 2017
Status	Concluded examination

Background

2.159 The committee first reported on the Social Services Legislation Amendment (Housing Affordability) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Social Services by 13 December 2017.[1]

2.160 The minister's response to the committee's inquiries was received on 11 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Automatic deduction of rent and housing payments from social security or family tax benefit payments

2.161 The bill seeks to amend the *Social Security (Administration) Act 1999, Social Security Act 1999* and *A New Tax System (Family Assistance) (Administration) Act 1999* to introduce an automatic rent deduction scheme (ARDS). ARDS is a scheme for tenants in social (public or community) housing for the automatic deduction of rent and other household payments from the tenants' social security or family tax benefit payments.

2.162 The bill provides that a social housing lessor (landlord) may request the Secretary deduct an amount from a social housing tenant's 'divertible welfare

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 43-52.

payment'[2] or family tax benefit to satisfy rent, household utilities or both that are payable by the tenant.[3] The request can be made by the lessor to the Secretary in the following circumstances:

> (a) both of the following apply:
>
> > (i) the tenant has an ongoing or outstanding obligation to pay an amount for rent, household utilities, or both, in relation to the tenant's occupancy of premises let by the lessor;
> >
> > (ii) the tenant's agreement with the lessor for occupancy of the premises, or another written agreement with the lessor, authorises the lessor to make requests under this Part for deductions from divertible welfare payments payable to the tenant; or
>
> (b) the tenant is to pay to the lessor an amount for loss of, or damage to, property, as a result of the tenant's occupancy of premises let by the lessor so as to comply with an order of a court, or of a tribunal or other body that has the power to make orders, and either:
>
> > (i) the period for appealing against the order ends without an appeal being made; or
> >
> > (ii) if an appeal is made against the order—the appeal is finally determined or otherwise disposed of; or
>
> (c) the tenant agrees, in writing, to pay to the lessor an amount for loss of, or damage to, property, as a result of the tenant's occupancy of premises let by the lessor.[4]

2.163 A 'social housing tenant' is defined as a person who is 18 years or older who pays, or is liable to pay, rent in relation to a premises let by a social housing lessor, whether or not the person is named in the agreement with the lessor for occupancy of the premises.[5] According to the explanatory memorandum, this definition will allow deductions to be sought from the welfare payment of any of the adult occupants of the house.[6]

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2 See proposed section 124QB of the *Social Security (Administration) Act 1999*, which defines 'divertible welfare payment' as a social security payment or a payment under the ABSTUDY scheme that is payable to a particular person and is not '(i) an Australian Victim of Terrorism Overseas Payment; or (ii) a Disaster Recovery Allowance; or (iii) a student start-up loan; or (iv) an ABSTUDY student start-up loan under the *Student Assistance Act 1973*; or (v) of a kind determined in an instrument [made by the Minister]'.

3 See proposed section 124QF(3) to the *Social Security (Administration) Act 1999* and proposed section 67D(3) to the *A New Tax System (Family Assistance) (Administration) Act 1999.*

4 Proposed section 124QF(1) to the *Social Security (Administration) Act 1999* and proposed section 67D(1) to the *A New Tax System (Family Assistance) (Administration) Act 1999.*

5 Proposed section 124QD to the *Social Security (Administration) Act 1999*.

6 Explanatory Memorandum (EM) p. 7.

Compatibility of the automatic rent deduction scheme with multiple rights

2.164 The initial analysis stated that the ARDS engages and limits several human rights, including:

- the right to social security;
- the right to an adequate standard of living;
- the right to privacy;
- the right to protection of the family; and
- the right to equality and non-discrimination (see **Appendix 2**)

2.165 The ARDS raises similar issues against the right to social security, the right to an adequate standard of living, the right to privacy and the right to protection of the family. Distinct considerations arise in relation to the right to equality and non-discrimination, which are discussed further below.

2.166 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. The Committee on Economic, Social and Cultural Rights has noted that social security benefits must be adequate in amount and duration having regard to the principle of human dignity, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.[7] Additionally, the right to an adequate standard of living in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires Australia to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. Under the Convention on the Rights of the Child (CRC), children have the right to benefit from social security and to a standard of living adequate for a child's physical, mental, spiritual, moral and social development.[8] Additionally, Australia has obligations under Article 23 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the ICESCR to provide the widest possible protection and assistance to the family.

2.167 The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.

2.168 The initial analysis stated that the ARDS may limit these rights, as the scheme limits social housing tenants' freedom and autonomy to make decisions about the way in which their social security payments or family tax benefits are used.

7 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security,* UN Doc E/C.12/GC/19 (2008), [22].

8 Article 26 and Article 27 of the Convention on the Rights of the Child.

The minister acknowledged in the statement of compatibility that the right to social security, the right to an adequate standard of living, the right to privacy, the right to protection of the family and the rights of children are engaged and limited by the ARDS. However, in relation to the right to privacy, the statement of compatibility only addressed the right to privacy insofar as it related to the disclosure of personal information. The statement of compatibility did not otherwise address the right to privacy, including the extent to which the bill may interfere with a person's private and home life through limiting affected persons' ability to choose the way in which their social security or family tax benefits are used.

2.169 For a limitation on a human right to be permissible, it must pursue a legitimate objective, be rationally connected to that objective, and be a proportionate way to achieve that objective. The statement of compatibility explained that the objective of ARDS is to prevent evictions due to arrears and debt which may force a person, and their children, into homelessness.[9] The statement of compatibility further stated:

> ARDS aims to:
>
> 1. reduce the risk that social housing tenants will accumulate rental arrears and other housing debt risking their tenancies,
> 2. reduce the cost of managing social housing arrears and debt, and
> 3. better secure the income stream associated with housing assets.[10]

2.170 A legitimate objective is one that is necessary to address an area of public and social concern, not one that simply seeks an outcome that is regarded as desirable or convenient. The initial analysis stated that the objective of reducing the risk of rental arrears, evictions and homelessness is capable of constituting a legitimate objective for the purposes of international human rights law.[11] However, where a measure may limit a human right, the committee's usual expectation is that the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective.[12] In this instance, no evidence was provided in the statement of compatibility as to the extent to which rental arrears in the social housing sector is a pressing issue.

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9 Statement of Compatibility (SOC) p. 2.

10 SOC p. 1.

11 The UN Special Rapporteur on adequate housing has recently emphasised the importance of the right to adequate housing and noted that it is a human right which is interdependent with other human rights, particularly the right to equality and non-discrimination and the right to life: *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,* A/HRC/34/51, (2017) [11].

12 Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014).

2.171 The statement of compatibility noted that, in most jurisdictions, social housing tenants have a condition in their lease to use a voluntary rent deduction scheme to pay housing tenancy costs, and that tenancy tribunals may order defaulting tenants to use the voluntary rent deduction scheme. It stated that under the present scheme tenants may 'bypass their social housing provider and cancel their authorised tenancy tribunal ordered voluntary rent deductions' due to social security payments and family tax benefits being 'absolutely inalienable' under the existing law.[13] However, no evidence was provided as to the extent to which tenants have engaged in 'bypassing' of tribunal orders, and no evidence was provided to explain the extent to which the existing scheme of voluntary rent deduction is ineffective to address the stated objective of reducing the risk of rental arrears, evictions and homelessness.

2.172 The statement of compatibility stated that people subject to the ARDS will benefit by way of a reduction in their liability to a social housing lessor, and that the scheme is designed to ensure persons continue to enjoy an adequate standard of living (including housing) by reducing the risk of arrears build-up which may lead to eviction and possible homelessness.[14] It further stated that by preventing rental arrears and possible eviction, the bill will assist a person's capacity to meet the basic needs of his or her family and protects the rights of children.[15] On these bases, the statement of compatibility argued that the measures are compatible with the rights to social security, an adequate standard of living, protection of the family and the rights of children.

2.173 However, the initial analysis stated that the application of the ARDS to persons with an 'ongoing *or* outstanding obligation'[16] to pay rent or housing utilities suggests that the scheme may apply to tenants with ongoing obligations to pay rent regardless of whether or not they are in rental arrears. This may result in tenants having limitations placed on their social security payments or family tax benefits, even in circumstances where they may not need assistance managing rental payments or payment of household utilities. The initial analysis stated that it was not clear how applying the scheme to persons in such circumstances was rationally connected to the objective of reducing risk of evictions and homelessness, as such persons may not be at risk. On the contrary, there may be a risk that the imposition of the ARDS on persons who are not at risk could encourage welfare dependency by reducing a person's independent financial management capabilities.

2.174 Similarly in relation to the proportionality of the measure, the initial analysis stated the application of the ARDS to persons with an ongoing (but not an

13 SOC, p. 1.

14 SOC, pp. 2-3.

15 SOC, pp. 2-3.

16 Proposed section 124QF(1) to the *Social Security (Administration) Act 1999* and proposed section 67D(1) to the *A New Tax System (Family Assistance) (Administration) Act 1999.*

outstanding) obligation to pay rent did not appear to be the least rights-restrictive means of achieving the objectives of reducing the risk of rental arrears, evictions and homelessness. There appeared to be other less rights-restrictive means of achieving these objectives, including limiting the scheme to persons who have an outstanding obligation to pay rent, or have a demonstrated risk of falling into rental arrears that is determined by reasonable and objective criteria, for example because the person may have fallen into rental arrears on several previous occasions.

2.175 In its *2016 Review of Stronger Futures Measures*, the committee commented that income management is most effective when it is voluntary, or when it is applied to individuals after considering their particular circumstances – that is, when it is applied flexibly.[17] The committee also raised concerns that compulsory income management provisions which operate inflexibly raise the risk that the regime would be applied to people who did not need assistance managing their budget.[18] The initial analysis of the present bill noted that the bill does not appear to include any requirement that a social housing lessor or the Secretary consider an individual's particular circumstances, beyond the requirement that a tenant has ongoing or outstanding obligation to pay rent and authority under the tenant's lease for the lessor to make the request. For example, there does not appear to be any requirement (discretionary or otherwise) for the Secretary to consider a tenant's personal circumstances, such as whether the imposition of the ARDS would cause hardship, in determining whether a deduction should be made following a request from a lessor.[19] This raised concerns that the measure may not provide sufficient flexibility to treat different cases differently having regard to the merits of an individual case.

2.176 The initial analysis stated that the absence of any discretion to consider a tenant's personal circumstances raised particular concerns in relation to the right to protection of the family and the rights of children. If, for example, the timing of the automatic rent deduction was such that it made it difficult for a parent to pay for other necessities in circumstances of financial stress, this could affect the standard of living of children under the tenant's care. This raised additional questions about the proportionality of the measure to the protection of the family and the rights of the child.

2.177 The committee therefore sought the advice of the minister 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

17 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) pp. 50-54.

18 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) p. 61.

19 See section 124QG.

(including any evidence of the extent to which the existing scheme of voluntary rent deduction is ineffective);

- how the automatic rent deduction scheme is effective to achieve (that is, rationally connected to) that objective (including its potential application to those who are not and have not been in rental arrears); and
- whether the automatic rent deduction scheme is a proportionate limitation on these rights, in particular whether applying the scheme described in paragraph [2.162] above to both ongoing and outstanding obligations to pay rent is the least rights-restrictive means of achieving the stated objective, and whether the scheme provides sufficient flexibility to treat different cases differently.

Minster's response

2.178 In relation to whether the stated objective addresses a pressing or substantial concern, the minster's response states:

> Rent arrears and a failure to pay other tenancy charges is the single most significant tenancy management issue facing social housing providers nationally. The impact of failed social housing tenancies due to rent arrears is significant-including the direct impact of exits into homelessness and the longer-term impacts of housing instability (particularly in terms of continuity of support arrangements; employment opportunities and school attendance for children).
>
> State and territory governments estimate that the social housing system is losing more than $30 million annually from unpaid rent and administrative costs. This places an additional and unnecessary burden on the already financially strained public housing system.
>
> The current Rent Deduction Scheme (RDS) is voluntary and easy to bypass. This is because arrangements can be cancelled by the tenant without the housing provider's knowledge, which can lead to increasing rental arrears and eventual eviction.
>
> For example in 2013-14, around 80,000 households in social housing stopped their voluntary deductions at some time during the year which put them at greater risk of falling behind in their rent.
>
> Social housing tenants not paying their rent can also put pressure on local support and homelessness services.

2.179 The minister's response also addresses the effectiveness of the current voluntary rent deduction scheme:

> In 2013-14, more than 8,900 social housing tenants, including families with children, were in serious rental arrears, with more than 2,300 people evicted due to rent defaults. In NSW, during the same period, over 80 per cent of those evicted due to serious rental arrears had previously participated in the current voluntary Rent Deduction Scheme (RDS) but

> had then cancelled. If an ARDS were in place, this group would have been unable to cancel their payment. This strongly suggests that ARDS would be effective in reducing tenancy eviction rates.

2.180 Based on the further information provided by the minister, it is likely that the ARDS addresses a pressing and substantial concern for the purposes of international human rights law.

2.181 The minister's response further explains that the ARDS will improve the operational efficiency of social housing, by ensuring social housing providers receive rent from tenants on time, including from those tenants who consistently fail to pay. The minister's response further explains that:

> Tenants have a legal obligation to pay rent as part of their tenancy agreements with their relevant housing providers. The ARDS acts as both a facility to enable the payment of these rents in a cost effective manner for housing providers, and a seamless mechanism for the tenant to ensure that their legal obligations are met.
>
> …
>
> ARDS recognises that social welfare payments should be used towards a person's and their family's basic needs and is intended to support security of tenure in housing. It also recognises that a person's home is an important precondition to their ability to exercise their human rights and their economic, social and cultural rights in particular.

2.182 In light of further information as to the level of arrears in the social housing context, to the extent that the ARDS would apply to persons that have an *outstanding* obligation to pay rent, the scheme appears to be rationally connected to the objective of reducing the risk of homelessness insofar as it could reduce tenancy eviction rates by preventing rental arrears from occurring.

2.183 However, the minister's response does not overcome the committee's specific concerns that the application of the ARDS to persons with an *ongoing* (but not an outstanding) obligation to pay rent does not appear to be rationally connected to the objective of reducing the risk of evictions and homelessness. This is because persons in such circumstances may not be at risk of eviction. This is also relevant to whether the limitation is proportionate, as concerns remain that tenants may have limitations placed on their social security and family tax benefits in circumstances where they pose no risk of falling into arrears. It would appear that a less rights-restrictive means of achieving the objective would include only applying the scheme to persons who have an outstanding obligation to pay rent, or have a demonstrated risk of falling into rental arrears that is determined by reasonable and objective criteria (such as previously falling into arrears).

2.184 As to the safeguards that are in place to consider individual circumstances, the minister's response explains that states and social housing providers are responsible for tenancy management and 'they would continue to retain

responsibility and flexibility for tenancy management and rent setting policies', such as deciding to which of their occupants of properties covered by a current lease ARDS should apply. The minister's response further explains:

> If a tenant is not able to resolve their concerns regarding an Automatic Rent Deduction Scheme (ARDS) deduction with their housing provider or a State based Review Body, they could approach the Department of Human Services (DHS). If it is a matter where the Commonwealth has responsibility, DHS and the Department of Social Services would monitor such requests for review as part of their usual business operations.
>
> The Secretary (or their delegate) also has the power to intervene and make a decision as to whether a deduction is made and the amount deducted. Policy guidelines will also be developed following the passing of the Bill, which will provide further clarity on the operation of ARDS.
>
> In addition, deductions under the scheme will stop as soon as the person is no longer living in public or community housing covered by a current lease.
>
> An ARDS is designed to work alongside government funded financial counselling and other available support services, to ensure that tenants continue to be housed safely and affordably while they get the help they need to sustain their tenancy.

2.185 While the minister's response provides information about the avenues that may be pursued by persons who have concerns over the operation of the scheme, it remains unclear whether sufficient safeguards are in place to accommodate tenants' individual circumstances. This includes whether the automatic deduction of rent would increase financial hardship or would operate in a manner that prevented a person having funds available to meet other basic and reasonable needs. In relation to the Secretary's power to intervene and make a decision as to whether a deduction is made, it is also not clear whether that power includes a discretion to consider matters beyond the requirement that a tenant has ongoing or outstanding obligation to pay rent and authority under the tenant's lease for the lessor to make the request. While the minister's response indicates that policy guidance will be provided in relation to the operation of the ARDS, this is less stringent than the protection of statutory processes. This is because such guidance can be removed, revoked or amended at any time and is not required as a matter of law. Therefore, based on the information provided, it is not possible to conclude that the safeguards referred to by the minister overcome the concerns that the blanket operation of the scheme may not provide sufficient flexibility to have regard to an individual's particular circumstances.

Committee response

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

2.187 Notwithstanding the legitimate objective of the bill, the preceding analysis indicates that the automatic rent deduction scheme may be incompatible with the

right to social security, the right to an adequate standard of living, the right to privacy, the right to protection of the family and the rights of children. This is because:

- **the application of the scheme to persons with an ongoing (but not an outstanding) obligation to pay rent does not appear to be rationally connected or proportionate to the stated objective of the bill of reducing the risk of rental arrears and homelessness; and**
- **the bill does not appear to provide sufficient flexibility to have regard to a tenant's individual circumstances.**

The right to equality and non-discrimination

2.188 The right to equality and non-discrimination is protected by the ICCPR and the ICESCR. It provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

2.189 'Discrimination' refers to a distinction based on a personal attribute (for example, race, sex, or religion) which has either the purpose (called 'direct' discrimination) or the effect (called 'indirect' discrimination) of adversely affecting human rights. 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.[20]

2.190 Demographic information published by the Australian Institute of Health and Welfare in July 2017 states that in social housing households, the majority of tenants were female (62%) and that 43% reported a disability, although only 29% identified a disability support pension as their main source of income.[21] Similarly in state-owned and managed Indigenous housing, approximately three quarters of tenants were female (76%) and 34% of tenants reported having a disability. In community housing households, 57% of tenants were female with more than one-third (35%) reporting having a disability.[22]

2.191 The initial analysis noted that the statement of compatibility does not acknowledge that the right to equality and non-discrimination is engaged or limited by the bill. However, the information in the preceding paragraph indicates that the ARDS may have a disproportionate impact on women and persons with a disability.

20 *Althammer v Austria*, HRC 998/01 [10.2].

21 Australian Institute of Health and Welfare, *Housing Assistance in Australia 2017* (13 July 2017) https://www.aihw.gov.au/reports/web/web-189/housing-assistance-in-australia-2017/contents/social-housing-tenants-1.

22 Australian Institute of Health and Welfare, *Housing Assistance in Australia 2017* (13 July 2017) https://www.aihw.gov.au/reports/web/web-189/housing-assistance-in-australia-2017/contents/social-housing-tenants-1.

Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.[23]

2.192 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective. For the reasons stated earlier, no evidence is provided in the statement of compatibility as to whether the existing scheme is ineffective to address the stated objective of reducing the risk of rental arrears, evictions and homelessness. This raises questions as to whether the measure is based on reasonable and objective criteria to justify the disproportionate impact this measure may have on women and persons with a disability. Information to justify the rationale for the differential effect on women and persons with a disability will also be relevant to the proportionality analysis.

2.193 The committee therefore sought the advice of the minister as to the compatibility of the automatic rent deduction scheme with the right to equality and non-discrimination.

Minster's response

2.194 In response, the minister provides the following information:

> An ARDS is not discriminatory; it is a mechanism available for social housing providers to use to ensure rent is paid when it is due. It is a matter for housing providers to determine to which tenants ARDS will apply.
>
> An ARDS will assist tenants by ensuring that they are able to honour rent and other household costs associated with tenancy obligations they have entered into.
>
> The intent of this measure is to improve longer-term housing stability and reduce the risk of homelessness. ARDS may therefore have a comparatively larger positive impact on women and persons with a disability as they are most likely to be overrepresented in social housing.

2.195 As noted earlier, a measure that is neutral on its face or without intent to discriminate may constitute indirect discrimination where a measure disproportionately affects people with a particular personal attribute. As noted by the minister in his response, women and persons with a disability are most likely to be overrepresented in social housing. In light of the demographic information [2.190] above, it appears that the ARDS may have a disproportionate impact on women and persons with a disability and therefore constitutes indirect discrimination.

2.196 As discussed above, the minister has provided further information as to the effectiveness of the existing scheme and the legitimate objective of the ARDS. The

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

minister has also identified that the scheme may positively impact women and persons with a disability as it will reduce their risk of homelessness.

2.197 However, the concerns discussed above in relation to the application of the scheme to persons with an ongoing obligation to pay rent are equally relevant in ascertaining whether the discrimination would be unlawful. By applying the scheme to persons with an ongoing (but not an outstanding) obligation to pay rent, there is a risk that the scheme may restrict social housing tenants' (of which women and persons with a disability are overrepresented) social security payments and family tax benefits in circumstances where those persons are not at risk of falling into arrears. There appear to be other, less rights-restrictive, measures available, such as applying the scheme only to those persons who are at risk. The minister has not provided information as to any reasonable and objective criteria to justify the disproportionate impact the measure may have on women and persons with a disability.

Committee response

2.198 The committee thanks the minister for his response.

2.199 The committee is unable to conclude that the measure is compatible with the right to equality and non-discrimination.

Amendments to the trial of the cashless welfare arrangements

2.200 Part 3D of the *Social Security (Administration) Act 1999* provides for the trial of cashless welfare arrangements. The trial permits certain welfare payments to be divided into 'restricted' and 'unrestricted' portions, with recipients being unable to spend the restricted portions of such payments on alcohol or gambling.[24] Currently, section 124PM provides that a person who receives a 'restrictable payment'[25] may use the restricted portion of the payment to purchase goods or services other than alcohol beverages or gambling, and 'may use the unrestricted portion of the payment, as paid to the person, at the person's discretion'.

2.201 Item 7 of the bill proposes to repeal section 124PM and substitute it with the following provision:

> A person who received a restrictable payment may use the restricted portion of the payment, as paid under subsection 124PL(2), to purchase goods or services, other than alcoholic beverages or gambling.

2.202 The effect of this amendment, according to the explanatory memorandum, would be to allow for automatic rent deductions 'to be made from the unrestricted portion of a cashless debit card participant's welfare payment, if necessary'.[26]

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24 See section 124PB of the *Social Security (Administration) Act 1999*.

25 Which includes a number of payments, including specified social security payments and family tax benefits: see section 124PD(1) of the Social Security (Administration) Act 1999.

26 EM, p. 6.

Compatibility of the amendments to the cashless welfare arrangements with the right to equality and non-discrimination

2.203 The committee has previously commented on the human rights compatibility of the cashless welfare arrangements.[27] The committee has also examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.[28] Those reports noted that the cashless welfare arrangements engage and limit several human rights, including the right to social security, the right to privacy and family and the right to equality and non-discrimination.

2.204 The initial assessment stated that, in allowing for automatic rent deductions to be made from the unrestricted portion of a cashless debit card participant's welfare payment, the bill appears to further restrict how a person subject to the cashless welfare regime may spend their social security payment or family tax benefit. It appears, for example, that a possible outcome of rent being automatically deducted from the unrestricted portion of a person's welfare payment is that a cashless welfare participant could have no amount of their unrestricted welfare payment remaining. That is, the amendment to section 124PM appears to leave open the possibility that no portion, or only a small portion, of a cashless welfare participant's welfare payment could be used at the person's discretion.

2.205 The issues raised in the previous section relating to the automatic rent deduction scheme apply equally to the amendments to the cashless welfare arrangements.[29] Further, the amendments to the cashless welfare regime raise additional issues in relation to the right to equality and non-discrimination. This is because, as the committee has previously commented, while the cashless welfare scheme does not directly discriminate on the basis of race, Indigenous people are disproportionately affected by the cashless welfare regime in the locations where the scheme currently operates.[30]

2.206 As noted earlier, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the

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27 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36.

28 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (27 June 2013) and *2016 Review of Stronger Futures Measures* (16 March 2016).

29 See also the previous comments of the committee: Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36.

30 See, Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36.

differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

2.207 The minister does not acknowledge that the amendments to the cashless welfare regime introduced by the bill engage and limit the right to equality and non-discrimination. However, as noted earlier, measures that disproportionately impact particular groups establish *prima facie* that there may be indirect discrimination. In addition to the concerns raised at [2.175] above in relation to the ARDS, the particular impact on participants in the cashless welfare scheme raises further questions as to the proportionality of the measure.

2.208 Accordingly, the committee sought the advice of the minister as to whether the amendments to the cashless welfare arrangements introduced by the bill are compatible with the right to equality and non-discrimination (including whether the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate limitation on the right).

Minster's response

2.209 The minister's response provides the following information in relation to the amendments to the cashless welfare arrangements:

> These amendments do not adversely affect CDC participants. They simply provide consistency for all welfare recipients subject to deductions such as the ARDS, regardless of whether they are also subject to the CDC.
>
> The amendments to allow the automatic deduction of rent where a person is also subject to the cashless debit card (CDC) do not have a negative effect on any CDC participants, including those that identify as Aboriginal or Torres Strait Islander. The interaction between the ARDS and the CDC program was considered carefully during drafting to ensure that CDC participants were not disadvantaged by the introduction of the ARDS.
>
> Generally, the amendments to cashless welfare provisions (contained in Part 30 of the *Social Security (Administration) Act 1999*) will allow for the automatic deduction of rent from the restricted portion of a CDC participant's payment.

2.210 While the minister's response states that the amendments do not adversely affect participants in the cashless welfare scheme, removing the reference in current section 124PM to a person's ability to 'use the unrestricted portion of the payment… at the person's discretion' would allow for automatic rent deductions to be made from a person's previously unrestricted portion of their welfare payment.[31] The bill therefore appears to further restrict how a person subject to the cashless welfare regime may spend their social security or family tax benefit, and may limit, or entirely preclude, a person's discretionary income if they are subject to both the

31 See item 7 of the bill, and page [6] of the explanatory memorandum.

ARDS and the cashless welfare regime. As such, the measure would appear to constitute a further limitation on the right to social security and right to privacy.

2.211 Additionally, as the committee has previously noted in its analysis of the cashless welfare regime,[32] Indigenous people are disproportionately affected by the cashless welfare regime in the locations where the scheme currently operates. This aspect of the bill therefore raises additional concerns in relation to the compatibility of the measure with the right to equality and non-discrimination. However, the minister has not provided any further information which directly addresses the compatibility of the amendments to the cashless welfare regime with this right. In light of the effect of the amendments on a person's discretionary income and the committee's previous analyses of the cashless welfare regime, serious concerns remain as to the compatibility of the amendments to the cashless welfare regime with the right to equality and non-discrimination.

Committee response

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

2.213 The effect of the amendments to the cashless welfare arrangements would be to allow for automatic rent deductions to be made from the previously unrestricted portion of a cashless debit card participant's welfare payment. This limits the right to equality and non-discrimination, as Indigenous people are disproportionately affected by the cashless welfare regime in locations where the scheme currently operates.

2.214 In light of the effect of the amendments on a person's discretionary income and the committee's previous analyses of the cashless welfare regime,[33] the proposed amendments to the cashless welfare regime introduced by the bill may be incompatible with the right to equality and non-discrimination.

32 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36.

33 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29; *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36.

Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017

Purpose	Seeks to amend the *Banking Act 1959* to establish the Banking Executive Accountability Regime and provide the Australian Prudential Regulation Authority with strengthened powers
Portfolio	Treasury
Introduced	House of Representatives, 19 October 2017
Rights	Privacy; not to incriminate oneself (see **Appendix 2**)
Previous report	12 of 2017
Status	Concluded examination

Background

2.215 The committee first reported on the Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Treasurer by 13 December 2017.[1]

2.216 The Treasurer's response to the committee's inquiries was received on 14 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Coercive examination and information gathering powers

2.217 Schedule 2 of the bill seeks to amend the *Banking Act 1959* to provide the Australian Prudential Regulation Authority (APRA) with new examination and information gathering powers. The powers include enabling APRA to require a person to appear before an APRA-appointed investigator and 'provide all reasonable assistance in connection with the investigation' and to require a person to produce books, accounts, documents or sign a record that may be relevant to an investigator, regardless of whether the provision of such information may incriminate the person.[2] Failure to comply with these requirements would be an offence and carry a maximum penalty of 30 penalty units (currently $6,300).[3]

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 53-57.

2 See Schedule 2, item 9, sections 61A and 61C. Under the bill, a person is required to appear before an investigator where the investigator 'reasonably believes or suspects that a person… can give information relevant to the investigator's investigation'. See proposed schedule 2, item 9, section 61C.

3 See Schedule 2, item 9, section 61G.

Compatibility of the measure with the right not to incriminate oneself

2.218 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR) include the right not to incriminate oneself (article 14(3)(g)).

2.219 Schedule 2 of the bill engages and limits this right by requiring a person to attend an examination, answer questions or provide books, accounts, documents or sign a record notwithstanding that to do so might tend to incriminate that person. The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective.

2.220 The statement of compatibility acknowledges that the right not to incriminate oneself is engaged by the bill, but states that the limitation on this right is permissible on the following bases:

> Engaging the right against self-incrimination in this way is necessary and justified as the public benefit in removing the liberty outweighs the loss to the individual. The information which would be obtained by APRA is critical in it performing its regulatory functions, specifically protecting depositors in an ADI [authorised deposit-taking institution], ensuring the stability of Australia's financial system including through investigating prudential matters.

2.221 While the broad objectives of protecting depositors and ensuring the stability of Australia's financial system may be capable of constituting legitimate objectives, the statement of compatibility provides no information about the importance of these objectives in the specific context of the measure. In order to demonstrate that the measure pursues a legitimate objective for the purposes of international human rights law, a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern is required.

2.222 Questions also remain as to whether the limitation is rationally connected to and a proportionate means of achieving the objectives. In particular, the availability of use and derivative use immunities can be an important factor in determining whether the abrogation of the privilege against self-incrimination is proportionate. That is, they may act as a relevant safeguard. The statement of compatibility states that a 'use' immunity would be available.[4] This means that, where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding, subject to exceptions,[5] but may be used to obtain further evidence against the person.

2.223 However, no 'derivative use' immunity is provided in the bill, which would prevent information or evidence indirectly obtained from being used in criminal

4 SOC, p. 79.

5 This includes proceedings concerning the falsity of the information provided. See SOC, p. 79.

proceedings against the person. It is acknowledged that a 'derivative use' immunity will not be appropriate in all cases because it is not reasonably available as a less rights restrictive alternative. For example, because it would undermine the purpose of the measure or be unworkable. However, the statement of compatibility does not substantively address why a 'derivative use' immunity would not be reasonably available in this case. This raises the question as to whether the measure is the least rights restrictive way of achieving the stated objective as required in order for the limitation to be proportionate.

2.224 Further, it is noted that the availability or lack of availability of a 'derivative use' immunity needs to be considered in the regulatory context of the proposed powers. The extent of interference that may be permissible as a matter of international human rights law may be, for example, greater in contexts where there are difficulties regulating specific conduct, persons subject to the powers are not particularly vulnerable or powers are otherwise circumscribed with respect to the scope of information which may be sought. That is, there is a range of matters which influence whether the limitation is proportionate.

2.225 The committee therefore sought the advice of the Treasurer as to:

- whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure;
- whether a derivative use immunity is reasonably available as a less rights restrictive alternative in proposed schedule 2 to ensure information or evidence indirectly obtained from a person compelled by APRA to answer questions or provide information or documents cannot be used in evidence against that person.

Treasurer's response

2.226 The Treasurer's response explains that the limitation on the right not to incriminate oneself is aimed at addressing a substantial concern:

> …The concern is that APRA must be able to acquire or access relevant information to ensure it can effectively investigate a prudential matter relating to an Authorised Deposit-Taking Institution (ADI) which, in turn, is likely to affect the ability of APRA to effectively perform its regulatory

> functions and meet its broad objectives of protecting depositors and ensuring the stability of Australia's financial system.
>
> The evidence to support these provisions is that information relevant to the prudential matters of an ADI is not always within the possession, custody or control of the ADI. There are cases where information relevant to an investigation concerning the prudential affairs of an ADI is legitimately in the possession of others including, but not limited to, current or former officers, agents, contractors or employees of the ADI.
>
> In cases where the person with the possession, custody or control of the relevant information forms the view that the provision of that information to APRA may potentially incriminate them or make them liable to a penalty, that person would, in the absence of any limitation on the right not to incriminate oneself, be entitled to refuse to disclose that information without any recourse in law.
>
> The difficulty for APRA in this scenario is that the absence of that relevant information may stymie the progress of APRA's investigation into prudential matters of the ADI.

2.227 The further information provided in the Treasurer's response supports the conclusion that the measures address a substantial concern and are therefore likely to be considered legitimate objectives for the purposes of international human rights law. The coercive examination and information gathering powers may be of assistance to APRA in performing its regulatory functions and, in turn, pursuing the objectives of protecting depositors and ensuring the stability of Australia's financial system. Accordingly, the measures are likely to be rationally connected to the stated objectives.

2.228 In relation to whether the limitation is proportionate to the stated objectives, the Treasurer's response identifies internal oversight mechanisms within APRA as safeguards, including that the decision to appoint an investigator is subject to the approval of senior APRA officers. The response also notes that the circumstances in which an investigation may commence are limited to matters concerning ADIs and related entities[6] under subsections 13(4), 13A(1) or 61(1) of the *Banking Act 1959*, which broadly relate to the inability or failure of ADIs to meet their obligations. This explanation from the Treasurer is relevant to the proportionality analysis as it explains the particular regulatory context in which such investigations occur and in which the examination and information gathering powers are used.

2.229 The Treasurer's response further states that, as set out in the bill, an appointed investigator needs to have 'reasonable belief' that a person has custody or

6 Subsection 61(1) of the *Banking Act 1959* also stipulates that APRA may appoint a person to investigate prudential matters relating to a body corporate that is an ADI; an authorised non-operating holding company; or a subsidiary of an ADI or of an authorised non-operating holding company.

control of books, accounts or documents relevant to the investigation in order to exercise his or her powers under section 61A of the bill. Similarly, the examination powers under proposed section 61C of the bill are available if an investigator 'reasonably believes or suspects' that a person can offer information relevant to the investigation. That the powers are exercised on evidentiary or otherwise only 'reasonable' grounds is also relevant in determining the adequacy of safeguards.

2.230 The Treasurer's response also identifies the provision of a 'use' immunity as a relevant safeguard. In regard to whether a derivative use immunity would be reasonably available, the Treasurer's response states:

> As the committee has noted, direct use immunity is conferred by these provisions, but not derivative use immunity. The reason for this is that if derivative use immunity applied, it would impair APRA's ability to effectively perform its regulatory functions.
>
> …
>
> In most cases, establishing compliance with derivative use immunity would be substantially more difficult. It would require persuading the court to the required standard that no part of the original information was taken into account, directly or indirectly, when obtaining the information upon which the prosecution is based.
>
> If derivative use immunity applied, then further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered through independent investigative processes. Also, where the information-obtaining power is exercised against officers or ex-officers who may have been responsible for the deterioration or failure of a financial institution, for example, a director implicated in a failure such as HIH, a derivative use immunity would not be helpful in building a case against the director for breach of their duties under law.
>
> APRA concurs with ASIC's view expressed in ASIC's submissions to the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms: Issues Paper 46 (March 2015) at page 25: 'Any grant of derivative use immunity has the potential to render a person conviction-proof for an unforeseeable range of offences.'
>
> These provisions are consistent with the majority of existing self-incrimination provisions in other APRA-administered legislation, including provisions in the SIS Act and PHI Act.

2.231 The Treasurer's response effectively argues that a derivative use immunity would not be reasonably available, contending that it would be difficult to establish compliance with derivative use immunity in subsequent legal proceedings; that persons responsible for financial crimes may escape conviction if a derivative use immunity were granted; and that the self-incrimination provisions in the bill are consistent with other APRA-administered legislation.

2.232 However, as noted in the initial analysis, the regulatory context in which the abrogation against self-incrimination operates is relevant in determining the proportionality of the measure. The Treasurer has explained the particular regulatory context in which APRA operates, and the limited operation of the information sharing provisions to when investigations have been commenced concerning ADIs and related entities when such ADIs are failing or are unable to meet their obligations. The requirement that the power only be exercised on 'reasonable' grounds also provides an additional safeguard. Therefore, while administrative difficulties such as proving that evidence in an investigation was obtained independently of protected evidence are unlikely, in isolation, to be a sufficient reason for not providing a derivative use immunity, the specific regulatory context of the proposed powers and the circumstances in which an investigation may commence, on balance, tend to suggest that the limitation on the right not to incriminate oneself may be proportionate.

Committee response

2.233 The committee thanks the Treasurer for his response and has concluded its examination of this issue.

2.234 Based on the further information provided, the committee considers that, on balance, the measure may be compatible with the right not to incriminate oneself.

Compatibility of the measure with the right to privacy

2.235 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life.

2.236 By requiring a person to attend an examination, answer questions or provide books, accounts, documents or sign a record in connection with an APRA investigation, including in circumstances where the provision of such information may tend to incriminate the person, Schedule 2 of the bill engages and limits the right to privacy.

2.237 The statement of compatibility does not acknowledge that the proposed examination and information gathering powers engage the right to privacy and therefore does not provide an assessment of the human rights compatibility in relation to this aspect of the measure.[7]

2.238 Assuming that the measure pursues the objectives outlined above in relation to the right not to incriminate oneself (that is, protecting depositors and ensuring the

7 It is noted that the statement of compatibility does acknowledge that the right to privacy is engaged by another measure in the bill that requires authorised deposit-taking institutions (ADIs) to provide information to APRA, including personal information, on persons with senior executive responsibility within the ADI or its subsidiaries: See SOC p. 80.

stability of Australia's financial system), for the reasons earlier stated, these may be capable of being legitimate objectives. However, questions remain as to whether the objectives address a pressing and substantial concern specifically in relation to this measure, and whether the measure is rationally connected to and a proportionate means of achieving the objectives in the context of limitations on the right to privacy.

2.239 In particular, to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. Information and evidence as to whether the measure is the least rights-restrictive way of achieving the stated objective of the measure, and of any safeguards in place to protect a person's informational privacy when providing information pursuant to APRA's examination and information gathering powers, would be of assistance in determining the proportionality of the measure.

2.240 The committee therefore sought the advice of the Treasurer as to:

- whether the proposed coercive examination and information gathering powers pursue a legitimate objective (including reasoning or evidence that establishes that the stated objectives address a pressing or substantial concern);
- how the measure is effective to achieve (that is, rationally connected to) those objectives; and
- whether the limitation is reasonable and proportionate to achieve the stated objectives (including whether there are less rights restrictive ways of achieving that objective, whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and whether there are adequate and effective safeguards in relation to the measure).

Treasurer's response

2.241 In relation to whether the coercive examination and information gathering powers pursue a legitimate objective and are rationally connected to that objective, the Treasurer's response refers to the advice provided in relation to the compatibility of the measure with the right not to incriminate oneself (discussed at [2.226]-[2.227] above). As noted earlier, in light of the Treasurer's response, it appears the measure pursues a legitimate objective and is rationally connected to that objective.

2.242 As to the proportionality of the measure, the Treasurer's response cites as a relevant safeguard subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* (APRA Act), which makes it an offence for a current or former APRA officer to disclose 'protected information' or a 'protected document'. However, it is noted that this provision is subject to a range of exceptions which allow for the disclosure of information in certain circumstances. For example, subsection 56(5)(a) of the

APRA Act stipulates that it is not an offence for a person to disclose information to another financial sector supervisory agency or other agency specified in regulations when the person is satisfied that the information will assist that agency to perform its functions or exercise its powers.

2.243 In further reference to the proportionality of the proposed measure, the Treasurer highlights his advice in relation to the right not to incriminate oneself. As set out above, this includes that the scope of investigations are limited to the inability or failure of ADIs to meet their obligations and that investigators must have a 'reasonable' basis for exercising their powers. Noting the information provided on potential safeguards, including subsection 56(2) of the APRA Act, as well as the specific regulatory context of the proposed powers, on balance, the limitation on the right to privacy may be proportionate.

Committee response

2.244 The committee thanks the Treasurer for his response and has concluded its examination of this issue.

2.245 Based on the further information provided, the committee considers that, on balance, the measure may be compatible with the right to privacy.

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:

- Australian Education Amendment (2017 Measures No. 2) Regulations 2017 [F2017L01501];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017 [F2017L01080];
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 [F2017L01592];
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No. 2) [F2017L01063];
- Crimes (Overseas) (Declared Foreign Countries) Amendment Regulations 2017 [F2017L01520];
- Criminal Code Amendment (High Risk Terrorist Offenders) Regulations 2017 [F2017L01490];
- Export Control Bill 2017;
- Extradition (El Salvador) Regulations 2017 [F2017L01581];
- Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L01575];
- Family Law Amendment (Parenting Management Hearings) Bill 2017;
- Federal Financial Relations (National Partnership Payments) Determination No. 124 (September 2017) [F2017L01505];
- Federal Financial Relations (National Partnership Payments) Determination No. 125 (October 2017) [F2017L01509];
- Federal Financial Relations (National Partnership Payments) Determination No. 126 (October 2017) [F2017L01510];
- Federal Financial Relations (National Partnership Payments) Determination No. 127 (November 2017) [F2017L01539];
- Migration Legislation Amendment (2017 Measures No. 4) Regulations 2017 [F2017L01425];
- Migration Regulations (IMMI 17/129: Specification of Regional Areas for a Safe Haven Enterprise Visa) Instrument 2017 [F2017L01607]; and
- National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

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

- Federal Financial Relations (National Partnership Payments) Determination No. 123 (August 2017) [F2017L01143];
- Federal Financial Relations (National Partnership Payments) Determination No. 122 (July 2017) [F2017L01148]; and
- Social Security (Administration) (Recognised State/Territory Authority – Northern Territory Department of Health) Determination 2017 [F2017L01371].

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

SENATOR THE HON MITCH FIFIELD
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
PARLIAMENT HOUSE
CANBERRA ACT 2600

Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017

Dear Chair

I refer to your letter dated 29 November 2017 in relation to the Parliamentary Joint Committee on Human Rights' (the Committee's) assessment of the Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017.

I welcome the opportunity to respond to the Committee's comments and provide the following advice under each comment:

Committee's comments:

1.27 The preceding analysis raises questions as to whether the measure constitutes a permissible limitation on the freedom of expression.

1.28 The committee therefore seeks the advice of the minister 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;**

While the Australian Broadcasting Corporation's (ABC) Editorial Policies cover 'fair treatment' and 'a balance that follows the weight of evidence', these are only internal policies that can be amended at any time. The legitimate object of the Bill is to give certainty that it is a duty of the Board to ensure that the ABC's gathering and presentation of news and information is 'fair' and 'balanced' according to the recognised standards of objective journalism.

- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**

The purpose of the Bill is to provide certainty that the ABC continues to present its news and information in a 'fair' and 'balanced' manner. There is no other way to achieve this obligation in respect of the Board's duty, other than through legislation. The ABC's Editorial Policies, while a robust document, could be amended at any time to disregard such an important part of providing professional and steadfast journalistic news and information services. The Bill will ensure that 'fair' and 'balanced' reporting will be a duty of the Board as the obligation will be embedded in legislation.

- **whether the limitation is proportionate, including information as to the meaning of the words 'fair' and 'balanced', and whether those words are intended to have the same meaning in the bill as those words used in the ABC's editorial policy on impartiality.**

The ABC's own Editorial Policies require the ABC to adhere to fair treatment in the gathering and presentation of news and information, and a balance in its news reporting that follows the weight of evidence. The measure contained in this Bill aims to create unity between the ABC Act and the ABC Editorial Policies; it merely protects this obligation in legislation.

Thank you for your consideration on this issue.

Yours sincerely

MITCH FIFIELD

14/12/17

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MC17-111842

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 6 December 2017, seeking a response to the Parliamentary Joint Committee on Human Rights *Report 13 of 2017*, concerning the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 [F2017L01311] (the CATSI Regulations).

In response to the Committee's request, I have enclosed advice regarding the nature of the documents and information that the Registrar of Indigenous Corporations (the Registrar) may make available to the public under the CATSI Regulations, and relevant safeguards in place for the protection of individuals' privacy.

The Committee can be assured that the Registrar is aware of, and takes seriously, the protection of the personal privacy of individuals, and this applies equally to any documents covered under section 55 of the CATSI Regulations that are currently held by the Registrar.

I acknowledge that this aspect of the CATSI Regulations may engage the right to privacy. However, the Registrar has established safeguards to ensure the protection of individuals' privacy whilst ensuring the important objective of supporting and regulating Aboriginal and Torres Strait Islander corporations. These safeguards ensure that the application of section 55 of the CATSI Regulations is effective and proportionate in relation to the right to privacy.

I trust this advice addresses the Committee's concerns and I look forward to working with you to assist in responding to future queries.

Yours sincerely

NIGEL SCULLION

12 / 12 / 2017

Advice in response to request from the Parliamentary Joint Committee on Human Rights

Advice in relation to the nature of the documents and information that the Registrar may make available to the public under the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (the CATSI Regulations):

Section 55 of the CATSI Regulations deals with information and documents that were created in the context of the predecessor to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), namely the *Aboriginal Councils and Associations Act 1976* (ACA Act). Chapter 9 of the Registrar's policy statement *PS-12: Registers and the use and disclosure of information held by the Registrar* specifically provides for this issue:

> **9 Information under the *Aboriginal Councils and Associations Act 1976* (ACA Act)**
> 9.1 Another function of the Registrar is to make documents and information relating to the registration of a corporation under the ACA Act available to the public, if the Registrar considers it appropriate. This includes documents and information that before the CATSI Act began were:
>
> - filed or lodged with the Registrar or served on the Registrar under the ACA Act
> - kept by the Registrar under the ACA Act or
> - given to or served on a person by the Registrar under the ACA Act.
>
> 9.2 In determining whether it is appropriate to release information or documents relating to the registration of an Aboriginal and Torres Strait Islander corporation under the ACA Act, the Registrar will consider:
>
> - whether the information or document would be exempt under the CATSI Act
> - whether a third party gave the information to the Registrar and the information related to a particular corporation – for example, information provided by a liquidator or administrator
> - whether there is a public interest or benefit in releasing the information.
>
> 9.3 The Registrar will not release information or documents which relate to a corporation under the ACA Act if they would be exempt information under the CATSI Act.
>
> 9.4 Any personal information contained in a document may be removed before its release.

The Registrar's policy statement, *PS-01: Providing information and advice,* outlines the nature of the information that the Registrar may make public as follows:

> 4.2 Information [that] is by its nature uncontroversial. Often information given will be 'public information'. It includes the following:
>
> - the name or Indigenous Corporation Number of a corporation
> - publicly available details about a corporation appearing on the Registrar's website
> - publicly available information or documents on the Register of Aboriginal and Torres Strait Islander Corporations
> - providing copies of a corporation's rule book to its members
> - the address and contact details of the Registrar or staff
> - general information about what functions the Registrar performs
> - information about the Registrar's public education programs
> - official publications produced by the Registrar
> - standard responses covered by the Registrar's publications.
>
> 4.3 Information may include telling people what forms to complete or procedures to follow.

4.4 Telling a person which part of the CATSI Act, the regulations, a corporation's rule book or a publication is relevant to their concern or query would also be information.

4.5 In some straightforward cases, providing an explanation of part of the CATSI Act, the Regulations or a corporation's rule book may be classified as information—for example, where the information:

- is a plain English explanation of a straightforward and uncontroversial clause which is well understood
- relates to provisions of the CATSI Act, the Regulations or model rule book for which the Registrar is responsible; and
- is information which is included in a Registrar's publication.

Relevant safeguards in place for the protection of individuals' privacy:

Paragraph 4.15 of *PS-01: Providing information and advice* states that: 'The Registrar is also bound by the Australian Privacy Principles in the *Privacy Act 1988* (Privacy Act), which regulate the collection, use, and storage and collection of personal information. Information received from individuals will be dealt with in accordance with these statutory requirements...'.

Paragraphs 7.1 to 7.8 of the Registrar's policy statement *PS-15: Privacy*, outlines the privacy obligations of the Registrar with respect to the use and disclosure of protected information. This applies to any equivalent material contained in documents created under the ACA Act that are held by the Registrar.

The Office of the Registrar of Indigenous Corporations (ORIC) has also published a privacy statement on its website to demonstrate its commitment to protect the privacy of officers of Aboriginal and Torres Strait Islander corporations. This statement can be found at http://www.oric.gov.au/privacy-statement. As ORIC is part of the Department of the Prime Minister and Cabinet (PM&C), it is also bound by PM&C's Privacy Policy.

Through the matters outlined in the relevant policy statements and the published privacy statements of ORIC and PM&C (published for the purposes of Australian Privacy Principles 1.3-1.5) as outlined above, the Registrar and ORIC are committed to the protection of the privacy of individuals in accordance with the Privacy Act. This includes any documents or information falling within the scope of section 55 of the CATSI Regulations.

Senator the Hon Marise Payne
Minister for Defence

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7800

MC17-000649

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair Tom.

Thank you for your letter of 29 November 2017 about the human rights compatibility of the Defence Legislation Amendment (Instrument Making) Bill 2017.

I understand that the Parliamentary Joint Committee on Human Rights is seeking advice as to whether the provision relating to the use of force in executing warrants is compatible with the right to life and with the right to freedom from torture, cruel, inhuman and degrading treatment or punishment.

While in most cases Defence can reach agreement with landowners regarding aviation hazards, the powers referred to in the new provisions of the Bill are important because they provide guidance in the event that agreement is not possible. The provision relating to use of force is aimed at achieving a legitimate objective, being the removal or reduction of hazards to defence aviation to enhance the safety of defence aviation.

Under new subsection 117AF(3), use of force against a person is limited to defence aviation area inspectors. Before appointing a defence aviation area inspector, the Secretary or the Chief of the Defence Force must be satisfied that the person has the knowledge, training or experience necessary to properly exercise the powers of a defence aviation area inspector. Since those powers include the power to use necessary and reasonable force, this will require the person to have sufficient knowledge, training or experience necessary to properly exercise the power to use force.

Importantly, the use of force is limited to what is necessary and reasonable. Factors that may be relevant in determining what is reasonable include the urgency of the aviation situation, other avenues that may be available to remove or reduce the hazard, the effect not removing or reducing the hazard will have on safety or operational requirements, and the particular circumstances of the person in question. Apart from a situation involving self-defence, it is difficult to imagine a scenario which would justify the deliberate use of lethal force or force that would cause serious injury to a person.

If a defence aviation area inspector used force beyond what was necessary or reasonable, they would be subject to the ordinary criminal law, and could be investigated and prosecuted the same as any other person. A person subjected to the use of force would be able to report to the police or complain to Defence.

In this context, Defence considers that the chances of this provision limiting the right to life or the right to freedom from torture, cruel, inhuman and degrading treatment or punishment, extremely remote.

If you would like further information about this matter, please contact Ms Lynne Ross, Director, Defence Legal, on , or by email tc

I trust this information assists.

Yours sincerely

MARISE PAYNE

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

Reference: MB17-003722

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Fair Work Laws Amendment (Proper use of Worker Benefits) Bill 2017

This letter is in response to your letter of 29 November 2017 concerning issues raised in the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Report No.12 of 2017* in relation to the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the Bill).

The Australian Government made an election commitment to implement the majority of the recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption. The Bill responds to 10 recommendations of the Royal Commission. These relate to financial management and accountability (recommendations 9, 10, 17 and 39), the regulation of worker entitlement funds (recommendations 45, 46 and 49), election payments (recommendation 43), prohibiting coerced payments to employee benefit funds (recommendation 50) and disclosable arrangements (recommendation 47).

The Bill addresses Government and community concerns, highlighted by the Royal Commission, that the current regulation of registered organisations and their related entities is not satisfactory. Consistent with the Royal Commission recommendations, the Bill will provide for increased transparency of the financial affairs of registered organisations and worker entitlement funds to ensure greater accountability to the members of registered organisations.

I strongly reject any suggestion that the Bill limits rights to freedom of association or collective bargaining. In fact, the Bill significantly enhances the rights of workers for whom large sums of money are managed on their behalf, by ensuring that this money is properly accounted for and only used for legitimate purposes.

My detailed response to each of the issues raised in your correspondence is attached. I trust the Committee will find the information useful.

Yours sincerely

Senator the Hon Michaelia Cash
13 / 12 / 2017

Encl.

Attachment A

Detailed response to issues raised in *Human Rights Scrutiny Report No.12 of 2017*

FAIR WORK LAWS AMENDMENT (PROPER USE OF WORKER BENEFITS) BILL 2017

Compatibility with the right to freedom of association, the right to just and favourable conditions at work and the right to freedom of assembly and expression

Prohibiting terms of industrial agreements requiring or permitting payments to unregistered worker entitlement funds

The Committee asks:

- **whether the limitation is a reasonable and proportionate measure to achieve its stated objective (addressing findings by relevant international supervisory mechanisms about whether the limitation is permissible); and**
- **whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.**

Current provisions

Subdivision D of Part 2-3 of the *Fair Work Act 2009* (FW Act) provides for terms that must not be included in modern awards.

Section 194 of the FW Act defines 'unlawful term' in relation to terms of enterprise agreements.

Part 2-9 of the FW Act regulates other terms and conditions of employment.

Changes proposed through the Bill

Schedule 2 of the Bill would amend section 194 and add new sections 151A and 333B to the FW Act to prohibit any term of a modern award, enterprise agreement or contract of employment requiring or permitting contributions for the benefit of an employee to be made to any worker entitlement fund that is not a registered worker entitlement fund.

Discussion

As noted by the Committee:

> ... the measure does not prohibit contributions to worker entitlement funds but requires any contributions 'to be made to registered worker entitlement funds that are subject to basic governance and disclosure requirements designed to address potential conflicts of interest, breaches of fiduciary duty and the potential for coercion'. As such the measure would appear to be rationally connected to its stated objective.[1]

Reasonableness and proportionality

The Committee considers that the prohibition of terms of industrial agreements requiring or permitting payments to unregistered worker entitlement funds engages and limits the right to freedom of association, the right to collectively bargain, and the right to just and favourable conditions of work; and raises questions as to its compatibility with these rights.

Any worker entitlement fund, including those controlled by any industrial association, can be registered provided it meets basic governance and disclosure requirements. These requirements are designed to address potential conflicts of interest, breaches of fiduciary duty and coercive conduct. There is no restriction on who can be a member of a fund. The provisions enhance the right to just and favourable conditions of work by ensuring that money held by worker entitlement funds is used to benefit workers. The amendments will provide employees with a guarantee that any contributions they voluntarily make to a worker entitlement fund is subject to appropriate scrutiny and oversight.

To the extent that the prohibition may engage any of these rights, the measure is reasonable and proportionate and enhances workers' rights by ensuring that money held on their behalf is protected. The amendments are the least rights restrictive possible in that they do not represent an unqualified

[1] *Human Rights Scrutiny Report No.12 of 2017*, p 19, para 1.61.

prohibition on terms of industrial agreements that provide for contributions to worker entitlement funds. Rather, they require such contributions to be made to registered worker entitlement funds that are subject to basic governance and disclosure obligations.

The International Labour Organization (ILO) has stated that 'Restrictions on [the] principle [of leaving the greatest possible autonomy to organizations in their functioning and administration] should have the sole objective of protecting the interests of members'.[2]

To the extent the proposed provisions may engage with these rights they do so only to protect the rights of workers by ensuring that their money is properly managed and their interests protected.

The provisions support the basic governance and disclosure requirements of the Bill that are designed to address potential conflicts of interest, breaches of fiduciary duty and potential for coercive conduct that were found by the Royal Commission into Trade Union Governance and Corruption (Royal Commission) in examining the operation in Australia of worker entitlement funds. As such, the amendment protects the interests of workers.

Consultation

The Bill, including these provisions, was the subject of consultation with worker entitlement funds and employee and employer organisations prior to introduction. All worker entitlement funds registered for the purpose of fringe benefits tax laws were invited to consultation. Employee and employer organisations and their peak councils were consulted through the Committee on Industrial Legislation.

In addition, the recommendations of the Royal Commission implanted by this Bill were the subject of extensive consultation and discussion by the Royal Commission, which invited submissions from any interested parties.

Regulation of worker entitlement funds

The Committee asks:

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

Current provisions

An ASIC class order currently exempts worker entitlement funds from regulation under the *Corporations Act 2001*.

Contributions to 'approved worker entitlement funds' under the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act 1986) are exempt from fringe benefits tax. Funds can be approved if they meet certain minimum criteria, largely concerned with how fund money can be spent. This imposes a degree of indirect regulation on these funds.

Changes proposed through the Bill

The Bill will amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to insert new Part 3C of Chapter 11 to apply governance, financial reporting and financial disclosure requirements to worker entitlement funds. As noted by the Committee, Schedule 2 of the Bill would require worker entitlement funds to meet requirements for registration and meet certain conditions relating to financial management, board composition, disclosure and how money is spent. These conditions include that a worker entitlement fund will only be able to be operated by a corporation and cannot be operated by a registered organisation (proposed new section 329LA condition 2).[3]

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[2] ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva* Fifth (revised) Edition, 2006, para 369.

[3] *Human Rights Scrutiny Report No.12 of 2017*, p 20, para 1.64–1.65.

Discussion

The Committee is concerned that the prohibition on registered organisations administering worker entitlement funds and limiting the purposes for which money may be used appears to engage and limit the right to freedom of association and the right to just and favourable conditions of work.[4]

The objective of the Bill in relation to the administration of worker entitlement funds and limiting the purposes for which worker entitlement fund income and contributions can be used is to ensure that workers' entitlements are managed responsibly and transparently and in their interests. Funds will have to be run by trained professionals of good fame and character and fund money will be restricted from being re-characterised and spent for unauthorised purposes. These measures are intended to prohibit what the Royal Commission found were substantial payments flowing out of worker entitlement funds to other parties for purposes other than paying members.[5]

Requiring the registration of worker entitlement funds and placing conditions on that registration are measures that are rationally connected to the objective of ensuring that workers' entitlements are managed responsibly and transparently in their interests.

Requiring a fund operator to be a constitutional corporation is necessary to ensure that the provisions regulating such funds are valid. A similar requirement applies to superannuation funds under the *Superannuation Industry (Supervision) Act 1993*.

Requiring that a fund operator cannot be an organisation is designed to prevent conflicts of interest for worker entitlement funds that also make substantial payments to those organisations for purposes other than paying members worker entitlements.

In this respect, the Royal Commission stated that:

> The very substantial revenue flows to unions generate significant conflicts of interest and potential breaches of fiduciary duty on the part of unions and union officials negotiating enterprise agreements … In short, the union and union officials owe a duty to act in the interests of union member employees when negotiating enterprise agreements. At the same time, there is a significant potential and incentive for the union to act in its own interests to generate revenue.[6]

The worker entitlement fund, Incolink, provides an example of the substantial revenue that flows to unions and employer groups. Between 2011 and 2015, the Construction, Forestry, Mining and Energy Union (CFMEU), the Master Builders Association of Victoria and the Plumbing Joint Training Fund together received over $85 million from Incolink.[7] These organisations are all represented on the board of Incolink.

In addition, none of the existing worker entitlement funds that are approved under the FBTA Act 1986 are operated by registered organisations; most worker entitlement funds are run by corporations with a mix of representatives from employer and employee associations on their boards. The Bill does not alter this position. Officers of registered organisations can still sit on the board of worker entitlement funds.

The Bill also retains the existing legal limits on how contributions and income of a fund can be spent under the FBTA Act 1986.

To the extent that these measures may limit human rights, any limitation is reasonable and proportionate in achieving the objectives of the Bill. Commensurate with this, the measures are the least rights restrictive as they do not prevent contributions to worker entitlement funds but provide appropriate governance and transparency to ensure that workers' entitlements are managed responsibly and transparently in their interests. They also take into account the feedback provided by funds during consultation, including to allow funds to use income to pay for training and welfare

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[4] *Human Rights Scrutiny Report No.12 of 2017*, p 20, para 1.66.
[5] Royal Commission into Trade Union Governance and Corruption, *Final Report*, 2015, Volume 5, p 304.
[6] Royal Commission into Trade Union Governance and Corruption, *Final Report*, 2015, Volume 5, p 305.
[7] Royal Commission into Trade Union Governance and Corruption, *Final Report*, 2015, Volume 4, pp 980–986.

services, subject to appropriate criteria, and the provision of a separate regulatory scheme for single employer worker entitlement funds.

Prohibiting terms of industrial instruments requiring payments to election funds

The Committee asks:

- **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) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is the least restrictive way of achieving its stated objective).**

Current provisions

There are currently no provisions in the FW Act or RO Act that deal with terms of industrial instruments requiring or permitting employees to pay into election funds. This is despite the fact that section 190 of the RO Act prohibits an organisation from using its resources for the purposes of the election of a particular candidate. Because election funds are structurally separate from the organisation, they are not captured by this provision.

Changes proposed through the Bill

Schedule 3 of the Bill would amend section 194 of the FW Act to prohibit any term of an enterprise agreement or contract of employment requiring or permitting employee contributions for a regulated election purpose.

Schedule 3 would also amend Part 2-9 of the FW Act to provide that any term of a contract of employment requiring or permitting payments for a regulated election purpose will have no effect.

A 'regulated election purpose' is one that includes the purpose of funding, supporting or promoting the election of candidates for election to office in an industrial association.

Discussion

The Committee considered that prohibiting the inclusion of particular terms in an enterprise agreement interferes with outcomes of the bargaining process and, accordingly, engages and limits the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association.

Election funds are established to fund election campaigns for office within registered organisations and are regularly sourced from contributions from employees of such organisations. These funds are usually managed by one or more individuals who hold elected office within the organisation. They are not established in the interests of workers who are subject to the collective agreement but rather the interests of officials of the bargaining representative. The Royal Commission found that such arrangements unfairly disadvantage candidates who are not already in office and have been misused by officials controlling the funds where there are no contested elections. The Royal Commission also found a lack of oversight of election funds, with information about revenue and expenditure sometimes hidden, or not kept at all.[8]

The amendments remove any legal or practical compulsion on employees to contribute to a particular election fund. They ensure employees have a choice about whether to contribute to the particular fund.

In the case that the amendments may limit human rights, they are reasonable and proportionate. The amendments are the least rights restrictive possible in that they do not provide for an absolute prohibition on contributions to election funds. Employees will still be able to make genuine contributions, voluntarily and independently of an industrial instrument.

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[8] Royal Commission into Trade Union Governance and Corruption, *Final Report*, 2015, Volume 5, pp.280-281.

By seeking to remove any legal or practical compulsion on employees to contribute to election funds, the amendments also engage and enhance the right to freedom of association by allowing choice in respect of contributions to election funds.

Prohibiting any action with the intent to coerce a person to pay amounts to a particular fund

The committee asks:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international 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 (including any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).**

The committee also asks in respect of the same measure:

- **the scope of any restriction on the right to freedom of expression and assembly;**
- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed, any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).**

Current provisions

Part 3-1 of the FW Act provides for general workplace protections. It contains specific prohibitions against coercive behaviour in relation to workplace rights (section 343) and industrial activities (348). However, the Part does not specifically prohibit coercive action in relation to the making payments to certain funds, particularly where such action occurs outside of the enterprise bargaining process. These funds include superannuation funds, training and welfare funds, worker entitlement funds and insurance arrangements and are collectively referred to by the Royal Commission as 'worker benefit funds'.

Changes proposed through the Bill

Schedule 4 of the Bill would amend Part 3-1 of the FW Act to insert a new section 355A to prohibit a person from taking coercive action in relation to the making of payments to a particular worker benefit fund. This would fix an existing gap in the Act, which prohibits coercion in relation to a wide range of other conduct, but not in relation to contributions to funds.

Discussion

The Committee is concerned that this measure circumscribes the right to strike as protected by the right to freedom of association.

On the contrary, compelling contributions to a particular worker benefit fund infringes basic principles of freedom of association and, by prohibiting mandatory contributions, the amendment is in fact promoting human rights. The amendment addresses the problems identified by the Royal Commission in a reasonable, necessary and proportionate manner.

The Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for failures to comply with Part 3-3 of the FW Act, dealing with industrial action. The Royal Commission recommended that coercion to pay into a worker entitlement fund be prohibited in response to a number of examples of inappropriate pressure being applied to secure payments into worker entitlement funds. For example, the Royal Commission found that the CFMEU engaged in 'a protracted campaign of industrial blackmail and extortion'

against Universal Cranes to secure payments to specific worker entitlement funds. Those funds provided substantial financial benefits to the CFMEU illustrating a clear conflict of interest. The union undertook this campaign in spite of employees choosing to adopt in-house schemes for redundancy and sick leave that offered them better value for money.[9]

In response to this evidence, the measure in Schedule 4 of the Bill addresses a gap in the current coercion protections in the FW Act. In its Final Report the Royal Commission noted:

> Accordingly, action done to coerce an employer to agree to a particular term of an enterprise agreement requiring contributions to a particular employee benefit fund is prohibited. However, it is doubtful whether action taken outside the enterprise bargaining process, for example, as part of seeking to come to a 'side deal' between employer and union, would be caught.[10]

The current FW Act provisions are not specifically designed to address this behaviour—they may do so, but not in all circumstances. This amendment will put the issue beyond doubt and pursues the legitimate objective of reducing the potential for coercive behaviour outside the enterprise bargaining process, for example in side deals.

The Committee is also concerned that the measure circumscribes the right to freedom of expression as set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and the right of peaceful assembly set out in Article 21 of the ICCPR. It is not clear how the relevant rights are engaged as the measure does not interfere with an individual's right to hold opinions without interference, the right to freedom of expression or the freedom to seek, receive and impart information and ideas of any kind or the right of peaceful assembly. In any event, the amendment pursues the legitimate objective of ensuring that a person cannot coerce another person to make payments into certain worker benefit funds and is reasonable and proportionate.

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[9] Royal Commission into Trade Union Governance and Corruption, *Interim Report*, 2014, Volume 2, p 1400.
[10] Royal Commission into Trade Union Governance and Corruption, *Final Report*, 2015, Volume 5, p 338.

TREASURER

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letters of 29 November 2017 on behalf of the Parliamentary Joint Committee on Human Rights (the committee) in relation to issues raised in the committee's *Report 12 of 2017* concerning the following Bills:

- Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017; and
- Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017.

I would like to thank you for the opportunity to provide further information on the issues identified by the committee. I have addressed each of the issues in **Attachment A** to this letter.

I trust that this information will be of assistance to the committee.

Yours sincerely

The Hon Scott Morrison MP

12 / 12 / 2017

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ATTACHMENT A

RESPONSE TO QUESTIONS FROM THE COMMITTEE

Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017

Issue: Compatibility of the measure with the right not to incriminate oneself

Noting the preceding analysis, the committee seeks the advice of the Treasurer as to:

1. **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 for the purposes of international human rights law;**

2. **how the measure is effective to achieve (that is, rationally connected to) that objective;**

3. **whether the limitation is proportionate to achieve the stated objective;**

4. **whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure;**

5. **whether a derivative use immunity is reasonably available as a less rights restrictive alternative in sections 62ZOD of the Insurance Act 1973 and 179AD of the Life Insurance Act 1995 to ensure information or evidence indirectly obtained from a person compelled to give information or documents cannot be used in evidence against that person.**

Explanation:

1. Objectives

The information gathering powers in proposed sections 62ZOD of the *Insurance Act 1973* (Insurance Act) and 179AD of the *Life Insurance Act 1995* (Life Insurance Act) form part of proposed statutory management regimes to be inserted by the Bill into the Insurance Act and Life Insurance Act. These regimes are based on existing provisions in the *Banking Act 1959* (Banking Act) and will enable APRA to appoint a statutory manager to an insurer or, in certain circumstances, a related body corporate. Appointment of a statutory manager will generally only occur in situations of urgency, for example where the failing insurer poses a threat to financial system stability.

There is a pressing need for such a measure because of the lack of a statutory management regime for insurers as compared with the Banking Act and consequently, a substantial gap in APRA's resolution regime for insurers to effectively and efficiently manage and resolve a distressed or failing insurer. Statutory management powers will be exercised with the broad objectives of protecting the interests of policyholders of insurers and ensuring the stability of Australia's financial system, both of which are such pressing or substantial concerns for most Australians that the limitation upon the right to claim privilege against self-incrimination in the measure is warranted and justified.

2. Effectiveness in achieving objectives

The proposed information gathering powers (proposed sections 62ZOD of the Insurance Act and 179AD of the Life Insurance Act) are based on the existing section 14A of the Banking Act. It is critical that a statutory manager, having taken over what will often be an insolvent or near insolvent financial institution or related entity, be in a position to obtain all relevant information relating to the business of the body corporate from officers (and former officers) in order for the statutory manager to control, stabilise, investigate and (to the extent possible) resolve the body corporate or resolve a related entity.

Overriding the privilege against self-incrimination is justified in this context because only the key personnel of an insurer will have access to information and documents relating to the insurer's business, including its financial condition. It is essential for a statutory manager to be able to obtain this information quickly to assist with the management and crisis resolution of an insurer that is financially distressed. In circumstances where an insurer is distressed or failing, especially where its failure may have an adverse effect on financial stability, time is of the essence in ensuring the orderly resolution of the insurer. By compelling relevant officers or ex-officers promptly to provide required information and documents relating to the business of the body corporate, statutory managers will be able to maximise their ability to rehabilitate a distressed insurer, or to ensure an orderly resolution and exit of a failing insurer. This will ultimately benefit the insurer's customers, creditors and other suppliers. In the event of a significant crisis, APRA would also be able to use the information gathered to support decision making and prevent contagion in the financial system, ensuring that financial system stability is maintained.

3. Proportionality of measures

The limitation to the privilege against self-incrimination is proportionate to achieve the stated objective due to the limited circumstances in which the proposed powers may be exercised. The information gathering powers in question can only be used where a statutory manager has been appointed, and there is a high threshold for triggering the appointment of a statutory manager to an insurer or related body corporate.

In order to appoint a statutory manager to an insurer, APRA must be satisfied that a condition for the appointment of a judicial manager exists (e.g. insolvency) and that at least one of a number of further conditions is satisfied (e.g. the failure of the insurer poses a threat to the stability of the financial system). Similarly, if the appointment of the statutory manager is to a related body corporate of an insurer, APRA must be satisfied that a relevant threshold test has been met (e.g. that a statutory manager has been or can be appointed to the insurer and the related body corporate supplies essential services to the insurer).

4. Sufficiency of circumscription

As noted above, the information gathering powers in question can only be used where a statutory manager has been appointed. This means that the proposed information gathering powers are not likely to be exercised except in circumstances warranting their use. The powers only relate to information relating to the business of the body corporate under statutory management.

The powers are further circumscribed in that they apply only in relation to an 'officer' as defined in section 9 of the *Corporations Act 2001* (the Corporations Act) (e.g. a director or other senior person with significant strategic responsibilities in relation to the failing entity), and a person who has been such an officer. Circumstances may exist where the failure of the insurer can be attributed to a failure by one or more officers to comply with their statutory responsibilities, including where there has been a breach of Corporations Act provisions carrying an offence. This raises the real possibility of the statutory manager's ability to fulfil his

or her duties being hampered by a refusal to provide information on self-incrimination grounds, making the override of the privilege against self-incrimination necessary in this instance.

5. Derivative use immunity

As the committee has noted, direct use immunity is conferred by these provisions, but not derivative use immunity. The reason for this is that if derivative use immunity is applied, it would often be very difficult for the prosecution to show that the evidence they rely on to prove a criminal case against an officer relating to the failure of the financial institution was uncovered through an absolutely independent and separate investigation process. This may in turn lead to hesitation on the part of a statutory manager to exercise the information gathering power, undermining the purpose for which the power was conferred.

If derivative use immunity applied, then further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered through independent investigative processes. Also, where the information-obtaining power is exercised against officers or ex-officers who may have been responsible for the deterioration or failure of a financial institution, for example, a director implicated in a failure such as HIH, a derivative use immunity would not be helpful in building a case against the director for breach of their duties under law.

These provisions are consistent with the majority of existing self-incrimination provisions in other APRA-administered legislation, including provisions in the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) and *Private Health Insurance (Prudential Supervision) Act 2015* (PHI Act).

The committee has also noted the difference between APRA's proposed information gathering powers (in proposed sections 62ZOI of the Insurance Act and 179AI of the Life Insurance Act), which includes derivative use immunity, and the proposed statutory manager's powers to require officers to provide information (in proposed sections 62ZOD and 179AD), which do not. This difference currently exists in the context of the Banking Act between existing provisions (namely sections 14A and 14AD) that correspond to those proposed for the Insurance and Life Insurance Acts.

APRA's information gathering power applies in respect of any person while the statutory manager's information gathering power is more circumscribed in scope and applies only in respect of officers (and ex-officers) of an insurer. This is a crucial distinction. Officers are in a different situation to ordinary persons in that they are the key personnel of the insurer with greater access to the relevant information and documents relating to the insurer. Also, an officer may well have breached directors' duties in connection with the failure of the insurer. Therefore, while use immunity is appropriate in this context, derivative use immunity may impede any prosecution or penalty proceedings against these officers for breach of their duties, especially given the issues identified above relating to the application of derivative use immunity. By contrast, APRA's information gathering power extends to any person, including an ordinary citizen, and the greater protection afforded by derivative use immunity is justified in this particular context because of the wider scope of the power.

Issue: Compatibility of the measure with the right to privacy

The preceding analysis raises questions about whether the amendment to section 42 of the Transfer Act is compatible with the right to privacy.

The committee therefore seeks the advice of the Treasurer as to:

1. **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 for the purposes of international human rights law;

2. **how the measure is effective to achieve (that is, rationally connected to) that objective; and**

3. **whether the limitation is proportionate to achieve the stated objective.**

Explanation:

1. Objectives

APRA's current powers under the *Financial Sector (Business Transfer and Group Restructure) Act 1999* (Transfer Act) enable it to compulsorily transfer all of the assets and liabilities of a failing regulated entity to another regulated entity. Compulsory business transfer is an important power among the resolution options available to APRA when managing the distress or failure of a regulated entity. Accordingly, the Transfer Act enables some or all of the business of a regulated entity (including assets, liabilities, legal rights and obligations, data and systems) to be transferred to another regulated entity to facilitate the resolution of the entity.

Existing section 42 of the Transfer Act provides that APRA may, in connection with a compulsory transfer, or a proposed or possible compulsory transfer, provide information (including personal information or confidential commercial information) to the receiving body, or to the possible or proposed receiving body, about the business that is to be, or that may be, transferred.

This provision is necessary under the current framework (i.e. where APRA may require a transfer of business) because the receiving body's board of directors must consent to the transfer and be in a position to undertake due diligence on the business being transferred. The business being transferred will usually include employment contracts (that is, staff will usually be transferred) and include records of insurance contracts which may cover customers who are individuals.

However, there is no current power under the Transfer Act to transfer a failing regulated entity's shares to another body corporate as a means of achieving the same outcome. The Bill supplements the Transfer Act by providing that, as an alternative to requiring a transfer of business, APRA may transfer the shares (ownership) of the failing entity to a new owner. The ability to transfer the shares of a failing regulated entity could, in some circumstances, provide a more efficient and simpler means of achieving an orderly resolution, than affecting a full transfer of all of the assets and liabilities of the entity. This is an enhancement of the Transfer Act to provide APRA with greater flexibility and certainty when considering the resolution options available to address and resolve a failing entity. The enhancement will enable APRA to more quickly achieve an orderly resolution of a distressed entity which is in the interests of most Australians as it helps prevent contagion in the financial system, ensuring that financial system stability is maintained.

As with other resolution powers to be exercised by APRA, compulsory transfer powers are exercised with the broad objectives of protecting the interests of depositors and policyholders and maintaining the stability of Australia's financial system, both of which are such pressing or substantial concerns for most Australians that the limitation to privacy in the measure is warranted and justified.

2. Effectiveness in achieving objectives

As explained in the statement of compatibility referred to by the committee, the proposed information sharing provisions (in particular, the amended section 42, applicable to both transfer

of shares and transfer of business) are a necessary component of the framework for transfers under the Transfer Act.

In order for APRA to require a compulsory transfer, a receiving body's board must consent to the transfer from the transferring body (as is currently the case with a transfer of business). As with a transfer of business, in order for the receiving body's board to consent, it must be apprised of relevant knowledge of what is to be transferred to it, including all relevant information and documentation pertaining to the transferring body which may contain personal information relating to staff or individuals who have insurance or other arrangements with the failed entity. Without being so informed, it is impossible for the board to reach a decision as to whether to consent to the transfer. Therefore the information sharing provisions ensure that the receiving body can be provided relevant information about the staff, management and insurance arrangements as part of their due diligence when they are deciding whether or not to consent to the transfer.

3. Proportionality of measures

The limitation to privacy is proportionate to the stated objective as it is subject to appropriate safeguards. In terms of the safeguards referred to in the committee's comments, it is important to recognise that section 56 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act) imposes confidentiality upon APRA officers in respect of 'protected information' and 'protected documents'. Broadly, documents and information become 'protected' by virtue of both having been received by APRA and relating to the affairs of entities that APRA regulates, or customers of those entities, or entities that APRA registers or collects data from under the *Financial Sector (Collection of Data) Act 2001* (FSCODA).

Subsection 56(2) of the APRA Act makes it an offence for a person who is, or has been, an APRA officer to disclose protected information or a protected document to any person or to a court, subject to certain exceptions. Information relating to a transferring body subject to the proposed information sharing provisions under the measure would be protected information under section 56 of the APRA Act as having been received by APRA and relating to the affairs of entities regulated by APRA.

The secrecy regime under section 56 extends to the receiving body's officers because they fall within paragraph (c) of the definition of 'officer' in subsection 56(1) of the APRA Act (received in course of their employment). As such, onward disclosure of the information by the receiving body to other persons is restricted under section 56.

Also, as noted in section 42 of the Transfer Act, subsection 56(9) of the APRA Act allows for conditions to be imposed on disclosure of protected information to restrict the use to which the receiving body may put the information to. Failure to comply with any condition so imposed is an offence. For example, if APRA were to disclose information about staff or insurance contracts of a failed insurer to a body corporate that was considering taking on ownership of the failed insurer via a transfer of shares, APRA could impose conditions under subsection 56(9) on the body corporate and its officers at the time of disclosing the information. Such conditions might require the recipients to only use the information for the purposes of deciding whether or not to accept the transfer, and not to further disclose the information.

As such, the secrecy regime under section 56 of the APRA Act affords an effective and appropriate degree of protection to any personal information that may be included within protected information. Where the information is provided to a statutory manager, it is important to note that a statutory manager is, in any case, subject to the secrecy regime under section 56 of the APRA Act, as signposted under subsection 14C(5) of the Banking Act, and proposed subsections 62ZOK(4) and 179AK(4) of the Insurance Act and Life Insurance Act respectively.

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-020470

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
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8 DEC 2017

Dear Chair Ian

I refer to your letter of 29 November 2017 on behalf of the Parliamentary Joint Committee on Human Rights. In your letter, you requested additional information on the requirements of the Medicare obstetrics items which were amended on 1 November 2017 by the *Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017.*

On 10 November 2017, I wrote to the Standing Committee on Senate Regulations and Ordinances on the nature of the mental health assessment required to be conducted for antenatal items 16590 and 16591 and new postnatal item 16407. In the response, I noted the following:

- The mental health assessment can be met if the medical practitioner enquires about the mental wellbeing of the patient. This is a mandatory requirement.
- If the patient consents to a comprehensive assessment, the medical practitioner can discuss significant risk factors to the patient's wellbeing (such as drug and alcohol use and domestic violence).
- If the patient does not consent to a comprehensive assessment, a Medicare benefit is still payable for the service. This ensures that all patients will continue to have access to Medicare-subsidised obstetrics services.

I have enclosed a copy of my response for your information.

The provision of a comprehensive mental health assessment, subject to the patient's consent, is intended to enable the prevention or early detection of mental health disorders. These disorders, which affect one in 10 women during pregnancy and one in seven women after birth, have the potential to have a negative impact on the physical and mental wellbeing of mothers and their children.

The obstetrics changes are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Women will continue to have access to subsidised obstetrics services under Medicare, which is consistent with Articles 9 and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR). Women who elect to have a comprehensive mental health assessment will enjoy an improved standard of treatment for obstetrics care. The assessment will also contribute to the healthy development of the child.

You asked for clarification on the meaning of the word 'screening' in items 16590 and 16591 and new postnatal item 16407. In the context of these items, screening does not involve the use of any diagnostic techniques such as diagnostic imaging or pathology tests. Screening is simply asking patients a series of questions on certain risks factors. In other words, it is part of the comprehensive mental health assessment which the patient may or may not consent to. This terminology would be understood by medical practitioners and is consistent with the relevant clinical guidelines, *Mental Health Care in the Perinatal Period: Australian Clinical Practice Guideline*.

As noted above, if the patient does not consent to a comprehensive assessment, a Medicare benefit is still payable for the service.

The mental health assessment is minimally invasive and does not limit the patient's right to privacy under Article 17 of the International Covenant on Civil and Political Rights.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Encl (1)

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-018079

Senator John Williams
Chair
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Room S1.111
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CANBERRA ACT 2600

10 NOV 2017

Dear Chair

Healthcare Identifiers Amendment (Healthcare Identifiers of Healthcare Providers) Regulations 2017

Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017

Sections 20 and 25D of the *Healthcare Identifiers Act 2010* (HI Act) enable regulations to authorise the collection, use, disclosure or adoption of healthcare identifiers for health-related purposes, and were included in the HI Act in 2015 as a result of a recommendation made by the *Healthcare Identifiers Act and Service Review, Final Report – June 2013* (the HI Review). The HI Review recognised a number of uses of healthcare identifiers that were not anticipated by the HI Act but would have the potential to deliver significant improvements in healthcare, and recommended that the Australian Health Ministers' Advisory Council (AHMAC) consider amending the HI Act to provide a regulation-making power to prescribe additional organisations that could handle healthcare identifiers.

AHMAC, and subsequently Council of Australian Governments (COAG) Health Council in August 2015, agreed to amend the HI Act to establish this mechanism. At that time Health Ministers also agreed that AHMAC agreement would be sought on all legislative instruments under the HI Act, with escalation to Health Ministers as appropriate. This office and my Department continue to honour this commitment.

The mechanism to make these regulations enables the Government to provide new authorisations more quickly than would be possible if amendments to the Act were needed each time a new entity is identified, providing more responsiveness for supporting entities that provide health-related support to consumers.

The *Healthcare Identifiers Amendment (Healthcare Identifiers of Healthcare Providers) Regulations 2017* (the Amendment Regulations) reinstate, in part, authorisations that were inadvertently removed as part of the 2015 changes. The absence of these authorisations began having adverse effects on the effectiveness of healthcare identifiers – for example, primary health networks could not collect healthcare providers' healthcare identifiers as part of managing healthcare delivery in their region, which is important in enabling primary health networks to work together to facilitate and evaluate the delivery of healthcare. It also created a barrier to the delivery of certain types of mobile apps that could connect to the My Health Record system – apps that would otherwise help individuals to manage their health information.

The Amendment Regulations were made as an interim measure to provide these much needed authorisations until they could be reinstated in their entirety through amendments to the HI Act. A review of the HI Act is scheduled to begin in coming months for delivery by November 2018 and it is likely to recommend amendments to the HI Act. It is intended that the removed authorisations be reinstated as part of those amendments as soon as practicable after the review is delivered.

The *Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017* implements the Government's response to the recommendations of the Medicare Benefits Schedule (MBS) Review Taskforce (the Taskforce) in relation to obstetrics services. These recommendations were subject to consultation and public feedback prior to the finalisation of the Taskforce's recommendations, with most respondents supporting the recommendations.

I note the Committee's request for information around the nature of the mental health assessment required to be conducted for amended antenatal items 16590 and 16591 and new postnatal item 16407. The Government does not intend to prescribe the method by which practitioners undertake mental health assessments of their patients, as this should be a matter of clinical judgement based on the individual needs of the patient. However, it is recommended that when conducting mental health assessment screening practitioners have regard to the appropriate and current Australian Clinical Practice guidelines.

Alcohol or drug misuse are significant risk factors that can negatively affect both the mental health of the patient and the wellbeing of infants. As part of an antenatal (16590 and 16591) or postnatal (16407) service, it is expected that a medical practitioner be required to enquire about the mental wellbeing of the patient and undertake a more comprehensive assessment where agreed to by the patient. This would include a discussion about factors that pose a significant risk to mental health, such as drug and alcohol use and domestic violence. This would then enable monitoring or referral for appropriate assessment, support and treatment, and facilitate education about the inherent risks of drug and alcohol misuse in pregnancy.

It is not intended that the screening for drug and alcohol use would require diagnostic testing of the patient. It is also not intended that a patient would be ineligible for Medicare benefit if the patient declines to receive a comprehensive mental health assessment. In that scenario, a Medicare benefit would still be payable providing the medical practitioner had enquired about the patient's mental wellbeing. This is outlined in the explanatory notes that are available on www.mbsonline.gov.au to assist practitioners when seeking information and guidance around the billing of items under Medicare. A copy of this note is attached.

I acknowledge that the explanatory statement for this instrument is not clear with regards to consent. My Department will look to correct this in the explanatory statement when the *Health Insurance (General Medical Services Table) Regulations* are remade in mid-2018.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Encl 1 – MBS explanatory note

Technical requirements

In order to fulfill the item descriptor there must be a visual and audio link between the patient and the remote practitioner. If the remote practitioner is unable to establish both a video and audio link with the patient, a MBS rebate for a telehealth attendance is not payable.

Individual clinicians must be confident that the technology used is able to satisfy the item descriptor and that software and hardware used to deliver a videoconference meets the applicable laws for security and privacy.

TN.4.13 Mental Health Assessments for Obstetric Patients (Items 16590, 16591, 16407)

Items for the planning and management of pregnancy (16590 and 16591) and for a postnatal attendance between 4 and 8 weeks after birth (16407), include a mental health assessment of the patient, including screening for drug and alcohol use and domestic violence, to be performed by the clinician or another suitably qualified health professional on behalf of the clinician. A mental health assessment must be offered to each patient, however, if the patient chooses not to undertake the assessment, this does not preclude a rebate being payable for these items.

It is recommended that mental health assessments associated with items 16590, 16591, and 16407 be conducted in accordance with the National Health and Medical Research Council (NHMRC) endorsed guideline: *Mental Health Care in the Perinatal Period: Australian Clinical Practice Guideline* – October 2017, Centre for Perinatal Excellence.

Results of the mental health assessment must be recorded in the patient's medical record. A record of a patient's decision not to undergo a mental health assessment must be recorded in the patient's clinical notes.

TN.4.14 Extended Medicare Safety Net (EMSN) for Obstetric Services (Items 16531, 16533 and 16534)

The Extended Medicare Safety Net (EMSN) benefit is capped at 65% of the schedule fee for obstetric items 16531, 16533, and 16534. However, as these items are for in-hospital services only, the EMSN does not apply

TN.6.1 Pre-anaesthesia Consultations by an Anaesthetist - (Items 17610 to 17625)

Pre-anaesthesia consultations are covered by items in the range 17610 - 17625.

Pre-anaesthesia consultations comprise 4 time-based items utilising 15 minute increments up to and exceeding 45 minutes, in conjunction with content-based descriptors. A pre-anaesthesia consultation will attract benefits under the appropriate items based on **BOTH** the duration of the consultation **AND** the complexity of the consultation in accordance with the requirements outlined in the content-based item descriptions.

Whether or not the proposed procedure proceeds, the pre-anaesthetic attendance will attract benefits under the appropriate consultation item in the range 17610 - 17625, as determined by the duration and content of the consultation.

The following provides further guidance on utilisation of the appropriate items in common clinical situations:

(i) Item 17610 (15 mins or less) - a pre-anaesthesia consultation of a straightforward nature occurring prior to investigative procedures and other routine surgery. This item covers routine pre-anaesthesia consultation services including the taking of a brief history, a limited examination of the patient including the cardio-respiratory system and brief discussion of an anaesthesia plan with the patient.

(ii) Item 17615 (16-30 mins) - a pre-anaesthesia consultation of between 16 to 30 minutes duration AND of significantly greater complexity than that required under item 17610. To qualify for benefits patients will be undergoing advanced surgery or will have complex medical problems. The consultation will involve a more extensive examination of the patient, for example: the cardio-respiratory system, the upper airway, anatomy relevant to regional anaesthesia and invasive monitoring. An anaesthesia plan of management should be formulated, of which there should be a written record included in the patient notes.

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

Mr Ian Goodenough MP
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Dear Chair Ian

Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017

Thank you for your letter of 29 November 2017 regarding the Parliamentary Joint Committee on Human Rights' consideration of the above Bill in its *Report 12 of 2017*.

I have included my response to this request below, which I trust will assist the Committee in its consideration of the Bill.

Right to a fair trial and the right to a fair hearing

At paragraphs 1.120 to 1.121 and paragraphs 1.133 to 1.134, the Committee has requested my advice as to whether the amendments in the Bill are compatible with the right to a fair trial and a fair hearing under Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) with reference to the following considerations:

- By reference to the Committee's Guidance Note 2, whether the freezing, restraint or forfeiture powers and the unexplained wealth regime that are affected by these amendments may be characterised as 'criminal' for the purposes of international human rights law having regard to the nature, purpose and severity of the measures; and;

- The extent to which the amendments are compatible with the criminal process guarantees set out in Articles 14 and 15, including any justification for any limitations of these rights where applicable.

Minister's response

The Proceeds of Crime Act 2002 is civil in character

The Committee's Guidance Note 2 states that the test for whether a penalty can be classified as 'criminal' relies on three criteria: the domestic classification of the penalty; the nature and purpose of the penalty, and the severity of the penalty.

On the first criterion, it is clear that asset recovery actions, including those under the unexplained wealth regime, are characterised as civil in nature under Australian domestic law.[1]

On the second criterion, the *Proceeds of Crime Act 2002* (POC Act) is not solely focused on deterring or punishing persons for breaching laws, but is primarily focused on remedying the unjust enrichment of criminals who profit at society's expense.[2] Actions under the POC Act also make no determination of a person's guilt or innocence and can be taken against assets without a finding of any form of culpability against a particular individual.[3]

On the third criterion, Guidance Note 2 provides that a penalty is likely to be considered criminal for the purposes of human rights law if the penalty is imprisonment or a substantial pecuniary sanction. Proceedings under the POC Act cannot in themselves create any criminal liability and do not expose people to any criminal sanction (or a subsequent criminal record). Further, penalties under the POC Act cannot be commuted into a period of imprisonment.

On whether the sanction is substantial, it also remains open to a court to decrease the quantum to be forfeited under the Act to accurately reflect the quantum that has been derived or realised from crime, ensuring that orders are aimed primarily at preventing the retention of ill-gotten gains, rather than the imposition of a punishment or sanction.[4]

Compatibility with criminal justice guarantees

As the unexplained wealth regime and general forfeiture regime under the POC Act are civil in nature, it would not be appropriate or necessary to assess the compatibility of the amendments in the Bill with the criminal justice guarantees set out in Articles 14 and 15 of the ICCPR.

Amendments to civil law can only engage the right to a fair hearing for civil hearings under Article 14(1). 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.

Assessment of POC Act

The Committee has recommended (at paragraph 1.122) 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.

I note this recommendation and reiterate my previous comments as outlined at paragraph 1.115 of the Committee's report, namely that 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 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 when developing Bills to amend the Act.

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[1] *Proceeds of Crime Act 2002* s 315.
[2] Ibid ss 5(a) – (ba).
[3] See asset-directed forfeiture under the *Proceeds of Crime Act 2002* ss 19 and 49.
[4] For example, see compensation orders under the *Proceeds of Crime Act 2002* ss 77 and 94A.

Right to privacy

At paragraph 1.129 the Committee has raised concerns about the right to privacy in the following terms:

The committee therefore seeks the advice of the minister as to whether the limitation on the right to privacy is proportionate to the objective of the measure (including whether there are adequate safeguards in place to protect persons' property from being forfeited where they have been acquitted of the offence, and whether there are other less-rights restrictive means of achieving the objective).

Minister's response

The Committee has questioned whether the measures in the Bill are proportionate in achieving their objectives, noting that a person can be required to forfeit property linked to an offence where they have been acquitted of this offence or their conviction has been subsequently quashed.

This concern, however, only arises in relation to non-conviction based forfeiture orders under the POC Act.[5] This method of forfeiture is specifically designed to allow proceeds authorities to seize and forfeit property where they can establish a link to criminal conduct on the balance of probabilities (the civil standard of proof). This system of forfeiture functions independently of any criminal finding of guilt, which is established on the higher standard of 'beyond reasonable doubt'.

The Australian Law Reform Commission previously recommended the adoption of a non-conviction based forfeiture regime in its review of the *Proceeds of Crime Act 1987*, which found that the previous system of conviction-based forfeiture was ineffective at confiscating criminal assets and undermining the profitability of criminal enterprises.[6]

As noted in the Explanatory Memorandum to the Bill, the Act already contains safeguards and protections that ensure the measures are no more onerous than necessary to achieve their objectives. I also note that the civil forfeiture orders under the Act make no determination of a person's guilt or innocence and impose no criminal penalties upon an individual. Allowing these orders to be revoked where it is found that a person did not commit an offence beyond reasonable doubt, as is the case with an acquittal, would therefore be inappropriate and counterproductive to the underlying aims of non-conviction based forfeiture.

Should your office require any further information, the responsible advisor for this matter in my office is Adrian Barrett, who can be contacted on

I trust this information has been of assistance.

Yours sincerely

Michael Keenan

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[5] See *Proceeds of Crime Act 2002* ss 51, 80, 120 and 157.

[6] *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* [1999] ALRC 87.

The Hon Christian Porter MP
Minister for Social Services

MC17-012667

11 DEC 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Mr Goodenough~~ Ian

Thank you for your letter of 29 November 2017 requesting further information around the human rights compatibility of the Social Services Amendment (Housing Affordability) Bill 2017 (the Bill), on the Parliamentary Joint Committee on Human Rights' (the Committee) Report 12 of 2017. Please find my responses to the Committee's comments at Attachment A.

On balance, the Commonwealth Government views this Bill as having appropriate safeguards in place so as to be compatible with human rights while at the same time achieving the objective of ensuring a stable rental income stream for social housing providers. This will lead to a more efficient social housing system and reduces the risk of homelessness due to tenant evictions for the non-payment of rent.

By way of background, the introduction of an Automatic Rent Deduction Scheme (ARDS), formerly known as the Compulsory Rent Deduction Scheme, has been a reform and policy direction since the inception of the National Affordable Housing Agreement in 2009.

Participating State and Territory Ministers have worked with the Commonwealth to pursue the development of a sustainable rental deduction scheme with the intention to reduce homelessness, ensure financial sustainability of the system and support greater investment in social housing.

Thank you again for bringing your concerns to my attention.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

1.152 The preceding analysis raises questions as to the compatibility of the bill with the right to social security, the right to an adequate standard of living, the right to privacy, the right to protection of the family and the rights of children that are not addressed in the statement of compatibility.

1.153 The committee (on page 48 of the report) therefore seeks the advice of the minister 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 (including any evidence of the extent to which the existing scheme of voluntary rent deduction is ineffective).*

  The Government is committed to implementing a compulsory rent deduction scheme for social housing welfare recipients as announced in the 2016–17 Budget, following a request by the states and territories who identified an Automatic Rent Deduction Scheme (ARDS) as an effective means to improve the sustainability of social housing and improving outcomes. ARDS would reduce tenancy eviction rates, which could reduce the probability of evicted tenants becoming homeless.

  Rent arrears and a failure to pay other tenancy charges is the single most significant tenancy management issue facing social housing providers nationally. The impact of failed social housing tenancies due to rent arrears is significant—including the direct impact of exits into homelessness and the longer-term impacts of housing instability (particularly in terms of continuity of support arrangements; employment opportunities and school attendance for children).

  State and territory governments estimate that the social housing system is losing more than $30 million annually from unpaid rent and administrative costs. This places an additional and unnecessary burden on the already financially strained public housing system.

  The current Rent Deduction Scheme (RDS) is voluntary and easy to bypass. This is because arrangements can be cancelled by the tenant without the housing provider's knowledge, which can lead to increasing rental arrears and eventual eviction.

  For example in 2013-14, around 80,000 households in social housing stopped their voluntary deductions at some time during the year which put them at greater risk of falling behind in their rent.

  Social housing tenants not paying their rent can also put pressure on local support and homelessness services.

- *How the automatic rent deduction scheme is effective to achieve (that is, rationally connected to) that objective (including its potential application to those who are not and have not been in rental arrears).*

  The new scheme, expected to be available from March 2018, responds to concerns from all levels of government and the community about evictions and homelessness due to rental arrears.

Through this Bill, ARDS will improve the operational efficiency of social housing by ensuring social housing providers receive rent from tenants on time, including those tenants who consistently fail to pay.

States and social housing providers are responsible for tenancy management and they would continue to retain responsibility and flexibility for tenancy management and rent setting policies. They would decide to which of their occupants of properties covered by a current lease ARDS should apply.

- *Whether the automatic rent deduction scheme is a proportionate limitation on these rights, in particular whether applying the scheme described in paragraph [1.136] above to both ongoing and outstanding obligations to pay rent is the least rights-restrictive means of achieving the stated objective, and whether the scheme provides sufficient flexibility to treat different cases differently.*

In 2013-14, more than 8,900 social housing tenants, including families with children, were in serious rental arrears, with more than 2,300 people evicted due to rent defaults. In NSW, during the same period, over 80 per cent of those evicted due to serious rental arrears had previously participated in the current voluntary Rent Deduction Scheme (RDS) but had then cancelled. If an ARDS were in place, this group would have been unable to cancel their payment. This strongly suggests that ARDS would be effective in reducing tenancy eviction rates.

Tenants have a legal obligation to pay rent as part of their tenancy agreements with their relevant housing providers. The ARDS acts as both a facility to enable the payment of these rents in a cost effective manner for housing providers, and a seamless mechanism for the tenant to ensure that their legal obligations are met.

To the extent that the Bill may limit human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objective of preventing evictions due to arrears and debt which may force a person, and their children, into homelessness.

ARDS recognises that social welfare payments should be used towards a person's and their family's basic needs and is intended to support security of tenure in housing. It also recognises that a person's home is an important precondition to their ability to exercise their human rights and their economic, social and cultural rights in particular.

The Government is committed to ensuring that adequate safeguards are in place to protect tenants and ensure their particular circumstances are taken into account.

If a tenant is not able to resolve their concerns regarding an Automatic Rent Deduction Scheme (ARDS) deduction with their housing provider or a State based Review Body, they could approach the Department of Human Services (DHS). If it is a matter where the Commonwealth has responsibility, DHS and the Department of Social Services would monitor such requests for review as part of their usual business operations.

The Secretary (or their delegate) also has the power to intervene and make a decision as to whether a deduction is made and the amount deducted. Policy guidelines will also be developed following the passing of the Bill, which will provide further clarity on the operation of ARDS.

In addition, deductions under the scheme will stop as soon as the person is no longer living in public or community housing covered by a current lease.

An ARDS is designed to work alongside government funded financial counselling and other available support services, to ensure that tenants continue to be housed safely and affordably while they get the help they need to sustain their tenancy.

1.159 (on page 50 of the report) In relation to the right to equality and non-discrimination, the committee notes that the automatic rent deduction scheme appears to have a disproportionate negative impact on women and persons with a disability.

1.160 The committee therefore seeks the advice of the minister as to:

- *The compatibility of the automatic rent deduction scheme with the right to equality and non-discrimination.*

An ARDS is not discriminatory; it is a mechanism available for social housing providers to use to ensure rent is paid when it is due. It is a matter for housing providers to determine to which tenants ARDS will apply.

An ARDS will assist tenants by ensuring that they are able to honour rent and other household costs associated with tenancy obligations they have entered into.

The intent of this measure is to improve longer-term housing stability and reduce the risk of homelessness. ARDS may therefore have a comparatively larger positive impact on women and persons with a disability as they are most likely to be overrepresented in social housing.

1.169 The amendments to the cashless welfare arrangements that would allow automatic rent deductions from the unrestricted portion of a person's welfare payment would appear to have a disproportionate negative effect on Indigenous people, raising questions about whether this disproportionate negative effect (which indicates prima facie indirect discrimination) amounts to unlawful discrimination.

1.170 Accordingly, the Committee (on page 52 of the report) seeks the advice of the minister as to:

- *Whether the amendments to the cashless welfare arrangements introduced by the bill are compatible with the right to equality and non-discrimination (including whether the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate limitation on the right.*

These amendments do not adversely affect CDC participants. They simply provide consistency for all welfare recipients subject to deductions such as the ARDS, regardless of whether they are also subject to the CDC.

The amendments to allow the automatic deduction of rent where a person is also subject to the cashless debit card (CDC) do not have a negative effect on any CDC participants, including those that identify as Aboriginal or Torres Strait Islander. The interaction between the ARDS and the CDC program was considered carefully during drafting to ensure that CDC participants were not disadvantaged by the introduction of the ARDS.

Generally, the amendments to cashless welfare provisions (contained in Part 3D of the *Social Security (Administration) Act 1999*) will allow for the automatic deduction of rent from the restricted portion of a CDC participant's payment.

TREASURER

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letters of 29 November 2017 on behalf of the Parliamentary Joint Committee on Human Rights (the committee) in relation to issues raised in the committee's *Report 12 of 2017* concerning the following Bills:

- Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017; and
- Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017.

I would like to thank you for the opportunity to provide further information on the issues identified by the committee. I have addressed each of the issues in **Attachment A** to this letter.

I trust that this information will be of assistance to the committee.

Yours sincerely

The Hon Scott Morrison MP

12 / 12 / 2017

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Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017

Issue: Compatibility of the measure with the right not to incriminate oneself

The preceding analysis raises questions about the compatibility of the coercive examination powers in the bill with the right not to incriminate oneself.

The committee therefore seeks the advice of the Treasurer as to:

1. **whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;**

2. **how the measure is effective to achieve (that is, rationally connected to) that objective;**

3. **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**

4. **whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure;**

5. **whether a derivative use immunity is reasonably available as a less rights restrictive alternative in proposed schedule 2 to ensure information or evidence indirectly obtained from a person compelled by APRA to answer questions or provide information or documents cannot be used in evidence against that person.**

Explanation:

1. Objectives

The provisions in the Bill which the Committee notes engage and limit the right to a fair trial and right not to incriminate oneself are intended to address a substantial concern. The concern is that APRA must be able to acquire or access relevant information to ensure it can effectively investigate a prudential matter relating to an Authorised Deposit-Taking Institution (ADI) which, in turn, is likely to affect the ability of APRA to effectively perform its regulatory functions and meet its broad objectives of protecting depositors and ensuring the stability of Australia's financial system.

The evidence to support these provisions is that information relevant to the prudential matters of an ADI is not always within the possession, custody or control of the ADI. There are cases where information relevant to an investigation concerning the prudential affairs of an ADI is legitimately in the possession of others including, but not limited to, current or former officers, agents, contractors or employees of the ADI.

In cases where the person with the possession, custody or control of the relevant information forms the view that the provision of that information to APRA may potentially incriminate them or make them liable to a penalty, that person would, in the absence of any limitation on the right not to incriminate oneself, be entitled to refuse to disclose that information without any recourse in law.

The difficulty for APRA in this scenario is that the absence of that relevant information may stymie the progress of APRA's investigation into prudential matters of the ADI.

For example, if an accountable person (as defined by the proposed section 37BA of the Bill) had dishonestly used their position in order to obtain a personal benefit, and that same accountable person had made and retained personal notes recording that conduct, such evidence is likely to incriminate that accountable person and could be used to found a criminal prosecution against that person.

However, that same conduct by the accountable person could also be relevant evidence in an investigation into whether the ADI was meeting its accountability obligations under the proposed section 37C of the Bill and potentially other prudential obligations.

As the ADI is a corporate entity it must, by necessity, conduct its activities through natural persons. In many instances, like the example above, misconduct by a natural person employed by the ADI could also be used to substantiate a breach of obligations by both the natural person and the ADI.

Therefore, when investigating prudential matters relevant to the ADI it is critical that APRA have access not only to information held by the ADI, but that it also have access to information that is relevant to the ADI or its business that is held by others.

If a person were able to refuse to comply with an examination or information-gathering power and exercise the right against self-incrimination, there could be cases where it would impair APRA's ability to effectively investigate a prudential matter relating to an ADI which, in turn, is likely to adversely affect the ability of APRA to effectively perform its regulatory functions and meet its broad objectives of protecting depositors and ensuring the stability of Australia's financial system.

The right against self-incrimination would most likely be exercised in investigations concerning conduct at the more severe end of the spectrum (i.e. cases involving possible criminal conduct) and it will often be in these cases where the interests of the depositors, prudential matters relating to an ADI and financial stability will be most at risk.

2. Effectiveness in achieving objectives

It is crucial that APRA have access to information that may otherwise be unattainable by reason of the right against self-incrimination in order to help achieve its objectives.

The measures are effective in that they enable APRA, in the course of an investigation into prudential matters relating to an ADI, to have access to information relevant to those investigations, including information which relates to conduct that may expose the provider of that information to criminal proceedings or other penalties. If the conduct in question also relates to prudential matters of an ADI that APRA is, or may consider, investigating, then it is likely to be important for the protection of depositors in an ADI or to the stability of Australia's financial system

3. Proportionality of measures

The proposed measure is reasonable and proportionate to achieve the stated objectives of depositor protection and financial system stability. The limitation of the right against self-incrimination is a very serious measure and the Government would not seek to interfere with that right if APRA were able to readily acquire the relevant evidence through other means. However, in many cases, the best evidence is held by the person who carried out the conduct under scrutiny.

APRA investigations into prudential matters relating to an ADI are carried out with the broad objectives of protecting depositors of an ADI and ensuring the stability of Australia's financial system, both of which are such pressing or substantial concerns for most Australians that the

limitation upon the right to claim privilege against self-incrimination in the measures is warranted and justified.

I note that there are safeguards in place which ensure that APRA cannot use the measures lightly.

The proposed measures are not available for use until after APRA has appointed an investigator pursuant to subsections 13(4), 13A(1) or 61(1) of the Banking Act. The decision to appoint an investigator is subject to approval by formal internal delegations held by senior APRA officers.

Furthermore, if APRA wants to exercise any of the existing coercive information gathering powers in the course of an investigation under the Banking Act, such actions are also subject to approval by senior APRA officers under formal internal delegations and are subject to internal oversight governance structures.

It is also important to recognise that all information received by APRA pursuant to its exercise of the measures will be protected by Section 56 of the APRA Act. This provision concerns confidentiality of 'protected information' and 'protected documents'. Broadly, documents and information become 'protected' by virtue of both having been received by APRA and relating to the affairs of entities that APRA regulates, or customers of those entities, or entities that APRA registers or collects data from under the FSCODA.

Subsection 56(2) of the APRA Act makes it an offence for a person who is, or has been an APRA officer, to disclose protected information or a protected document to any person or to a court, subject to identified exceptions.

Subsection 52F(2) of the Banking Act also provides for 'use immunity', in that any information given to APRA in compliance with a requirement to give information under the Banking Act or the FSCODA is not admissible in evidence against the individual in criminal or civil penalty proceedings, other than in respect of the falsity of the information.

In light of the above safeguards, the limitation on the right not to incriminate oneself is a reasonable and proportionate measure to achieve the stated objective.

4. Sufficiency of circumscription

Persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measures.

The provisions are limited to the circumstances of an investigation having been commenced into certain matters concerning ADIs under the Banking Act and an investigator having been appointed. Further, the investigator needs to have a 'reasonable belief' on which to exercise the powers. The information-gathering powers are available for use against any person that the investigator 'reasonably believes' has custody or control of any books, accounts or documents relevant to the investigator's investigation.

The examination powers are available for use against any person that the investigator 'reasonably believes or suspects' can give information relevant to the investigator's investigation.

Additional circumscription of the persons upon whom the measures may be exercised would reduce the effectiveness of these powers and increase the likelihood that APRA will be unable to effectively perform its regulatory functions and meet its broad objectives of protecting depositors and ensuring the stability of Australia's financial system.

5. Derivative use immunity

As the committee has noted, direct use immunity is conferred by these provisions, but not derivative use immunity. The reason for this is that if derivative use immunity applied, it would impair APRA's ability to effectively perform its regulatory functions.

It is relatively straightforward to prove compliance with use immunity in that all of the evidence obtained under compulsion from the person concerned is easily identifiable and can be excluded from any subsequent criminal or civil penalty proceedings against that person.

In most cases, establishing compliance with derivative use immunity would be substantially more difficult. It would require persuading the court to the required standard that no part of the original information was taken into account, directly or indirectly, when obtaining the information upon which the prosecution is based.

If derivative use immunity applied, then further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered through independent investigative processes. Also, where the information-obtaining power is exercised against officers or ex-officers who may have been responsible for the deterioration or failure of a financial institution, for example, a director implicated in a failure such as HIH, a derivative use immunity would not be helpful in building a case against the director for breach of their duties under law.

APRA concurs with ASIC's view expressed in ASIC's submissions to the Australian law Reform Commission Inquiry into Traditional Rights and Freedoms: Issues Paper 46 (March 2015) at page 25: 'Any grant of derivative use immunity has the potential to render a person conviction-proof for an unforeseeable range of offences.'

These provisions are consistent with the majority of existing self-incrimination provisions in other APRA-administered legislation, including provisions in the SIS Act and PHI Act.

Issue: Compatibility of the measure with the right to privacy

The statement of compatibility has not identified or addressed the limitation on the right to privacy that arises from the proposed coercive examination and information gathering powers introduced by Schedule 2 of the bill.

The committee therefore seeks the advice of the Treasurer as to:

1. **whether the proposed coercive examination and information gathering powers pursue a legitimate objective (including reasoning or evidence that establishes that the stated objectives address a pressing or substantial concern);**

2. **how the measure is effective to achieve (that is, rationally connected to) those objectives; and**

3. **whether the limitation is reasonable and proportionate to achieve the stated objectives (including whether there are less rights restrictive ways of achieving that objective, whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and whether there are adequate and effective safeguards in relation to the measure).**

Explanation:

1. Objectives

The measure addresses a pressing and substantial concern about a gap in APRA's ability to effectively investigate prudential matters relevant to an ADI on the same basis as explained in answer to the same question concerning the right not to incriminate oneself in section 1 above.

2. Effectiveness in achieving objectives

The measure is effective to achieve the objective on the same basis as explained in answer to the same question concerning the right not to incriminate oneself in section 2 above.

3. Proportionality of measures

The limitation is proportionate to achieve the stated objective, is sufficiently circumscribed with respect to the stated objective of the measure, and there are adequate and effective safeguards in relation to the measure on the same basis as explained in answer to the same questions concerning the right not to incriminate oneself in sections 3, 4 and 5 above. Additional safeguards to protect the right to privacy are set out below.

Further safeguards to protect the right to privacy are also provided within the proposed examination powers. In particular:

- the proposed subsection 61E(1) of the Bill provides that the examination must take place in private;
- the proposed subsection 61E(2) of the Bill specifies who may be present at the examination; and
- the proposed subsection 61E(3) of the Bill creates an offence for a person to be present at the examination if not permitted.

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.

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[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

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 a 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 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 edition, 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 (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [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 civil penalty provision 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 2/3 of the head sentence).

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

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 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 the 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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