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 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 12 February and 22 March 2018 (consideration of 3 bills from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 9 January and 14 February 2018 (consideration of 2 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The committee has concluded its consideration of 12 bills and instruments that were previously deferred.[3]

Instruments not raising human rights concerns

1.3 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.

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

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

2 The committee examines legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. See, https://www.legislation.gov.au/.

3 These are: Australian Education Amendment (2017 Measures No. 2) Regulations 2017 [F2017L01501]; Criminal Code Amendment (High Risk Terrorist Offenders) Regulations 2017 [F2017L01490]; Crimes (Overseas) (Declared Foreign Countries) Amendment Regulations 2017 [F2017L01520]; 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]; Federal Financial Relations (National Partnership Payments) Determination No. 123 (August 2017) [F2017L01143]; Federal Financial Relations (National Partnership Payments) Determination No. 122 (July 2017) [F2017L01148]; Legislation (Deferral of Sunsetting—Privacy Guidelines for the Medicare Benefits and Pharmaceutical Benefits Programs) Certificate 2017 [F2017L01719]; National Security Information (Criminal and Civil Proceedings) Amendment Regulations 2017 [F2017L01660]; and Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018.

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.

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 4) [F2017L01678]

Purpose	Amends the Anti-Money Laundering and Counter-Terrorism Financing Rules 2007 (No. 1) to allow the AUSTRAC CEO to exempt reporting entities from particular provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* where a requesting officer of an eligible agency reasonably believes that providing a designated service to a customer would assist the investigation of a serious offence
Portfolio	Attorney-General
Authorising legislation	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives on 5 February 2018)
Right	Fair hearing (see **Appendix 2**)
Status	Seeking additional information

Exemptions for reporting entities from compliance with obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

1.6 The Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 4) [F2017L01678] (the instrument) allows the CEO of the Australian Transaction Reports and Analysis Centre (AUSTRAC) to exempt reporting entities from certain obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).

1.7 Section 75.2 of the instrument provides that, if a requesting officer[4] of an eligible agency[5] reasonably believes that providing a designated service to a

4 'Requesting officer' is defined under subsection 75.10(2) of the instrument, and means the head of an eligible agency, or a member of an eligible agency who is a Senior Executive Service (SES) employee or equivalent, or who holds the rank of superintendent or higher.

5 'Eligible agency' is defined under subsection 75.10(1) of the instrument, and means the Australian Crime Commission, the Australian Federal Policy, the Immigration Department, the NSW Crime Commission or the police force or service of a State or the Northern Territory.

customer would assist the investigation of a serious offence,[6] the officer may request the AUSTRAC CEO to exempt specified reporting entities from certain obligations under the AML/CTF Act. Section 75.3 provides that the exemption in section 75.2 applies to the following provisions of the AML/CTF Act:

- section 29 (identity verification for certain pre-commencement customers);
- section 32 (carrying out the applicable customer identification procedure before the commencement of the provision of a designated service);
- section 34 (carrying out the applicable customer identification procedure after the commencement of the provision of a designated service);
- section 35 (verification of identity of customers);
- section 36 (ongoing customer due diligence);
- section 82 (compliance with Part A of an anti-money laundering and counter-terrorism financing program);
- section 136 (false or misleading information);
- section 137 (producing false or misleading documents);
- section 138 (false documents);
- section 139 (providing a designated service using a false customer name or customer anonymity); and
- section 142 (conducting transactions so as to avoid reporting requirements relating to threshold transactions).

1.8 Under the AML/CTF Act, designated services include (among other things) dealings with accounts by financial institutions, the administration of trusts, the supply of goods by way of lease or hire-purchase, and the guarantee of loans.[7] A reporting entity is any person that provides a designated service.[8]

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

1.9 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). Additional guarantees in the determination of a criminal charge include the right to be presumed innocent and the right not to incriminate oneself.[9] The right also encompasses notions of the

6 'Serious offence' is defined under subsection 75.10(3) of the instrument, and means an offence against a Commonwealth, State or Territory law, punishable on indictment by imprisonment for 2 or more years, or an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would constitute a serious offence.

7 AML/CTF Act section 6.

8 AML/CTF Act section 5, definition of *reporting entity*.

9 International Covenant on Civil and Political Rights (ICCPR) article 14(2)-14(7).

fair administration of justice and prohibits investigatory techniques that incite individuals to commit a criminal offence.[10]

1.10 An exemption granted by the AUSTRAC CEO may engage the right to a fair trial in this respect. This is because it is unclear whether exempting reporting entities from compliance with obligations under the AML/CTF Act could permit those entities (on behalf of a law enforcement officer) to encourage or incite an individual to commit a criminal offence, or to provide incriminating information that might later be relied upon in criminal proceedings. That is, it is unclear whether the exemption could allow conduct which rises to the level of entrapment for the purposes of international human rights law which would constitute a limitation on the right to a fair trial.[11]

1.11 Limitations on human rights may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

1.12 The statement of compatibility for the instrument does not identify that the right to a fair trial may be engaged and limited and does not explain whether an exemption granted by the AUSTRAC CEO could be used to incite or encourage the commission of an offence.[12] Accordingly, the statement of compatibility does not provide a substantive assessment of whether any limitation on the right to a fair hearing and a fair trial would be permissible.

1.13 However, in relation to the objective of the measure, the explanatory statement nevertheless states:

> AUSTRAC is aware of instances when law enforcement enquiries with reporting entities about the activities of certain customers have adversely affected the progress of related law enforcement investigations.
>
> The issue for law enforcement arises when reporting entities undertake actions, in line with their obligations under the AML/CTF Act, which have the effect of alerting customers to possible closer scrutiny of their financial transactions. Customers then cease their activities with the reporting entity, thus limiting the ability of law enforcement officers to investigate the financial transactions.

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10 See, *Ramanauskas v Lithuania*, European Court of Human Rights (ECHR) Application No. 74420/01, 5 February 2008, [55]. The ECHR has consistently held that entrapment violates article 6 of the European Convention on Human Rights, which is equivalent to article 14 of the ICCPR.

11 See, *Khudobin v Russia,* ECHR Application No. 59696/00, 26 October 2006; *Baltins v Latvia,* ECHR Application No. 25282/07, 8 January 2013; *Ramanauskas v Lithuania*, ECHR Application No. 74420/01, 5 February 2008, [55].

12 Statement of compatibility (SOC), p. 5.

> A temporary exemption from certain AML/CTF Act obligations is needed in circumstances where actions taken by reporting entities, in line with these AML/CTF obligations, could undermine invstigations by law enforcment into certain customers of the reporting entities.[13]

1.14 Ensuring the effective investigation of serious offences is likely to constitute a legitimate objective for the purposes of international human rights law.

1.15 However, it is unclear from the information provided whether the measure is rationally connected and proportionate to this objective. For example, in relation to whether the measure is rationally connected, it is unclear how compliance with the specific obligations listed in section 75.3 would operate to undermine an investigation.

1.16 In relation to the proportionality of the measure, it is unclear whether there are adequate and effective safeguards to ensure that reporting entities (on behalf of law enforcement officials or otherwise) are not able to incite or encourage the commission of an offence, or to ensure that evidence obtained by enticement is not relied upon in criminal or civil proceedings.

Committee comment

1.17 The right to a fair trial and fair hearing may be engaged and limited by the measure. The preceding analysis raises questions as to whether the measure is compatible with these rights.

1.18 Accordingly, the committee requests the advice of the Attorney-General as to whether the measure is compatible with the right to a fair trial and fair hearing including:

- **whether an exemption granted by the AUSTRAC CEO could permit law enforcement officers (acting through reporting entities) to incite or encourage the commission of an offence (including whether there are any safeguards in place);**
- **if the right to a fair trial and fair hearing may be limited by the measure:**
  - **how the measure is effective to achieve (that is, rationally connected to) its stated objectives; and**
  - **whether any limitation is a reasonable and proportionate means of achieving the stated objective (including whether there are adequate and effective safeguards in place, such as, to ensure that law enforcement officers are not able to incite or encourage the commission of an offence, or to rely on evidence that has been improperly obtained in criminal proceedings).**

13 Explanatory statement (ES), p. 1.

Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018

Purpose	Seeks to amend the *Crimes Act 1914* to create exceptions to provisions that would prevent the disclosure of spent, quashed and pardoned convictions for persons who work or seek to work with people with disability in the NDIS
Portfolio	Social Services
Introduced	House of Representatives, 15 February 2018
Rights	Privacy; work; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Permitting disclosure of spent, quashed and pardoned convictions in certain circumstances

1.19 The measures in the Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018 (the bill) seek to create exceptions to Part VIIC of the *Crimes Act 1914* (Crimes Act) with respect to persons who work, or seek to work, with persons with disability in the National Disability Insurance Scheme (NDIS). The effect of these exceptions would be that the spent, quashed and pardoned convictions of persons working or seeking to work with persons with disability under the NDIS may be disclosed to and by, and taken into account by, Commonwealth, State and Territory agencies for the purposes of assessing the person's suitability as a disability worker.

Compatibility of the measure with the right to privacy and the right to work

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

1.21 The measures engage the right to privacy by enabling the disclosure, and the taking into account, of information relating to a person's spent convictions, quashed convictions and convictions for which the person has been pardoned.

1.22 The right to work in the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work. The right to work further requires that state parties to the ICESCR provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory manner.[1] The measures may engage the right to work, as

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

individuals may be excluded from employment with the NDIS on the basis of their criminal record.

1.23 These rights may be subject to permissible limitations which are provided by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.24 The statement of compatibility acknowledges that the measure engages and limits the right to privacy and the right to work. However, the statement also argues that these limitations are permissible as they are reasonable to protect people with disability.[2]

1.25 The statement of compatibility further states that 'the paramount objective of the bill is to protect people with a disability from experiencing harm arising from unsafe supports or services under the NDIS'.[3] This appears to be a legitimate objective for the purposes of international human rights law. In this respect, it is noted that the measures are directed at promoting the rights of persons with disabilities—consistent with Australia's obligations under the Convention on the Rights of Persons with a Disability—by ensuring that the supports and services provided through the NDIS are delivered by a suitable workforce.[4]

1.26 Including additional information regarding spent, quashed and pardoned convictions may enable worker screening units to accurately assess a person's suitability as a disability support worker, and in this respect the measure also appears to be rationally connected to this objective.

1.27 However, there are questions about whether the measures in the bill constitute a proportionate limit on the right to privacy and the right to work in this instance. In relation to the proportionality of the measure, the statement of compatibility states:

> The Bill provides access to a worker's detailed criminal history information to state-based worker screening units to enable a thorough risk-based worker screening assessment proportionate to determining the potential risk of harm to people with a disability receiving services under the NDIS. Further, the permission to access such information will be obtained from a worker applying for a worker screening access check as a part of the application process.[5]

1.28 It is acknowledged that, in some circumstances, it may be appropriate to permit the disclosure, or the taking into account, of a person's criminal history

2 Statement of compatibility (SOC), pp. 11-12.

3 SOC, p. 10.

4 SOC, p. 10.

5 SOC, p. 12

information so as to properly assess whether a person poses an unacceptable risk of harm, including when persons work with vulnerable people. In order to be a proportionate limitation on human rights, such limitations must be sufficiently circumscribed and only be as extensive as is strictly necessary to achieve their legitimate objectives.

1.29 In this instance, there are questions as to whether the breadth of the measure is greater than necessary to achieve the stated objectives. The measure appears to permit the disclosure, and the taking into account, of a person's entire criminal record, including minor convictions (for example, shoplifting), regardless of whether those criminal convictions bear any relevance to the person's capacity to perform the job or indicate that the person poses an unacceptable risk.

1.30 In this respect, jurisprudence concerning the right to privacy in the United Kingdom has held that legislation requiring the disclosure of a person's entire criminal history may be incompatible with the right to privacy where disclosure of such information is not determined by reference to whether it is relevant to the legitimate purpose of enabling employers to assess the suitability of an individual for a particular kind of work.[6] This raises questions as to whether there may be other, less rights-restrictive alternatives available, such as only requiring disclosure of serious offences or offences that are relevant to a person's suitability as a disability worker.

1.31 Additionally, it is unclear why it is necessary to permit the disclosure and the taking into account of spent and quashed convictions, and wrongful convictions for which the person has been pardoned. In the case of a wrongful conviction, for example, the person may be factually and legally innocent of the offence with which they were charged. In those circumstances, it is not clear how requiring persons to disclose this criminal history is proportionate to the legitimate objectives.

1.32 Further, it is unclear whether there are sufficient safeguards to ensure that the measure is a proportionate limitation on human rights. The statement of compatibility recognises that 'it is critical that NDIS worker screening does not unreasonably exclude offenders from working in the disability sector'.[7] The statement of compatibility further states:

> The State and Territory-operated worker screening units will be required to have appropriately skilled staff to assess risks to people with disability, to comply with the principles of natural justice, and to comply with a

6 See T*, R (on the application of) v Greater Manchester Chief Constable & Ors* [2013] EWCA Civ 25 (29 January 2013). The UK Supreme Court in that case held the relevant legislation to be incompatible with article 8 of the European Convention on Human Rights. See also the decision of Bell J in the Victorian Supreme Court in *ZZ v Secretary, Department of Justice* [2013] VSC 267 (22 May 2013).

7 SOC, p. 11.

> nationally consistent risk assessment and decision-making framework, including considerations of the circumstances surrounding any offence. The Bill provides the means to gain the necessary information to assess such circumstances.
>
> In this way, the Bill…supports a proportionate approach to safeguards that does not unduly prevent a person from choosing to work in the NDIS market, but ensures the risk of harm to people with disability is minimised, by excluding workers whose behavioural history indicates they pose a risk from certain services and supports.[8]

1.33 The bill provides some safeguards in relation to the persons who may disclose criminal history information and take that information into account, and the persons to whom that information may be disclosed. In particular, it is noted that criminal history information may only be disclosed to or by, or taken into account by, prescribed persons and bodies. Before a person or body is prescribed, the minister must be satisfied that the person or body has a legislative basis for being prescribed, complies with the principles of natural justice, and has a risk assessment framework and appropriately skilled staff to assess risks to the safety of a person with disability.[9] However, the safeguards in the bill do not appear to limit the scope of the criminal history information that may be disclosed or taken into account.

Committee comment

1.34 The preceding analysis raises questions as to whether the measure is compatible with the right to privacy and the right to work. Accordingly, the committee requests the advice of the minister as to whether the measures are reasonable and proportionate to achieving the stated objectives of the bill (including whether the measures are the least rights-restrictive way of achieving the objective and the existence of any safeguards).

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

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

1.36 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[10] The UN Human Rights Committee has

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8 SOC, p. 12.

9 See proposed sections 85ZZGI, 85ZZGJ and 85ZZGK and 85ZZGL.

10 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.

described indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[11]

1.37 The United Nations Human Rights Committee has not considered whether having a criminal record constitutes 'other status'. However, relevantly, the European Court of Human Rights has interpreted non-discrimination on the grounds of 'other status' to include an obligation not to discriminate on the basis of a criminal record.[12] While this jurisprudence is not binding on Australia, the case law from the Court is useful in considering Australia's obligations in similar provisions in the International Covenant on Civil and Political Rights (ICCPR).[13] Providing that certain persons may disclose, and may take into account, information in relation to a person's criminal history information for the purposes of worker screening for the NDIS is likely to engage the right to equality and non-discrimination. This is because persons may be excluded from employment with the NDIS on the basis of their criminal record.

1.38 However, the statement of compatibility does not recognise that the right to equality and non-discrimination is engaged by the measure, and so does not provide a substantive assessment of whether the measure constitutes a permissible limitation on that right.

1.39 Under international human rights law, 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.[14]

1.40 As outlined above, the objective of the measure appears to be legitimate for the purposes of human rights law. However, on the basis of the information provided, it is not apparent that the measure is rationally connected and proportionate to that objective.

1.41 This is because the bill would permit the disclosure and the taking into account of a person's *entire* criminal history, including information relating to convictions that may not be relevant to a person's suitability as a disability worker in

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11 See e.g. *Althammer v Austria,* Human Rights Committee, 8 August 2003, [10.2].

12 See *Thlimmenos v Greece*, ECHR Application No. 34369/97 (6 April 2000).

13 See also the Australian Human Rights Commission Act 1986 (Cth) which considers discrimination in employment on the basis of criminal record as part of Australia's obligations under International Labour Organisation Convention 111, the *Discrimination (Employment and Occupation) Convention 1958,* which prohibits discrimination in employment. See Australian Human Rights Commission*, 'On the Record: Discrimination in Employment on the basis of Criminal Record under the AHRC Act'* (2012).

14 *Althammer v Austria* HRC 998/01, [10.2].

the NDIS, quashed convictions, and convictions for which a person has been pardoned. Given that a person's criminal history may not be relevant to their suitability as a disability worker in the NDIS, it is unclear that taking such information into account would be an effective means of achieving the legitimate objective. There are also questions as to whether there are other, less rights restrictive, alternatives available to achieve the objective. It is also unclear whether there are adequate and effective safeguards to ensure that NDIS screening units and prospective employers do not take into account irrelevant matters when making decisions about excluding persons from employment.

Committee comment

1.42 The preceding analysis raises questions as to whether the measure is compatible with the right to equality and non-discrimination. Accordingly, the committee requests the advice of the minister as to the compatibility of the measure with this right.

Export Control Bill 2017

Purpose	Amends the framework for regulating the export of goods, including agricultural products and food, from Australian territory
Portfolio	Agriculture and Water Resources
Introduced	Senate, 7 December 2017
Rights	Privacy; freedom of association; work (see **Appendix 2**)
Status	Seeking additional information

Requirement to be a 'fit and proper person'

1.43 The Export Control Bill 2017 (the bill) would impose conditions on the export of some types of goods including requiring that: a person holds an export licence; an establishment or premises is registered for export operations; and the export is in accordance with an approved export arrangement. Under the bill, the secretary[1] may refuse or suspend a licence, registration or an arrangement if the applicant or a person who participates or would participate in managing or controlling the export business is not a 'fit and proper person'.[2] Subsection 372(2) of the bill provides that in determining whether the person is a 'fit and proper person' the secretary must have regard to a range of matters including whether the person or an associate of that person:

- has been convicted of an offence or ordered to pay a pecuniary penalty under particular legislation;[3]
- has provided false, misleading or incomplete information in an application and/or to the secretary; or
- had an application, registration or licence revoked, suspended or refused.[4]

1 The 'secretary' is the Secretary of the Department of the minister who will administer the Export Control Act 2017 if the bill passes the parliament and receives Royal Assent: Explanatory memorandum (EM) p. 6.

2 See, for example, sections (a) sections 112, 117, 123, 127 and 138 (decisions in relation to registered establishments); (b) sections 151, 156, 165, 171 and 179 (decisions in relation to 8 approved arrangements); (c) sections 191, 196, 201, 205 and 212 (decisions in relation to export licences).

3 The legislation is the bill; the *Biosecurity Act 2015*; another Act prescribed by the rules; the *Criminal Code* or the *Crimes Act 1914* to the extend it relates to the *Biosecurity Act 2015* or another Act prescribed by the rules: see section 372(2) of the rules.

1.44 In determining whether the person is a 'fit and proper person' the secretary may also have regard to:

- whether the person has been convicted or ordered to pay a penalty under any other Australian law;
- the interests of the industry or business that relate to the person's export business; or
- any other relevant matter.[5]

1.45 Section 373 further provides that the rules may prescribe kinds of persons who are required to be 'fit and proper persons' for the purposes of the bill.

Compatibility of the measure with the right to work, the right to freedom of association and the right to equality and non-discrimination

1.46 The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work. The right to work also requires that state parties provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory manner.[6] The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[7]

1.47 By providing that in order to engage in certain export related activities a person must be 'fit and proper,' the measure may engage and limit the right to work, the right to equality and non-discrimination and the right to freedom of association. This is because a person may be unable to engage in export related business due to, for example, their conduct or the conduct of an associate. It is noted that the 'fit and proper person' test may encompass a broad range of conduct which also extends to

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4 'Associate' is defined in section 13 of the bill as including (a) a person who is or was a consultant, adviser, partner, representative on retainer, employer or employee of: (i) the first person; or (ii) any corporation of which the first person is an officer or employee or in which the first person holds shares; (b) a spouse, de facto partner, child, parent, grandparent, grandchild, sibling, aunt, uncle, niece, nephew or cousin of the first person; (c) a child, parent, grandparent, grandchild, sibling, aunt, uncle, niece, nephew or cousin of a spouse or de facto partner of the first person; (d) any other person not mentioned in paragraph (a), (b) or (c) who is or was: directly or indirectly concerned in; or in a position to control or influence the conduct of; a business or undertaking of: the first person; or a corporation of which the first person is an officer or employee, or in which the first person holds shares; (e) a corporation: of which the first person, or any of the other persons mentioned in paragraphs (a), (b), (c) and (d), is an officer or employee; or in which the first person, or any of those other persons, holds shares; (f) if the first person is a body corporate—another body corporate that is a related body corporate (within the meaning of the *Corporations Act 2001*) of the first person.

5 Subsection 373(3).

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

7 Article 22 of the International Covenant on Civil and Political Rights.

the conduct of the person's associates. In this respect, the 'fit and proper person' test may also penalise a person for associating with certain individuals. The right to work, the right to equality and non-discrimination and the right to freedom of association may be subject to permissible limitations provided that such measures pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

1.48 In relation to the application of the 'fit and proper person' test, the statement of compatibility states that the measure pursues 'the legitimate objective of ensuring that persons who have been approved to export goods from Australian territory are persons who are trustworthy…[as] the government needs to be certain that the persons responsible for export operations will not abuse the trust placed in them'.[8] Given the particular regulatory context, this is likely to be a legitimate objective for the purposes of international human rights law.

1.49 The measure would also appear to be rationally connected to this objective. The statement of compatibility explains that the reason why the measure extends to a person's business associates is that:

> Business associates and others may have influence over the primary person such that they may be able to compel them to undertake illegal activities on their behalf, through inducement or other means. Putting a fit and proper person test in place will notify the Department of any associates of the primary person who may pose a risk and allow them to take action to ensure Australia's agricultural exports are not compromised.[9]

1.50 In relation to the measure's application, the statement of compatibility notes that the requirements will only extend to persons who are voluntarily seeking to benefit from the export of goods from Australian territory. This is a relevant factor in respect of whether the measure is a proportionate limitation on human rights.

1.51 Further in relation to the proportionality of the limitation, the statement of compatibility notes that section 372 provides an exhaustive list of factors to be taken into account by the secretary in determining whether the person is a 'fit and proper' person, that associates are limited to those defined in section 13 of the bill and that the secretary's decision is reviewable.[10] While these factors are relevant, it is noted that the secretary's discretion to determine that a person is not a fit and proper person is still potentially very broad and may allow the secretary to take account of, for example, types of criminal conviction that may be less serious and 'any other matter' which the secretary considers relevant. It is unclear from the information provided why each such category of factor needs to be taken into account to achieve

8 Statement of compatibility (SOC), p. 451.

9 SOC, p. 451.

10 SOC, pp. 454-455.

the legitimate objective of the measure. Further, while 'associates' are restricted to those set out in section 13, this list is still substantial and includes family members, advisers, employees and business contacts. This raises a concern that the limitation may not be the least rights restrictive approach.

1.52 Finally, who is required to be a 'fit and proper person' will be able to be set out in delegated legislation. This raises a related concern as to whether the classes of person subject to the requirement are sufficiently circumscribed.

Committee comment

1.53 The preceding analysis indicates that there are questions as to the proportionality of the limitation on the right to work, the right to freedom of association and engagement of the right to equality and non-discrimination.

1.54 The committee therefore seeks the advice of the minister as to whether:

- **the limitation is a reasonable and proportionate measure for the achievement of its stated objective (including whether the measure is sufficiently circumscribed, the breadth of the secretary's discretion and the availability of relevant safeguards); and**
- **consideration could be given to: amending section 372 to restrict the range of factors that the secretary may consider as adversely affecting whether a person is a 'fit and proper person'; restricting the list of 'associates' in section 13; and setting out who is required to be a fit and proper person in primary legislation rather than in delegated legislation.**

Extradition (El Salvador) Regulations 2017 [F2017L01581]

Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017[F2017L01575]

Purpose	The Extradition (El Salvador) Regulations 2017 seek to declare El Salvador as an 'extradition country' for the purposes of the *Extradition Act 1988*; the Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017 seek to remove reference to India from the list of extradition countries and also seek to amend certain definitions in the Extradition (Physical Protection of Nuclear Material) Regulations 1988 and the Extradition Regulations 1988
Portfolio	Attorney-General
Authorising legislation	*Extradition Act 1988*
Last day to disallow	[F2017L01581]: 15 sitting days after tabling (tabled Senate 7 December 2017) [F2017L01575]: 15 sitting days after tabling (tabled Senate 6 December 2017)
Rights	Prohibition against torture, cruel, inhuman and degrading treatment; life; fair hearing and fair trial; liberty; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Background

1.55 The committee has considered human rights issues raised by extradition regulations and the *Extradition Act 1988* (the Extradition Act) on several previous occasions.[1] As the Extradition Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment by the relevant minister in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The committee has previously stated that the Extradition Act would benefit from a comprehensive

1 See the committee's comments in Parliamentary Joint Committee on Human Rights, *First report of 2013* (6 February 2013) pp. 111-112; see also *Sixth report of 2013* (15 May 2013) p. 149; *Tenth report of 2013* (26 June 2013) p. 56; *Twenty-second report of the 44th Parliament* (13 May 2015) pp. 108-110; *Report 4 of 2017* (9 May 2017) pp. 70-73.

review from the relevant minister to assess its provisions against Australia's obligations under international human rights law.[2]

Extending the definition of 'extradition country' to include El Salvador

1.56 The Extradition Act provides the legislative basis for extradition in Australia. The Extradition Act allows Australia to receive extradition requests from countries that are declared by regulation to be an 'extradition country'[3] and for powers under that Act to be exercised in relation to such a request.

1.57 The Extradition (El Salvador) Regulations 2017 (the El Salvador regulations) seek to declare El Salvador as an 'extradition country' for the purposes of the Extradition Act. Previously, the extradition relationship between Australia and El Salvador was governed by the *Treaty between the United Kingdom of Great Britain and Ireland and El Salvador for the Mutual Surrender of Fugitive Criminals 1883*, which Australia inherited when it obtained independent status as a constitutional monarchy.

1.58 As the El Salvador regulations expand the operation of the Extradition Act, it is necessary to assess the human rights compatibility of the Extradition Act as a whole when considering these regulations.

1.59 The committee has previously considered that extradition pursuant to the Extradition Act may engage and limit a range of human rights, including the:

- prohibition against torture, cruel, inhuman and degrading treatment;
- right to life;
- right to a fair hearing and fair trial;
- right to liberty; and
- right to equality and non-discrimination.[4]

1.60 The statement of compatibility acknowledges that these rights are engaged by the El Salvador regulations.[5]

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2 Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (26 June 2013) p. 56; *Twenty-second report of the 44th Parliament* (13 May 2015) pp. 108-110; *Report 4 of 2017* (9 May 2017) pp. 70-73.

3 'Extradition country' is defined in section 5 of the Extradition Act to mean, relevantly '(a) any country (other than New Zealand) that is declared by the regulations to be an extradition country.'

4 It is noted that it is difficult to assess the compatibility of the Extradition Act for human rights in the absence of a foundational human rights compatibility assessment. Therefore, the rights listed are not intended to be comprehensive and there may be other human rights engaged and limited by the Extradition Act.

5 Statement of Compatibility (SOC) p. 4.

Compatibility of the measure with the prohibition against torture, cruel, inhuman and degrading treatment

1.61 Australia has obligations under article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (CAT) not to extradite a person to another country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Australia's obligations under article 7 of the International Covenant on Civil and Political Rights (ICCPR) are broader in scope and not only prohibit torture but also prohibit 'cruel, inhuman or degrading treatment or punishment'.[6] The United Nations (UN) Human Rights Committee has held that article 7 prohibits extradition of a person to a place where that person may be in danger of torture or cruel, inhuman or degrading treatment or punishment if extradited.[7]

1.62 The statement of compatibility states that the El Salvador regulations are consistent with a person's rights in respect of the prohibition against torture, cruel, inhuman and degrading treatment.[8] In this respect, it is noted that section 22(3) of the Extradition Act prohibits the Attorney-General from determining that a person should be surrendered where there are substantial grounds for believing the person would be in danger of being tortured. This is an important safeguard for the purposes of international human rights law. However, there is no equivalent legal requirement in relation to the extradition of persons who may be in danger of cruel, inhuman or degrading treatment or punishment if returned. While there is a general discretion for the Attorney-General not to surrender a person, as stated in previous human rights assessments by the committee, ministerial discretion not to remove a person, rather than a legislative obligation, is not a sufficient safeguard for the purposes of international human rights law.[9]

Committee comment

1.63 The committee seeks the advice of the Attorney-General as to the adequacy of the safeguards in the El Salvador regulations and Extradition Act in relation to the extradition of persons who may be in danger of being subject to cruel, inhuman or degrading treatment or punishment upon return to the extradition country.

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6 See, also, Committee against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, advanced unedited version (9 February 2018) [26].

7 UN Human Rights Committee, *General Comment No.20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment of Punishment)* (1992) [9].

8 SOC, p. 7.

9 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (June 2013) p. 58.

Compatibility of the measure with the right to life

1.64 The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. While the ICCPR does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another nation state. This prohibits a state from deporting or extraditing a person to a country where that person may face the death penalty.[10] The Constitution of El Salvador retains the death penalty only for cases provided by military laws during an international state of war.[11]

1.65 The statement of compatibility states that the Extradition Act is 'consistent with the Australian Government's longstanding opposition to the death penalty', citing section 22(3) of the Extradition Act.[12] That section requires the Attorney-General not to surrender a person to a country where the offence is punishable by a penalty of death, unless the country gives an undertaking that the person will not be tried for the offence; if tried, the death penalty will not be imposed; or if the death penalty is imposed it will not be carried out. The statement of compatibility also notes that in practice undertakings relating to the death penalty in extradition cases have always been honoured.[13] It also notes that 'given the public nature of extradition, the Australian Government would most likely be aware of a breach of a death penalty undertaking' as Australia monitors Australian citizens who have been extradited through its consular network. Additionally, it states that it is open to the decision-maker to consider ongoing monitoring as a condition of the extradition and it is open to the person subject to the extradition request to challenge the decision.[14]

1.66 These are important safeguards that are relevant to the determination of whether the Extradition Act is compatible with the right to life. However, diplomatic assurances and undertakings may be breached, and the Extradition Act does not *require* the Attorney-General to refuse extradition if there are substantial grounds to believe the person would be in danger of being subjected to the death penalty. It also does not *require* any monitoring of the treatment of people extradited to ensure that assurances are being complied with.[15] The UN Human Rights Committee has also

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10 *Judge v Canada* (929/1998), Human Rights Committee, 13 August 2003, [10.4]; *Kwok v Australia* (1442/05) Human Rights Committee, 23 November 2009, [9.4],[9.7].

11 See El Salvador's Depository Notification to the Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (8 April 2014) available https://treaties.un.org/doc/Publication/CN/2014/CN.201.2014-Eng.pdf . See also Article 2(2) of the Second Optional Protocol to the International Covenant on Civil and Political Rights.

12 SOC, p. 7.

13 SOC, p. 7.

14 SOC, p. 7.

15 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) p. 154.

noted that diplomatic assurances alone may not be sufficient to eliminate the risk in circumstances where there is no mechanism for monitoring of their enforcement or no means through which the assurances could be effectively implemented.[16]

Committee comment

1.67 The committee seeks the advice of the Attorney-General as to the adequacy of the safeguards in place to protect the right to life of persons who may be subject to the death penalty if extradited.

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

1.68 Article 14 of the ICCPR provides that everyone has the right to a fair and public hearing in the determination of any criminal charge. European human rights jurisprudence has recognised that fair trial rights may be engaged where a person is extradited in circumstances where there is a real risk of a flagrant denial of justice in the country to which the individual is to be extradited.[17] While it is not binding on Australia, the interpretation of the right to a fair trial and fair hearing under the European Convention of Human Rights is instructive.[18] It is also noted that the position in European human rights law jurisprudence is consistent with the United Nations Model Treaty on Extradition, which includes a mandatory ground of refusing extradition '[i]f the person whose extradition is requested…would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14'.[19] The committee has therefore

16 *Alzery v Sweden* (1416/2005) Human Rights Committee, 10 November 2006, [11.5]

17 See, *Al Nashiri v Poland,* European Court of Human Rights (24 July 2014), [562]-[569]; *Othman (Abu Qatada) v United Kingdom,* European Court of Human Rights (17 January 2012), [252]-[262]; *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, per Lord Steyn at [41]; *Soering v United Kingdom* European Court of Human Rights (7 July 1989) [113].

18 It is acknowledged that in 2007 the UN Working Group on Arbitrary Detention noted the reluctance of states to extend the application of the prohibition of refoulement to articles 9 and 14. However the Working Group continued by stating that 'to remove a person to a State where there is a genuine risk that the person will be detained without legal basis, or without charges over a prolonged time, or tried before a court that manifestly follows orders from the executive branch, cannot be considered compatible with the obligation in article 2 of the International Covenant on Civil and Political Rights, which requires that States parties respect and ensure the Covenant rights for all persons in their territory and under their control': see *Report of the Working Group on Arbitrary Detention to the Human Rights Council,* 9 January 2007, UN Doc. A/HRC/4/40, [44]-[49].

19 Model Treaty on Extradition, adopted by General Assembly resolution 45/116 as amended by General Assembly resolution 52/88, available at: https://www.unodc.org/pdf/model_treaty_extradition.pdf.

previously noted its concern that the Extradition Act does not provide for the denial of a fair trial or fair hearing as a ground for an extradition objection.[20]

1.69 The statement of compatibility states that the Australian Government's position is that article 14 of the ICCPR does not contain non-refoulement obligations (that is, obligations not to return a person to their country of origin).[21] The statement of compatibility does, however, provide information as to safeguards in the Extradition Act which would allow a decision-maker to consider matters going to fair hearing and fair trial rights, including the extradition objection precluding extradition if it would result in double jeopardy,[22] and the general discretion to refuse surrender.[23] The statement of compatibility further notes that it is open to decision-makers to request assurances that persons being extradited would receive a fair trial.

1.70 However, as noted earlier, a general executive discretion to refuse to surrender a person may not be a sufficient safeguard for the purposes of international human rights law.

1.71 An additional issue in relation to the right to a fair hearing and fair trial is that, under the Extradition Act, the requesting State is not required to produce any evidence that there is a case to answer before a person is extradited (this is sometimes referred to as the 'no evidence' model).[24] Further, a person who may be subject to the extradition is prohibited from adducing any evidence to contradict the allegation that the person has engaged in conduct constituting an extradition offence (and prohibits a magistrate or Judge from receiving such evidence).[25] The provisions which govern an appeal to a higher court in relation to extradition also prohibit a person from adducing such evidence on appeal and prohibit the court from receiving such evidence on review or appeal.[26]

1.72 The absence of any requirement that there be a case to answer before a person is extradited raises questions as to whether there are sufficient safeguards in place to ensure that extradition of persons occurs in a manner that is compatible with the right to a fair hearing and fair trial. As the Joint Standing Committee on Treaties noted in its review of Australia's extradition laws in 2001, 'the consequences for a person who is facing extradition to a foreign country where the legal system,

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20 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) pp. 154-155; *Tenth Report of 2013* (June 2013) pp. 60-61.

21 SOC, p. 8.

22 Extradition Act section 7(e).

23 SOC, p. 8.

24 Joint Standing Committee on Treaties, Report 40, *Extradition – a review of Australia's law and policy,* August 2001, [3.77].

25 Section 19(5), Extradition Act.

26 Section 21A(4), Extradition Act.

language and availability of legal assistance may present great difficulties, mean that extradition cannot be treated merely as an administrative step'.[27] The statement of compatibility to the El Salvador regulations does not address the human rights compatibility of the 'no evidence' approach.

Committee comment

1.73 The committee seeks the advice of the Attorney-General as to:

- **the adequacy of the safeguards in place to prevent the extradition of persons who may, on surrender, suffer a flagrant denial of justice; and**
- **whether, in not requiring any evidence to be produced before a person can be extradited, and in preventing a person subject to extradition from producing evidence about the alleged offence, the El Salvador regulations and the Extradition Act are compatible with the right to a fair trial and fair hearing.**

Compatibility of the measure with the right to liberty

1.74 The right to liberty is a procedural guarantee requiring that persons not be arbitrarily and unlawfully deprived of liberty. This requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances. Imposing a rule that bail must be refused except in special circumstances, as occurs in the Extradition Act,[28] appears to limit this right. This concern is heightened by the potentially lengthy period in which a person may be detained during extradition proceedings.[29] It is noted that this is of particular concern in the context of the El Salvador regulations, which increase the period in which a person must be brought

27 Joint Standing Committee on Treaties, Report 40, *Extradition – a review of Australia's law and policy,* August 2001, [3.77]. The Joint Standing Committee also noted at that time that there were persuasive grounds for Australia to consider increasing its evidentiary requirements from the default 'no evidence' model: [3.80].

28 See sections 15(6), 18(3), 19(9A), 21(2B), 21(6)(f)(iv), 32(3), 35(6)(g)(iv), 49C(3).

29 This is particularly the case if the proposed amendments to the Extradition Act in Schedule 3 of the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 come into effect. Those amendments would provide that where a person has been released on bail and a temporary surrender warrant for the extradition of the person has been issued, the magistrate, judge or relevant court *must* order that the person be committed to prison to await surrender under the warrant. The committee has previously concluded in relation to this proposed amendment that there was a risk the measure is not a proportionate limitation on the right to liberty, as the measure may not be the least rights restrictive measure in each individual case in circumstances where it obliges a court to commit a person awaiting transfer to prison regardless of their individual risk: see Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) p. 98. As at 26 March 2018, this bill is before the Senate.

before a magistrate or eligible Federal Circuit Court judge after being arrested from 45 days[30] to 60 days.[31]

1.75 As such, the limitation must be shown to seek to achieve a legitimate objective, have a rational connection to that objective and be proportionate. The statement of compatibility notes that a presumption against bail is appropriate 'given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of the alleged offenders to face justice in the requesting country'.[32] However, as the committee has previously stated, while preventing people who may be a flight risk from avoiding the extradition process may be capable of being a legitimate objective, it is not clear that a blanket prohibition on bail except in special circumstances is a proportionate response.[33]

1.76 In *Griffiths v Australia,* the UN Human Rights Committee found that Australia had breached Article 9(1) of the ICCPR on the basis that the complainant's continuing detention pending extradition without adequate individual justification was arbitrary.[34] It reiterated that in order to avoid a characterisation of arbitrariness, detention should not continue beyond the period for which the State party could provide appropriate justification.[35] It also concluded that there may be less rights-restrictive measures to achieve the same ends, such as the imposition of reporting obligations, sureties or other conditions which would take account of individual circumstances.[36]

1.77 The UN Human Rights Committee also found Australia in violation of article 9(4) of the ICCPR in circumstances where the complainant was 'effectively precluded, by virtue of the State party's law and practice, from taking effective proceedings before a court in order to obtain a review of the lawfulness of his continuing detention, as the courts had no power to review whether his detention continued to be lawful after a lapse of time and to order his release on this basis'.[37] The Australian government responded to this ruling by noting (relevantly) that it was open to the complainant to apply for bail, citing the power of the Court under section 21(6) of the Extradition Act to order release on bail if there were 'special

30 This is the default period provided by section 17(2)(a) of the Extradition Act.

31 Section 6 of the El Salvador Regulations.

32 SOC, p. 9.

33 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 156-157; *Report 4 of 2017* (9 May 2017) pp. 95-97.

34 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.3].

35 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.2]; see also, *C v Australia* (90/1999), UN Human Rights Committee, 28 October 2002, [8.2].

36 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.2].

37 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.5].

circumstances' justifying that release, and also pointed to the availability of the writ of mandamus in the High Court of Australia and judicial review under the *Judiciary Act 1903*.[38] However, it is not clear that the requirement of a court considering whether 'special circumstances' exist would be sufficient consideration of whether a person's detention may be compatible with Article 9. It is also not clear how such matters would be able to be raised through judicial review. Therefore, questions arise as to whether the current framework for review in the Extradition Act, as expanded by the El Salvador regulations, provides sufficient opportunity for persons to challenge the lawfulness of their continuing detention for the purposes of international human rights law.

1.78 Further, extradition invariably results in the detention of a person pending extradition and may also involve lengthy detention in a foreign country while awaiting trial. This potentially lengthy detention of persons without first testing the evidence against them raises additional concerns that the 'no evidence' model discussed above may give rise to a circumstance where a person may be arbitrarily detained. This matter was not addressed in the statement of compatibility.

Committee comment

1.79 The committee seeks the advice of the Attorney-General as to:

- **whether a presumption against bail except in special circumstances is a proportionate limitation on the right to liberty;**
- **whether, having regard to *Griffiths v Australia,* the El Salvador regulations and the Extradition Act provide an opportunity for persons to review the lawfulness of their detention pending extradition in accordance with article 9(4) of the ICCPR;**
- **whether detaining persons during the extradition process without first testing the evidence against the person is compatible with the right to liberty; and**
- **whether section 6 of the El Salvador regulations, which increases the period in which a person must be brought before a magistrate or eligible Federal Circuit Court judge after being arrested from 45 days to 60 days, is a proportionate limitation on the right to liberty.**

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

1.80 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

38 See 'Griffiths v Australia (1973/2010) – Australian Government response' available at Attorney-General's Department 'Human Rights Communications' website at https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx.

are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law. 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'.

1.81 As noted in the statement of compatibility, section 7 of the Extradition Act promotes this right to the extent that it sets out grounds on which a person might raise an objection to extradition, including grounds to object where:

- surrender is sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions; or
- the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions.[39]

1.82 While these are important safeguards, it does not cover all of the grounds that are considered 'prohibited grounds' of discrimination in the international human rights conventions to which Australia is a party, including discrimination on the basis of disability, language, opinions (other than political opinions), social origin or marital status. The statement of compatibility notes that the person subject to extradition 'has an opportunity to make representations to the decision-maker regarding all of the protected attributes in article 26 of the ICCPR',[40] however no information is provided in the statement of compatibility as to how such matters would be taken into account. There does not appear to be any legal requirement for a decision-maker to refuse to surrender a person where they may be subject to discrimination on a prohibited ground that is not included in section 7 of the Extradition Act.

Committee comment

1.83 The committee seeks the advice of the Attorney-General as to the compatibility of the El Salvador regulations and the Extradition Act with the right to equality and non-discrimination. In particular, the committee seeks information as to the safeguards in place to ensure:

- **a person is not extradited where their surrender is sought for the purpose of prosecuting or punishing the person on account of her or his personal attribute that is protected under article 26 of the ICCPR but not listed in section 7 of the Extradition Act; and**

39 SOC, p. 9.

40 SOC, p. 9.

- **a person is not extradited where they may be prejudiced at her or his trial, or punished, detained or restricted in her or his personal liberty, by reason of a personal attribute that is protected under article 26 of the ICCPR but not listed in section 7 of the Extradition Act.**

Removing India from the list of extradition countries in the Extradition (Commonwealth Countries) Regulations 2010

1.84 Item 1 of the Extradition Legislation Amendment (2017 Measure No. 1) Regulations (Extradition Amendment Regulations) seeks to remove India from the list of extradition countries in Schedule 1 in the Extradition (Commonwealth Countries) Regulations 2010 (the Commonwealth Countries Regulations). This is because extradition requests between Australia and India are now governed under the Extradition (India) Regulations 2010 (the India Regulations) and the Extradition Act, so the reference to India in the Commonwealth Countries Regulations is no longer required.

Compatibility of the measure with multiple rights

1.85 The human rights analysis discussed earlier in relation to the El Salvador regulations applies equally to the Extradition Amendment Regulations. However, it is noted that there are several additional safeguards included in the India regulations that are not present in the El Salvador regulations and which modify the operation of the Extradition Act, including:

- article 4(3)(d) of the bilateral extradition treaty with India (implemented domestically through the India Regulations) allows a request for extradition to be refused if surrender is likely to have exceptionally serious consequences for the person whose extradition is sought, including because of the person's age or state of health; and
- if Australia receives a request under the India Extradition Treaty, then supporting documentation to establish that the person sought has committed the offence must be provided.[41] This is a departure from the 'no evidence' standard discussed above in relation to the El Salvador regulations.

1.86 However, it is also noted that the Commonwealth Countries Regulations, which will no longer apply to India as a result of the Extradition Amendment Regulations, provides for additional safeguards which would have provided greater safeguards to protect human rights, including:

- the standard of evidence required to support an extradition request under the Commonwealth Countries Regulations is that of a 'prima facie' case,[42]

41 Statement of Compatibility to the Extradition Legislation Amendment (2017 Measure No.1) Regulations, p. [6].

42 See section 8 of the Extradition (Commonwealth Countries) Regulations 2010.

which provides a greater level of scrutiny than the 'no evidence' standard under the Extradition Act; and

- a requirement that the person must not be surrendered if the Attorney-General is satisfied that it would be 'unjust, oppressive or too severe a punishment' to surrender the person, such as where the offence is trivial or where the accusation against the person was not made in good faith or in the interests of justice.[43]

1.87 These safeguards in the Commonwealth Countries Regulations are relevant to the determination of whether the human rights engaged and limited by the Extradition Act are proportionate. In particular, the presence of the 'prima facie' evidence test in the Commonwealth Countries Regulations would address some of the concerns discussed earlier concerning the default 'no evidence' standard in the Extradition Act in relation to the right to a fair trial and fair hearing and the right to liberty. Similarly, the requirement that a person must not be extradited if it would be 'unjust, oppressive or too severe a punishment' may assist in determining whether the measure is compatible with the right to a fair trial and fair hearing. By removing India from the scope of the Commonwealth Countries Regulations, these safeguards are no longer available.

Committee comment

1.88 The committee seeks the advice of the Attorney-General as to the compatibility of Items 2 and 3 of the Extradition Legislation Amendment (2017 Measure No.1) Regulations with human rights, having regard to the matters discussed at [1.61] to [1.83] above, in particular the:

- **prohibition against torture, cruel, inhuman and degrading treatment;**
- **right to life;**
- **right to a fair hearing and fair trial;**
- **right to liberty; and**
- **right to equality and non-discrimination.**

1.89 The committee seeks the advice of the Attorney-General as to whether removing India from the list of 'extradition countries' in the Extradition (Commonwealth Countries) Regulations 2010 is a proportionate limitation on human rights, having regard to the safeguards in that regulation that are not present in the Extradition Act or the Extradition (India) Regulations 2010.

43 See section 9 of the Extradition (Commonwealth Countries) Regulations 2010.

Amendments to reflect changes made to the Convention on the Physical Protection of Nuclear Material 1979

1.90 Items 2, 3 and 4 of the Extradition Amendment Regulations also seek to amend the Extradition (Physical Protection of Nuclear Materials) Regulations 1988 (the Nuclear Materials Regulations) and the Extradition Regulations 1988 to reflect amendments made to the Convention on the Physical Protection of Nuclear Material (the Nuclear Material Convention). That convention relevantly requires states parties to provide extradition and mutual assistance to facilitate the enforcement of a series of offences relating to the protection, storage and transportation of nuclear material. Amendments to that convention were made by the Amendment to the Convention on the Physical Protection of Nuclear Material (the Amended Nuclear Material Convention) which expands the list of offences for which signatories may request a person's extradition. The Amended Nuclear Material Convention also requires signatories not to regard offences committed under that convention as a 'political offence' when considering a request for extradition or mutual assistance.[44] As a consequence, a request for extradition or for mutual legal assistance based on an offence under the Nuclear Material Convention (as amended by the Amended Nuclear Material Convention) cannot be refused on the ground it is a political offence.

Compatibility of the measure with multiple rights

1.91 The effect of the amendments introduced relating to the Amended Nuclear Material Convention in the Extradition Amendment Regulations is to expand the operation of the Extradition Act to include a broader range of offences, and to remove offences under the Nuclear Material Convention (as amended by the Amended Nuclear Material Convention) from the scope of the 'political offence' extradition objection. As a consequence, the human rights analysis discussed above in relation to the El Salvador regulations applies equally to these amendments.

1.92 As noted in the statement of compatibility, there are some safeguards contained in the Nuclear Material Convention (as amended by the Amended Nuclear Material Convention) that are incorporated into Australian law through the Nuclear Materials Regulations that may assist in determining the proportionality of the limitations on human rights, including:

- article 11B of the Amended Nuclear Material Convention provides that nothing in the convention shall be interpreted as an obligation to extradite where the extraditing state has substantial grounds for believing that the request for extradition for one of the offences under the convention 'has been made for the purpose of prosecuting or punishing a person on account

44 Under the Extradition Act, there is an extradition objection in relation to an extradition offence if the offence is a 'political offence' in relation to the extradition country: Section 7(a), Extradition Act.

of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons'; and

- article 12 of the Nuclear Material Convention provides that any persons in relation to whom proceedings are being carried out in connection with the offences in the convention 'shall be guaranteed fair treatment at all stages of the proceedings'.

1.93 However, concerns remain in relation to the human rights compatibility of the Extradition Amendment Regulations for the same reasons as those outlined above in relation to the El Salvador Regulations. For example, it is noted that the 'no evidence' standard applies in relation to these amendments. While the statement of compatibility states that the 'prima facie' standard is not required because extradition is not a criminal process,[45] the statement of compatibility does not specifically address the concerns raised above that the 'no evidence' standard may not provide a sufficient safeguard to ensure that extradition of persons occurs in a manner that is compatible with the right to a fair hearing and fair trial or right to liberty.

Committee comment

1.94 The committee seeks the advice of the Attorney-General as to the compatibility of items 2 and 3 of the Extradition Legislation Amendment (2017 Measure No.1) Regulations with human rights having regard to the matters discussed at [1.61] to [1.83] above, in particular the:

- **prohibition against torture, cruel, inhuman and degrading treatment;**
- **right to life;**
- **right to a fair hearing and fair trial;**
- **right to liberty; and**
- **right to equality and non-discrimination.**

45 Statement of Compatibility to the Extradition Legislation Amendment (2017 Measure No.1) Regulations, page [5]-[6].

Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018

Purpose	Amends the *Higher Education Support Act 2003* including to: provide a new minimum repayment income of $44,999 for the compulsory repayment of Higher Education Loan Program (HELP) debts; replace the current repayment thresholds and introduce additional repayment thresholds; index HELP repayment thresholds to the consumer price index instead of average weekly earnings; and introduce, from 1 January 2019, a combined lifetime limit on the amount a student can borrow under HELP of $150,000 for students studying medicine, dentistry and veterinary science courses, and $104,440 for other students
Portfolio	Education and Training
Introduced	House of representatives, 14 February 2018
Rights	Education; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Background

1.95 The committee has commented on proposed reforms to the funding of higher education and reforms to the Higher Education Loan Program (HELP) on a number of occasions.[1]

1.96 Most recently, the committee considered the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (2017 bill) in its *Report 5 of 2017* and *Report 7 of 2017*.[2] The current 'Student Loan Sustainability' bill[3] (2018 bill) reintroduces a number of the measures contained in the 2017 bill.

Lowering repayment threshold for HELP debts and changes to indexation

1.97 Schedule 1 of the 2018 bill lowers the current minimum repayment income for HELP loans to $44,999 per annum (currently, the repayment threshold is

1 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) pp. 8-13; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 43-64; *Twenty-second Report of the 44th Parliament* (13 May 2015) pp. 163-174; *Report 5 of 2017* (14 June 2017) pp. 22-30 and *Report 7 of 2017* (8 August 2017) pp. 41-60.

2 Parliamentary Joint Committee on Human Rights*, Report 5 of 2017* (14 June 2017) pp. 22-30 and *Report 7 of 2017* (8 August 2017) pp. 41-60.

3 Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018.

$55,874).[4] It also introduces additional repayment thresholds and rates (1 percent at $45,000 and increasing to 10 percent on salaries over $131,989 per annum).[5] The equivalent measure contained in the 2017 bill sought to lower the repayment threshold to $41,999 per annum.[6]

1.98 From 1 July 2019 repayment thresholds including the minimum repayment amount will be indexed using the Consumer Price Index (CPI) rather than Average Weekly Earnings (AWE).[7] This is a reintroduced measure which is contained in the 2017 bill.

Compatibility of the measures with the right to education

1.99 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to education. It specifically requires, with a view to achieving the full realisation of the right to education, that:

> Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

1.100 Australia has obligations to progressively introduce free higher education by every appropriate means and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of the right to education.[8] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.[9]

1.101 The Australian system of higher education allows students to defer the costs of their education under a HELP loan until they start earning a salary above a certain threshold. The proposed lowering of the repayment threshold engages and may limit the right to education as it imposes payment obligations on those who earn lower incomes. This appears to be contrary to the requirement under article 13 of the ICESCR to ensure that higher education is equally accessible and progressively free. Similarly, the proposed change to indexation also engages and may limit the right to education as it may increase the amount to be paid, relative to earnings, in the event that growth in the CPI exceeds growth in AWE. In this respect, the United Nations

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4 Statement of compatibility (SOC) p. 4; Schedule 1, item 2.

5 Schedule 1, item 2.

6 See schedule 3 of the 2017 bill.

7 Explanatory Memorandum (EM) p. 1.

8 See, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (8 December 1999) [44]-[45].

9 See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (8 December 1999) [44]-[45].

(UN) Committee on Economic, Social and Cultural Rights has raised serious concerns about access to education in the context of the operation of student loan schemes internationally.[10]

1.102 The committee previously corresponded with the minister about the compatibility of the measures in the 2017 bill which sought to lower the repayment threshold with the right to education. The repayment threshold in the 2018 bill is slightly higher than the amount in the 2017 bill, but the measures raise substantively identical issues in relation to the right to education. While the statement of compatibility to the 2018 bill identifies that these measures engage the right to education, it does not include the level of detail previously provided by the minister in his response to the 2017 bill. Where a measure that the committee has previously considered is reintroduced, previous ministerial responses to the committee's requests for further information should be used to inform the statement of compatibility for the reintroduced measure. This additional information may assist the committee to determine whether or not the reintroduced measures are compatible with human rights, including taking into account previous conclusions.

1.103 In the context of this measure, the committee has previously concluded that lowering the repayment threshold may be compatible with the right to education. This was based on the information that was previously provided by the minister in response to the committee's request for information. However, in the absence of any detail from the minister in the statement of compatibility to the 2018 bill, further information is required in order for the committee to conclude its assessment of the reintroduced measure.

1.104 Nevertheless, the statement of compatibility argues that the measures are compatible with the right to education as they do not increase the overall cost to students or prevent access to higher education:

> Access to higher education will be maintained through the continued availability of HELP loans. As individuals will commence repayment sooner, it may create the belief that costs are increasing for students, thereby reducing access to higher education. By lowering the repayment threshold, and altering the indexation of the threshold to grow in line with CPI, this measure makes the overall scheme more affordable for Government in the

10 For example, the UN Committee on Economic, Social and Cultural Rights raised concerns about access to education in relation to the operation of the student loans scheme in the United Kingdom which shares similar elements to the Australian HELP scheme: UN Committee on Economic, Social and Cultural Rights , Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/1/Add.79 (5 June 2002) [22]; UN Committee on Economic, Social and Cultural Rights, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/5 (12 July 2009) [44]; UNESCR, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6 (14 July 2016) [65]-[66].

long-term, and does not result in an overall increase in costs for students.[11]

1.105 However, this does not fully address whether the changes to indexation and the repayment threshold may act as a disincentive for access to education or, more generally, how such measures impact upon Australia's obligations of progressive realisation.

1.106 Additionally, there may be a category of low income earners who, due to earning below the repayment threshold, may never have had to repay off the entire amount of their HELP-debt. If such low income earners now have to repay HELP-loans due to a change in thresholds, there are questions as to whether this could be an indirect reduction in freely accessible higher education for these classes of individuals.

1.107 Should the measure constitute a limitation on the right to education, it is unclear from the information provided whether this limitation is permissible as a matter of international human rights law. The statement of compatibility identifies the objective of the measure as 'ensuring the long term viability of the HELP scheme'.[12] However, it does not provide an evidence-based explanation of how this constitutes a legitimate objective for the purposes of international human rights law. In this respect, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, as set out above, a limitation must be rationally connected to, and a proportionate way to achieve, its stated objective in order to be permissible under international human rights law.

Committee comment

1.108 The preceding analysis raises questions as to whether the measures are compatible with the right to education.

1.109 Accordingly, the committee requests the further advice of the minister as to:

- **whether the proposed change in indexing from AWE to CPI means that students would pay more or less for their university degrees (including for their degree overall and as a proportion of their wages);**
- **whether requiring some classes of low income earners to repay HELP-debts could constitute an indirect reduction in the amount of government funding of higher education;**
- **whether the proposed changes to the repayment threshold and indexation could have an adverse impact on access to education;**

11 SOC, p. 5.

12 SOC, p. 4.

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

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

1.110 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 2(2) of ICESCR also prohibits discrimination specifically in relation to the human rights contained in the ICESCR such as the right to education. In addition to these general non-discrimination provisions, articles 1, 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describe the content of these obligations, including the specific elements that state parties are required to take into account to ensure the rights to equality for women.[13]

1.111 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[14] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[15] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without

13 Article 1 of CEDAW defines 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

14 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: ICCPR articles 2 and 26; ICESCR article 2(2); UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (10 November 1989) [1]. 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: See, for example, *Schmitz-de-Jon v Netherlands*, UN Human Rights Committee 855/99 (2001); *Gueye v France* UN Human Rights Committee 196/85 (1989); *Danning v Netherlands,* UN Human Rights Committee 180/84 (1990); *Lindgren et al v Sweden* UN Human Rights Committee 298-9/88 (1990) *Young v Australia*, UN Human Rights Committee 941/00 (2003); UN Human Rights Committee, Concluding observations on Ireland, A/55/40 (2000) [422]-[451]. See, also, UN Committee on Economic, Social and Cultural Rights, *General Comment 20, Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20 (2 July 2009) [28]-[35].

15 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989) [7].

intent to discriminate', which exclusively or disproportionately affects people with a particular protected attribute.[16]

1.112 Reducing the minimum repayment income threshold for HELP debts to $44,999 may have a disproportionate impact on women and other vulnerable groups.[17] In relation to women, this is because, on average, women are more likely to earn less than men, and therefore more are likely to be affected by the reduction in the repayment threshold to cover those earning between $44,999 and $55,000.

1.113 The change in indexation may also have a disproportionate effect on women and other vulnerable groups. As women, on average, earn less over a lifetime of employment, are more likely to take time out of the workforce to care for children and are more likely to be engaged in part-time employment, they may take longer to pay off their HELP debt than their male counterparts.[18] Where a person takes longer to repay a HELP debt, any changes in indexation under the HELP scheme relative to their earnings may have a more significant effect on them. This is because they may be subject to the indexation changes and repayment obligations for a longer period of time.

1.114 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[19] Differential treatment (including the differential effect of a measure that is neutral on its face)[20] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

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

17 See, for example, the UN Committee on Economic, Social and Cultural Rights, General Comment 20, Non-discrimination in economic, social and cultural rights, E/C.12/GC/20 (2 July 2009) [28]-[35].

18 See, Australian Bureau of Statistics (ABS), Employee Earnings and Hours (May 2016) http://www.abs.gov.au/ausstats/abs@.nsf/0/27641437D6780D1FCA2568A9001393DF?Opendocument; ABS, Gender indicators, Australia (August 2016) http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~August%202016~Main%20Features~Economic%20Security~6151; Workplace Gender Equality Agency, Gender pay gap statistics (March 2016) https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf (last accessed 24 May 2017); See, for example, Senate Standing Committee on Education and Employment, The Future of HECS (28 October 2014) p. 52.

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

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

1.115 The statement of compatibility acknowledges that the measures engage the right to equality and non-discrimination due to their disproportionate impacts on women:

> …the introduction of new HELP repayment thresholds, may be seen as limiting the right to non-discrimination due to disproportionate impacts on women and other low income groups.
>
> The Government currently carries a higher deferral subsidy from demographic groups that tend to have lower incomes. This includes women, individuals in part-time work, or individuals in low paid professions. As a result, some of these individuals, including women, may be making repayments for the first time as a result of the introduction of a lower minimum repayment threshold. Addressing this income inequality, however, is not the role of the higher education loans system.[21]

1.116 This statement is identical to the information provided in the statement of compatibility for the 2017 bill.[22] As with the 2017 bill, the statement of compatibility to the 2018 bill does not provide a substantive assessment of whether the measure amounts to indirect discrimination nor does it address the concerns expressed by the committee in its consideration of the measures in the 2017 bill.

1.117 Further, the argument in the statement of compatibility that a negative impact on women results from income inequality is not an adequate justification of the measure for the purposes of human rights law in circumstances where the measure has the potential to exacerbate inequality. Rather, as set out above, where there is evidence that a measure may have a disproportionate negative effect on women it shows *prima facie* that the measure itself may be discriminatory. In these circumstances, the measure may still be compatible with the right to equality and non-discrimination where the measure serves a legitimate objective, is effective to achieve that objective and is a proportionate means of achieving that objective. However, the statement of compatibility does not address whether this is the case with respect to these measures. Further, international human rights law recognises that it is fundamentally the role of government to address existing inequalities and ensure that these are not exacerbated through particular measures. In this respect, the United Nations (UN) Committee on Economic, Social and Cultural Rights, in its concluding observations on Australia in July 2017, recommended that Australia 'intensify its efforts to address the remaining obstacles to achieving substantive equality between men and women'.[23] As the minister's response to the 2017 bill did not fully address such issues, the committee previously advised that it was not

21 SOC, p. 6.

22 See, SOC to the 2017 bill, p. 10.

23 UN Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Australia, E/C.12/AUS/CO/5 (11 July 2017) [22].

possible to conclude that the measure was compatible with the right to equality and non-discrimination.[24]

Committee comment

1.118 The measure engages the right to equality and non-discrimination.

1.119 The preceding analysis raises questions as to whether the disproportionate negative effect on women (which indicates *prima facie* indirect discrimination) amounts to unlawful discrimination.

1.120 Accordingly, the committee requests the further advice of the minister as to:

- **whether the measure pursues a legitimate objective for the purposes of international human right law and whether there is reasoning or evidence that establishes that this objective addresses a pressing or substantial concern;**
- **how the measure is effective to achieve (that is, rationally connected to) the stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

Restriction on how much students can borrow under HELP to cover tuition fees

1.121 Schedule 3 of the 2018 bill introduces a new combined limit on how much students can borrow under HELP to cover their tuition fees from 1 January 2019. Currently, the limit applies only to debts incurred through FEE-HELP,[25] VET FEE-HELP[26] and VET Student Loans.[27] Under the proposal, debts incurred by Commonwealth supported students under HECS-HELP[28] will also be included in the

24 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) pp. 41-60.

25 FEE−HELP is a loan scheme that assists eligible fee paying students to pay all or part of their tuition fees. It is for domestic undergraduate and postgraduate students who do not have a Commonwealth supported place.

26 VET Student Loans commenced on 1 January 2017, replacing the VET FEE-HELP scheme, which ceased for new students on 31 December 2016.

27 The VET Student Loans program is an income contingent loan offered by the Australian Government that helps eligible students pay for some vocational education and training (VET) diploma level or above courses.

28 A commonwealth supported student place is part subsidised by the Australian government through the government paying part of the fees for the place directly to the university. Students are also required to contribute towards the study and pay the remainder of the fee called the 'student contribution amount' for each unit they are enrolled in at the higher education institution. HECS−HELP is a loan scheme for eligible students enrolled in Commonwealth supported places to pay their student contribution amounts.

lending limit. This means that all eligible domestic students will be subject to a single combined lending limit for their tuition fees. The lifetime limit will be $150,000 for students studying medicine, dentistry and veterinary science courses and $104,440 for other students. Loan limits will be indexed according to CPI.[29] The loan limit will not be retrospective with respect to HECS-HELP.[30]

Compatibility of the measure with the right to education

1.122 As set out above, article 13 of the ICESCR protects the right to education including ensuring that higher education is equally accessible, on the basis of capacity and through the progressive introduction of free higher education.

1.123 The combined lifetime loan limit on all HELP lending may restrict access to tertiary or further education for individuals who have reached the loan limit and who are unable to afford to pay their tuition fees upfront. Accordingly, the measure appears to be a backward step, or limitation, on the level of attainment of the right to higher education.[31] As noted above, such limitations or retrogressive measures may be permissible under international human rights law provided that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the UN Committee on Economic, Social and Cultural Rights has noted that:

> There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[32]

1.124 The statement of compatibility acknowledges that the measure engages the right to education and argues that any limitation on the right is permissible. It identifies the objective of the measure as 'ensuring access to tertiary education for those who cannot afford to pay their tuition upfront'.[33] While ensuring access to tertiary education may be capable of constituting a legitimate objective for the purposes of international human rights law, limited information is provided in the

29 Explanatory memorandum (EM), p. 22.

30 SOC, p. 6.

31 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999).

32 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999) [45].

33 SOC, p. 6.

statement of compatibility as to how this constitutes a pressing or substantial concern in the specific circumstances of the measure.

1.125 Further, it is unclear from the information provided how this measure is rationally connected to (that is, effective to achieve) this objective. This is because rather than ensuring access to higher education for those who cannot afford to pay fees upfront, the measure would appear instead to restrict access to higher education for those unable to pay if they have already reached the HELP limit.

1.126 In relation to the proportionality of the limitation, the statement of compatibility states that the loan limit is:

> …firstly, sufficient to support almost nine years of full time study as a Commonwealth supported student and, secondly, can reasonably be repaid within a borrower's lifetime, this measure is consistent with fair and shared access to education.[34]

1.127 However, this may not fully take into account all potential impacts on access to education for students, particularly in the context of lifelong learning or retraining. Additionally, while the loan amount may be sufficient to support nine years of fulltime study as a Commonwealth supported student, this does not appear to fully acknowledge the context of current higher education funding arrangements. Currently, in many graduate and postgraduate programs there are few commonwealth supported student places.[35] If a commonwealth supported place is unavailable, this means that students will usually have to pay higher fees in respect of such graduate and postgraduate programs. While students may be able to borrow the cost of their tuition under FEE-HELP, they will reach the lifetime loan limit sooner due to the higher costs of tuition. However, the effect of the measure will be to count both the FEE-HELP debt and any HECS-HELP debt (that students have already incurred, for example, during their undergraduate degree) for the purposes of the lifetime limit. This means that it is possible an Australian student who completes, for example, an undergraduate bachelor degree as a commonwealth supported student followed by a full-fee paying graduate degree may reach the lifetime loan limit. Accordingly, this raises a particular concern that the measure could have a significant

34 SOC, p. 6.

35 See, Study Assist, Commonwealth Supported places, http://studyassist.gov.au/sites/studyassist/helppayingmyfees/csps/pages/commonwealth-supported-places.

impact on access to higher education for some students.[36] Further, no information has been provided in the statement of compatibility about the consideration of alternatives, in the context of Australia's use of its maximum available resources. Based on the information provided, it is unclear that the measure is proportionate.

Committee comment

1.128 The preceding analysis raises questions as to the compatibility of the measure with the right to education.

1.129 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;**
- **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 (including in the context of lifelong learning or a future need for retraining);**
- **whether alternatives to the measure have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to ensure higher education is accessible to all, on the basis of capacity, by every appropriate means, and by the progressive introduction of free education.**

36 A student who completed a four year undergraduate Bachelor of Arts degree with honours as a Commonwealth supported student at, for example, Macquarie University might graduate with a HECS-HELP debt of approximately $43,016. If the student decided to undertake a graduate law degree such as a Juris Doctor as a full-fee paying student at, for example, the University of Melbourne the cost of this three year program would be approximately $124,385. These two programs of study would push the student over the proposed total lifetime HELP-loan limit: see, Melbourne University JD, Fees and Scholarships, http://law.unimelb.edu.au/study/jd#fees-and-scholarships; Macquarie University, Courses, Bachelor of Arts, https://courses.mq.edu.au/2018/domestic/undergraduate/bachelor-of-arts.

Identity-matching Services Bill 2018

Australian Passports Amendment (Identity-matching Services) Bill 2018

Purpose	Seeks to facilitate the exchange of identity information between Commonwealth, state, local and territory governments and certain non-government entities by providing explicit legal authority for the Department of Home Affairs to collect, use and disclose identification information in order to operate identity-matching services
Portfolio	Home Affairs; Foreign Affairs and Trade
Introduced	House of Representatives, 7 February 2018
Rights	Privacy (see **Appendix 2**)
Status	Seeking additional information

Background

1.130 The committee previously examined the instrument providing legislative authority for the government to fund the National Facial Biometric Matching Capability (the Capability) in its *Report 9 of 2017* and its *Report 11 of 2017*.[1] The Capability facilitates the sharing and matching of facial images as well as biometric information between agencies through a central interoperability hub (the Hub) and the National Driver Licence Facial Recognition Solution (the NDLFRS). In relation to this measure, the committee concluded that there was a risk of incompatibility with the right to privacy through the use of the existing laws as a basis for authorising the collection, use, disclosure and retention of facial images. The committee stated that setting funding for the Capability without new primary legislation which circumscribes the Capability's operation raises serious concerns as to the adequacy of safeguards to ensure that the measure is a proportionate limitation on the right to privacy.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 25-27; *Report 11 of 2017* (17 October 2017) pp. 84-91.

2 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 91.

Facilitating facial and biometric data identity matching

1.131 The Identity-matching Services Bill 2018 (the Identity Matching Bill) provides that the secretary of the Department of Home Affairs may develop, operate and maintain the Hub and the NDLFRS.[3]

1.132 The Hub would facilitate the sharing and matching of facial images as well as biometric information between government agencies by relaying electronic communications.[4]

1.133 The NDLFRS will include a database of identification information from state and territory authorities and will make driver licence facial images available through the identity matching service described below at [1.135].[5]

1.134 The Identity Matching Bill provides an explicit legal basis to authorise the Department of Home Affairs to collect, use and disclose 'identification information' about an individual if it occurs through the Hub or the NDLFRS and is for a range of specified purposes.[6] 'Identification information' is defined to include a person's name (current and former); address (current and former); place and date of birth; current or former sex, gender identity or intersex status; any information contained in a driver's licence, passport or visa and a facial image of the person.[7]

1.135 As set out in the explanatory memorandum, the Hub and the NDLFRS will support a range of identity matching services:

- the Face Verification Service (FVS), which enables a facial image and associated biographic details of a person to be compared on a one-to-one

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3 Identity Matching Bill section 14.

4 Identity Matching Bill, Explanatory Memorandum (IMB, EM) p. 2.

5 IMB, EM, p. 2.

6 Identity Matching Bill sections 3 and 17, 18; EM, p. 2-3. Under subsection 17(2) 'identification information' may be collected, used or disclosed for the following purposes: (a) providing or developing an identity-matching service for identity and community protection activities, being an activity for: (i) preventing and detecting identity fraud; (ii) preventing, detecting, investigating or prosecuting a federal, state or territory offence or starting or conducting proceedings for proceeds of crime; (iii) investigating or gathering intelligence relevant to national security; (iv) checking the background of a person with access to an asset, facility or person associated with government or protecting a person with a legally assumed identity or under witness protection; (v) promoting community safety, including identifying a person suffering or at risk of suffering physical harm (including missing or deceased persons or those affected by disaster) and a person reasonably believed to be involved in a significant risk to public health or safety; (vi) promoting road safety, including the integrity of driver licensing systems; and (vii) verifying the identity of an individual; (b) developing, operating or maintaining the NDLFRS; or (c) protecting the identities of persons who have legally assumed identities or are under witness protection.

7 Identity Matching Bill, section 5.

basis against an image held on a specific government record for that same individual;

- the Face Identification Service (FIS), which searches or matches facial images on a one-to-many basis to help determine the identity of an unknown person, or detect instances where a person may hold multiple fraudulent identities;
- the One Person One Licence Service (OPOLS), which will allow state and territory agencies to detect instances where a person may hold multiple driver licences across jurisdictions;
- the Facial Recognition Analysis Utility Service (FRAUS), which will allow state and territory agencies to assess the accuracy and quality of their data holdings; and
- the Identity Data Sharing Service (IDSS), which will allow for the sharing of biometric identity information between Commonwealth, state and territory agencies.[8]

1.136 The explanatory memorandum states that all states and territories have agreed to introduce or preserve legislation to support the collection, use and disclosures of facial images and identity information via these identity matching services.[9]

Compatibility of the measures with the right to privacy

1.137 The right to privacy includes respect for informational privacy, including the right to respect for private information, particularly the storing, use and sharing of personal information; and the right to control the dissemination of information about one's private life. As noted in the committee's previous reports, the collection, use and disclosure of identity information (including photographs) through the Hub and the NDLFRS engages and limits the right to privacy.[10] 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.

1.138 The statement of compatibility to the Identity Matching Bill acknowledges that authorising the Department of Home Affairs to collect, use and disclose information including personal and sensitive information engages and limits the right

8 IMB, EM, p. 4.

9 Identity Matching Bill, Statement of Compatibility (IMB, SOC) p. 40.

10 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 25-27; *Report 11 of 2017* (17 October 2017) p. 84-91. See, also, for example, *Peck v United Kingdom* (2003) 36 EHRR 41.

to privacy but argues that this limitation is permissible.[11] The statement of compatibility states that the measure pursues a range of objectives for each identity matching service (namely, the FVS, FIS, OPOLS, FRAUS and IDSS). These include the detection and prevention of identity fraud, national security, law enforcement, protective security, road safety and community safety.[12] These are likely to constitute legitimate objectives for the purposes of international human rights law.

1.139 The statement of compatibility to the Identity Matching Bill indicates that matching facial images, biometric data and identities through the Hub and the NDLFRS is also likely to be rationally connected (that is, effective to achieve) these objectives.

1.140 In relation to proportionality, each of the identity matching services provide for differing degrees of use, access and disclosure of personal information. However, there are general concerns in relation to proportionality that underlie each of the services. As such, the services will be discussed collectively below. Where there are particular concerns in relation to a specific identity matching service, these will also be discussed further below.

1.141 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. In relation to the scope of the limitation on the right to privacy proposed under the Identity Matching Bill, the statement of compatibility explains:

> The Bill is designed to facilitate Home Affairs to provide the identity-matching services, rather than authorise information-sharing by other organisations participating in the services. The Bill has been developed on the basis that other agencies or organisations participating in the identity-matching services must have their own legal authority to do so, and must comply with legislated privacy protections that apply to them.
>
> This provides an additional layer of protection for the identification information held within the NDLFRS or transmitted via the interoperability hub, by ensuring that there is no automatic exemption from privacy protections for users of the identity-matching services.[13]

1.142 Providing that agencies must have their own authorisation to access data could assist to circumscribe the limitation on the right to privacy. However, it appears that, depending on the scope of the authorisation provided to other agencies, facilitating access to identity matching services via the Hub and NDLFRS still could be a very extensive limitation on the right to privacy. In this respect, the scope

11 IMB, SOC, p. 44.

12 IMB, SOC, p. 45-56.

13 SOC, p. 44.

provided for commonwealth, state and territory agencies to determine what information they will provide and the circumstances in which information will be available through an authorisation, does not fully address privacy concerns in relation to the Identity Matching Bill.[14] This is because these agencies may not have adequate and effective safeguards in place to ensure that the disclosure and use of information to and from the Hub is a proportionate limit on the right to privacy.

1.143 More generally, who can access facial images and other biometric data, and in what circumstances, is relevant to whether the measure is sufficiently circumscribed. The Identity Matching Bill sets out who can use particular identity matching services through the Hub and the NDLFRS and in some cases for what purposes. The extent of access differs depending on the particular service. For example, the FIS can be used by a defined list of commonwealth, state and territory agencies as well as those prescribed through delegated legislation.[15] Restricting access to the FIS to specified particular agencies would assist with the proportionality of the measure. This is because the FIS is a more extensive limitation on the right to privacy in that it allows agencies to identify an unknown person. However, it is noted that in relation to the FIS the minister is empowered to prescribe further agencies by delegated legislation, such that it is unclear whether the measure is sufficiently circumscribed. In relation to the FVS, providing an agency otherwise has authorisation, the FVS may be used more broadly by an any agency of the commonwealth, state or territory or local government authorities or non-government entities that have been prescribed by regulation.[16] For the FVS and other identity matching services (the FRAUS, IDSS and OPOLs), there would therefore appear to be a potentially broad range of agencies that could access such services for a range of purposes.

1.144 Further, to the extent that current Australian privacy laws may apply to the proposed facility to match facial images and other biometric data, there are questions as to whether the current laws would provide adequate and effective safeguards for the purposes of international human rights law. In particular, while facial images are a type of personal information protected by the Australian Privacy Principles (APPs) and the *Privacy Act 1988* (Privacy Act),[17] compliance with the APPs and the Privacy Act does not necessarily provide an adequate safeguard for the purposes of international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information, including (as noted by the minister) where its use or disclosure is

14 See, SOC, p. 44.

15 Identity Matching Bill subsection 8(2).

16 Identity Matching Bill subsection 10(2).

17 See, Privacy Act, section 6.

authorised under an Australian Law,[18] which may be a broader exception than permitted in international human rights law. There is also a general exemption in the APPs on the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[19] Therefore, in the absence of greater safeguards in the Identity Matching Bill, there are serious questions as to whether the safeguards currently provided under Australian law would be sufficient for the purposes of international human rights law.

1.145 The number and type of facial images and other biometric data that may be collected, accessed, used and disclosed through the Hub and the NDLFRS is also relevant to the proportionality of the limitation. The statement of compatibility indicates the broad range of facial images and biometric information which would be accessible or searchable through the Hub including state and territory driver licences (via the NDLFRS). As the Hub will permit access to driver licences, the personal information of a significant proportion of the adult Australian population will be retained. A centralised facility for searching such large repositories of facial images and biometric data is a very extensive limitation on the right to privacy. The extent of the limitation heightens concerns as to whether the measure is overly broad and insufficiently circumscribed. There is a serious question as to whether having databases of, and facilitating access to, facial images of a very significant portion of the population in case they are needed is the least rights restrictive approach to achieving the stated objectives of the measure.

1.146 The statement of compatibility explains that the Identity Matching Bill restricts the authorisation for the Department of Home Affairs to collect, use and disclose information to a defined set of purposes, including providing an identity matching service for the purpose of an identity or community protection activity. Section 6 of the Identity Matching Bill defines 'identity or community protection activities' as detecting identity fraud, law enforcement activities, national security activities, protective security activities, community safety activities, road safety activities and verifying identity. Given these broad purposes, it appears that the range of information that could be subject to collection, disclosure and use is extensive. As noted above, driver licence photographs will be subject to the Hub and so the Hub will include personal information of a large number of the adult population. As such, it is unclear that restricting the Department of Home Affairs' authorisation to these purposes is sufficient to ensure that the measure is adequately circumscribed. Indeed, it appears that the measure may allow, for example, photographs to be collected from a range of sources. For example, it appears possible that social media photographs could be used.

18 APP 9; APP 6.2(b).

19 APP; 6.2(e).

1.147 The scope of historical facial images that will be subject to the Hub is also unclear. In this respect, while the Identity Matching Bill contains a number of offence provisions relating to unauthorised access and disclosure, there is still a further concern about whether the Hub will provide adequate and effective protection against misuse in respect of vulnerable groups. For example, it is unclear the extent to which there are specific safeguards for survivors of domestic or gender-based violence who may have changed their identity and to protect against the risks of unintended consequences. If historical facial images are available, it is also possible that it may reveal that a person has undergone a change in gender identity particularly as identification information is defined to include current or former sex or gender identities.[20] This may also engage the right to equality and non-discrimination.

1.148 More generally, it is noted that international human rights case law has raised concerns as to the compatibility of biometric data retention programs with the right to privacy. In *S and Marper v United Kingdom,* the European Court of Human Rights held that laws in the United Kingdom that allowed for fingerprints, cellular samples and DNA profiles to be indefinitely retained despite the affected persons being acquitted of offences was incompatible with the right to privacy. The court expressed particular concern about the 'indiscriminate and open-ended retention regime' which applied the same retention policy to persons who had been convicted to those who had been acquitted.[21] The court considered that the 'blanket and indiscriminate nature of the powers of retention' failed to strike 'a fair balance between the competing public and private interests'.[22]

1.149 Similarly, the United Kingdom (UK) Court of Appeal in *Wood v Commissioner of Police for the Metropolis,*[23] concluded that the retention of photographs which had been taken by police of a person in circumstances where the person had not committed any criminal offence had a disproportionate impact on the right to privacy under the UK *Human Rights Act.*[24] Collectively, these authorities suggest that the indiscriminate retention of a person's data (including biometric information and photographs) may not be a proportionate limitation on the right to privacy. In relation to accessing biometric information, the UK Courts have recently found that

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20 See, Identity Matching Bill section 5.

21 See, *S and Marper v United Kingdom,* European Court of Human Rights Application Nos.30562/04 and 30566/04 (2008) [119]. See, also, for example, *NK v Netherlands*, UN Human Rights Committee, CCPR/C/120/D/2326/2013 (27 November 2017).

22 See, *S and Marper v United Kingdom,* European Court of Human Rights Application Nos.30562/04 and 30566/04 (2008) [127].

23 *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 (21 May 2009).

24 *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 (21 May 2009) at [89] and [97].

data retention and access programs were inconsistent with the right to privacy in the context of European Union (EU) law to the extent the objective pursued by that access was not strictly limited solely to fighting serious crime and where access was not subject to prior review by a court or independent administrative authority.[25] The interpretation of the human right to privacy under the European Convention of Human Rights and the EU Charter of Fundamental Rights in those cases is instructive in informing Australia's international human rights law obligations in relation to the corresponding right to privacy under the ICCPR.

1.150 Further, some of the identity matching services under the Identity Matching Bill appear to have a more extensive impact on the right to privacy than others. For example, as noted above, the FIS would allow images of unknown individuals to be searched and matched against government repositories of facial images through the Hub. This particular identity matching service raises specific concerns given the scope of its potential impact on the right to privacy. It may not only reveal the identity of the individual but, depending on the circumstances, may reveal who a person is in contact with, when and where. For example, this could be the case with matching unidentified CCTV images of people with facial images held by government agencies. This in turn could potentially allow conclusions to be drawn about the person's political opinions, sexual habits, religion or medical concerns. This also raises concerns about whether such a measure could engage other human rights such as the right to freedom of association and the right to freedom of expression. In this context, it appears that the FIS may not be the least rights restrictive approach to achieve the stated objectives particularly noting that the facial images of the vast majority of adult Australians will be searchable through the Hub.

Committee comment

1.151 The preceding analysis raises questions as to whether the identity matching services which will be facilitated by the Interoperability Hub (the Hub) and the National Driver Licence Facial Recognition Solution (NDLFRS) are a proportionate limitation on the right to privacy.

1.152 The committee requests the advice of the Minister for Home Affairs as to whether the limitations on the right to privacy contained in the Identity Matching Bill are reasonable and proportionate measures to achieve the stated objective. This includes information in relation to:

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25 *Secretary of State for the Home Department v Watson MP & Ors* [2018] EWCA Civ 70 (30 January 2018) applying the Court of Justice of the European Union decision in *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v Watson and Others* [2016] EUECJ C-203/15; see also *Digital Rights Ireland Limited v Minister for Communications, Marine and Natural Resources & Others* and *Seitlinger and Others* [2014] EUECJ C-293/12. See, also, for example, the committee's consideration of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 in its *Fiftieth Report of the 44th Parliament* (14 November 2014) pp. 10-22.

- **whether the provisions in the Identity Matching Bill governing access to facial images and other biometric data are sufficiently circumscribed for each of the identity matching services;**
- **whether the *Privacy Act 1988* (Privacy Act) will apply to the operation of the Hub and, if so, whether it will act as an adequate and effective safeguard noting the various exceptions to the collection, use and disclosure of information under the Privacy Act;**
- **whether the Identity Matching Bill contains adequate and effective safeguards for the purposes of international human rights law;**
- **whether, in light of the number, types and sources of facial images and other biometric data that may be collected, accessed, used and disclosed through the Hub and the NDLFRS, these measures are the least rights restrictive approach (including whether having facial images of the vast majority of Australians searchable via the Hub is the least rights restrictive approach and whether there are restrictions as to the sources from which facial images may be collected);**
- **whether the measures are a proportionate limitation on the right to privacy with reference to the potential relevance of international jurisprudence such as that outlined at [1.148] – [1.149];**
- **the extent to which historical facial images will be subject to the Hub, and whether the Identity Matching Bill provides adequate and effective protection against misuse and in respect of vulnerable groups; and**
- **in relation to the Face Identification Service (FIS), whether allowing images of unknown individuals to be searched and matched against government repositories of facial images through the Hub is the least rights restrictive approach to achieve the stated objective.**

Department of Foreign Affairs and Trade participation in identity matching services

1.153 The Australian Passports Amendment (Identity-Matching Services) Bill 2018 (the Passport Amendment Bill) seeks to amend the *Australian Passports Act 2005* (Passports Act) to insert an additional purpose for the use and disclosure of personal information. Specifically, the Passport Amendment Bill would authorise the Department of Foreign Affairs and Trade (DFAT) to participate in a specified service to share and match information relating to the identity of a person.[26] It would also provide that the minister may arrange for the use of computer programs to make decisions or exercise powers under the Passports Act.[27]

26 See proposed subsection 46(d) of the Passports Act.

27 See proposed section 56A of the Passports Act.

Compatibility of the measure with the right to privacy

1.154 Permitting the minister to authorise DFAT to participate in the identity matching services and thereby share and match identity information, engages and limits the right to privacy. According to the statement of compatibility, the types of information to be disclosed and matched include biographic details such as names, dates of birth and gender as well as facial images.[28]

1.155 The statement of compatibility acknowledges that the measure engages and limits human rights but argues that this limitation is permissible.[29] It argues that the measure is 'pursuing the legitimate objective of making fast and secure identity verification available to support a range of identity-check processes'.[30] This would appear to be a description of the process the measure will facilitate rather than why this process pursues a legitimate objective for the purposes of international human rights law. For a limitation on a right to seek to achieve a legitimate objective, it must be demonstrated that the objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right. In this respect, the statement of compatibility goes on to state the services will provide a tool in support of the legitimate objective of 'combatting identity crime and supporting national security, law enforcement and community safety'.[31] As set out above, these are likely to be legitimate objectives for the purposes of international human rights law. It also appears that the measure is rationally connected to these objectives.

1.156 However, as outlined above at [1.140]-[1.150], there are serious questions about the proportionality of the limitation the identity matching services impose on the right to privacy. These concerns apply equally in relation to DFAT sharing and matching personal information through such services.

1.157 Additionally, the measure will authorise the sharing and matching of DFAT's repositories of personal information including passport photographs and biographic information. This means that the photographs and biometric data of a significant proportion of the population including children will be subject to the identity matching services through the Hub. There is a serious question as to whether having databases of, and facilitating access to, facial images of a very significant portion of the population in case they are needed is the least rights restrictive approach to achieving the stated objectives of the measure.

1.158 Beyond stating that there will be policy and administrative safeguards, the statement of compatibility provides limited information as to the nature of any

28 Statement of compatibility (SOC) to the Passport Amendment Bill, p 4.

29 SOC, Passport Amendment Bill, p. 4.

30 SOC, Passport Amendment Bill, p. 5.

31 SOC, Passport Amendment Bill, p. 5.

safeguards that will be in place with respect to DFAT sharing personal information via the identity matching services. Accordingly, it is unclear whether there are adequate and effective safeguards in place to ensure that the limitation on human rights is proportionate or that the measure is sufficiently circumscribed.

Committee comment

1.159 The preceding analysis raises questions as to whether authorising the Department of Foreign Affairs and Trade (DFAT) to participate in the identity matching services and thereby share and match identity information is a proportionate limitation on the right to privacy.

1.160 The committee requests the advice of the Minister for Foreign Affairs as to whether the limitation on the right to privacy by the measures in the Passport Amendment Bill are a reasonable and proportionate measure to achieve the stated objective. This includes information in relation to:

- **whether the *Privacy Act 1988* (Privacy Act) will apply to DFAT's disclosure of photographs and biographical information and, if so, whether it will act as an adequate and effective safeguard for the purposes of international human rights law noting the various exceptions to the collection, use and disclosure of information under the Privacy Act;**
- **whether the Passport Amendment Bill contains adequate and effective safeguards and is sufficiently circumscribed for the purposes of international human rights law;**
- **whether, in light of the number, types and sources of facial images and other biometric data that may be shared and matched, these measures represent the least rights restrictive approach to achieving the stated objectives (including whether having facial images of the vast majority of Australians searchable via the identity matching services is the least rights restrictive approach);**
- **whether the measure is a proportionate limitation on the right to privacy with reference to the potential relevance of international jurisprudence such as that outlined at [1.148]-[1.149];**
- **the extent to which DFAT's historical facial images will be subject to the identity matching services, and whether the Passport Amendment Bill or other Australian laws provide adequate and effective protection against misuse and in respect of vulnerable groups; and**
- **in relation to the Face Identification Service (FIS), whether allowing images of unknown individuals to be searched and matched against DFAT facial images through the Hub is the least rights restrictive approach to achieve the stated objective.**

Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018

Purpose	Amends the *Intelligence Services Act 2001* to establish the Australian Signals Directorate (ASD) as an independent statutory agency within the Defence portfolio reporting directly to the Minister for Defence; amend ASD's functions to include providing material, advice and other assistance to prescribed persons or bodies, and preventing and disrupting cybercrime; and give the Director-General powers to employ persons as employees of ASD. Also makes a range of consequential amendments to other Acts, including to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to provide that the Director-General of ASD may communicate AUSTRAC information to a foreign intelligence agency if satisfied of certain matters
Portfolio	Defence
Introduced	House of representatives, 15 February 2018
Rights	Privacy; life; freedom from torture, cruel, inhuman or degrading treatment or punishment; just and favourable conditions at work (see **Appendix 2**)
Status	Seeking additional information

Communicating AUSTRAC information to foreign intelligence agencies

1.161 Proposed section 133B of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AMLCT Act) provides that the Director-General of the Australian Signals Directorate (ASD) may communicate Australian Transaction Reports and Analysis Centre (AUSTRAC) information[1] to a foreign intelligence agency if satisfied of

1 'AUSTRAC information' is defined in section 5 of the AMLCT ACT as meaning eligible collected information (or a compilation or analysis of such information) and 'eligible collected information' is defined as information obtained by the AUSTRAC CEO under that Act or any other Commonwealth, State or Territory law or information obtained from a government body or certain authorised officers, and includes financial transaction report information as obtained under the *Financial Transaction Reports Act 1988*.

certain matters[2] and may authorise an ASD official to communicate such information on their behalf.

Compatibility of the measure with the right to privacy

1.162 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. As AUSTRAC information may include a range of personal and financial information, the disclosure of this information to foreign intelligence agencies engages and limits the right to privacy.

1.163 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. However, the statement of compatibility for the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018 (the bill) does not acknowledge this limitation on the right to privacy so does not provide an assessment as to whether the limitation is permissible in accordance with the committee's *Guidance Note 1*.

Committee comment

1.164 The preceding analysis raises questions as to whether the measure is compatible with the right to privacy.

1.165 The committee therefore requests the 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 whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards in relation to the operation of the measure).**

Compatibility of the measure with the right to life and the prohibition on torture, cruel, inhuman, degrading treatment or punishment

1.166 Under international human rights law every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation

2 The matters in respect of which the Director-General is to be satisfied are (a) the foreign intelligence agency has given appropriate undertakings for: (i) protecting the confidentiality of the information; and (ii) controlling the use that will be made of it; and (iii) ensuring that the information will be used only for the purpose for which it is communicated to the foreign country; and (b) it is appropriate, in all the circumstances of the case, to do so.

on state parties to protect people from being killed by others or from identified risks. While the International Covenant on Civil and Political Rights (ICCPR) does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another nation state.

1.167 As the United Nations (UN) Human Rights Committee has made clear, this prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UN Human Rights Committee stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.[3]

1.168 The sharing of information internationally with foreign intelligence agencies could accordingly engage the right to life. This issue was not addressed in the statement of compatibility.

1.169 A related issue potentially raised by the measure is the possibility that sharing of information may result in torture, or cruel, inhuman or degrading treatment or punishment. Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.[4] This issue was also not addressed in the statement of compatibility.

Committee comment

1.170 In relation to the right to life, the committee seeks the advice of the minister about the compatibility of the measure with this right (including the existence of relevant safeguards).

1.171 In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, the committee seeks the advice of the minister in relation to the compatibility of the measure with this right (including any relevant safeguards).

Operation outside the Public Service Act

1.172 The bill proposes that ASD will operate outside the *Public Service Act 1999* (PS Act) in relation to the employment of staff. Proposed section 38A of the

3 Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5, 7 May 2009, [20].

4 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 4(2); UN Human Rights Committee, *General Comment 20: Article 7* (1992) UN Doc HRI/GEN/1, [3].

Intelligence Services Act 2001 provides that the Director-General of ASD may employ such employees of ASD as the Director-General thinks necessary and may determine the terms and conditions on which employees are to be employed.[5] Further, the Director-General may, at any time, by written notice, terminate the employment of such a person.[6]

Compatibility of the measure with just and favourable conditions at work

1.173 The right to work and rights in work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[7]

1.174 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of State parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.[8]

1.175 The PS Act contains a range of provisions in relation to the terms and conditions of employment of public servants. By providing that the PS Act does not apply and that the Director-General may engage staff, set their conditions of employment through determinations and terminate their employment, the measure engages and may limit the right to just and favourable conditions at work.

1.176 The statement of compatibility acknowledges that the measure engages this right and argues that it pursues the objective of providing 'ASD with greater flexibility to recruit, retain, develop and remunerate its specialist staff'.[9] While the statement of compatibility points to some information as to why this objective may address a pressing and substantial concern, further information would have been useful. It is unclear, for example, how the PS Act operates as a barrier to the recruitment and retention of appropriate staff. It is also unclear why this could not be addressed

5 Item 29, proposed section 38A.

6 Item 29, proposed section 38A(4).

7 Related provisions relating to such rights for specific groups are also contained in article 5(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child (CRC) and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

8 See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23: on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* (26 April 2016) pp. 3 and 7.

9 Statement of compatibility (SOC) p. 7.

through the negotiation of entitlements through the usual enterprise agreement process.

1.177 Further, there is no specific information provided as to how the measure is rationally connected to (that is, effective to achieve) this stated objective.

1.178 Additionally, there are a number of questions about the proportionality of the measure. In this respect, the measure as proposed does not provide for minimum levels of entitlements or working conditions.

1.179 Currently, Australian Public Service (APS) employees are generally employed under relevant enterprise agreements which set out terms and conditions of employment. In this respect, it is unclear whether current APS employees who become employees of the ASD could be worse off under the measure. While the statement of compatibility points to the availability of some potential safeguards, it is unclear whether they are sufficient given the potential breadth of the Director-General's powers.

Committee comment

1.180 The preceding analysis raises questions as to whether the measure is compatible with the right to just and favourable conditions at work.

1.181 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;**
- **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.**

Legislation (Deferral of Sunsetting—Australian Crime Commission Regulations) Certificate 2017 [F2017L01709]

Purpose	Defers the date of automatic repeal ('sunsetting') of the Australian Crime Commission Regulations 2002 by 12 months, from 1 April 2018 to 1 April 2019
Portfolio	Attorney-General
Authorising legislation	*Legislation Act 2003*
Last day to disallow	Exempt from disallowance[1]
Right[s]	Privacy; liberty; effective remedy; fair trial and fair hearing; prohibition against torture, cruel, inhuman or degrading treatment or punishment (see **Appendix 2**)
Status	Seeking additional information

Background

1.182 The Australian Crime Commission Regulations 2002 (ACC regulations) are scheduled to sunset, that is, be automatically repealed, on 1 April 2018. This certificate defers the sunsetting date for 12 months, to 1 April 2019.[2]

1.183 While the certificate of deferral does not amend the current ACC regulations, the certificate has the effect of continuing their operation for a further 12 months. Accordingly, the committee is obliged to provide an assessment as to the compatibility of the certificate with human rights. This includes an assessment of the potential impact of the extension of the operation of the ACC regulations.

1.184 While the Attorney-General is not required to provide a statement of compatibility for this instrument,[3] where a legislative instrument engages human

1 Under section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the certificate is not required to be accompanied by a statement of compatibility because it is exempt from disallowance. The committee nevertheless scrutinises exempt instruments because section 7 of the same Act requires it to examine all instruments for compatibility with human rights.

2 Under section 50 of the *Legislation Act 2003* (Legislation Act), all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration. Instruments made before 1 January 2005 (when the sunsetting regime was introduced) sunset on a staggered basis, in accordance with the schedule in subsection 50(2). Section 51 of the Legislation Act provides that the Attorney-General may defer the sunsetting of a legislative instrument by up to 12 months, subject to certain conditions.

3 See footnote 1 above.

rights, including by continuing the effect of measures that engage rights, it is good practice for an assessment to be provided as to human rights compatibility.

Conferral of powers under state laws

1.185 Section 55A of the *Australian Crime Commission Act 2002* (ACC Act) provides Commonwealth legislative authority for the conferral by the states[4] of certain duties, functions or powers on the Australian Criminal Intelligence Commission (ACIC),[5] members of its board or staff, or a judge of the Federal Court or Federal Circuit Court. These may include duties, functions or powers of a kind specified in relevant regulations.

1.186 Section 8A and schedules 3, 4 and 5 of the ACC regulations prescribe provisions of state and territory laws for the purpose of section 55A. These include:

- under subsection 8A(1), duties, functions or powers provided in 19 provisions of state and territory Acts and regulations, specified in schedule 4, which may be conferred on the Commission; and
- under subsection 8A(2), duties, functions or powers provided in 305 provisions of state and territory Acts and regulations, specified in schedule 3, which may be conferred on the Commission's CEO, a member of its staff, the Chair or a member of its Board.

1.187 In each instance, the relevant duties, powers or functions may be conferred on the ACIC, members of its board or staff or federal judges for the purposes of, or in relation to, the investigation of a matter or the undertaking of an intelligence operation relating to a relevant criminal activity,[6] in so far as the relevant crime is, or includes, an offence or offences against a state law, whether or not that offence or those offences have a federal aspect.

Compatibility of the measure with multiple human rights

1.188 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. This includes informational privacy, the right to personal authority and physical and psychological integrity, and

4 'State' is defined in section 4 of the ACC Act to include the Australian Capital Territory and the Northern Territory.

5 In 2016 the Australian Crime Commission and CrimTrac were merged to form the Australian Criminal Intelligence Commission (ACIC). Pursuant to subsection 7(1A) of the ACC Act and section 3A of the Regulations, the ACIC is the body which now exercises the powers and functions of the ACC under the ACC Act and Regulations.

6 Under section 4 of the ACC Act, 'relevant criminal activity' is defined as 'any circumstances implying, or any allegations, that a relevant crime may have been, may be being, or may in future be, committed against a law of the Commonwealth, of a State or of a Territory'. 'Relevant crime' means serious and organised crime, or indigenous violence or child abuse.

prohibitions on unlawful and arbitrary state surveillance or interference with a person's home or workplace.

1.189 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty.

1.190 The right to a fair trial and a fair hearing encompasses notions of the fair administration of justice and prohibits investigatory techniques that incite individuals to commit a criminal offence.[7]

1.191 Australia is also required to ensure that those whose human rights are violated have access to an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

1.192 It appears that some of the provisions set out in schedules 3 and 4 to the Regulations, allowing the conferral of powers under state laws on the Commission, its board or staff, engage the right to privacy, the right to liberty, the right to a fair trial and a fair hearing, or the right to an effective remedy, and may engage other human rights. These include provisions relating to criminal intelligence operations, use of assumed identities by law enforcement personnel, use of surveillance devices, witness protection, and spent convictions.

1.193 For example, schedule 3 allows the conferral of powers on the CEO or staff of the ACIC under a number of provisions of the New South Wales *Law Enforcement (Controlled Operations) Act 1997* (NSW Act). This includes the power under section 13 of the NSW Act to engage in 'controlled activities' when part of an authorised 'controlled operation',[8] which may be conferred on any member of staff of the ACIC. Controlled activities are activities which, but for section 16 of the NSW Act, would be unlawful. Section 16 provides that any activity engaged in by a participant in an authorised operation, and in accordance with the authority for the operation, is not unlawful and does not constitute an offence or corrupt conduct despite any other Act or law.

1.194 As such, where that power is conferred, it would allow any member of the ACIC's staff, given the authority, to commit an otherwise unlawful act. Schedule 3 also permits the conferral on the CEO of the ACIC of the power, under subsection

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7 See, *Ramanauskas v Lithuania*, European Court of Human Rights (ECHR) Application No. 74420/01, 5 February 2008, [55]. The ECHR has consistently held that entrapment violates article 6 of the European Convention on Human Rights, which is equivalent to article 14 of the ICCPR.

8 Section 4 of the NSW Act defines a 'controlled operation' as an operation conducted for the purpose of obtaining evidence of criminal activity or corrupt conduct, arresting any person involved in criminal activity or corrupt conduct, frustrating criminal activity or corrupt conduct, or carrying out an activity reasonably necessary to facilitate one of the above purposes; and involving a controlled activity.

14(1) of the NSW Act, to grant (or refuse) retrospective authority for controlled activities.

1.195 While there appear to be some safeguards in relation to the controlled operations,[9] by allowing a broad range of activities that would otherwise be unlawful, these provisions could have a significant impact on various rights, including (but not restricted to) the right to liberty, the right to a fair trial and a fair hearing, the right to privacy and the right not to be subject to torture, cruel, inhuman or degrading treatment or punishment. The provisions may also prevent a person from seeking an effective remedy where his or her rights have been violated, insofar as a participant in a controlled operation is granted protection from criminal liability.

1.196 Another example is the prescription of powers under South Australia's *Listening and Surveillance Devices Act 1972* (SA Act).[10] Schedule 3 of the ACC regulations enables the conferral of powers on a staff or board member of the ACIC under section 7 of the SA Act to use listening devices to overhear, record, monitor or listen to private conversations without the consent of the parties, and in certain circumstances to disclose the information derived from their use. Powers are also able to be conferred under section 9 of the SA Act including, in subsection 9(2), powers to break into, enter and search any premises; stop, detain and search a vehicle; and detain and search any person; where an officer suspects on reasonable grounds that an unauthorised listening device is being held. Use of these powers would engage and limit the right to privacy of individuals subject to searches or surveillance, including respect for the privacy of a person's home, workplace and correspondence. The provision for the detention of persons also engages and limits the right to liberty.

1.197 It is noted that some of the powers prescribed in schedule 3 of the ACC regulations appear to be accompanied by certain duties which may act as safeguards on the use and scope of the power. However, there is no obligation in the ACC regulations requiring that where powers are conferred, the corresponding duties must be conferred along with them. It is unclear whether very broad powers could be conferred on the ACIC or its staff, without the safeguards contained in the original state or territory legislation.

1.198 In schedule 4, several powers are prescribed relating to the receipt or disclosure of information, which may include personal information. These include

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9 Section 7 of the NSW Act provides that controlled operations must not be authorised where they would involve inducing or encouraging a person to engage in criminal activity or corrupt conduct that they would not otherwise be expected to engage in; engaging in conduct likely to seriously endanger the health or safety of any person or result in serious loss or damage to property; or the commission of a sexual offence.

10 Schedule 3 also prescribes powers relating to surveillance devices under the *Surveillance Devices Act 1999* (Victoria), *Surveillance Devices Act 1998* (Western Australia) and *Surveillance Devices Act [2007]* (Northern Territory).

powers to receive information under subsection 11(1) of the First Home Owner Grants Regulation 2000 (WA), subsection 37(d) of the *Gambling and Racing Control Act 1999* (ACT), and subsection 97(d) of the *Taxation Administration Act 1999* (ACT); and the power to disclose information about spent convictions under subsection 17(3) of the *Spent Convictions Act 2000* (ACT). Once again, these powers engage and limit the right to informational privacy.

1.199 Limitations on human rights may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

1.200 However, no information is provided in the explanatory statement to the certificate about the human rights engaged by (the continued operation of) subsections 8A(1) and (2) and schedules 3 and 4 of the ACC regulations. As stated above, while a statement of compatibility is not required for this instrument, where a legislative instrument engages human rights, including by continuing the effect of measures that appear to engage rights, it is good practice for an assessment to be provided as to their human rights compatibility. In the absence of further information, it is not possible to conclude that the instrument is compatible with human rights.

Committee comment

1.201 The measure appears to engage and limit a range of human rights. The preceding analysis raises questions as to whether the measure is compatible with human rights.

1.202 The committee therefore seeks the advice of the Attorney-General as to:

- **the human rights engaged by subsections 8A(1) and (2) and schedules 3 and 4 of the ACC regulations;**
- **where these measures engage and limit human rights:**
  - **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
  - **how the measures are effective to achieve (that is, rationally connected to) a legitimate objective; and**
  - **whether the limitations are reasonable and proportionate to achieve that objective; and**
- **whether it would be feasible to amend the ACC regulations, when remade, to require that any state powers conferred on the ACIC or its personnel which limit human rights will only be exercisable where accompanied by the conferral of the corresponding duties and safeguards in the relevant state law.**

Collection and use of 'national policing information'

1.203 Subsection 4(1) of the ACC Act defines 'national policing information' as information that is collected by the Australian Federal Police, a state police force, or a body prescribed by the regulations, and is of a kind prescribed by the regulations.

1.204 Section 2A of the ACC regulations prescribes eight bodies (listed in schedule 1A) that collect 'national policing information', and prescribes the kind of national policing information collected as information held under, or relating to the administration of, 24 specified databases or electronic systems.

1.205 Section 9A of the ACC regulations prescribes six organisations to which national policing information may be disclosed by the CEO of the ACIC, without requiring the approval of the board, in addition to those specified in the ACC Act.[11]

Compatibility of the measure with the right to privacy

1.206 As set out above, 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.

1.207 As national policing information is likely to include private, confidential and personal information, its collection, use and disclosure by the ACIC engages and limits the right to privacy.

1.208 The committee previously examined the human rights implications of this measure in relation to the right to privacy in its *Report 7 of 2016* and *Report 8 of 2016*.[12] The committee sought advice as to whether the limitation was a reasonable and proportionate measure for the achievement of its stated objective, and in particular, whether there were sufficient safeguards in place to protect the right to privacy, noting in particular that the ACIC is not subject to the *Privacy Act 1988* (Privacy Act).

1.209 In response, the then Minister for Justice agreed that the collection and disclosure of national policing information engages and limits the right to privacy, but stated that the limitation was reasonable and proportionate to achieving the

11 Section 59AA of the ACC Act provides for the disclosure of information in the ACIC's possession by its CEO. Subsection 59AA(1B) provides that where that information is national policing information, the CEO must obtain the approval of the board before disclosing it, except to specified bodies, including bodies prescribed by the regulations.

12 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 30-32; *Report 8 of 2016* (9 November 2016) pp. 72-74. The Australian Crime Commission Amendment (National Policing Information) Regulation 2016 [F2016L00712], and the Australian Crime Commission Amendment (National Policing Information) Regulation 2016 which were examined in those reports introduced the provisions relating to national policing information into the ACC regulations.

objective of enabling the ACIC to fulfil its functions. The minister advised that the ACC Act provided sufficient safeguards to protect the right to privacy, and that the ACIC also had technical and administrative mechanisms in place to ensure that national policing information is collected, used and stored securely.

1.210 The minister noted that while the ACIC is not subject to the Privacy Act, the ACIC is experienced in the appropriate handling of sensitive information, and has safeguards and accessibility mechanisms specifically designed for the sensitive nature of its operations. The minister advised that the ACIC was in the process of preparing an information handling protocol addressing the way it would treat personal information.

1.211 On this basis, the previous human rights analysis in the committee's report stated that the legislative and administrative safeguards outlined in the minister's response were likely to improve the proportionality of the limitation on the right to privacy resulting from the collection, use and disclosure of national policing information, and may ensure that the measure would only impose proportionate limitations on this right. Nonetheless, the committee considered it difficult to reach a conclusion that the measure was compatible with human rights without the detail of the information handling protocol being available. The committee requested that a copy of the information handling protocol be provided to the committee once it was finalised.

1.212 However, the committee has not to date received a copy of that document, and it does not appear to be publicly available. No information is provided in the explanatory statement to this certificate of deferral about the engagement of the right to privacy by the (continued operation of) this measure.

Committee comment

1.213 The measure engages and limits the right to privacy. The committee previously concluded, based on information provided by the then Minister for Justice, that there appear to be relevant safeguards in place that may assist to ensure that it is a proportionate limit on the right to privacy.

1.214 The committee requests an update from the Attorney-General regarding the preparation of an information handling protocol by the ACIC, and reiterates its request that a copy of this document be provided to the committee.

Disclosure of 'ACC information'

1.215 Sections 9 and 10 and schedules 6 and 7 of the ACC regulations prescribe 5 international organisations, 98 Australian bodies corporate and 38 classes of body corporate to whom ACC information (defined by section 4 of the Act as information that is in the ACIC's possession) may be disclosed, in accordance with sections 59AA and 59AB of the Act.

Compatibility of the measure with the right to privacy

1.216 As noted above, the right to privacy includes respect for informational privacy. As ACC information is likely to include private, confidential and personal information, its disclosure by the ACIC engages and limits the right to privacy.

1.217 Limitations on the right to privacy may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

1.218 However, no information is provided in the explanatory statement to the certificate of deferral about the engagement of the right to privacy by the (continued operation of) this measure. As stated above, while a statement of compatibility is not required for this instrument, where a legislative instrument engages human rights, including by continuing the effect of measures that appear to engage rights, it is good practice for an assessment to be provided as to their human rights compatibility. In the absence of further information, it is not possible to conclude that the limitations on the right to privacy are justifiable.

Committee comment

1.219 The measure engages and limits the right to privacy. The preceding analysis raises questions as to whether the measure is compatible with that right.

1.220 The committee requests the Attorney-General's advice as to:

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

Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708]

Purpose	Prescribes tertiary courses that must be completed, and exams that must be passed, in order to register as a migration agent. Prescribes the English language tests that certain persons must take in order to register as a migration agent, and the minimum scores that a person must achieve
Portfolio	Home Affairs
Authorising legislation	Migration Agents Regulations 1998
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives on 5 February 2018)
Right	Equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Requirement for certain persons to complete additional English language exams to register as a migration agent

1.221 Relevantly, section 7(2) of the Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708] (the instrument) introduces new language proficiency exams for persons seeking to register as a migration agent unless specified residency and study requirements are met. Persons are exempt from language proficiency exams if they have successfully met specified requirements in Australia, New Zealand, the United Kingdom, the Republic of Ireland, the United States of America, the Republic of South Africa or Canada as follows:

- secondary school studies to the equivalent of Australian Year 12 level with minimum 4 years secondary school or equivalent study, and have successfully completed a Bachelor degree or higher; or
- they have successfully completed the equivalent of secondary school studies to at least Australian Year 10 with at least 10 years of primary or secondary schooling, or their secondary school studies and degree; and
- while completing their primary or secondary schooling, or their secondary school studies and degree, they were resident in one of those countries.

1.222 If these requirements are not met, then section 8 of the instrument provides that persons who are required to complete the English-language proficiency test must achieve:

- in the International English Language Testing System (IELTS), an overall score of at least 7, with a minimum score of 6.5 in each component of the test (speaking, listening, reading and writing); or
- in the Test of English as a Foreign Language internet-based test (TOEFL iBT), an overall score of at least 94, with minimum scores of 20 in speaking and listening, 19 in reading, and 24 in writing.

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

1.223 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 are entitled without discrimination to the equal and non-discriminatory protection of the law.

1.224 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[1] The UN Human Rights Committee has described indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute (for example, national origin or language).[2]

1.225 Requiring certain persons to complete an English language proficiency test to be eligible for registration as a migration agent engages the right to equality and non-discrimination on the basis of language competency or 'other status'. It may also indirectly discriminate on the basis of national origin as it may disproportionately impact individuals from countries where English is not a national language or widely spoken.

1.226 Further, by providing that persons who completed their education and were resident in specified countries are not required to undertake a language proficiency test, the measure may also further indirectly discriminate on the basis of national origin. This is because it will have a disproportionate negative effect on individuals from countries that are not excused from the English language proficiency test requirement. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[3]

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1 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.

2 See, e.g., *Althammer v Austria*, Human Rights Committee, 8 August 2003, [10.2].

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

1.227 The statement of compatibility states that the instrument does not engage any of the applicable rights or freedoms,[4] and so does not provide an assessment of whether the right to equality and non-discrimination is engaged by the measure.

1.228 Under international human rights law, 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.[5]

1.229 The statement of compatibility states that the objective of the instrument is to 'strengthen the educational qualifications of migration agents…to ensure that their clients receive high standards of service'.[6] These are likely to be legitimate objectives for the purposes of human rights law, particularly given the complexities of the Australian migration system and the potentially serious effect that poor advice can have on individuals.[7]

1.230 Notwithstanding the legitimate objectives of the measure, it is unclear whether the measure is effective to achieve (that is, rationally connected to) and proportionate to that objective. In this respect, it is acknowledged that a level of proficiency in English may be needed to practise effectively as a migration agent in Australia. Requiring a person either to complete all or part of their education in English, or to complete an English-language proficiency test, may therefore be an effective means of ensuring the necessary level of proficiency.

1.231 However, it is noted that the IELTS and the TOEFL iBT may exceed those requirements necessary to enter tertiary study.[8] It is unclear from the information provided that merely completing 10 years of primary and secondary education, to the equivalent of Australian Year 10 level, would ensure a person possesses a level of English proficiency equivalent to that of a person who achieves the required IELTS or TOEFL iBT scores. Consequently, it appears possible that persons who are not educated in Australia, or in another prescribed country, may be required to meet a potentially higher standard of English language proficiency than their Australian (or prescribed country) counterparts in order to be eligible for registration as a migration

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4 Statement of compatibility (SOC), p. 8.

5 *Althammer v Austria* HRC 998/01, [10.2].

6 SOC, p. 8.

7 C N Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority: Final Report* (September 2014), p. 142.

8 See, for example, Flinders University, English language requirements, http://www.flinders.edu.au/international-students/study-at-flinders/entry--and-english-requirements/english-language-requirements.cfm; Australian National University, English language admission requirements for students, https://policies.anu.edu.au/ppl/document/ANUP_000408.

agent. This raises concerns as to whether the differential requirements would be effective to achieve the stated objectives, and whether the differential requirements are based on reasonable and objective criteria.

1.232 Similarly, it is unclear from the information provided that the exemption for a person who completed their school education at an institution in one of the prescribed countries where they were resident is rationally connected to the stated objective. This is because it is unclear that this would necessarily ensure the person's proficiency in English at the required level.

1.233 In relation to the proportionality of the measure, the statement of compatibility states:

> Strengthening educational requirements for the migration agent industry does not exclude applicants from the profession, provided they meet the applicable standards, which are reasonable and transparent.[9]

1.234 However, there are questions as to whether the application of these standards is sufficiently circumscribed with respect to the stated objective of the measure. For example, the instrument would require a person to complete an English proficiency test irrespective of whether their education was primarily in English, if the person did not complete their education in a prescribed country. For example, English may be the primary language used in an institution (for example, an international school) in a country that is not a prescribed country. Further, a number of universities consider that secondary and tertiary studies completed in English from countries that are not listed in the instrument satisfy the English proficiency requirements necessary for entry into the migration law program.[10] This raises questions as to whether requiring a person who was educated primarily in English to also sit a proficiency test is the least rights-restrictive means of achieving the stated objectives of the measure.

Committee comment

1.235 The preceding analysis raises questions as to whether the measure is compatible with the right to equality and non-discrimination. Accordingly, the committee requests the advice of the minister as to:

- **how the measures are effective to achieve (that is, rationally connected to) the stated objectives; and**
- **whether the measures are reasonable and proportionate to achieving the stated objectives of the instrument (including how the measures are based on reasonable and objective criteria, whether the measures are the least**

9 SOC, p. 8.

10 See, for example, Australian National University, English language admission requirements for students, https://policies.anu.edu.au/ppl/document/ANUP_000408.

rights-restrictive way of achieving the stated objective and the existence of any safeguards).

Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018

Purpose	Amends the *Social Security Act 1991* to increase the newly arrived resident's waiting period from 104 weeks to 156 weeks for certain social security payments and concession cards; introduce a newly arrived resident's waiting period of 156 weeks for bereavement allowance, widow allowance, parenting payment and carer allowance; and make a technical amendment; amends the *Farm Household Support Act 2014* to increase the newly arrived resident's waiting period from 104 weeks to 156 weeks; amends the *A New Tax System (Family Assistance) Act 1999* and *Social Security Act 1991* to introduce a newly arrived resident's waiting period of 156 weeks for family tax benefit; and amends the *Paid Parental Leave Act 2010* to introduce a newly arrived resident's waiting period of 156 weeks for parental leave pay and dad and partner pay
Portfolio	Social Services
Introduced	House of representatives, 15 February 2018
Rights	Social security; adequate standard of living; women's rights (see **Appendix 2**)
Status	Seeking additional information

Background

1.236 The committee has considered the human rights implications of a waiting period for classes of newly arrived residents to access social security payments on a number of occasions.[1]

Newly arrived resident's waiting period for social security payments

1.237 The Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 (the bill) would increase the waiting period for newly arrived residents to access a range of social security payments including bereavement allowance, widow allowance, parenting payment, carer allowance, farm household allowance, family tax benefit, parental leave pay and dad and partner pay from 104 weeks (2 years) to 156 weeks (3 years).[2] It will also extend the

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 2-11; *Report 8 of 2016* (9 November 2016) pp. 57-61; *Report 2 of 2017* (21 March 2017) pp. 41-43; *Report 4 of 2017* (9 May 2017) pp. 149-154.

2 Explanatory memorandum (EM), p. 1.

waiting period to access the low income Health Care Card (HCC) and Commonwealth Seniors Card from 104 weeks (2 years) to 156 weeks (3 years).

Compatibility of the measure with the right to social security, the right to an adequate standard of living and the right to health

1.238 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, particularly the right to an adequate standard of living and the right to health.[3] The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for *all* people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[4]

1.239 Australia has obligations to progressively realise these rights and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps.[5] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

1.240 Extending the waiting period to three years (from the current two years) further restricts access to social security (including health care cards) for newly arrived residents. Accordingly, the measure constitutes a retrogressive measure, a type of limitation, in the realisation of the right to social security, the right to an adequate standard of living and the right to health.

1.241 The statement of compatibility acknowledges that the measure engages the right to social security and states that:

> Given the current fiscal environment…three years is a reasonable period to expect new permanent migrants to support themselves and their families when they first settle in Australia. This will reduce the burden placed on Australia's welfare payments system and improve its long-term sustainability.[6]

1.242 In general terms, budgetary constraints and financial sustainability have been recognised as a legitimate objective for the purpose of justifying reductions in government support that impact on the progressive realisation of economic, social

3 See, International Covenant on Economic, Social and Cultural Rights (ICESCR) article 9; United Nations Committee on Economic, Social and Cultural Rights, General Comment 19: the right to social security, E/C.12/GC/19 (4 February 2008).

4 See, ICESCR, article 11.

5 See, ICESCR, article 2.

6 Statement of compatibility (SOC), p. 29.

and cultural rights. However, the United Nations Committee on Economic, Social and Cultural Rights has explained that any retrogressive measures:

> …require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant [ICESCR] and in the context of the full use of the maximum available resources.[7]

1.243 In this respect, limited information has been provided in the statement of compatibility to support the characterisation of financial sustainability or budgetary constraints as a pressing or substantial concern in these specific circumstances. If this were a legitimate objective for the purposes of international human rights law, reducing government spending through this measure may be capable of being rationally connected to this stated objective.

1.244 In relation to the proportionality of the limitation, the statement of compatibility explains that there will be a range of exemptions from the waiting period. These include exemptions for humanitarian migrants, New Zealand citizens on a Special Category visa, and holders of certain temporary visas, including temporary protection visas and Safe Haven Enterprise Visas, to be able to immediately access family tax benefit payments, parental leave pay and dad and partner pay.[8] It is relevant to the proportionality of the limitation that certain classes of visa holders will be able to access a number of social security payments.

1.245 The statement of compatibility explains that there will also be a provision for migrants who become lone parents after becoming an Australian resident, to access social security payments:

> Migrants who become a lone parent after becoming an Australian resident will continue to be exempt from the waiting period for parenting payment, newstart allowance and youth allowance. Those who receive an exemption from the waiting period for one of these payments will also be exempt from the waiting period for FTB [family tax benefit]. Those who subsequently have a new child will also be able to transfer to PLP [parental leave pay] or DaPP [dad and partner pay] if they are otherwise qualified. This ensures that parents who lose the support – financial and otherwise – of a partner have access to support for themselves and their children.[9]

1.246 The statement of compatibility further explains that the availability of Special Benefit social security payments are an additional safeguard in relation to the measure:

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7 UN Committee on Economic, Social and Cultural Rights, General Comment 3: the nature of state party obligations, E/1991/23 (14 December 1990) [9].

8 SOC, p. 30.

9 SOC, p. 30.

> …migrants who experience a substantial change in circumstances after the start of their waiting period, and are in financial hardship, will continue to be exempt from the waiting period for special benefit. Special benefit is a payment of last resort that provides a safety net for people in hardship who are not otherwise eligible for other payments. Those who receive this exemption and have dependent children will also be exempt from the waiting period for FTB. Consistent with established policy (contained in the Guide to Social Security Law) this may include migrants:
>
> - who are the victim of domestic or family violence;
> - who experience a prolonged injury or illness and are unable to work, or whose partner or sponsor does;
> - whose dependent child develops a severe medical condition, disability or injury; or
> - whose sponsor or partner dies, becomes a missing person or is imprisoned leaving the migrant with no other means of support.
>
> These exemptions ensure that there continues to be a safety net available for potentially vulnerable individuals and families who are unable to support themselves despite their best plans.

1.247 The Special Benefit appears to provide an important safeguard such that these individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of financial hardship. This is of considerable importance in relation to the proportionality of the limitation.

1.248 However, increasing the waiting period to access social security for newly arrived residents generally from two years to three years is still a considerable reduction in the availability of social security. In this respect, it would be useful for further information to be provided about any consideration of alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources.

Committee comment

1.249 The preceding analysis raises questions as to the compatibility of the measure with the right to social security and the right to an adequate standard of living.

1.250 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 in the specific circumstances of the proposed legislation;**
- **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 its stated objective (including the extent of the reduction in access**

to social security payments; what level of support Special Benefit payments provide; and whether the measure is the least rights restrictive approach); and

- **whether alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources, have been fully considered.**

Compatibility of the measure with the right to maternity leave

1.251 The right to maternity leave is protected by article 10(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[10] and includes an entitlement for parental leave with pay or comparable social security benefits for a reasonable period before and after childbirth.

1.252 The UN Committee on Economic, Social and Cultural Rights has further explained that the obligations of state parties to the ICESCR in relation to the right to maternity leave include the obligation to guarantee 'adequate maternity leave for women, paternity leave for men, and parental leave for both men and women'.[11] By extending the waiting period for access to parental leave pay and dad and partner pay, the measure engages and limits this right.

1.253 In restricting the paid maternity leave support available to newly arrived migrants for a further year (bringing the total waiting period to three years), the measure is a retrogressive measure, a type of limitation, for the purposes of international human rights law.

1.254 As noted above, limitations on human rights may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

1.255 The statement of compatibility acknowledges that the measure engages the right to paid maternity leave but appears to argue that this limitation is permissible.

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10 The Australian government on ratification of CEDAW in 1983 made a statement and reservation that: 'The Government of Australia advises that it is not at present in a position to take the measures required by Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits throughout Australia.' This statement and reservation has not been withdrawn. However, after the Commonwealth introduced the Paid Parental Leave scheme in 2011, the Australian Government committed to establishing a systematic process for the regular review of Australia's reservations to international human rights treaties: See, Attorney-General's Department, Right to Maternity Leave https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttomaternityleave.aspx.

11 UN Committee on Economic, Social and Cultural Rights, *General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005). See also, article 3 of ICESCR.

However, limited information or reasoning has been provided as to whether the objectives of ensuring financial sustainability or budgetary constraints address a pressing or substantial concern in these specific circumstances. As noted above, reducing government spending through this measure would appear to be rationally connected to this stated objective.

1.256 In relation to the proportionality of the limitation, the statement of compatibility states:

> While it is acknowledged that the upbringing of children requires a sharing of responsibility between men and women and society as a whole, it is reasonable to expect that migrants who make the decision to have a child during their initial settlement period should also allow for the costs of supporting themselves and their children during the waiting period.
>
> The Australian welfare system is targeted so that those who most need help receive it. In order to sustain this, those who can support their children are expected to do so.[12]

1.257 However, this does not fully take into account that the timing of having children and a consequential need for paid maternity leave may not necessarily be something that is fully in the hands of potential parents. Noting that the measure applies to a range of visas, it also does not explain why newly arrived residents would necessarily be in a better position to adequately support the costs of having children than other individuals.

1.258 The statement of compatibility further explains in relation to the proportionality of the measure that there is a transitional period so that migrants who may have a baby born between 1 July 2018 and 1 January 2019 will still be able to access paid parental leave. While having a transitional period may be an important safeguard ensuring expectant parents who had planned care arrangements around the existing parental leave provisions would not be affected by the changes, it does not address broader concerns.

1.259 It is noted that increasing the waiting period to access paid parental leave from two years to three years is a considerable reduction in the availability of parental leave pay and dad and partner pay. It may have particularly significant consequences for those who have no access to other paid parental leave arrangements through their employer. In this respect, it would be useful for further information to be provided about any consideration of alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources.

12 SOC, p. 31.

Committee comment

1.260 The preceding analysis raises questions as to the compatibility of the measure with the right to paid parental leave.

1.261 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 in the specific circumstances of the proposed legislation;**
- **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 its stated objective (including the extent of the reduction in access to parental leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and**
- **whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.**

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

1.262 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. In addition to these general non-discrimination provisions, articles 1, 2, 3, 4 and 15 of the CEDAW further describe the content of these obligations, including the specific elements that state parties are required to take into account to ensure the rights to equality for women.[13]

1.263 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[14] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[15] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without

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13 Article 1 of CEDAW defines 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

14 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: ICCPR articles 2 and 26; ICESCR article 2(2); UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (10 November1989) [1]. 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.

15 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989) [7].

intent to discriminate', which exclusively or disproportionately affects people with a particular protected attribute.[16]

1.264 As women are the primary recipients of paid parental leave, increasing the waiting period for access may have a disproportionate negative effect on women who are newly arrived residents. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[17] Differential treatment (including the differential effect of a measure that is neutral on its face)[18] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

1.265 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged. It states that the measure pursues the objective of 'ensuring newly arrived migrants meet their own living costs…in order to keep the system sustainable into the future'.[19] As noted above, limited information or reasoning has been provided as to whether the objectives of ensuring financial sustainability or budgetary constraints address a pressing or substantial concern in these specific circumstances. Further, while the statement of compatibility points to the existence of particular exemptions which may operate as safeguards, no information is provided as to whether the measure is the least rights restrictive approach.

Committee comment

1.266 The preceding analysis raises questions as to the compatibility of the measure with the right to equality and non-discrimination.

1.267 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 in the specific circumstances of the proposed legislation;**
- **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 its stated objective (including whether it is based on reasonable and objective criteria; the extent of the reduction in access to parental**

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

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

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

19 SOC, p. 36.

leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and

- **whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.**

Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018

Purpose	Introduces offences prohibiting the production, distribution and possession of sales suppression tools in relation to entities that have Australian tax obligations. Also requires entities providing courier or cleaning services that have an ABN to report to the Australian Taxation Office information about transactions that involve engaging other entities to undertake those courier or cleaning services for them
Portfolio	Treasury
Introduced	House of Representatives, 7 February 2018
Rights	Presumption of innocence, privacy (see **Appendix 2**)
Status	Seeking additional information

Strict liability offences relating to the production, distribution and possession of sales suppression tools

1.268 Schedule 1 of the Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018 (the bill) seeks to introduce offence provisions relating to the production or supply of electronic sales suppression tools[1] and the acquisition, possession or control of such tools where the person is required to keep or make records under an Australian taxation law.[2] A person will also commit an offence where they have incorrectly kept records using electronic sales suppression tools.[3] Each of these offences are offences of strict liability.[4]

1 'Electronic sales suppression tools' are defined in proposed section 8WAB of the bill to mean a device, software, program or other thing, a part of any such thing, or a combination of any such things or parts, that meets the following conditions: (a) it is capable of falsifying, manipulating, hiding, obfuscating, destroying, or preventing the creation of, a record that: (i) an entity is required by a taxation law to keep or make; and (ii) is, or would be, created by a system that is or includes an electronic point of sale system; (b) a reasonable person would conclude that one of its principal functions is to falsify, manipulate, hide, obfuscate, destroy, or prevent the creation of, such records.

2 See sections 8WAC and 8WAD of the bill.

3 Section 8WAE of the bill.

4 See sections 8WAE(4), 8WAD(3), 8WAE(2) of the bill.

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

1.269 The right to the presumption of innocence requires that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

1.270 Strict liability offences limit the right to be presumed innocent until proven guilty because they allow for the imposition of criminal liability without the need to prove fault. The bill therefore engages and limits the right to the presumption of innocence by imposing strict liability offences.

1.271 Strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence.

1.272 The statement of compatibility for the bill states that the bill does not engage 'any of the applicable rights or freedoms',[5] but does state that 'applying strict liability to these offences covered by these amendments is appropriate because it substantially improves the effectiveness of the prohibition on electronic sales suppression tools'.[6]

1.273 Where legislation provides for a strict liability offence, the committee's usual expectation is that the statement of compatibility provides an assessment of whether such limitations on the presumption of innocence are proposed in pursuit of a legitimate objective, are rationally connected to this objective, and are a reasonable, necessary and proportionate means to achieving that objective. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create strict liability offences. Further information from the minister in this regard will assist the committee to conclude whether the measure permissibly limits the right to be presumed innocent.

Committee comment

1.274 The committee notes that its *Guidance Note 2* sets out information specific to strict liability offences.

1.275 The committee seeks the advice of the Treasurer as to:

- **whether the strict liability offences are aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how this measure is effective to achieve (that is, rationally connected to) that objective; and**

5 Statement of Compatibility (SOC), [1.109].

6 SOC, [1.104].

- **whether the limitation on the right to be presumed innocent is proportionate to achieve the stated objective.**

Various Instruments made under the Autonomous Sanctions Act 2011[1]

Purpose	Amends the Autonomous Sanctions Regulations 2011
Portfolio	Foreign Affairs
Authorising legislation	*Autonomous Sanctions Act 2011*
Last day to disallow	[F2018L00049]: 15 sitting days after tabling (tabled Senate 5 February 2018, notice of motion to disallow must be given by 8 May 2018) [F2017L01063] and [F2017L01080]: 15 sitting days after tabling (tabled Senate 4 September 2017) [F2017L01592]: 15 sitting days after tabling (tabled Senate 8 February 2018, notice of motion to disallow must be given by 8 May 2018) [F2018L00102] and [F2018L00108]: 15 sitting days after tabling (tabled Senate 15 February 2018, notice of motion to disallow must be given by 25 June 2018) [F2018L00099], [F2018L00101] and [F2018L00100]: 15 sitting days after tabling (tabled Senate 14 February 2018, notice of motion to disallow must be given by 21 June 2018)
Rights	Multiple rights (see **Appendix 2**)
Status	Seeking additional information

1 Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No. 2) [F2017L01063]; Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No.3) [F2017L01592]; 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) Continuing Effect Declaration 2018 [F2018L00049]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Continuing Effect Declaration 2018 [F2018L00108]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Continuing Effect Declaration 2018 [F2018L00102]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Libya) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00101]; Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00099]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00100].

Background

1.276 This report considers a number of new instruments under the *Autonomous Sanctions Act 2011* (the Act).[2] This Act, in conjunction with the Autonomous Sanctions Regulations 2011 (the 2011 regulations) and various instruments made under those 2011 regulations, provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime).

1.277 Initial human rights analysis of various autonomous sanctions instruments was undertaken in 2013, and further detailed analysis (of autonomous sanctions and of the UN Charter sanctions regime) was made in 2015 and 2016.[3] This analysis stated that, as the instruments under consideration expanded or applied the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime, or by amending the regime itself, it was necessary to assess the human rights compatibility of the autonomous sanctions regime and aspects of the UN Charter sanctions regime as a whole when considering these instruments. A further response was therefore sought from the minister, which was considered in the committee's *Report 9 of 2016*.[4] The committee concluded its examination of various instruments and made a number of recommendations to assist the compatibility of the sanctions regime with human rights.[5]

'Freezing' of designated person's assets and prohibitions on travel

1.278 Each of the new instruments designates and declares persons for the purpose of the 2011 regulations. Persons are designated and declared where the Minister for Foreign Affairs is satisfied that doing so will facilitate the conduct of Australia's relations with other countries or with entities or persons outside of Australia, or will otherwise deal with matters, things or relationships outside Australia.[6] The 2011 regulations set out the countries and activities for which a person or entity can be designated or declared.[7] For example, the Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No. 2) [F2017L01063] designates and declares certain persons

2 See footnote 1.

3 See, Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) pp. 135-137; and *Tenth report of 2013* (26 June 2013) pp. 13-19; *Twenty-eighth report of the 44th Parliament* (17 September 2015) pp. 15-38; and *Thirty-third report of the 44th Parliament* (2 February 2016) pp. 17-25.

4 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 41-55.

5 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 53; see also *Report 10 of 2017* (12 September 2017) pp. 27-31.

6 Section 10(2) of the Autonomous Sanctions Act 2011.

7 Section 6 of the Autonomous Sanctions Regulations 2011.

or entities for the purposes of the 2011 regulations on the basis that the Minister for Foreign Affairs is satisfied that the person or entity is assisting in the violation or evasion by the Democratic People's Republic of Korea (DPRK) of specified United Nations (UN) Security Council Resolutions.

1.279 The effect of the designations and declarations in each of the instruments is that the listed persons:

- are subject to financial sanctions such that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a designated person.[8] A person's assets are therefore effectively 'frozen' as a result of being designated; and
- are subject to a travel ban to prevent the persons travelling to, entering or remaining in Australia.

1.280 The autonomous sanctions regime provides that the minister may grant a permit authorising the making available of certain assets to a designated person.[9] An application for a permit can only be made for basic expenses, to satisfy a legal judgment or where a payment is contractually required.[10] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[11]

Compatibility of the designations and declarations with multiple human rights

1.281 The statement of compatibility for each of the instruments states that the instruments are compatible with human rights and freedoms. However, the statements of compatibility provide only a broad description of the operation and effect of each instrument, and none provide any substantive analysis of the rights and freedoms that are engaged and limited by the instruments. This is the case notwithstanding that committee reports have previously raised significant human rights concerns in relation to such instruments on a number of previous occasions. As set out in the committee's *Guidance Note 1,* the committee's usual expectation is that the statement of compatibility provides a detailed and evidence-based assessment of the rights engaged and limited by the measure, including whether any limitations on such rights are permissible (that is, whether they are prescribed by law, pursue a legitimate objective, are rationally connected to that objective, and are proportionate).

1.282 It is noted that aspects of the sanctions regimes may operate variously to both limit and promote human rights. However, consistent with committee practice

8 Section 14 of the Autonomous Sanctions Regulations 2011.

9 See section 18 of the Autonomous Sanctions Regulations 2011.

10 See section 20 of the Autonomous Sanctions Regulations 2011.

11 See subsection 20(3)(b) of the Autonomous Sanctions Regulations 2011.

to comment by exception, the current and previous examination of Australia's sanctions regimes has been, and is, focused solely on measures that impose restrictions on individuals.

1.283 The committee has previously noted that the autonomous sanctions regime engages and may limit multiple human rights, including:

- the right to privacy;
- the right to a fair hearing;
- the right to protection of the family;
- the right to an adequate standard of living;
- the right to freedom of movement;
- the prohibition against non-refoulement; and
- the right to equality and non-discrimination.

1.284 Further analysis of the rights engaged by the current instruments is set out below.

1.285 The committee further notes that the analysis below is in relation to the human rights obligations owed to individuals located in Australia. The committee is unaware whether any of the designations or declarations made under the autonomous or UN Charter sanctions regime has affected individuals living in Australia (although as at 21 February 2018 the consolidated list of individuals subject to sanctions currently includes two Australian citizens who have been delegated pursuant to the UN Charter sanctions regime).[12] The analysis below therefore provides an assessment of whether the amendments to the autonomous sanctions regime introduced by the instruments could breach the human rights of persons to whom Australia owes such obligations, irrespective of whether there have already been instances of individuals in Australia affected by these measures.

Right to privacy, right to a fair hearing, right to protection of the family, right to an adequate standard of living and the right to freedom of movement

Right to privacy

1.286 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home. The designation and declaration of a person under the autonomous sanctions regimes is a significant incursion into a person's right to personal autonomy in one's private life (within the right to privacy). In particular, the freezing of a person's assets and the requirement for a designated person to seek the

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

permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a private life, free from interference by the state.

1.287 Further, the designation process under the autonomous sanctions regimes limits the right to privacy of close family members of a designated person. As noted above, once a person is designated under either sanctions regime, the effect of designation is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a designated person (unless it is authorised under a permit to do so). This could mean that close family members who live with a designated person will not be able to access their own funds without needing to account for all expenditure, on the basis that any of their funds may indirectly benefit a designated person (for example, if a spouse's funds are used to buy food or public utilities for the household that the designated person lives in).

Right to a fair hearing

1.288 The right to a fair hearing is protected by article 14 of the ICCPR. The right applies both to criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right applies where rights and obligations, such as personal property and other private rights, are to be determined. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. The committee's previous human rights analysis of the autonomous sanctions regimes therefore noted that the designation and declaration process under the sanctions regimes limits the right to a fair hearing because it does not provide for merits review of the minister's designation or declaration under the autonomous sanctions regime before a court or tribunal.[13]

Right to protection of the family

1.289 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents, will therefore engage this right. A person who is declared under the autonomous sanctions regime for the purpose of preventing the person from travelling to, entering or remaining in Australia will have their visa cancelled pursuant to the Migration Regulations 1994.[14]

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13 See further below and Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 45.

14 See Migration Regulations 1994, section 2.43(1)(aa) and section 116(1)(g) of the Migration Act 1958.

This makes the person liable to deportation which may result in that person being separated from their family, which therefore engages and limits the right to protection of the family.

Right to an adequate standard of living

1.290 The right to an adequate standard of living is guaranteed by article 11 of ICESCR and requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. The imposition of economic sanctions on a person engages and limits this right, as persons subject to such sanctions will have their assets effectively frozen and may therefore have difficulty paying for basic expenses.[15]

Right to freedom of movement

1.291 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'. 'Own country' is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties, such as long standing residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.[16] The power to cancel a person's visa that is enlivened by designating or declaring a person under the autonomous sanctions regime may engage and limit the freedom of movement. This is because a person's visa may be cancelled (with the result that the person may be deported) in circumstances where that person has strong ties to Australia such that Australia may be considered their 'own country' for the purposes of international human rights law, despite that person not holding formal citizenship.

Limitations on human rights

1.292 Each of these rights may be subject to permissible limitations under international human rights law. In order to be permissible, the measure must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective. In the case of executive powers which seriously disrupt the lives of individuals subjected to them, the existence of safeguards is important to

15 The minister may grant a permit for the payment of such expenses (including foodstuffs, rent or mortgage, medicines or medical treatment, public utility charges, insurance, taxes, legal fees and reasonable professional fees): Section 18 and 20 of the Autonomous Sanctions Regulations 2011. However, the minister must not grant a permit unless the minister is satisfied that it would be in the national interest to grant the permit and is satisfied about any circumstance or matter required by the regulations to be considered for a particular kind of permit: section 18(3) of the Autonomous Sanctions Regulations 2011.

16 UN Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999). See also *Nystrom v Australia* (1557/2007), UN Human Rights Committee, 1 September 2011.

prevent arbitrariness and error, and ensure that the powers are exercised only in the appropriate circumstances.

1.293 The committee has previously accepted that the use of international sanctions regimes to apply pressure to governments and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law.[17] However, it has expressed concerns that the sanctions regimes may not be regarded as proportionate to their stated objective, in particular because of a lack of effective safeguards to ensure that the regimes, given their serious effects on those subject to them, are not applied in error or in a manner which is overly broad in the individual circumstances.

1.294 For example, the previous human rights analysis raised concerns that the designation or declaration under the autonomous sanctions regime can be solely on the basis that the minister is 'satisfied' of a number of broadly defined matters,[18] and that there is no provision for merits review before a court or tribunal of the minister's decision. In response to previous questions from the committee in relation to these issues, the minister noted that the decisions were subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and under common law.[19] This appears to be one safeguard available under general law insofar as it does secure the minimum requirement that the minister act in accordance with the legislation.

1.295 However, as noted in the committee's previous report, the effectiveness of judicial review as a safeguard within the sanctions regimes relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the executive. The scope of the power to designate or declare someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms. It is noted that this formulation limits the scope to challenge such a decision on the basis of there being an error of law (as opposed to an error on the merits) under the ADJR Act or at common law. As the committee has previously explained, judicial review will generally be insufficient, in and of itself, to operate as a sufficient safeguard for human rights purposes in this context.[20]

1.296 The previous human rights analysis has also raised concerns that the minister can make the designation or declaration without hearing from the affected person

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17 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 44.

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

19 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 46.

20 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 46-47; and *Twenty-eighth Report of the 44th Parliament* (17 September 2015) [1.116] to [1.123].

before the decision is made. In response to previous questions from the committee, the minister indicated that the designation or declaration without hearing from the affected person was necessary to ensure the effectiveness of the regime, as prior notice would effectively 'tip off' the person and could lead to assets being moved off-shore. However, the previous human rights analysis noted that there may be less rights-restrictive measures available, such as freezing assets on an interim basis until complete information is available including from the affected person.[21]

1.297 There is also no requirement to report to Parliament setting out the basis on which persons have been declared or designated and what assets, or the amount of assets that have been frozen. In response to previous questions from the committee, the minister stated that public disclosure of assets frozen could risk undermining the administration of the sanctions regimes. However, the previous human rights analysis noted that it was difficult to accept the minister's justification as information identifying declared or designated persons is already publicly available on the Consolidated List of individuals subject to sanctions, which is available on the Department of Foreign Affairs and Trade website.[22]

1.298 Previous human rights analysis has also noted that once the decision is made to designate or declare a person, the designation or declaration remains in force for three years and may be continued after that time (such as occurs through these instruments). There is no requirement that if circumstances change or new evidence comes to light the designation or declaration will be reviewed before the three year period ends. In response to previous questions from the committee on this issue, the minister noted that designations and declarations may be reviewed at any time and persons may request revocation if circumstances change or new evidence comes to light. While this is true, without an automatic requirement of reconsideration if circumstances change or new evidence comes to light, a person may remain subject to sanctions notwithstanding that designation or declaration may no longer be required.[23] This is of particular relevance in the context of the Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) Continuing Effect Declaration and Revocation Instrument 2018 [F2018L00099], which renews the designation and declarations, against many persons for a further three years on the basis of (among other things) their indictment before the International Criminal Tribunal for the former Yugoslavia (ICTY). However, the ICTY closed on 31 December 2017 with remaining appeals being determined by the UN Mechanism for International Criminal Tribunals (MICT), which raises questions as to whether the

21 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 47.

22 See, http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx; Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 48-49.

23 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 49.

continued application of sanctions against those persons because of their status as (former) ICTY indictees is proportionate.

1.299 Similarly, a designated or declared person will only have their application for revocation considered once a year. If an application for review has been made within the year, the minister is not required to consider it. The minister has previously stated that this requirement is intended to ensure the minister is not required to consider repeated, vexatious revocation requests.[24] However, the previous human rights analysis noted that the provision gives the minister a discretion that is broader than merely preventing vexatious applications and the current requirement may affect meritorious applications for revocation.[25]

1.300 There is also no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister. The minister has previously stated that the imposition of targeted financial sanctions is considered, internationally, to be a preventive measure that operates in parallel to complement the criminal law.[26] The previous human rights analysis accepted that such measures may be preventive, but also noted that without further guidance from the minister (such as when and in what circumstances complementary targeted action would be needed) that there appeared to be a risk that such action may not be the least restrictive of human rights in every case.[27]

1.301 The previous human rights analysis also raised concerns relating to the minister's unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses. While the minister has previously stated that such discretion is appropriate, the previous human rights analysis expressed concern as the broad discretion to impose conditions on access to money for basic expenses does not appear to be the least rights-restrictive way of achieving the legitimate objective.[28]

1.302 The previous human rights analysis also raised concerns that there is no requirement that in making a designation or declaration the minister must take into account whether doing so would be proportionate with the anticipated effect on an individual's private and family life. The committee has previously noted that this absence of safeguards in relation to family members raises concerns as to the proportionality of the measure.[29]

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24 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 49.

25 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 49.

26 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 50.

27 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 50.

28 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 50.

29 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 51.

1.303 Further, limited guidance is available under the Act or 2011 regulations or any other publicly available document setting out the basis on which the minister decides to designate or declare a person.[30] The previous human rights analysis noted that this lack of clarity raises concerns as to whether the regime represents the least rights-restrictive way of achieving its objective, as the scope of the law is not made evident to those who may fall within the criteria for listing and who may seek in good faith to comply with the law.[31]

1.304 The European Court of Human Rights decision in *Al-Dulimi and Montana Management Inc. v Switzerland* provides further useful guidance on the interaction between UN Security Council sanctions and international human rights law.[32] This case confirmed the presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights. The European Court of Human Rights found that domestic courts should have the ability to exercise scrutiny so that arbitrariness can be avoided. This case also indicated that, even in circumstances where an individual is specifically listed by the UN Security Council Committee, individuals should be afforded a genuine opportunity to submit evidence to a domestic court to seek to show that their inclusion on the UN Security Council list was arbitrary. That is, the state is still required to afford fair hearing rights in these circumstances. In light of this case and the concerns discussed above, there are concerns that the current Australian model of autonomous sanctions regimes may be incompatible with the right to a fair hearing.

1.305 The committee has also previously noted that, in terms of comparative models, the United Kingdom (UK) has implemented its obligations in a manner that incorporates a number of safeguards not present in the Australian autonomous sanctions regime, including:

- challenges to designations made by the executive can be made by way of full merits appeal rather than solely by way of judicial review;[33]
- quarterly reports must be made by the executive on the operation of the regime;[34]
- an Independent Reviewer of Terrorism Legislation reviews each designation and has unrestricted access to relevant documents, government personnel, the police and intelligence agencies;[35]

30 See further below.

31 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 48.

32 *Al-Dulimi and Montana Management Inc. v Switzerland,* ECHR (Application no. 5809/08) (21 June 2016).

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

34 See section 30 of TAFA 2010.

- the executive provides a 'Designation Policy Statement' to Parliament setting out the factors used when deciding whether to designate a person;
- an Asset-Freezing Review sub-group annually reviews all existing designations, or earlier if new evidence comes to light or there is a significant change in circumstances, and the executive invites each designated person to respond to whether they should remain designated;[36]
- the prohibition on making funds available does not apply to social security benefits paid to family members of a designated person (even if the payment is made in respect of a designated person);[37] and
- when the executive is considering designating a person, operational partners are consulted, including the police, to determine whether there are options available other than designation—for example, prosecution or forfeiture of assets—to ensure that there is not a less rights restrictive alternative to achieve the objective.[38]

1.306 These kinds of safeguards in the UK asset-freezing regime are highly relevant indicia that there are more proportionate methods of achieving the legitimate objective of the Australian autonomous sanctions regimes. That is, it would appear that a less rights-restrictive approach is reasonably available.

The prohibition on non-refoulement and the right to an effective remedy

1.307 Australia has non-refoulement obligations under the Refugee Convention, the ICCPR and the Convention Against Torture (CAT). This means that Australia must not return any person 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.[39] Non-refoulement obligations are absolute and may not be subject to any limitations.

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

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

37 See subs 16(3) of TAFA 2010.

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

39 See, Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (9 February 2018).

1.308 Independent, 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 giving effect to non-refoulement obligations.

1.309 As noted earlier, an Australian visa holder who is declared under the autonomous sanctions regime for the purpose of preventing the person from travelling to, entering or remaining in Australia will have their visa cancelled pursuant to the Migration Regulations 1994.[40] It is not clear whether this provision would apply to visa holders who have been found to engage Australia's non-refoulement obligations.

1.310 Section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen (which includes persons whose visas have been cancelled) in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. There is thus no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, nor is there any statutory provision granting access to effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations. As stated in previous human rights assessments, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[41]

1.311 This therefore raises concerns that the declaration of a person who is an Australian visa holder under the autonomous sanctions regime, which may trigger the cancellation of a person's visa, in the absence of any statutory protections to prevent the removal of persons to whom Australia owes non-refoulement obligations, may be incompatible with the obligation of non-refoulement in conjunction with the right to an effective remedy.

Committee comment

1.312 The committee notes that the relevant statements of compatibility assert that the instruments are compatible with human rights and freedoms and draws the minister's attention to its *Guidance Note 1* which sets out the committee's expectations in relation to drafting statements of compatibility.

1.313 The committee seeks the advice of the minister as to the compatibility of the measures with the right to privacy, right to a fair hearing, right to protection of the family, right to an adequate standard of living and the right to freedom of

40 See, Migration Regulations 1994, section 2.43(1)(aa) and section 116(1)(g) of the Migration Act 1958.

41 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 76-77; *Report 11 of 2017* (17 October 2017) pp. 108-111.

movement. In particular, the committee seeks the advice of the minister as to how the designation and declaration of persons pursuant to the autonomous sanctions regime is a proportionate limit on these rights, having regard to the matters set out in [1.286] to [1.306] above.

1.314 The committee notes that the consequence of the exercise of the power to declare persons under the autonomous sanctions regime is that the person is prohibited from travelling and may have their visa cancelled. The committee seeks the advice of the minister as to the compatibility of this measure with the prohibition on non-refoulement in conjunction with the right to an effective remedy. This includes any safeguards in place to ensure that persons to whom Australia owes protection obligations will not be subject to refoulement as a consequence of being declared under the autonomous sanctions regime.

1.315 The committee draws the minister's attention to the Committee's recommendations in *Report 9 of 2016* that consideration be given to the following measures, several of which have been implemented in relation to the comparable regime in the United Kingdom, to ensure compatibility with human rights:

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

1.316 The committee seeks the advice of the minister as to whether a substantive assessment of the human rights engaged and limited by the autonomous sanctions regime will be included in future statements of compatibility to assist the committee fully to assess the compatibility of the measure with human rights in future.[42]

Designations or declarations in relation to specified countries

1.317 The autonomous sanctions regime allows the minister to make a designation or declaration in relation to persons involved in some way with (currently) eight specified countries.

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

1.318 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law. Unlawful discrimination may be direct (that is, having the purpose of discriminating on a prohibited ground), or indirect (that is, having the effect of discriminating on a prohibited ground, even if this is not the intent of the measure). One of the prohibited grounds of discrimination under international human rights law is discrimination on the grounds of national origin and nationality.

1.319 The previous human rights analysis of the sanctions regime considered that the designation of persons in relation to specified countries may limit the right to equality and non-discrimination.[43] This is because nationals of listed countries may be more likely to be considered to be 'associated with' or work for a specified government or regime than those from other nationalities. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.

1.320 A disproportionate effect on a particular group may be justifiable such that the measure does not constitute unlawful indirect 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. Information to justify the rationale for differential treatment will be relevant to this proportionality analysis.

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42 See further section 8(3) of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

43 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 53-54.

Committee comment

1.321 The preceding analysis indicates that the designations or declarations in relation to specified countries appear to have a disproportionate impact on persons on the basis of national origin or nationality.

1.322 The committee seeks the advice of the minister as to the compatibility of the measures with the right to equality and non-discrimination.

Advice only

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

Appropriation Bill (No. 3) 2017-2018

Appropriation Bill (No. 4) 2017-2018

Purpose	Appropriation Bill (No. 3) 2017-2018 seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government; Appropriation Bill (No. 4) 2017-2018 seeks to appropriate money from the Consolidated Revenue Fund for services that are not the ordinary annual services of the Government
Portfolio	Finance
Introduced	House of Representatives, 8 February 2018
Rights	Multiple rights (see **Appendix 2**)
Status	Advice only

Background

1.324 The committee has considered the human rights implications of appropriations bills in a number of previous reports,[1] and they have been the subject of correspondence with the Department of Finance.[2] During the 44th Parliament, the Minister for Finance previously invited the committee to meet with departmental officials about this issue.[3]

1 See, Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013) p. 65; *Seventh report of 2013* (5 June 2013) p. 21; *Third report of the 44th Parliament* (4 March 2014) p. 3; *Eighth report of the 44th Parliament* (24 June 2014) p. 5 and p. 31; *Twentieth report of the 44th Parliament* (18 March 2015) p. 5; *Twenty-third report of the 44th Parliament* (18 June 2015) p. 13;*Thirty-fourth report of the 44th Parliament* (23 February 2016) p. 2; *Report 2 of 2017* (21 March 2017) p.44; *Report 5 of 2017* (14 June 2017) p. 42.

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

3 See, for example, Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (June 2014) pp. 5-7, 33.

1.325 The committee previously reported on Appropriation Bill (No. 1) 2017-2018 and Appropriation Bill (No. 2) 2017-2018 (the earlier 2017-2018 bills) in its *Report 5 of 2017*.[4]

Potential engagement and limitation of human rights by appropriations Acts

1.326 As previously stated in respect of the 2017-2018 bills, proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[5]

1.327 The committee's report has previously noted that:

> …the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. In particular, the committee considers there may be specific appropriations bills or specific appropriations where there is an evident and substantial link to the carrying out of a policy or program under legislation that gives rise to human rights concerns.[6]

Compatibility of the bills with multiple rights

1.328 As with the earlier 2017-2018 bills, and previous appropriations bills, the current bills are accompanied by a brief statement of compatibility, which notes that the High Court has stated that, beyond authorising the withdrawal of money for broadly identified purposes, appropriations Acts 'do not create rights and nor do they, importantly, impose any duties'.[7] The statements of compatibility conclude that, as their legal effect is limited in this way, the bills do not engage, or otherwise affect, human rights.[8] The statements of compatibility also state that '[d]etailed information on the relevant appropriations…is contained in the portfolio [Budget] statements'.[9] No further assessment of the human rights compatibility of the bills is provided.

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4 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) p. 42.

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

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

7 Appropriation Bill (No. 3) 2017-2018: explanatory memorandum (EM), statement of compatibility (SOC), p. 4; Appropriation Bill (No. 4) 2017-2018: EM, SOC, p. 4.

8 Bill No. 3, EM, SOC, p. 4; Bill No. 4, EM, SOC, p. 4.

9 Bill No. 3, EM, SOC, p. 4; Bill No. 4, EM, SOC, p. 4.

1.329 A full human rights analysis in respect of such statements of compatibility can be found in the committee's *Report 9 of 2016*.[10] Under international human rights law, Australia has obligations to respect, protect and fulfil human rights. These include specific obligations to progressively realise economic, social and cultural (ESC) rights using the maximum of resources available;[11] and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. This means that any reduction in allocated government funding for measures which realise socio-economic rights, such as specific health and education services, may be considered as retrogressive in respect of the attainment of ESC rights and, accordingly, must be justified for the purposes of international human rights law.

1.330 The cited view of the High Court that appropriations Acts do not create rights or duties as a matter of Australian law does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law, as specific appropriations reducing expenditure may be regarded as retrogressive, or as limiting rights. The appropriation of funds facilitates the taking of actions which may affect both the progressive realisation of, and the failure to fulfil, Australia's obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.331 As previously stated, while such bills present particular difficulties for human rights assessments because they generally include high-level appropriations for a wide range of outcomes and activities across many portfolios, the allocation of funds via appropriations bills is susceptible to a human rights assessment directed at broader questions of compatibility.[12]

Committee comment

1.332 The committee notes that, as with previous appropriations bills, the statements of compatibility for the current bills provide no assessment of their

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10 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 30-33.

11 See, UN Office of the High Commissioner for Human Rights, *Manual on Human Rights Monitoring*, http://www.ohchr.org/Documents/Publications/Chapter20-48pp.pdf; Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

12 There are a range of international resources to assist in the preparation of human rights compatibility assessments of budgets: See, for example, Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (Unifem, 2006) *https://www.internationalbudget.org/wp-content/uploads/Budgeting-for-Women%E2%80%99s-Rights-Monitoring-Government-Budgets-for-Compliance-with-CEDAW.pdf*; UN Practitioners' Portal on Human Rights Approaches to Programming, *Budgeting Human Rights*, http://hrbaportal.org/archives/tools/budgeting-human-rights; Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

compatibility with human rights on the basis that they do not engage or otherwise create or impact on human rights. However, while the committee acknowledges that appropriations bills present particular challenges in terms of human rights assessments, the appropriation of funds may engage and potentially limit or promote a range of human rights that fall under the committee's mandate.

1.333 Given the difficulty of conducting measure-level assessments of appropriations bills, the committee recommends that consideration be given to developing alternative templates for assessing their human rights compatibility, drawing upon existing domestic and international precedents. Relevant factors in such an approach could include consideration of:

- **whether the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights;**
- **whether any reductions in the allocation of funding are compatible with Australia's obligations not to unjustifiably take retrogressive or backward steps in the realisation of economic, social and cultural rights; and**
- **whether the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).**

1.334 The committee would welcome the opportunity to engage further with the department on these and related matters concerning statements of compatibility for appropriations bills.

Australian Citizenship Legislation Amendment (Strengthening the Commitments for Australian Citizenship and Other Measures) Bill 2018

Purpose	Seeks to make a range of amendments to the *Australian Citizenship Act 2007*, the *Migration Act 1958* and other legislation including in relation to citizenship eligibility requirements, character requirements and review of decisions
Sponsor	Senator Pauline Hanson
Introduced	7 February 2018, Senate
Rights	Obligation to consider the best interests of the child; children's right to nationality; children to be heard in judicial and administrative proceedings; fair hearing; freedom of movement; equality and non-discrimination (see **Appendix 2**)
Status	Advice only

Background

1.335 The committee previously examined the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (2017 bill) in its *Report 8 of 2017* and *Report 10 of 2017*.[1] The 2017 bill contained a number of reintroduced measures that were previously contained in the Australian Citizenship and Other Legislation Amendment Bill 2014 (2014 bill), examined in the committee's *Eighteenth Report of the 44th Parliament* and *Twenty-Fourth Report of the 44th Parliament*.[2]

1.336 The 2014 bill lapsed at the prorogation of the 44th parliament and the 2017 bill is not proceeding.[3]

1.337 The Australian Citizenship Legislation Amendment (Strengthening the Commitments for Australian Citizenship and Other Measures) Bill 2018 (2018 bill) is substantially the same as the 2017 bill. Accordingly, the committee's previous assessment is summarised briefly below.

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 2-31, *Report 10 of 2017* (12 September 2017) pp. 35-53.

2 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 4-30; *Twenty-fourth Report of the 44th Parliament* (23 June 2015) pp. 25-73.

3 The 2017 bill was discharged from the Senate Notice Paper on 18 October 2017.

Summary of measures in the 2018 bill

1.338 The 2018 bill seeks to make a number of amendments to the *Australian Citizenship Act 2007* (Citizenship Act) that were contained in the 2017 bill, including to:

- amend the general eligibility criteria under section 21(2) of the Citizenship Act to require that applicants have 'competent English';[4]
- require the minister to be satisfied that a person 'has integrated into the Australian community' in order for that person to be eligible for citizenship by conferral;[5]
- grant the minister a discretionary power to revoke a person's Australian citizenship, up to 10 years after citizenship was first granted, where the minister is 'satisfied' that the person became an Australian citizen as a result of fraud or misrepresentation by themselves or a third party with a requirement of a court finding as to fraud or misrepresentation;[6]
- extend the 'good character' requirements for applicants for Australian citizenship to persons under 18 years of age;[7]
- provide that a child found abandoned in Australia is taken to have been born in Australia and to be an Australian citizen by birth, unless it is proved that the person was outside Australia before they were found abandoned or they are not an Australian citizen by birth;[8]
- restrict automatic citizenship at 10 years of age for a child born in Australia;[9]
- remove the power of the Administrative Appeals Tribunal (AAT) to review a decision made by the minister personally under the Citizenship Act, if the

4 Item 8, proposed subsection 3(1).

5 Item 43, proposed subsection 21(2)(fa).

6 Item 113, proposed section 34AA.

7 Item 26, proposed paragraph 16(2)(c).

8 Item 20, proposed subsections 12(8) and 12(9).

9 Currently, under the Citizenship Act, section 12, a child born in Australia automatically becomes an Australian citizen at 10 years of age if the child has been ordinarily resident in Australia throughout the 10 years since their date of birth. The 2018 bill proposes to withhold citizenship to those who would otherwise be entitled to it under this provision for reasons including: one or both of the child's parents were foreign diplomats; the child was effectively present in Australia as an unlawful non-citizen; or one or both of the child's parents came to Australia before the child was born, did not hold a substantive visa at the time of the child's birth and was an unlawful non-citizen at any time prior to the child's birth. See item 20.

minister has stated in a notice that the decision was made in the public interest;[10]

- empower the minister to set aside decisions made by the AAT in reviewing decisions of the minister's delegates, if the minister's delegate had originally decided that an applicant for citizenship was not of good character, or was not satisfied as to the person's identity, and the minister is satisfied it is in the public interest to set aside the AAT's decision; and[11]
- extend the bar on approval for citizenship to cases where a person is subject to a court order.[12]

1.339 The 2017 bill sought to amend the general residence requirement in the Citizenship Act to require citizenship by conferral applicants to have been a permanent resident for four years before they are eligible to apply for citizenship.[13] Under the Citizenship Act, the current requirement is 12 months.[14] The 2018 bill seeks to change the requirement from 12 months to eight years. This measure is the only substantive change between the 2017 bill and the 2018 bill.

Compatibility of the measures with human rights

1.340 The committee examined each of the above reintroduced measures in its previous assessment of the 2017 bill in *Report 8 of 2017* and *Report 10 of 2017*.

1.341 In relation to measures in the 2017 bill that were previously contained in the 2014 bill, the committee drew the various human rights implications of these measures to the attention of the parliament in its *Report 8 of 2017* including in relation to:

- *The power to revoke Australian citizenship due to fraud or misrepresentation – removal of court finding*: the previous human rights analysis raised concerns in relation to this measure and the obligation to consider the best interests of the child, the child's right to nationality, the right of the child to be heard in judicial and administrative proceedings, the right to a fair trial and a fair hearing and the right to freedom of movement.[15]
- *Extending the good character requirement to include applicants for Australian citizenship under 18 years of age*: the previous human rights

10 Item 126, proposed subsection 52(4).

11 Item 127, proposed section 52A.

12 Item 103, proposed subsection 30(8).

13 Item 56, proposed subsection 22(1A).

14 See, Citizenship Act, subsection 22(1)(c).

15 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 12-22.

analysis raised concerns in relation to this measure and the obligation to consider the best interests of the child as a primary consideration.[16]

- *Citizenship to a child found abandoned in Australia:* the previous human rights analysis raised concerns in relation to this measure and the obligation to consider the best interests of the child and a child's right to nationality.[17]
- *Limiting automatic citizenship at 10 years of age:* the previous human rights analysis raised concerns in relation to this measure and the obligation to consider the best interests of the child and a child's right to nationality.[18]
- *Personal ministerial decisions not subject to merits review:* the previous human rights analysis raised concerns in relation to this measure and the right to a fair hearing.[19]
- *Ministerial power to set aside decisions of the AAT if in the public interest:* the previous human rights analysis raised concerns in relation to this measure and the right to a fair hearing.[20]
- *Extension of bars to citizenship where a person is subject to a court order:* the previous human rights analysis raised concerns in relation to the right to equality and non-discrimination.[21]

1.342 In relation to two measures that were new in the 2017 bill, the committee concluded its examination in its *Report 10 of 2017* after receiving a response from the minister:[22]

- *Requirement that applicants for Australian citizenship have 'competent English'*: the previous analysis set out that the measure engages the right to equality and non-discrimination on the basis of language, and may also indirectly discriminate on the basis of national origin, in causing a disproportionate impact on individuals from countries where English is not

16 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 22-24.

17 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 24-25.

18 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 25-27.

19 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 27-28.

20 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 28-29.

21 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 29-31.

22 Parliamentary Joint Committee on Human Rights, *Report 10 of 2017* (12 September 2017) pp. 35-53.

the national language or widely spoken. The analysis in *Report 10 of 2017* stated that concerns remained, including as to whether the English language requirement was rationally connected to the stated objective of promoting social cohesion; whether there would be adequate government support to bring adults up to the required English level; and the existence of adequate exemptions. The committee therefore concluded that the measure appeared likely to be incompatible with the right to equality and non-discrimination.[23]

- *Requirement that the minister be satisfied that a person 'has integrated into the Australian community' in order for that person to be eligible for citizenship by conferral*: the previous analysis noted that the measure potentially engaged and limited multiple human rights, including the right to equality and non-discrimination and the right to freedom of expression. A particular concern was noted in that there was nothing on the face of the legislation which appeared to limit the minister's discretion in determining the basis on which a person will be considered to have integrated into the Australian community. The proposed provision to exclude merits review of the minister's personal decision to refuse a citizenship application also raised concerns in relation to the right to a fair hearing. Noting the broad scope of the proposed power, the committee concluded that there may be human rights concerns in relation to its operation.[24] However, it was noted that setting out criteria for the exercise of this power by legislative instrument may be capable of addressing some of these concerns.

Committee comment

1.343 The committee refers to its previous consideration of the 2017 bill in its *Report 8 of 2017* and *Report 10 of 2017*.

1.344 Noting the human rights concerns raised in relation to the 2017 bill, the committee draws the human rights implications of the reintroduced measures in the 2018 bill to the attention of the parliament.

23 Parliamentary Joint Committee on Human Rights, *Report 10 of 2017* (12 September 2017) p. 49.

24 Parliamentary Joint Committee on Human Rights, *Report 10 of 2017* (12 September 2017) p. 53.

Migration Legislation Amendment (2017 Measures No. 4) Regulations 2017 [F2017L01425]

Purpose	Sought to introduce a series of amendments to the *Migration Regulations 1994*, including new and expanded visa conditions for most temporary visas, and restrictions on applying for visas for persons whose visa had previously been cancelled
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	This regulation was disallowed on 5 December 2017
Rights	Right to liberty; protection of family; freedom of expression and assembly; freedom of movement (see **Appendix 2**)
Status	Advice only

Background

1.345 The Migration Legislation Amendment (2017 Measures 4) Regulations 2017 (the amendment regulations) were disallowed in the Senate on 5 December 2017.

Schedule 1: Outstanding public health debt conditions

1.346 Schedule 1 of the amendment regulations sought to create a new visa condition that the visa holder must not have an 'outstanding public health debt'.[1] Breach of this visa condition would be a ground for considering cancellation of the visa.[2]

Compatibility of the measures with multiple rights

1.347 The introduction of a visa condition that outstanding public health debts must be paid engages and limits a number of human rights, in particular:

- the right to health;
- the right to social security; and
- the right to equality and non-discrimination.

1.348 The right to health is guaranteed by article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and is fundamental to the

1 A public health debt is a debt relating to public health or aged care services that has been reported to the Department of Immigration and Border Protection as outstanding by a Commonwealth, State or Territory health authority under an agreement between the authority and the Department: see the proposed definition in regulation 1.03

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

exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and requires available, accessible, acceptable and quality health care. In particular, in relation to accessibility, the United Nations (UN) Economic, Social and Cultural Rights Committee has noted:

> health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.[3]

1.349 The right to health requires states to ensure the right of access to health facilities, goods and services on a non-discriminatory basis.[4] Similarly, the right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law. The ICCPR defines 'discrimination' as a distinction based on a personal attribute (including nationality and national or social origin), which has either the purpose ('direct' discrimination), or the effect ('indirect' discrimination), of adversely affecting human rights.

1.350 The right to social security includes the right to access benefits to prevent access to health care from being unaffordable. As the UN Economic, Social and Cultural Rights Committee has stated in relation to the right to social security, 'States parties have an obligation to guarantee that health systems are established to provide adequate access to health services for all'.[5] Australia has an obligation in relation to these rights for *all* people in Australia.

1.351 As explained in the statement of compatibility, temporary visa holders generally do not have access to Medicare and so are expected to pay directly for the health care services they receive.[6] The absence of Medicare for temporary visa holders raises issues around the economic accessibility of health care. While the measure does not exclude access to health care services in its terms, in practice it may do so as those who cannot afford such services would be unable to access such

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3 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000), [12].

4 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000), [12], [18], [43]; see also Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.

5 UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008), [13].

6 SOC, p. 6. The statement of compatibility notes that some temporary visa holders are eligible for Medicare through a Reciprocal Health Care Arrangement (RHCA) and some temporary visa holders are provided with Medicare eligibility (for example, protection visa holders).

health care services. The possibility of visa cancellation where outstanding health debts remain unpaid raises an additional obstacle on individuals being able to access health care, as persons may be deterred from accessing such care because of the significant consequences of being unable to pay. This therefore limits the right to health and the right to social security. Further, while Australia enjoys a degree of discretion in differentiating between nationals and non-nationals, the application of this measure to temporary visa-holders (who by definition will not be citizens of Australia) may also engage Australia's obligations in relation to non-discrimination on the grounds of nationality and national origin.

1.352 Limitations on these rights will be permissible if the measures serve a legitimate objective, are rationally connected to this objective and are a proportionate means of achieving that objective.

1.353 The statement of compatibility explains that the new costs arrangements 'are necessary, reasonable and proportionate to achieve the aim of limiting the financial burden on Australia's public health system, through raising the awareness of temporary visa holders of their liability for health services used in Australia'.[7] However, 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. While the statement of compatibility notes that health care providers 'have noted cases where temporary visa holders incurred debts for treatment which they did not pay, and for which they were unlikely to pay, and where there was limited capacity for the relevant health authority to recover the debt', it provides no information or evidence as to the extent to which this occurs and is a pressing issue. Insofar as the measure aims to raise awareness of visa holders' liability for health services, it is not clear this would be a legitimate objective, as to be capable of justifying a proposed limitation on human rights. This is because a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.

1.354 Limitations on human rights must also be rationally connected to, and a proportionate way to achieve, the legitimate objective. The statement of compatibility provides no information or explanation of how the measure is rationally connected to (that is, effective to achieve) the stated objective.

1.355 As to the proportionality of the measure, it is relevant whether there are adequate safeguards in place and whether there are other less rights-restrictive means of achieving the objectives. As to safeguards, the statement of compatibility explains:

> A decision on reporting a debt will ultimately be a matter for the relevant health authority. For example, a relevant health authority may choose not to inform the Department of a health debt where the debt is too small to

7 SOC, p. 9.

> warrant a referral, where the authority is inclined to waive the debt for compelling/compassionate reasons or where an appropriate payment plan is in place. When a debt is resolved, the health authority will notify the Department that this has happened.
>
> In situations where an outstanding public health debt has been reported, the initial action for the Department will be to encourage the visa holder to contact the health facility to which the monies are owed and arrange to pay the debt. Breach of a visa condition is a ground for considering cancelling that visa. However, the preferred outcome is to have the debt repaid prior to the person being granted further visas or cancellation being pursued. On occasions consideration of visa cancellation may be appropriate; however this would be discretionary and due consideration will be given to individual circumstances.[8]

1.356 The statement of compatibility further notes that it 'is intended that cancellation will only be considered in cases where there is a serious breach or repeated breaches suggest[ing] a pattern of adverse behaviour in the area of compliance with visa conditions'.[9] However, these limitations appear to be matters within the discretion of the decision-maker and matters of departmental policy rather than a legal requirement. It appears as a matter of law that the visa cancellation power could be used in less serious cases. Accordingly, such discretionary safeguards may not be sufficient from the perspective of international human rights law.

1.357 It also appears there are a range of other, less rights-restrictive measures that may be available to achieve the stated objective. For example, raising awareness of a person's liability to pay for their health care costs could occur at the time the person applies for the visa through the provision of information. It is not clear from the statement of compatibility whether less rights-restrictive alternatives had been considered, which raises further questions as to the proportionality of the measure.

Schedule 2: Amendments to visa conditions

1.358 Schedule 2 of the amendment regulations sought to introduce a series of amendments to the Migration Regulations 1994 (the migration regulations) relating to visa conditions with which visa holders must comply, namely:

- broadening the wording of condition 8303 in Schedule 8 of the migration regulations so as to make it a condition of a person's visa that the visa-holder must not become involved in 'activities that endanger or threaten any individual'.[10] This proposed condition was in addition to the current requirement that visa holders do not become involved in 'activities

8 SOC, p. 6.

9 SOC, p. 8.

10 Item 112 of Schedule 2 of the amendment regulations.

disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community'.[11] Condition 8303 applies to most temporary visas.

- extending condition 8564 so that it would be a mandatory condition for most temporary visa holders. Condition 8564 requires visa holders not to engage in criminal conduct. At present, the condition only applies on a discretionary basis to Bridging Visa E (BVE).[12]
- introducing new condition 8304 to create a new condition requiring visa holders to identify themselves by the same name in all dealings with Commonwealth, State or Territory government agencies. The condition would have applied mandatorily to most temporary visas.

1.359 Non-compliance with the proposed visa conditions would mean that the visa holder may be considered for visa cancellation under section 116(1)(b) of the *Migration Act 1958* (Migration Act). Under section 116(1)(b), officers have a discretion to determine whether visa cancellation was appropriate.

1.360 Where a person's visa is cancelled on grounds of breach of condition 8303 or 8564, the amendment regulations also sought to introduce amendments to prevent former temporary visa holders whose visas had been cancelled on these 'behaviour-related'[13] grounds from making a BVE application. The effect of this is that persons whose visas were cancelled would not be allowed back into the community on a bridging visa while arrangements were made for those persons to depart, unless the department has assessed that the person does not pose a risk to the community and grants a BVE without the need for the non-citizen to apply.[14]

Compatibility of the measures with the right to liberty

1.361 Article 9 of the International Covenant on Civil and Political Rights (ICCPR), prohibits the arbitrary and unlawful deprivation of liberty. This prohibition against arbitrary detention requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances and subject to regular review. The concept of 'arbitrariness' extends beyond the apparent 'lawfulness' of detention to

11 See clause 8303 in Schedule 8 of the Migration Regulations 1994.

12 A BVE is a temporary visa that is ordinarily granted to 'unlawful non-citizens' to enable them to lawfully live in the community while their immigration status is finalised or while they make arrangements to leave Australia: Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014) pp. 107-108.

13 'Behaviour related grounds' were defined as grounds where visa applicants had their previous visa cancelled under section 116 of the Migration Act because they had been assessed as a risk to public health, safety or the good order of the community or an individual or because they engaged in criminal conduct.

14 SOC, p. 20.

include elements of injustice, lack of predictability and lack of due process.[15] The right to liberty applies to all forms of deprivations of liberty, including immigration detention, although what is considered arbitrary may vary depending on context.

1.362 Under the Migration Act, the cancellation of the visa of a non-citizen living in Australia results in that person being classified as an unlawful non-citizen, and subject to mandatory immigration detention prior to removal or deportation.[16] A person whose visa is cancelled under section 116(1)(b) of the Migration Act for breaching the proposed visa conditions would be detained and become liable for removal from Australia. In particular, persons who breach the 'behaviour related' conditions in conditions 8303 and 8564 would not be eligible for a bridging visa and so would not be permitted to remain in the community. This includes holders of temporary protection visas and safe haven visas who have been found to engage Australia's non-refoulement obligations.[17] The measure accordingly engages and limits the right to liberty.

1.363 The statement of compatibility acknowledges that the right to liberty is engaged by the introduction of the new visa conditions. However, for each of the proposed new or expanded visa conditions, the statement explains that the limitations on the right to liberty are reasonable, proportionate and necessary.

1.364 For the amendments to condition 8303, the statement of compatibility explains that the purpose of the amendment is 'the protection of the Australian community from behaviour that threatens or endangers an individual'.[18] The statement of compatibility describes the legitimate objective of the expanded application of condition 8564 to be 'the protection of the Australian community from criminal conduct'.[19] For the amendments to visa condition 8304, the statement of compatibility explains that the legitimate objective is 'the protection of the Australian community from identity fraud'.[20] The amendments to the BVE application validity requirements were stated to be for the safety of the Australian community.

1.365 Each of these objectives is capable of being a legitimate objective for the purposes of international human rights law. However, the statement of compatibility provides limited information about the importance of these objectives in the context of the particular measures. In order to show that the measures are in furtherance of a legitimate objective for the purposes of international human rights law, a reasoned

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15 Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [11]-[12]

16 See sections 189 and 198 of the *Migration Act 1958* (Cth).

17 Statement of Compatibility (SOC), p. 14.

18 SOC, pp. 13-14.

19 SOC, p. 16.

20 SOC, p. 19.

and evidence-based explanation of why the measure addresses a substantial and pressing concern is required. This may include, for example, information or evidence that demonstrates that introducing a requirement that visa holders do not become involved in activities that endanger or threaten individuals is a pressing or substantial concern. The statement of compatibility also provides limited information as to whether the limitations imposed by the measures are rationally connected to (that is, effective to achieve) the stated objectives.

1.366 There are also concerns in relation to the proportionality of each of the measures. In relation to condition 8303, the statement of compatibility explains that the amendment would empower the minister to cancel a person's visa in a broad range of circumstances:

> …where they [(visa holders)] engage in adverse behaviour against individuals within the community, such as where there is objective evidence of harassment, stalking, intimidation, bullying, or otherwise threatening an individual, but which may not necessarily be subject to criminal sanctions. These activities may include public 'hate speech' or online vilification targeted at both groups and individuals based on gender, sexuality, religion and ethnicity. Evidence provided by law enforcement agencies of conspiracy to cause harm or incite violence against an individual can also be considered under condition 8303.[21]

1.367 While the statement of compatibility explains that the minister or officers determining whether a visa should be cancelled for breaching condition 8303 may exercise discretion taking 'account of all of the circumstances of the applicant and consider[ing] each case on its own merits',[22] it remains the case that the visa condition requiring persons not to be involved in 'activities that endanger or threaten any individual' is very broad. It includes, for example, conduct that falls short of criminal conduct.[23] It would appear to be broad enough to allow the minister or departmental officer the discretion to cancel a visa (and consequently detain a person) in circumstances where the conduct is not unlawful but is merely disruptive or undesirable. This raises serious concerns that the measure may not have been sufficiently circumscribed to achieve the stated objective of the measure.

1.368 Similarly in relation to the expanded application of condition 8564 to most temporary visas, no information is provided in the statement of compatibility as to the meaning of 'criminal conduct'. The statement of compatibility explains that this condition 'will capture criminal conduct that is not captured by section 501 or

21 SOC, p. 12.

22 SOC, p. 12.

23 SOC, p. 12.

paragraph 116(1(e)'.[24] This therefore would appear to include within its scope potentially minor criminal conduct, and conduct which has not necessarily been the subject of a criminal conviction in a court of law. This similarly raises concerns as to the proportionality of the measure.

1.369 In relation to new condition 8304, the statement of compatibility explains that the introduction of this condition is 'in response to heightened risks when a person is able to deal with different government agencies under different names preventing law enforcement agencies from sharing important information and protecting Australia's national security'.[25] While the statement of compatibility states that the cancellation power for breaching this condition will be enlivened 'where there is evidence of intentional use of more than one identity concurrently in order to gain an advantage or deceive',[26] it does not appear that this is an express requirement in either proposed condition 8304 or section 116(1)(b) of the Migration Act. It is not clear whether this condition could potentially cover minor discrepancies (such as incorrect spelling of names on a person's Medicare card) and also whether it sufficiently accommodates visa holders whose identity documents from their home country have been spelled incorrectly or inconsistently, or are incorrectly translated. This raises concerns as to whether there are less rights-restrictive measures available and whether the measure is sufficiently circumscribed.

1.370 The new visa conditions, and the consequence of detention following visa cancellation for breach of those conditions, is of particular concern in relation to visa holders who have been found to engage Australia's non-refoulement obligations, as it gives rise to the prospect of prolonged or indefinite detention. The statement of compatibility explains that Australia will not remove a person where it would be inconsistent with Australia's non-refoulement obligations (the consequence of which may be prolonged or indefinite detention), however it further states that the 'determining factor' in determining whether detention is arbitrary is 'not the length of detention, but whether the grounds for detention are justifiable'.[27] The statement of compatibility further explains non-refoulement obligations are considered as part of the discretion to cancel a visa under section 116. However, while the United Nations Human Rights Committee has accepted that detention for the control of

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24 Section 116(1)(e) allows the Minister to cancel a visa if satisfied that '(e) the presence of its holder in Australia is or may be, or would or might be, a risk to: (i) the health, safety or good order of the Australian community or a segment of the Australian community; or (ii) the health or safety of an individual or individuals'. Section 501 sets out circumstances in which the minister or their delegate may cancel a visa on character grounds, including where a person has a substantial criminal record.

25 SOC, p. 18.

26 SOC, p. 18.

27 SOC, p. 14.

immigration is not arbitrary *per se*,[28] it has consistently considered that Australia's application of mandatory immigration detention (including the possibility of prolonged or indefinite detention) and the impossibility of challenging such detention is contrary to Article 9(1) of the ICCPR.[29] Further, the UN Human Rights Council's Working Group on Arbitrary Detention has recently stated that the detention of asylum seekers, immigrants or refugees must never be unlimited or of excessive length, and a maximum period should be provided by law.[30]

Compatibility of the measures with the right to the protection of the family

1.371 The right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. This right may be engaged where a person is expelled from a country without due process and is thereby separated from their family.[31] While there is significant scope for states parties to enforce their immigration policies and to require departure of unlawfully present persons, where a family has been in the country for a significant duration of time additional factors justifying the separation of families going beyond a simple enforcement of immigration law must be demonstrated in order to avoid a characterisation of arbitrariness or unreasonableness.[32] The measure engages and limits the right to protection of the family as visa cancellation for breaching the proposed visa conditions could operate to separate family members.[33]

1.372 Limitations on the right to protection of the family are permissible where the limitations pursue a legitimate objective, and are rationally connected and proportionate to that objective. As noted earlier, while the stated objectives of the proposed new or expanded visa conditions are capable of being legitimate objectives for the purposes of international human rights law, insufficient information was provided to determine the importance of the objectives in the specific context of the

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28 See, recently, Human Rights Council Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its seventy-ninth session: Opinion No.42/2017* (22 September 2017), [30].

29 See, for example, *C v Australia* (900/1999) Human Rights Committee, 13 November 2002, [8.2]; *Bakhtiyari et al. v. Australia* (1069/2002) Human Rights Committee, 6 November 2003, [9.3]; *D and E v. Australia* (1050/2002) Human Rights Committee, 9 August 2006, [7.2]; *Shafiq v. Australia* (1324/2004) Human Rights Committee, 13 November 2006, [7.3]; *Shams et al. v. Australia,* (1255/2004) Human Rights Committee, 11 September 2007, [7.2]; *F.J. et al. v. Australia* (2233/2013) Human Rights Committee, 2 May 2016, [10.4].

30 See Human Rights Council Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session: Opinion No.71/2017,* A/HRC/WGAD/2017/71 (21 December 2017), [3], [49].

31 *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015.

32 *Winata v Australia* (9030/2000) Human Rights Committee, 26 July 2001, [7.3].

33 See *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015; *Winata v Australia* (9030/2000) Human Rights Committee, 26 July 2001.

measures. Similarly, there is limited information in the statement of compatibility as to the rational connection between the stated objectives and the measures.

1.373 As to proportionality, the statement of compatibility explains that any separation of family members in Australia by a person being removed as a result of breaching their visa conditions will not be inconsistent with the right to protection of the family, as 'the decision to cancel will appropriately weigh the impact of separation from family from the best interests of any children against the non-citizen's risk to the community by engaging in this prohibited conduct'.[34] However, no information is provided in the statement of compatibility as to whether such factors are weighed or balanced as a matter of policy rather than as a legal requirement. This raises concerns as to whether there are sufficient safeguards to protect against arbitrary interference with family life.

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

1.374 The right to freedom of opinion and expression is protected by article 19 of the ICCPR. The right to freedom of opinion is the right to hold opinions without interference, and cannot be subject to any exception or restriction. The right to freedom of expression extends 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. The right to freedom of assembly is guaranteed by article 21 of the ICCPR. The right protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.

1.375 Freedom of assembly and freedom of expression may be subject to permissible limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*), or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so.

1.376 The statement of compatibility does not address whether the rights to freedom of assembly and expression are engaged or limited by the measures. However, it appears that amended condition 8303 could engage and limit these rights insofar as it allows a person's visa to be cancelled where their conduct is threatening to an individual. As noted earlier in the context of the right to liberty, the scope of the new condition is not clear. It would appear to apply to conduct falling short of criminal conduct, and appears broad enough to apply to exercises of the freedom of expression and assembly, such as a campaign of civil disobedience or acts of political protest within an immigration detention facility that is deemed by an official or the minister to be threatening. This raises concerns as to whether the

34 SOC, pp. 15, 17, and 20.

limitation on these rights pursues a legitimate objective, is rationally connected to the objective and is proportionate. It would have been useful if such matters were addressed in the statement of compatibility.

Compatibility of the measure with non-refoulement obligations and the right to an effective remedy

1.377 Australia has non-refoulement obligations under the Refugee Convention, the ICCPR and the Convention Against Torture (CAT). This means that Australia must not return any person 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.[35] Independent, 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 giving effect to non-refoulement obligations. Non-refoulement obligations are absolute and may not be subject to any limitations.

1.378 As noted earlier, the statement of compatibility notes that the amended visa conditions will apply to holders of temporary visa holders and safe haven enterprise visa holders who have been found to engage Australia's non-refoulement obligations. The statement of compatibility further states, however, that 'Australia takes its international obligations seriously, and will not remove a person where it would be inconsistent with Australia's non-refoulement obligations'.[36]

1.379 However, section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen (which, as noted earlier, includes persons whose visas have been cancelled) in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. There is thus no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, nor is there any statutory provision granting access to effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations. As stated in previous human rights assessments by the committee, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[37] This therefore raises serious concerns that the expansion of the conditions with which visa holders must comply (the breach of which may result in visa cancellation and deportation), in the absence of any statutory protections to prevent

35 See, Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (9 February 2018).

36 SOC, p. 14.

37 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) 76-77; *Report 11 of 2017* (17 October 2017) pp. 108-111.

the removal of persons to whom Australia owes non-refoulement obligations, may be incompatible with the obligation of non-refoulement in conjunction with the right to an effective remedy.

Compatibility of the measure with the right to freedom of movement

1.380 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'. 'Own country' is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties, such as long standing residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.[38]

1.381 The statement of compatibility does not acknowledge that the right to enter one's own country is engaged and limited. While the amended or expanded visa conditions apply to temporary visa holders, it is possible that the right to freedom of movement is engaged by this measure, as the visa cancellation and subsequent deportation may apply to a person who, despite not holding formal citizenship, has strong ties to Australia such that Australia can be considered their 'own country'. This may apply, for example, to holders of temporary protection visas whose protection claims have not been determined for many years, during which time they may have established close personal and family ties.

1.382 As noted earlier, there are concerns in relation to whether the limitations pursue a legitimate objective, are rationally connected to the objective and are proportionate. It would have been useful if such matters were addressed in the statement of compatibility. In particular, it would have been useful for the statement of compatibility to explain whether there are any safeguards in place applicable to individuals for whom Australia is their 'own country', such as ensuring their visa is only cancelled as a last resort where other mechanisms to protect the safety of the Australian community are unavailable.

Schedule 2: Changes to Public Interest Criterion 4020

1.383 The amendment regulations had also proposed to broaden the visa refusal powers on the grounds of fraud under Public Interest Criterion (PIC) 4020 to allow consideration of any previous cases of fraud in the 10 years prior to the current visa application (rather than the current requirement of 12 months) and also of instances of fraud in previous visa applications made (in addition to the current provision that limits consideration to fraud in respect of visas currently held).

38 UN Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999). See also *Nystrom v Australia* (1557/2007), UN Human Rights Committee, 1 September 2011.

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

1.384 As noted above, the right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. The measure engages and limits the right to protection of the family as persons who have engaged in fraud will be excluded from further visa applications for 10 years, and therefore unable to return to Australia, which may involve the separation of families.[39]

1.385 The statement of compatibility states the extended period of 10 years is necessary to protect the integrity of the visa framework:

> There is a risk that where a visa applicant has provided fraudulent documents in visa applications, they will also give incorrect, bogus or fraudulent information to other government agencies, such as social security and tax. It is the Department's view that a lesser time exclusion would not be as effective in achieving this goal given the current trend for applicants to actively 'wait out' the exclusion period and immediately re-apply.[40]

1.386 Protecting the integrity of the visa framework is likely to be a legitimate objective for the purposes of international human rights law. Expanding the period in which previous cases of fraud can be considered from 12 months to 10 years is likely to be rationally connected to this objective.

1.387 As to proportionality, the statement of compatibility explains that any separation of family members as a result of the changes to PIC 4020 will not be inconsistent with the right to protection of the family, as application of PIC 4020 'will take into account any mitigating or compelling circumstances and weigh these against the need to protect the integrity of the migration programme'.[41] In this respect the statement of compatibility explains that under policy guidance, flexibility is applied when officers assess a visa applicant against PIC 4020. The circumstances the officers will take into account include:

- whether the incorrect information was more than a typographical error, or the person did not realise the documents provided were not genuine;
- whether the omission was the result of the applicant being ignorant to its relevance;

39 See *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015; *Winata v Australia* (9030/2000) Human Rights Committee, 26 July 2001.

40 SOC, p. 23.

41 SOC, p. 24.

- whether the information was also 'false or misleading' at the time it is given.[42]

1.388 The statement of compatibility further explains that policy guidance states that applicants who accidentally provide false or incorrect information will not be subject to refusal (including typographical errors, misunderstanding the requirements of the visa application form, or the provision of the wrong documents).[43] Delegates also have a discretion to waive the requirements of PIC 4020 where the existing circumstances of the individual have changed to the extent where the person should be given a visa, such as in compelling and compassionate circumstances (including where the person is unfit to travel, death or serious illness in the family, or natural disaster or civil unrest in the applicant's home country).[44]

1.389 While these safeguards in the form of policy guidance may be capable of addressing some concerns, policy guidance is less stringent than the protection of statutory processes as the safeguards within that policy guidance can be removed, revoked or amended at any time and are not required as a matter of law. Additionally, decision-making by a delegate as to whether fraud has occurred pursuant to PIC 4020 falls short of the ordinary manner in which fraud or misrepresentation is determined to have occurred, that is, through adjudication by a court. This raises concerns as to whether the safeguards provided in the policy guidance are sufficient, and whether the interference on the right to protection of the family is proportionate.

Committee comment

1.390 The committee notes that the Migration Legislation Amendment (2017 Measures No. 4) Regulations 2017 were disallowed on 5 December 2017.

1.391 The committee draws the human rights implications of the Migration Legislation Amendment (2017 Measures No. 4) Regulations 2017 to the attention of the minister and parliament.

42 SOC, pp. 23-24.

43 SOC, p. 24.

44 SOC, p. 24.

Migration Regulations (IMMI 17/129: Specification of Regional Areas for a Safe Haven Enterprise Visa) Instrument 2017 [F2017L01607]

Purpose	Specifies postcodes within Australia that are taken to be 'regional areas' for the purposes of the Migration Regulations 1994
Portfolio	Home Affairs
Authorising legislation	Migration Regulations 1994
Last day to disallow	Exempt from Disallowance[1]
Rights	Multiple Rights (see **Appendix 2**)
Status	Advice only

Specification of postcodes within Australia for Safe Haven Enterprise visas

1.392 The Migration Regulations (IMMI 17/129: Specification of Regional Areas for a Safe Haven Enterprise Visa) Instrument 2017 (the instrument) specifies postcodes within Australia which are taken to be a 'regional area' for the purpose of the provisions of the Migration Regulations 1994 (the migration regulations) relating to Safe Haven Enterprise Visas (SHEV). Applicants for a SHEV must include in their application an indication that the applicant or a member of the applicant's family unit intends to study or work while accessing minimum social security benefits in a regional area.

Compatibility of the measure with multiple rights

Previous committee consideration of Safe Haven Enterprise Visas

1.393 Safe haven enterprise visas (SHEVs) were created by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act). SHEVs are a form of temporary protection visa that may be granted to persons who are found to be owed protection obligations and who indicate an intention to work or study in regional areas in Australia. The visas are granted for a period of five years.

1 Under section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the determinations are not required to be accompanied by statements of compatibility because they are exempt from disallowance. The committee nevertheless scrutinises exempt instruments because section 7 of the same Act requires it to examine all instruments for compatibility with human rights.

1.394 The committee has previously reported on the human rights compatibility of temporary protection visas (TPVs) and SHEVs.[2] The committee has previously considered that SHEVs, as a form of temporary protection visa, may engage multiple human rights, in particular Australia's non-refoulement obligations and the right to freedom of movement.[3]

Non-refoulement

1.395 Australia's non-refoulement obligations mean that Australia must not return any person 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. The committee has previously considered that the absence of procedural and substantive safeguards to protect against the refoulement of holders of TPVs and SHEVs may be incompatible with Australia's non-refoulement obligations.[4]

Right to freedom of movement

1.396 Article 12 of the ICCPR protects freedom of movement and relevantly includes the right to move freely within a country for those who are lawfully within the country, the right to leave any country and the right to enter one's own country. The right may be restricted in certain circumstances.

1.397 The right to leave a country encompasses both the legal right and practical ability to leave a country. It applies not just to departure for permanent emigration but also for the purpose of travelling abroad; and applies to every person lawfully within Australia, including those who have been recognised as refugees. States are therefore required to provide necessary travel documents to ensure this right can be realised.[5]

1.398 People who hold a SHEV, or whose last substantive visa was a SHEV, are barred from making a valid application for a Bridging Visa B (a category of visa which

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2 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 70-92; *Twenty-fourth Report of the 44th Parliament* (23 June 2015) pp. 20-24; *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 19-25, pp. 149-194; *Report 7 of 2016* (11 October 2016) pp. 108-112.

3 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 19-25, pp. 149-194. See also *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 80-85. The committee also raised concerns in relation to TPVs more broadly in relation to the right to health, the right to protection of the family and the rights of the child.

4 See Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 163-167 in relation to TPVs and Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 109 in relation to SHEVs.

5 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [8]-[10].

allows overseas travel). As the SHEV class visa has a more restricted travel facility than the Bridging Visa B class, the committee has previously noted that prohibiting SHEV holders from applying for a Bridging Visa B engages and limits the right to freedom of movement.[6] The committee concluded that a person who has been recognised as one to whom Australia owes protection obligations, but does not have the necessary travel documents to allow them to travel (and return to Australia at the conclusion of their travel), is not able to practically realise their right to leave the country. The committee therefore previously concluded that the introduction of SHEVs engages and limits the right to freedom of movement for SHEV holders; and that the minster had not provided sufficient justification so as to enable a conclusion that the regulation is compatible with this right.[7]

1.399 In the present instrument, specifying the postcodes in which persons who are SHEV holders may study or work also engages and limits the right of persons lawfully within the territory to have liberty of movement and freedom to choose their own residence. The United Nations (UN) Human Rights Committee has stated that an alien who entered the country illegally, but whose status has been regularised, should be considered to be lawfully within the territory for the purposes of the right to freedom of movement.[8] This means that, once a person is lawfully within a country, any limitation on a person's freedom of movement has to be justified by article 12(3) of the ICCPR, which provides that freedom of movement shall not be subject to any restrictions except those which are provided by law, and are necessary to protect national security, public health or morals or the rights and freedoms of others.[9]

1.400 While noting that a statement of compatibility was not required to be tabled with this instrument,[10] the committee's legislative terms of reference require it to provide an assessment as to the compatibility of the instrument with human rights.[11] Where a legislative instrument engages human rights it is good practice for an assessment to be provided as to human rights compatibility.[12] In the absence of

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6 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 108-110.

7 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 108-111.

8 UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [4].

9 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [4].

10 See section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

11 See section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

12 As per the committee's *Guidance Note 1: Drafting statements of compatibility*: 'the committee considers statements of compatibility as essential to the examination of human rights in the legislative process', p. 3.

further information, it is not possible to conclude that the limitation on the right to freedom of movement is justifiable.

Committee comment

1.401 It is not possible to conclude that the proposed amendments to the safe haven enterprise visas introduced by the instrument are compatible with human rights.

1.402 The committee draws the human rights implications of the instrument to the attention of the parliament.

Social Services Legislation Amendment (Drug Testing Trial) Bill 2018

Purpose	Seeks to introduce a two year mandatory drug testing trial for 5000 recipients of Newstart Allowance and Youth Allowance
Portfolio	Social Services
Introduced	House of Representatives, 28 February 2018
Rights	Social security; adequate standard of living; equality and non-discrimination; privacy (see **Appendix 2**)
Status	Advice only

Background

1.403 The committee previously examined the human rights compatibility of a mandatory drug testing trial for new recipients of Newstart Allowance and Youth Allowance (proposed drug testing trial) in its *Report 8 of 2017* and *Report 11 of 2017.* This measure was previously included as Schedule 12 to the Social Services Legislation Amendment (Welfare Reform) Bill 2017 (Welfare Reform Bill).[1] However, the Welfare Reform Bill was subsequently amended to remove Schedule 12.

1.404 The Social Services Legislation Amendment (Drug Testing Trial) Bill 2018 (the Drug Testing Trial Bill) is substantially the same as Schedule 12 of the Welfare Reform Bill. Accordingly, the committee's previous assessment is summarised below.

Summary of the measures in the Drug Testing Trial Bill

1.405 The Drug Testing Trial Bill seeks to make a number of amendments to the *Social Security Act 1991* (Social Security Act), the *Social Security (Administration) Act 1999* and consequential amendments to other Acts that were contained in Schedule 12 to the Welfare Reform Bill. As with the Welfare Reform Bill, the Drug Testing Trial bill seeks to establish a mandatory drug testing trial involving 5,000 new recipients of Newstart Allowance and Youth Allowance. The Drug Testing Bill specifies that the regions to be the subject of the trial are Canterbury-Bankstown (New South Wales) Logan (Queensland) and Mandurah (Western Australia). If they reside in a trial site, all people making a claim for Newstart Allowance or Youth Allowance after the commencement of the Drug Testing Trial Bill would be asked to acknowledge on their claim form that they may be required to undergo a drug test as a condition of payment.

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 46-77; *Report 11 of 2017* (17 October 2017) pp. 138-203.

1.406 Recipients who test positive will then be subject to income management (including the use of a cashless welfare card) for 24 months and be subject to further random tests. If a recipient tests positive to a subsequent test, they will be required to repay the cost of these tests through reduction in their fortnightly social security payment. This may be varied due to hardship. Recipients who test positive to more than one test during the 24 month period will be referred to a contracted medical professional for assessment.[2] If the medical professional recommends treatment, the recipient will be required to complete certain treatment activities, such as counselling, rehabilitation and/or ongoing drug testing, as part of their employment pathway plan.[3]

1.407 Recipients who do not comply with their employment pathway plan, including drug treatment activities, would be subject to a participation payment compliance framework, which may involve the withholding of payments. Recipients would not be exempted from this framework if the reason for their non-compliance is wholly or substantially attributable to drug or alcohol use.[4]

1.408 Recipients who refuse to take the test will have their payment cancelled on the day they refuse, unless they have a reasonable excuse. If they reapply, payment will not be payable for 4 weeks from the date of cancellation and they will still be required to undergo random mandatory drug testing.

Compatibility of the measure with human rights

1.409 The committee examined this reintroduced measure in its previous assessment of the proposed drug testing trial in *Report 8 of 2017* and *Report 11 of 2017*. The previous human rights analysis stated that the proposed drug testing trial would engage and limit a number of human rights, in particular the right to privacy, the right to social security and right to an adequate standard of living, and the right to equality and non-discrimination.

1.410 As to the right to social security and the right to an adequate standard of living, the previous analysis noted that the measure engaged these rights in three ways. First, the measure may result in a reduction in social security payments to cover the costs of positive drug tests, or penalise a person for failing to fulfil their mutual obligation requirements. Secondly, the risk of the result of the test being disclosed to law enforcement, immigration or other welfare authorities may cause people to avoid applying for necessary welfare payments, causing destitution. Thirdly, the measure may impermissibly discriminate against those with substance addictions which rise to the level of disability. The previous human rights analysis stated that the measure was likely to be incompatible with the right to social security

2 See Explanatory Memorandum (EM) p. 5.

3 See EM, p. 5.

4 This aspect of the measure is subject to the passage of the Welfare Reform Bill.

and adequate standard of living as it appeared the measure was unlikely to be proportionate to the legitimate objective of the measure.[5] These same concerns apply equally to the reintroduced measures.

1.411 As to the right to privacy, the previous human rights analysis noted that the bill engaged and limited the right to privacy in several respects. First, drug testing is an invasive procedure and so may violate a person's legitimate expectation of privacy. Secondly, the measure requires the divulging of private medical information to a firm contracted to conduct the drug testing. Thirdly, the use of a card in purchasing essential goods after a person's welfare benefit is quarantined will disclose that a person receives quarantined social security payments. The previous human rights analysis stated that the bill appeared to provide adequate safeguards with respect to the retention and disclosure of drug test results, which were to be set out in proposed Social Security (Drug Test Rules) in the event the bill was passed.[6] However, overall with respect to the use of personal information and the issues of bodily integrity, noting that limitations on this right must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, the previous human rights analysis concluded that the measure was likely to be incompatible with the right to privacy. While the measure was considered to be aimed at a legitimate objective, there appeared to be other, less rights restrictive ways to achieve this objective.[7]

1.412 It is noted that the Drug Testing Trial Bill additionally provides that the Secretary of the Department of Social Services must determine that a person is not to be subject to income management if the Secretary is satisfied that being subject to the regime would pose a serious risk to the person's mental, physical or emotional wellbeing.[8] This is a change from the measure as it was initially introduced in the Welfare Reform Bill. At the time the committee undertook its initial analysis of the Welfare Reform Bill, this was a matter of discretion for the Secretary.[9] However, the minister had foreshadowed these amendments in his response to the Welfare Reform Bill, and the human rights analysis considered that the amended provision,

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5 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 160-167

6 It is noted that the EM to the Drug Trial Testing Bill includes the discussion of the privacy implications of the bill that was included in the Minister's response to the committee in relation to Schedule 12 of the Welfare Reform Bill: see page 11 of the EM. As noted, this information allowed the committee to conclude that some aspects of the bill relating to the retention and disclosure of drug test results were accompanied by adequate safeguards.

7 See Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 152-160.

8 See proposed section 123UFAA(1C).

9 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 46-77.

while alleviating some of the concerns as to the proportionality of the interference with the right to privacy, still raised human rights concerns.[10] This is because the provisions appear to operate inflexibly, raising the risk that the regime will be applied to people who do not need assistance in managing their budget.[11] These concerns remain in the Drug Testing Trial Bill. This is particularly the case in light of the fact that, although the Secretary must determine that a person is not to be subject to income management if the Secretary is satisfied that being subject to the regime would pose a serious risk to the person's mental, physical or emotional wellbeing,[12] the Secretary is not required, when determining whether someone should be subject to income management, to 'inquire into whether the person being subject to the income management regime…poses a serious risk to the person's mental, physical or emotional wellbeing'.[13]

1.413 Finally, as to the right to equality and non-discrimination, the previous human rights analysis noted that the measure may disproportionately affect those with drug and alcohol dependencies[14] and Indigenous people. The previous human rights analysis stated that the measure was likely to be incompatible with the right to equality and non-discrimination, noting the measure appeared likely to have a disproportionate negative impact on particular groups and that it appeared the measure was unlikely to be the least rights-restrictive measure.[15] It is noted that the statement of compatibility to the Drug Testing Trial Bill states (in contrast to the Welfare Reform Bill) that individuals will be selected for drug testing at random.[16] However, it goes on to state, in relation to Australia's obligations under the Convention on the Elimination of all forms of Racial Discrimination and the Convention on the Rights of Persons with a Disability that 'it is intended that recipients will be selected for testing on the basis of their risk factors for having drug misuse issues'.[17] It is therefore not clear whether the selection process for the drug

10 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 156-157.

11 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 156-157.

12 See proposed section 123UFAA(1C).

13 See proposed section 123UFAA(1D).

14 Where a person's drug use rises to that of dependence or addiction, the person has a disability which is not only considered an 'other status' for the purpose of the International Covenant on Civil and Political Rights but is also protected from discrimination under the Convention on the Rights of Persons with Disabilities: see Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 167.

15 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 167-169.

16 Statement of Compatibility to the Drug Testing Trial Bill, p. 6.

17 Statement of Compatibility to the Drug Testing Trial Bill, p. 7.

testing trial within the trial area will be entirely random.[18] In any event, concerns remain as to the disproportionate negative impact on those with drug and alcohol dependencies and Indigenous people. It also remains the case that the minister has not explained how income management and, in certain circumstances, reducing payments of persons who fail to undertake treatment activities would be an effective or proportionate means of ensuring job seekers get the support they need to address drug dependency issues.

Committee comment

1.414 The committee refers to its previous consideration of the proposed mandatory drug testing trial for new recipients of Newstart Allowance and Youth Allowance in its *Report 8 of 2017* and *Report 11 of 2017*. The previous human rights assessment of the measure concluded that the proposed mandatory drug testing trial was likely to be incompatible with the right to privacy, the right to social security and right to an adequate standard of living, and the right to equality and non-discrimination.

1.415 Noting the human rights concerns raised in relation to the proposed mandatory drug testing trial in the Welfare Reform Bill, the committee draws the human rights implications of the reintroduced measures in the Drug Testing Trial Bill to the attention of the parliament.

18 This was an issue raised by the committee in *Report 11 of 2017* (17 October 2017) p. 168.

Telecommunications (Interception and Access) Regulations 2017 [F2017L01701]

Purpose	Remakes and repeals the Telecommunications (Interception and Access) Regulations 1987 to prescribe the forms in relation to issuing warrants and authorisations under the *Telecommunications (Interception and Access) Act 1979* and prescribe the role of a Public Interest Advocate
Portfolio	Attorney-General
Authorising legislation	*Telecommunications (Interception and Access) Act 1979*
Last day to disallow	Currently, 8 May 2018 (Senate)
Rights	Privacy; freedom of expression; effective remedy; fair hearing (see **Appendix 2**)
Status	Advice only

Background

1.416 The committee has considered proposed amendments to the *Telecommunications (Interception and Access) Act 1979* (TIA Act) on a number of previous occasions.[1]

1.417 As the TIA Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights*

1 Parliamentary Joint Committee on Human Rights, Law Enforcement Integrity Legislation Amendment Bill 2012, *Fifth Report of 2012* (October 2012) pp. 12-21; Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *Fifteenth Report of the 44th Parliament* (14 November 2014) pp. 10-22; *Twentieth report of the 44th Parliament* (18 March 2015) pp. 39-74; and *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 133-139; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, *Thirty-second report of the 44th Parliament* (1 December 2015) pp. 3-37 and *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 85-136; the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2016* (22 November 2016) pp. 2-8 and *Report 1 of 2017* (16 February 2017) pp. 35-44; the Telecommunications (Interception and Access – Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017* (8 August 2017) pp. 30-33; the Investigation and Prosecution Measures Bill 2017, Report 12 of 2017 (28 November 2017) pp. 84-88; and the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) pp. 2-36.

(Parliamentary Scrutiny) Act 2011. As the committee has previously noted,[2] it is difficult to assess the human rights compatibility of measures which extend, amend or operationalise the TIA Act without the benefit of a foundational human rights assessment.

1.418 The Telecommunications (Interception and Access) Regulations 2017 [F2017L01701] (the regulations) repeal and remake the Telecommunications (Interception and Access) Regulations 1987 (1987 regulations), which are due to sunset. The explanatory statement explains that the regulations remake the 1987 regulations 'in substantially the same form, with minor modifications to ensure the regulations remain fit for purpose'.[3] The regulations prescribe matters including the forms in relation to issuing warrants and authorisations under the TIA Act and the role of the Public Interest Advocate (PIA) in the journalist information warrant process.

Warrants authorising agencies to intercept and access communications and telecommunications data

1.419 The TIA Act provides a legislative framework that criminalises the interception and accessing of telecommunications. However, the Act sets out exceptions that enable defined or declared agencies to apply for access to communications[4] and telecommunications data.[5]

1.420 Chapters 2 and 3 of the TIA Act provide for warranted access by an agency to the content of communications, including both communications passing across telecommunications services[6] and stored communications content. Chapter 4 of the TIA Act provides for warrantless access to telecommunications data (metadata) by a defined or declared 'interception agency'.

1.421 However, access to telecommunications data relating to a journalist or their employer where the purpose is to identify a journalist's source is prohibited unless a warrant has been obtained (a 'journalist information warrant').[7]

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2 See, for example, Parliamentary Joint Committee on Human Rights, Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2017* (22 November 2016) pp. 2-8 and the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) pp. 2-36.

3 Explanatory statement (ES), [5].

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

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

6 That is, the interception of live communications.

7 See, Division 4C, Part 4-1, Chapter 4 of the TIA Act.

1.422 As noted above, the regulations prescribe the forms in relation to issuing warrants and authorisations, including warrants authorising agencies to intercept telecommunications, stored communication warrants and journalist information warrants. The prescribed forms are substantially the same as those contained in the 1987 regulations.

Compatibility of the measure with the right to privacy

1.423 The right to privacy includes 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. As the regulations relate to the powers of agencies to access an individual's private communications and telecommunications data, the regulations engage and limit the right to privacy.

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

1.425 The statement of compatibility acknowledges that the warrants and authorisations regime engages the right to privacy and identifies the objectives of the measure as 'national security, public safety, addressing crime, and protecting the rights and freedoms of individuals'.[8] In general terms, these may be capable of constituting a legitimate objective for the purposes of international human rights law. Enabling access to telecommunications and communications data would also appear to be rationally connected to this objective.

1.426 As to the proportionality of the measure, the statement of compatibility focuses on safeguards in relation to the journalist information warrant process (discussed from [1.433] below) but provides little further information in relation to the other prescribed warrants and authorisations.

1.427 In its consideration of measures enabling agencies to access powers under the TIA Act,[9] the committee has previously noted that, although access to private communications occurs via a warrant regime which itself may be sufficiently circumscribed, the use of warrants does not provide a complete answer as to whether chapters 2 and 3 of the TIA Act constitute a proportionate limit on the right to privacy.

8 ES, statement of compatibility (SOC), [30].

9 See, Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017*(8 August 2017) pp. 30-33 and Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 1 of 2017* (16 February 2017) pp. 35-44.

1.428 The committee has also previously raised concerns in relation to the warrantless access to telecommunications data (metadata) under chapter 4 of the TIA Act. These concerns included that the internal self-authorisation process for access to telecommunications data by prescribed agencies did not contain sufficient safeguards; the possibility of accessed data subsequently being used for an unrelated purpose; and safeguards in relation to the period of retention of such data.[10]

1.429 In relation to the specific situation of journalists and their sources, the requirement of a warrant prior to accessing a journalist's telecommunications data may provide a relevant safeguard. However, it is unclear whether this is a sufficient safeguard as it does not prevent the metadata of suspected sources being accessed without a warrant in order to determine the identity of the source.

1.430 As these concerns in relation to the interception and access of communications and telecommunications data by prescribed agencies under the TIA Act remain unresolved, it cannot be determined that the limitation on the right to privacy related to the regulations is proportionate to the stated objective. On a number of previous occasions the committee has recommended that the TIA Act would benefit from a foundational review of its human rights compatibility.[11]

Committee comment

1.431 The committee considers that the *Telecommunications (Interception and Access) Act 1979* would benefit from a full review of its compatibility with the right to privacy, including the sufficiency of safeguards.

1.432 Noting the human rights concerns regarding the right to privacy identified in its previous reports on the regulations, the committee draws the human rights implications of the regulations to the attention of the parliament.

10 Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *Fifteenth Report of the 44th Parliament* (November 2014) pp. 10-22; *Twentieth report of the 44th Parliament* (18 March 2015) pp. 39-74 and Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 1 of 2017* (16 February 2017) p. 36.

11 See, for example, Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, *Report 2 of 2018* (13 February 2018) pp. 2-36; Telecommunications (Interception and Access – Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017* (8 August 2017) p. 33; Investigation and Prosecution Measures Bill 2017, *Report 12 of 2017* (28 November 2017) p. 88.

Journalist information warrant process and role of the Public Interest Advocate

1.433 As noted at [1.421] above, the TIA Act prohibits eligible persons[12] from authorising access to telecommunications data relating to a journalist or their employer where the purpose is to identify a journalist's source, unless a journalist information warrant has been obtained.[13] The TIA Act sets out that the minister (in the case of ASIO) or the issuing authority (in the case of enforcement agencies) must not issue a journalist information warrant to eligible persons unless the minister or issuing authority is satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source.[14] The TIA Act also provides that in making that assessment, the minister or issuing authority is to have regard to any submissions made by a 'Public Interest Advocate' (PIA).[15]

1.434 The regulations prescribe the process for applying for a journalist information warrant and matters relating to the performance of the role of a PIA. Under the scheme the PIA will make submissions to the minister or issuing authority as to whether a warrant should be issued and whether any conditions or restrictions should be imposed on the warrant.[16] In relation to the role of the PIA, the regulations set out:

- that only the most senior members of the legal profession may be appointed as PIAs and prescribing levels of security clearance for certain PIAs;
- that agencies are required to provide a PIA with a copy of a proposed request or application for a journalist information warrant or notify a PIA prior to making an oral application;
- the processes for PIAs to receive further information (or a summary of further information) provided to the minister or issuing authority by agencies and to prepare new or updated submissions based on that information; and
- matters relating to submissions made by PIAs.

1.435 The committee previously considered the measures outlined above, which were contained in the Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015 [F2015L01658], in its

12 Eligible persons are defined in the Act as the Director-General of Security; Deputy Director-General of Security; an ASIO employee or an ASIO affiliate under certain conditions. See, subsection 175(2) and subsection 176(2) in Division 3, Part 4-1 of Chapter 4 of the TIA Act.

13 See, Division 4C of Part 4-1 of Chapter 4 of the TIA Act.

14 See subparagraph 180L(b), subdivision B, division 4C of the TIA Act.

15 See subparagraphs 180L(2)(b)(v) and 180T(2)(b)(v), subdivision B of division 4C of the TIA Act.

16 EM, SOC, [37].

Thirty-second report of the 44th Parliament and *Thirty-fifth report of the 44th Parliament*.[17] Drawing on the committee's previous assessments, matters raising human rights concerns are set out below.

Compatibility of the measure with multiple rights

1.436 Accessing telecommunications data relating to a journalist, or their employer, where the purpose is to identify a journalist's source, in the context of the journalist information warrant and PIA scheme, engages and may limit multiple rights, including:

- right to privacy;[18]
- right to freedom of expression;[19]
- right to an effective remedy;[20] and
- right to a fair hearing.[21]

1.437 The statement of compatibility argues that the regulations engage the right to privacy and engage and promote the right to freedom of expression, but no assessment of the compatibility of the measure with the right to an effective remedy or a fair hearing is provided.

1.438 In relation to the right to privacy, the statement of compatibility explains that the role of the PIA in the warrant process 'ensures that any interference with the privacy of any person or persons that may result from disclosing telecommunications data would be lawful, justifiable and proportionate'.[22]

1.439 In relation to the right to freedom of expression, the statement of compatibility contends that the warrant and PIA scheme intends to promote the protection of this right:

> …The existence of robust oversight of authorisation requests protects against access to source information occurring in a way which is inconsistent with the assurances of confidentiality that may be given by a journalist to a source save where the public interest outweighs the maintenance of confidentiality. Independent authority, through the creation of journalist information warrants issued by a judicial officer or

17 Parliamentary Joint Committee on Human Rights, *Thirty-second report of the 44th Parliament* (1 December 2015) pp. 44-48 and *Thirty-fifth report of the 44th Parliament* (25 February 2016) pp. 18-26.

18 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

19 Article 19, ICCPR.

20 Article 2, ICCPR.

21 Article 14, ICCPR.

22 EM, SOC, [34].

> AAT member minimises the potential for deterring sources from actively assisting the press to inform the public on matters of public interest and ensures that the freedom of the press is not adversely affected by the measure.
>
> […]
>
> The Public Interest Advocate process further supports the right to freedom of expression by requiring the balance of competing public interests between disclosure of information for national security and law enforcement purposes and the protection of confidential sources which support freedom of expression.[23]

1.440 The statement of compatibility also outlines that the warrant and PIA scheme contains adequate safeguards, including by requiring that agencies provide a PIA with a copy of a proposed request or application for a warrant prior to making an oral application; enabling PIAs to receive further information provided to the minister or issuing authority by agencies; enabling PIAs to prepare a new or updated submission based on any further information provided; and by prescribing criteria that ensure PIAs are 'appropriately skilled and independent and able to advocate in the public interest'.[24]

1.441 The committee previously considered that the journalist information warrant and PIA schemes may seek to better protect the right to privacy and the right to freedom of expression in the context of the TIA Act. However, it was noted that the regulations may lack sufficient safeguards to appropriately protect these rights. As noted at [1.429] above, it does not appear that any safeguards exist in the regulations to prevent the metadata of suspected sources being accessed directly, without a warrant, in order to determine the identity of the source. Therefore, notwithstanding the journalist information warrant process, the metadata measure may still have a 'chilling effect' on freedom of expression for certain individuals.

1.442 Further, the committee's previous assessment noted that the regulations do not enable the PIA to seek instructions from any person affected by the journalist information warrant.[25] The previous analysis stated that it was unclear how a PIA would be able to effectively represent the interests of a person subject to the warrant in these circumstances, or provide information that would relevantly weigh on the issuing authority's determination as to whether to grant a warrant.

1.443 Further, the previous assessment noted that the regulations provide no procedural guarantees to ensure the PIA is able to make a submission on an

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23 EM, SOC, [40]-[41].

24 EM, SOC, [36].

25 Parliamentary Joint Committee on Human Rights, *Thirty-fifth report of the 44th Parliament* (25 February 2016), pp. 23-24.

application for a journalist information warrant prior to the issuance of a warrant.[26] In response to the committee's inquiries in this regard, the then Attorney-General noted that it would be beyond the scope of the regulation-making power in the TIA Act to prevent warrants being made in the absence of a submission from a PIA, because the legislation provides discretion to the issuing authority as to whether to issue a journalist information warrant. While the previous analysis acknowledged that a minister may not make delegated legislation that is contrary to the primary statute, it was considered that this additional safeguard could be incorporated in an appropriately amended primary statute. Despite relevant additional safeguards identified in the Attorney-General's response the concern remained that a minister or issuing authority may still issue a journalist information warrant without any submission from a PIA, thereby limiting the right to a fair hearing and an effective remedy, and, consequentially, the right to privacy and freedom of expression.

1.444 As these concerns in relation to the measure remain unresolved, it cannot be determined that the limitation on the right to privacy, the right to freedom of expression, the right to a fair hearing and the right to an effective remedy are proportionate to the stated objective.

Committee comment

1.445 The committee reiterates its view that the *Telecommunications (Interception and Access) Act 1979* would benefit from a full review of its compatibility with the right to privacy, including the sufficiency of safeguards.

1.446 Noting the human rights concerns identified in its previous reports, the committee draws the human rights implications of this aspect of the regulations to the attention of the parliament.

26 Parliamentary Joint Committee on Human Rights, *Thirty-fifth report of the 44th Parliament* (25 February 2016), pp. 24-25.

Bills not raising human rights concerns

1.447 Of the bills introduced into the Parliament between 12 February and 22 March, 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):

- Banking Amendment (Rural Finance Reform) Bill 2018;
- Bankruptcy Amendment (Debt Agreement Reform) Bill 2018;
- Competition and Consumer Amendment (Free Range Eggs) Bill 2018;
- Competition and Consumer Amendment (Misleading Representations About Broadband Speeds) Bill 2018;
- Interstate Road Transport Legislation (Repeal) Bill 2018;
- Marine Safety (Domestic Commercial Vessel) Levy Bill 2018;
- Marine Safety (Domestic Commercial Vessel) Levy Collection Bill 2018;
- Migration Amendment (Clarification of Jurisdiction) Bill 2018;
- National Housing Finance and Investment Corporation Bill 2018;
- National Housing Finance and Investment Corporation (Consequential Amendments and Transitional Provisions) Bill 2018;
- Protection of the Sea Legislation Amendment Bill 2018;
- Social Services Legislation Amendment (14-month Regional Independence Criteria) Bill 2018;
- Treasury Laws Amendment (Illicit Tobacco Offences) Bill 2018;
- Treasury Laws Amendment (Income Tax Consolidation Integrity) Bill 2018;
- Treasury Laws Amendment (2018 Measures No. 3) Bill 2018; and
- Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 1) Bill 2018.

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**.

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
Rights	Privacy, criminal process rights (see **Appendix 2**)
Previous report	1 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017 (the bill) in its *Report 1 of 2018*, and requested a response from the Minister for Communications by 21 February 2018.[1]

2.4 The minister's response to the committee's inquiries was received on 21 February 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 2-6.

Establishment of the Register of Foreign Ownership of Media Assets

2.5 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'[2] in an Australian media company, including the name of the foreign stakeholder, the foreign stakeholder's company interests[3] in the Australian media company and the country in which the foreign stakeholder is ordinarily resident.[4]

2.6 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,[5] and 'such other information (if any) relating to the person as is specified' by legislative instrument.[6] 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.[7]

Compatibility of the measure with the right to privacy

2.7 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.

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2 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.

3 '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.

4 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).

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

6 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.

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

2.8 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.[8] 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.

2.9 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 companies'.[9] As noted in the initial human rights analysis, 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.

2.10 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 initial analysis stated that the powers to specify, by legislative instrument, additional information that foreign stakeholders must provide to the ACMA is broadly worded.[10] It was 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.[11] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights.

2.11 It was 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.

2.12 The committee therefore sought the advice of the minister as to whether the limitation on the right to privacy is proportionate to the stated objective of the

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

9 SOC, p. 18.

10 See proposed sections 74F(2), 74H(2), 74J(2), and74K(2).

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

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).

Minister's response

2.13 The minister's response provides useful information in relation to the proportionality of the limitation on the right to privacy. The minister's response explains that the power for the ACMA to collect any additional information is a 'reserve power' that would 'be used in exceptional circumstances only, if at all', and that 'there is no intention that this reserve power would be used to collect personal information'. The minister's clarification suggests that the power to prescribe further information to be collected by legislative instrument, while broad, is unlikely to be exercised in a way that is incompatible with the right to privacy in this particular case. However, the committee will consider the human rights compatibility of any further legislative instrument when it is received.

2.14 The minister's response also identifies a number of relevant safeguards that will ensure this power is sufficiently circumscribed, including the minister's expectation that the ACMA would consult with the office of the Australian Information Commissioner before making any legislative instrument, as well as safeguards provided by the *Privacy Act 1988* (Privacy Act):

> Moreover, any additional information sought by the ACMA using this power will relate to the legitimate fulfilment of its functions in relation to the Register, and there is no intention that this reserve power would be used to collect additional personal information. In this regard, it should be noted that the ACMA, as an Australian government agency, is bound by and subject to the provisions of the *Privacy Act 1988* (Privacy Act), which include adherence to the Australian Privacy Principles (APP). Among other things, these principles require APP entities to consider the privacy of personal information, including ensuring that APP entities manage personal information in an open and transparent manner.
>
> The APPs also require the ACMA to take such steps as are reasonable in the circumstances to protect information from misuse, interference and loss, and from unauthorised access, modification or disclosure. In a practical sense, I expect that the ACMA will ensure that access to any personal or commercially sensitive information that it collects will only be accessible by those people performing the administration of the Register and on a strictly 'need to know' basis. I also expect that it will implement robust measures to prevent privacy breaches, which may include the establishment of firewalls, network segmentation, role-based access controls, physical security, and auditing and training of its personnel.
>
> In the event that the ACMA no longer requires the information that it collects, the ACMA is required to take such steps as are reasonable in the circumstances to destroy the information, or to ensure that the

> information is de-identified. It was not necessary to expressly set out the requirements of the Privacy Act in the Bill given that, as an APP entity, the ACMA is required to adhere to these obligations. Section 13 of the Privacy Act imposes significant penalties for serious interferences with privacy.

2.15 While the minister has identified safeguards in the Australian Privacy Principles (APPs), it is noted that the APPs do not necessarily provide an adequate safeguard for the purposes of international human rights law in all circumstances. This is because the APPs contain a number of exceptions to the prohibition of use or disclosure of personal information, including where its use or disclosure is authorised under an Australian Law,[12] which may be broader than the scope permitted in international human rights law.

2.16 However, the minister's clarification as to the steps that ACMA is required to take to protect information from misuse, interference and from unauthorised access or disclosure, as well as the clarification that the ACMA is required to take reasonable steps to destroy information or ensure it is de-identified when the information is no longer required, suggests that there are safeguards in place to ensure that the limitation on the right to privacy is circumscribed. In light of the further information provided by the minister, it is likely that on balance the measures would be a proportionate limitation on the right to privacy.

Committee response

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

2.18 Based on the information provided by the minister, subject to the content of any further legislative instrument, it is likely that the measures will be a proportionate limitation on the right to privacy. The committee will consider the human rights compatibility of any legislative instrument prescribing additional information that can be collected when it is received.

Civil penalties for failing to comply with notification requirements

2.19 Proposed sections of the bill provide that a foreign person who fails to properly notify the ACMA of being a foreign stakeholder is liable to a civil penalty.[13] Similarly, a person who fails to notify the ACMA when they cease to be a foreign stakeholder is liable to a civil penalty.[14] The amount of penalty unit for a non-body corporate is 60 penalty units (currently $12,600).[15] Further, if a person fails to comply

12 APP 9; APP 6.2(b).

13 See sections 74F(3), 74H(3), 74J(3) and 74K(4).

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

15 See the Explanatory Memorandum, Table 1.

with the section, it would be a separate contravention for each day that the person has failed to comply with the notification obligation.[16]

Compatibility of the measure with criminal process rights

2.20 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).

2.21 As noted in the initial human rights analysis, the statement of compatibility has not addressed whether the civil penalty provisions might be considered 'criminal' for the purposes of international human rights law. Applying the tests set out in the committee's *Guidance Note 2*:

- first, as the provisions are not classified as 'criminal' under domestic law they will not automatically be considered 'criminal' for the purposes of international human rights law;
- secondly, 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.[17] However, no information is otherwise provided in the statement of compatibility as to the nature and purpose of the penalties save for describing the penalties as an 'administrative' penalty;[18] and
- thirdly, in relation to severity,[19] 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.

2.22 These issues were not addressed in the statement of compatibility. The committee therefore sought 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

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

17 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.

18 SOC, p. 20.

19 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.

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)).

Minister's response

2.23 The minister's response usefully addresses each of the tests set out in the committee's *Guidance Note 2* as to whether the civil penalties may be classified as 'criminal' for the purposes of international human rights law. First, the minister notes that the civil penalties are not classified as 'criminal' under Australian law.

2.24 Secondly, the minister clarifies the nature and purpose of the civil penalties:

> The purpose of the penalty is not to punish or deter, but rather to ensure that the Register can be a reliable and current source of information about the levels and sources of foreign investment in Australian media companies at any particular time. It is common practice for non-compliance with government regulation to result in the imposition of an administrative penalty.
>
> Moreover, the penalty does not apply to the public in general, but is restricted to foreign persons in a specific regulatory context, being those foreign persons who are required to provide the ACMA with information prescribed by the Bill. Therefore, the only people captured by these provisions are foreign individuals and body corporates with company interests in excess of two and a half per cent in Australian media companies. This will be predominantly corporate entities who are required to report given the nature of investments in the media industry.

2.25 This information suggests that, having regard to the nature and purpose of the civil penalty, the penalty is unlikely to be 'criminal' under step two of the test. However, even if the penalty was not 'criminal' on this aspect of test, the penalty may still be 'criminal' for the purposes of international human rights law if it is sufficiently severe. In this respect, the minister's response explains:

> The amounts payable under the civil penalty provisions are reasonable and ensure that there is proportionality between the seriousness of the contravention and the quantum of the penalty sought. The effective operation of the Register will be predicated on the information contained within it being reliable and accurate, and the penalties have been set at a

> level that should ensure compliance in relation to the Register's reporting obligations. These penalty amounts are consistent with the maximum amount that is generally recommended (one-fifth of the maximum penalty that a court could impose on a person, but which is not more than 12 units for an individual and 60 units for a body corporate).

2.26 While the minister's response is helpful in assessing the proportionality of the measure, it is noted that the amounts referred to by the minister that are generally recommended (not more than 12 penalty units for an individual and 60 units for a body corporate) appear to refer to the infringement notice provisions in the bill, not the civil penalties. According to the explanatory memorandum of the bill, the civil penalty provisions (proposed sections 74F(3), 74H(3), 74J(3) and 74K(4)) attract a maximum penalty of 300 penalty units for a body corporate and 60 penalty units for other persons.[20] However, it is acknowledged that the infringement notice provisions[21] offer an alternative to court action for breach of the civil penalty provisions and, for individuals who choose to pay the amount as an infringement notice as an alternative to court proceedings, the amount of the penalty is not substantial (10 penalty units, or $2,100).[22]

2.27 In relation to the committee's concern about the civil penalty applying to each day of contravention and the safeguards in place, the minister's response explains:

> …I would note that the ACMA has the capacity to exercise forbearance in determining whether to seek the cumulative penalty payable under the Bill. This would involve the ACMA considering, among other things, the circumstances surrounding the contravention. While the penalty contained in the Bill should not be considered criminal for the purposes of international human rights law, I do note that the Bill preserves the privilege against self-incrimination. This is an important safeguard and protection for entities and persons that may be required to disclose information under the Register.

2.28 While the potential maximum civil penalty that may be imposed (if it applies to each day of contravention) may potentially be substantial, noting the particular regulatory context, the intended application of the penalties and the minister's clarification that those impacted by the measure are most likely to be body corporates, there appears to be sufficient basis to conclude that the civil penalties are unlikely to be considered 'criminal' for the purposes of international human rights law. Accordingly, the criminal process rights contained in articles 14 and 15 of the ICCPR are unlikely to apply.

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20 See Explanatory Memorandum, page 20 and 37 (Table 1).

21 Sections 74F(5), 74G(4), 74H(5), 74J(5), 74K(6)

22 Explanatory Memorandum, pp. 20 and 37 (Table 1).

Committee response

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

2.30 In light of the additional information provided the committee notes that the measure appears unlikely to be 'criminal' for the purpose of international human rights law. The committee notes that this information would have been useful in the statement of compatibility.

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**)
Previous report	1 of 2018
Status	Concluded examination

Background

2.31 The committee first reported on the Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) (Documents) Amendment Instrument 2017 (No. 1) [F2017L01456] (the instrument) in its *Report 1 of 2018*, and requested a response from the Minister for Foreign Affairs by 21 February 2018.[1]

2.32 The minister's response to the committee's inquiries was received on 6 March 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.33 The committee has examined offence provisions arising out of sanctions regulations on a number of previous occasions.[2] The human rights assessment of these regulations noted that proposed criminal offences arising from the breach of

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018), pp. 7-10.

2 See, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 11; *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.

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 instrument examined in this report raises similar human rights concerns.

Offences of dealing with export and import sanctioned goods

2.34 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).[3] 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).[4] The instrument re-lists a number of documents as well as adding some additional documents to the list.[5]

2.35 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.[6] The documents that are specified by the minister through the instrument take various forms, including letters and information circulars.

2.36 Sections 9 and 10 of the 2008 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 2008 DPRK sanctions regulations are contraventions of a 'UN sanction enforcement law'.[7] 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 UN Charter Act).[8] Therefore, a person commits an offence under the UN Charter 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

3 2008 DPRK regulations section 5.

4 See, 2008 DPRK sanctions regulations section 5.

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

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

7 See, also, *Charter of the United Nations Act 1945* section 2B.

8 UN Charter Act section 27.

then punishable by up to 10 years' imprisonment and/or a fine of up to 2,500 penalty units (or $525,000).[9]

Compatibility of the measure with human rights

2.37 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 detained. 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.

2.38 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.

2.39 The initial human rights analysis stated that, 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 UN Charter Act subject to a penalty of imprisonment, the instrument engages and may limit the right to liberty.

2.40 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.[10] 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.

2.41 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.[11] In particular there appears to be a lack of clarity about what is and what is not prohibited for export and import. The initial analysis noted that this raises specific concerns that, by making a breach of such regulations a criminal offence, the application of such an

9 UN Charter Act section 27.

10 2008 DPRK regulations section 5.

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

offence provision may not be a permissible limitation on the right to liberty as it may result in arbitrary detention.

2.42 In this respect, it was 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.[12] 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'.[13] The initial analysis stated that 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 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.

2.43 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'.[14] 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*.

2.44 Accordingly, the committee requested 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

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

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

14 Statement of compatibility, p. 1.

- 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.

Minister's response

2.45 The minister's response provides the following general information about the instrument:

> As noted by the Committee in its *Report 1 of 2018*, this instrument amends the *Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) (Documents) Instrument 2017* (the Documents List). Goods mentioned in the Documents List 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*.
>
> The Documents List is periodically updated to reflect Australia's obligations under relevant United Nations Security Council resolutions (UNSCRs) to prohibit trade in certain items to North Korea. The Documents List thereby gives effect in Australian law to obligations imposed by UNSCRs.
>
> The Government recognises the need to ensure Australians have sufficient certainty about which goods are subject to sanctions. The documents specified by the Documents List are an internationally accepted reference for those industries, persons and companies that trade in such goods. For example, INFCIRC/254/Part 1 and INFCIRC/254/Part 2 referred to in *Report 1 of 2018*, are the guidelines implemented by the Nuclear Suppliers Group for nuclear exports and nuclear-related exports aimed at ensuring that nuclear trade for peaceful purposes does not contribute to the proliferation of nuclear weapons or other nuclear explosive devices.
>
> In addition, the Department of Foreign Affairs and Trade provides a free service (via the Online Sanctions Administration System) whereby members of the public can submit inquiries about whether a proposed transaction is subject to Australia's sanctions laws. This would include an assessment as to whether a good is an import or export sanctioned good under the Documents List.
>
> In light of these factors, the Government's view is that the instrument is compatible with human rights, including the quality of law test and the right to a fair hearing, the right to a fair trial and the right to liberty.
>
> As requested by the Committee, the statement of compatibility with human rights (SCHR) for the next amending instrument for the Documents List will include a substantive assessment of human rights compatibility along the lines I have described above. I will also amend the SCHR for the *Charter of the United Nations (Sanctions-Democratic People's Republic of*

Korea) (Documents) Amendment Instrument 2017 (No. 1) to include such an assessment.

2.46 Based on the information provided by the minister the measure would appear to be compatible with the right to a fair trial, the right not to be arbitrarily detained and the quality of law test. It is noted in this respect that the measures operate in specific export and import contexts that involve a range of technical requirements. The Department of Foreign Affairs and Trade's service which enables individuals to seek advice about the application of sanction laws including whether a good is an import or export sanctioned good, may operate as an additional safeguard in this respect.

Committee response

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

2.48 Based on the information provided, the committee considers that the measure is likely to be compatible with the right to a fair trial, the right not to be arbitrarily detained and the quality of law test.

2.49 The committee welcomes the minister's commitment to amend the statement of compatibility for the instrument to include the information outlined above.

2.50 The committee further welcomes the minister's commitment to include a substantive assessment of the human rights implications of similar instruments in statements of compatibility going forward.

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**)
Previous report	1 of 2018
Status	Concluded examination

Background

2.51 The committee first reported on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the bill) in its *Report 1 of 2018*, and requested, and received, a response from the Minister for Finance by 21 February 2018.[1] The minister's response is discussed below and is reproduced in full at **Appendix 3**.

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

2.52 The bill introduces a requirement for persons to be registered as a 'political campaigner' if their 'political expenditure' during the current, or in any of the previous three, financial years was $100,000 or more.[2] 'Political expenditure' means

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 11-29.

2 Section 287F of the bill. A person or entity must also register as a political campaigner if their political expenditure 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. Allowable amount is defined in proposed subsection 287(1) to mean any amount received by the person or entity, or to which the entity has access, during the financial year except any gifts received from another person or entity that is not an allowable donor and any loan to which the person or entity has access.

expenditure incurred for a 'political purpose'.[3] A person is required to register as a 'third party campaigner' if the amount of political expenditure incurred by or with the authority of the person or entity during the financial year is more than the 'disclosure threshold' ($13,500);[4] 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.[5] Additionally, an entity[6] 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.[7]

2.53 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:

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3 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.

4 The 'disclosure threshold' is defined in section 287(1) of the bill to be $13,500.

5 Section 287G(1).

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

7 Section 287H(1).

(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

(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.

2.54 The registers of political campaigners, third party campaigners and of associated entities are established and maintained by the electoral commissioner.[8] 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.[9] The registers must be maintained electronically and be publicly available.[10]

Compatibility of the measure with multiple rights

2.55 As identified in the initial analysis, the obligation to register as a 'political campaigner', 'third party campaigner' and 'associated entity' engages the freedom of

8 Proposed section 287N of the bill.

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

10 Proposed section 287Q.

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

2.56 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.[11] However, the bill also promotes the freedom of expression insofar as it allows the public to receive information about the source of political communication.[12]

2.57 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 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'.[13]

2.58 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.[14] 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.[15]

2.59 The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation, and also includes respect for informational 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

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11 Statement of Compatibility (SOC) [4].

12 SOC [6].

13 SOC [4].

14 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] and [5]-[6].

15 SOC [4].

'political campaigner', 'third party campaigner' or an 'associated entity', as this would publicly disclose personal information.[16]

2.60 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.

2.61 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.[17] 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;
>
> 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.

2.62 The previous analysis stated that 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.

2.63 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.[18]

2.64 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

16 SOC [4], [8].

17 SOC [5].

18 SOC [5].

necessary to achieve its objective. In this respect, the initial analysis stated that 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.[19]

2.65 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.

2.66 It was 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 genuine satirical, academic or artistic purposes.[20] 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'.[21] However, that safeguard does not appear to apply to the examples provided above.

2.67 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

19 Section 287(1) of the bill.

20 Proposed section 287.

21 Explanatory Memorandum (EM), [39].

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.[22]

2.68 As noted in the initial analysis, 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.

2.69 Thus, the ambiguity in the definition of 'political expenditure' and potential breadth of the definition of 'associated entity' could lead to considerable uncertainty 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.[23]

2.70 An additional issue identified 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

22 EM, [61].

23 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).

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.[24]

2.71 The committee therefore requested 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'.

Minister's response

2.72 The minister's response states that 'key non-party actors are already required to identify themselves in political communications by the *Electoral and Other Legislation Amendment Act 2017* [(Authorisation Amendment Act)]' and reiterated that the registration scheme 'complements the Authorisation Amendment Act'. In relation to the breadth of the definitions in the bill, the minister's response states:

> The Bill narrows the current definition of 'political expenditure', as currently set out in the Authorisation Amendment Act. This definition captures expenditure promoting political views. Whether or not the views or the issue are partisan in nature is immaterial to whether they are political in nature, and therefore the transparency of expenditure used to raise the prominence of such views in public debate is in the public interest.
>
> It is also in the public interest for citizens to be able to identify where an issue is prominent in public debate because its supporters or detractors incurred a significant amount of expenditure. Without such transparency, citizens could reasonably infer that the issue was a priority for government intervention, at the cost of other, perhaps more worthy or pressing, issues.
>
> There are expected to be around 50 entities that will be required to register as a third party or political campaigner, taking historic reporting patterns into account.
>
> With respect to the definition of 'associated entity', new subsection 287H(5) clarifies the meaning of 'associated entity'. I disagree with the Committee's analysis, given the ease of registration and this clarification,

24 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.

that the Bill's registration requirements in relation to associated entities could discourage or prevent people from forming an association.

2.73 While the minister's response states that the definition of 'political expenditure' narrows the current definition under the Authorisation Amendment Act, this does not fully address the concerns articulated in the previous human rights analysis. It is noted that the application of the definition in the bill triggers broader obligations. In addition to 'capturing expenditure promoting political views', it also covers broader matters including '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)'. As noted in the initial analysis, expenditure would appear to be for this political purpose regardless of how insignificant or incidental the issue is at an election. Therefore, concerns remain that the definition of 'political expenditure' is overly broad such that the registration requirement introduced by the bill is not a proportionate limitation on human rights.

2.74 In the case of the registration obligation on political campaigners, it may be that the expenditure thresholds in section 287F[25] mean that, notwithstanding the broad definition of political expenditure, in practice only a small number of persons and entities would meet the financial threshold required for registering as a political campaigner. Assuming this is the case, insofar as the registration obligation is imposed on political campaigners, the limitation on human rights may be sufficiently circumscribed. However, the situation is less clear insofar as it applies to 'third party campaigners'. The financial threshold for third party campaigners is much lower ($13,500) and as noted in the initial analysis, the breadth of the definitions is such that a potentially wide category of persons may be captured by the registration obligations.

2.75 In relation to the proportionality of the limitation insofar as it applies to 'associated entities', as noted in the initial analysis the clarification in section 287H(5) that an entity will be required to register as an associated entity where it operates 'wholly, or to a significant extent, for the benefit of' a registered political party is very broad. As outlined in the examples provided in the initial analysis (extracted at [2.67] and [2.68] above), the definitions (when read with the definition of 'political expenditure') would appear to capture a broad variety of persons, entities and circumstances. While the minister does not agree with the previous analysis that the registration requirements in relation to associated entities could have a 'chilling effect', this does not address the underlying concern that the definitions are not

25 As discussed above, proposed section 287F of the bill requires the amount of political expenditure by or with the authority of the person or entity during that or any one of the previous financial ears is $100,000 or more. A person or entity must also register as a political campaigner if their political expenditure 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.

sufficiently circumscribed. The minister's response also does not address the committee's concerns as to the potential reputational consequences for individuals or entities required to register. This raises the issue that rather than providing greater transparency the measure may create confusion in certain circumstances about degrees of political connection between persons and the political process.

2.76 Therefore, notwithstanding the legitimate transparency objectives of the bill, concerns remain that the registration requirements for third party campaigners and associated entities are insufficiently circumscribed. As such the measure does not appear to be a proportionate limitation on human rights.

Committee response

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

2.78 Based on the information provided by the minister, the registration obligations on political campaigners may be a proportionate limitation on the right to freedom of expression, the right to freedom of association, the right to privacy, and the right to take part in the conduct of public affairs.

2.79 The information provided by the minister and the preceding analysis indicates that the registration obligations on third party campaigners and associated entities may be incompatible with the right to freedom of expression, the right to freedom of association, the right to privacy, and the right to take part in the conduct of public affairs. This is because the measure does not appear to be sufficiently circumscribed to constitute a proportionate limitation on these rights.

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

2.80 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).

2.81 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;[26] and incurring political expenditure where an

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

'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.[27]

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

2.82 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 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.

2.83 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.
>
> 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).[28]

2.84 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'.[29]

2.85 As set out in the committee's *Guidance Note 2,* there are three key aspects to assessing whether a penalty is considered 'criminal' for the purposes of international human rights law:

- the domestic classification of the penalty;
- looking 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, and where there is an intention to punish or deter, irrespective of the level of penalty; and

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

28 EM, p. 19.

29 SOC [16].

- considering the severity of the penalty.

2.86 In this instance, the penalties are described as 'civil' (step 1). This is a relevant factor, 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.

2.87 In relation to the nature and purpose of the penalties (step 2), the statement of compatibility relevantly 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, the initial analysis identified that 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.

2.88 Also relevant to the nature and purpose of the penalties is that civil penalty provisions are 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.

2.89 Step 3 is to look at the severity of the penalties. 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 penalty in this particular regulatory context is unclear due to the lack of information in the statement of compatibility.

2.90 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 [2.83] above.

2.91 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.

2.92 With reference to its *Guidance Note 2*, the committee therefore sought 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.

2.93 If the penalties were to be considered 'criminal' for the purposes of international human rights law, the committee sought 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)).

Minister's response

2.94 In relation to the nature and purpose of the penalties (step 2), the minister's response states that the *purpose* of the civil penalty provisions in the bill is to deter non-compliance. As to the *nature* of the penalty, the minister's response states:

> The Bill's registration requirements apply to those who spend significant amounts of money attempting to influence the results of an election, and those associated with registered political parties. Based on historic reporting, around 50 entities are expected to be registered as third parties or political campaigners, and around 200 entities as associated entities. There is likely to be some overlap between these two groups (so it is not accurate to add the two figures). Many of these entities will already be subject to annual reporting requirements under the *Commonwealth Electoral Act 1918*.

2.95 This provides useful further information as to the particular regulatory context of the civil penalty regime. The relatively small number of persons and entities identified in the minister's response as being potentially liable to register

would suggest that the penalties apply in that specific context rather than to the public at large. Given the financial threshold for political campaigners of $100,000, it appears that the number of persons and entities required to register as political campaigners who may be liable for a civil penalty would be small. This suggests that, for political campaigners, the penalties may not be 'criminal' for the purposes of step 2 of the test.

2.96 However, as noted above and in the previous analysis, concerns remain that the scope of definitions that give rise to registration obligations for third party campaigners and associated entities may capture a broad variety of persons, entities and circumstances, and so it is not possible to conclude that the regime can categorically be said not to apply to the public in general. The potential application of the penalties to the public in general coupled with the purpose of deterrence suggests that the penalty is more likely to be 'criminal' under the second limb of the test.

2.97 As to step 3 relating to the severity of the penalties, the minister's response provides the following information:

> The maximum civil penalty amount is lower for third parties due to their lower levels of political expenditure. Lower levels of political expenditure are less likely to distort public debate. Third parties may have comparatively fewer financial resources available to them, or fewer connections with registered political parties. This indicates that a lower penalty amount for third parties would have a similar deterrent effect to the higher amounts applied to political campaigners and associated entities in context.

2.98 The minister's response also explains that the Courts must take into account a range of factors when determining the appropriate civil penalty in accordance with the *Regulatory Powers (Standard Provisions) Act 2014*. The minister's response states in this respect:

> The requirement for courts to consider a range of factors makes it unlikely that the maximum penalty would be imposed in each and every instance. Therefore, the relevant consideration in setting a civil penalty amount is the most egregious instances of non-compliance. In the context of the Bill's registration requirements, the most egregious instance of non-compliance could, for example, involve a large, well-funded organisation or wealthy individual deliberately concealing from the public the fact that they were incurring large amounts of political expenditure in order to influence the composition of the legislative and executive arms of the Australian Government. Such an outcome would be potentially very beneficial to the entity or individual and very detrimental to the civil and political rights of Australians more broadly. I therefore consider the penalties are more than justified in context.

2.99 As noted in the committee's *Guidance Note 2,* 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 or entity that fails to register could be exposed to significant penalties of up to 240 penalty units (for political campaigners and associated entities) or 120 penalty units (for third parties) per day for each day of contravention. While the minister's response explains the rationale for applying lower civil penalties to third parties and higher civil penalties to political campaigners, the minister's response does not fully explain the rationale for the higher penalty to associated entities (which, as noted by the minister, would capture around 200 entities). Notwithstanding the small number of persons and entities that may be required to register as 'political campaigners', as the extract in the explanatory memorandum to the bill (extracted above at [2.83]) makes clear, the maximum penalties that could be payable by political campaigners could be substantial. This concern applies equally to associated entities and third party campaigners, for whom the application of the penalties is more general and whose financial resources may be limited.

2.100 The potential application of such large penalties 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 minister's response points to the court's discretion in the amount of penalty to be imposed and the unlikeliness of courts awarding the maximum penalty except in the most egregious circumstances as a reason why the penalty should not be considered criminal. While the actual penalty that is imposed is important, 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.

2.101 Where a penalty is considered 'criminal' for the purposes of international human rights law this does not mean that it is illegitimate, unjustified or does not pursue important goals. Rather, where a penalty is considered 'criminal' for the purposes of international human rights law it means that criminal process rights, such as the right to be presumed innocent (including the criminal standard of proof) (article 14(2) of the ICCPR) are required to apply. As noted in the initial human rights analysis 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.

2.102 While the committee requested the advice of the minister as to whether the measures were compatible with criminal process rights including whether any limitations on these rights are permissible, the minister's response does not provide any information in this respect except to state that 'guaranteeing the rights in the committee's comments…would involve criminalising the requirements'. However, it is noted that the classification of the penalties as 'criminal' does not necessarily require criminalising the requirements, but rather the provision of additional

safeguards. Accordingly, without information from the minister regarding such matters, it is not possible to conclude that the civil penalty provisions accord with criminal process rights under international human rights law.

Committee response

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

2.104 The preceding analysis indicates that the penalties may be considered criminal for the purposes of international human rights law. This means that criminal process rights under articles 14 and 15 of the ICCPR are required to apply. However, the bill does not appear to provide for these rights to apply, and therefore it is not possible to conclude whether these civil penalties are compatible with criminal process rights.

Restrictions on and penalties relating to foreign political donations

2.105 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[30] 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.[31] 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).[32]

2.106 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'.[33] 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.[34] 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

30 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).

31 Section 287AA of the bill.

32 Section 302D(2) and (3)

33 Section 302E(2)(b).

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

registered organisations are paid into the same account as that which is used for domestic political purposes.[35]

2.107 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),[36] 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.[37] A person who 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 ($105,000). 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,[38] 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'.[39]

2.108 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.[40]

2.109 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.[41] A person who contravenes section 302L commits a criminal offence with a

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35 Section 302F.

36 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].

37 Section 302G(2).

38 Section 302J.

39 Section 302H.

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

41 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).

penalty of 10 years imprisonment or 600 penalty units, or both, or is liable to a civil penalty of 1000 penalty units.[42]

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

2.110 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.[43] Each of these rights is summarised at [2.56] to [2.58] above.

2.111 In relation to the restrictions on foreign political funding to registered political parties, state branches of registered political parties, candidates, and Senate 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.[44]

2.112 However, the initial analysis stated that 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.[45]

2.113 However, for the reasons discussed above at [2.64] to [2.69] 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'. Equally, the prohibition on foreign donations to third party campaigners or certain

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

43 SOC [4].

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

45 SOC [14].

political campaigners where those donations are for 'political purposes' is equally broad.

2.114 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[46] 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 was 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 of the right to freedom of association'.[47] 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'.[48]

2.115 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' has a broad meaning 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.[49] 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.

2.116 The committee therefore sought 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).

Minister's response

2.117 In relation to the proportionality of the foreign donations restrictions as they apply to third party campaigners and political campaigners in proposed section 302E,

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46 See sections 302L and 302P.

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

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

49 Section 287(1) of the bill.

the minister referred to his earlier comments regarding the scope of the concept of 'political purpose' in relation to the registration requirements, and further noted 'the public interest in this case involves citizens' freedom from undue influence or interference when exercising their right to vote'.

2.118 However, notwithstanding the legitimate aim being pursued by the bill, there appears to be a risk that reasonable fundraising activities for third party campaigners and political campaigners concerning matters of public importance may be significantly restricted. This is due to the broad and potentially uncertain range of matters that may be considered as a 'political purpose', including important issues of public interest that may also be issues (or likely to be issues) in an election. As to political campaigners, notwithstanding the relatively small number of persons and entities that would meet the definition of 'political campaigner', the potential limitation on the right to freedom of expression, the right to freedom of association and the right to participate in public affairs is substantial. When coupled with the potentially significant administrative burden required to obtain 'appropriate donor information' (for political campaigners and political entities) and the uncertain number of persons and entities that may fall within the definition of 'third party campaigner' (discussed above in relation to the registration requirements), concerns remain that foreign donations restrictions placed on third party campaigners and political campaigners in section 302E may be overly broad.

2.119 As to the prohibition on persons soliciting gifts from non-allowable donors in section 302G, the minister's response states:

> Effective anti-avoidance provisions like section 302G are essential to the effectiveness of the foreign donations restrictions. Ineffective provisions cannot be proportional, as they do not achieve the public interest which they intend to promote.

2.120 It is noted that in order to be a proportionate limitation on human rights, the measure must be the least rights-restrictive measure to achieve the stated objective. The minister's response does not explain how the broad provision would be proportionate to achieve the legitimate objectives of the measure or whether other, less rights-restrictive alternatives had been considered. Further, the response does not address the underlying concerns set out in the initial human rights analysis that section 302G, insofar as it applies to donations that may be transferred to 'any other person for one or more political purposes' may be insufficiently circumscribed, having regard as to the breadth of the definition of 'political purpose' discussed above. In light of the potentially broad operation of section 302G, the measure may not be a proportionate limitation on human rights as it appears to be overly broad.

Committee response

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

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

2.123 The information provided by the minister and the preceding analysis indicates that the restrictions on foreign political donations placed on political campaigners and third party campaigners, as well as the prohibition on persons soliciting funds from non-allowable donors, may be incompatible with the right to freedom of expression, the right to freedom of association, and the right to take part in the conduct of public affairs. This is because the measure does not appear to be sufficiently circumscribed to constitute a proportionate limitation on these rights.

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

2.124 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 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 [2.82] to [2.89].

2.125 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'.

2.126 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 (step 1). Further, no information is available in the statement of compatibility to ascertain the nature and purpose of the civil penalty in accordance with step 2, for example whether the penalties are intended to punish or deter.

2.127 As to the severity of the penalty (step 3), it is noted that the civil penalties applicable for breaching the foreign donations restrictions are significant, ranging from 500 penalty units to 1000 penalty units for the various offences.

2.128 With reference to its *Guidance Note 2*, the committee therefore sought 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.

Minister's response

2.129 In relation to the nature and purpose of the penalties, the minister's response explains that the penalties are designed to have a 'deterrent effect'. As to

the regulatory context of the penalties, the minister's response explains that the regulatory context is the same as that discussed above in relation to the civil penalties associated with the registration requirements. However, the minister's response additionally emphasises 'the increasing incidence of foreign interference in domestic political processes reported through the free press as a key consideration for the foreign donations restrictions'. It is noted that in relation to some of the penalty provisions, the penalties apply to only a small category of persons. For example, in the context of section 302D and 302E, the persons who may be liable to a civil penalty are the agent of a political entity or the financial controller of certain political campaigners (for section 302D) or the financial controller of a political campaigner or third party campaigners (for section 302E).[50] For these penalties, the limited scope of application of the penalties in the particular regulatory context suggests that the penalties are unlikely to be 'criminal' at this second step of the test.

2.130 However, for other penalties, it appears that the penalty could apply to the public at large. This could be the case, for example, in relation to section 302G which applies to a 'person' who solicits a donor to make a gift when the person intends for that gift to be transferred to a political entity, a political campaigner, or 'any other person for one or more political purposes'. The section would appear to be capable of applying to the public at large if they meet the criteria in section 302G.[51] The potential application of the penalty to the public at large coupled with the deterrent purpose of the penalties suggests that these penalties may be classified as 'criminal' under the second step of the test.

2.131 As to the severity of the penalty, the minister's response explains that 'the relative size of the foreign donations penalties has been calibrated according to the deterrent effect in context'. However, whereas in the context of civil penalties attached to the registration requirements the maximum civil penalty is lower for third parties due in part to the 'comparatively fewer financial resources available to them', the civil penalties associated with foreign donations to third party campaigners and political campaigners in section 302E are the same. It is not clear from the minister's response why a different approach has been taken to the severity of the penalty for third party campaigners in the context of foreign donations restrictions.

2.132 In relation to the severity of the civil penalties that may be imposed on the agent of a political entity or the financial controller of political campaigners for receiving foreign donations,[52] while the penalties may be substantial, having regard to the particular regulatory context it appears on balance that the penalties are unlikely to be considered criminal for the purposes of international human rights law.

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50 See also section 302F, 302L and 302K.

51 See also section 302H.

52 Sections 302D, 302D(1)(a)(ii), 302F, 302K and 302L.

2.133 However, in relation to the severity of the civil penalties that may be imposed on the financial controller of third party campaigners (in section 302E), while this penalty does not apply to the public in general, as noted by the minister in the context of the civil penalties for failing to register, third party campaigners may have fewer financial resources available to them than political campaigners (and political entities). This suggests that the penalty of 1000 penalty units ($210,000) may be substantial and, cumulatively considered with the nature and purpose of the penalty, may be considered 'criminal' for the purposes of international human rights law.

2.134 The minister has also not fully addressed the basis of imposing a substantial pecuniary penalty on persons who may solicit gifts contrary to section 302G. Having regard to the potential application of the penalty to the public at large, the deterrent purpose of the penalty and the substantial pecuniary sanction ($105,000), cumulatively considered the penalties imposed under section 302G may be 'criminal' for the purposes of international human rights law.

2.135 As noted earlier, where a civil penalty may be classified as 'criminal' for the purposes of international human rights law, it means that criminal process rights must apply. As noted in the initial analysis, the civil penalties do not appear to accord with criminal process guarantees.

Committee response

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

2.137 In relation to the civil penalties that may be imposed on the agent of a political entity or the financial controller of political campaigners for receiving foreign donations, on balance it is unlikely that the civil penalties would be considered 'criminal' for the purposes of international human rights law.

2.138 In relation to the civil penalties that may be imposed on financial controllers of third party campaigners for receiving foreign donations contrary to section 302E, and the civil penalties that may be imposed on persons who solicit gifts from non-allowable donors contrary to section 302G, based on the information provided the penalties may be considered criminal for the purposes of international human rights law. This means that criminal process rights under articles 14 and 15 of the ICCPR are required to apply. However, the bill does not appear to provide for these rights to apply, and therefore it is not possible to conclude whether these civil penalties are compatible with criminal process rights.

Reporting of non-financial particulars in returns

2.139 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.

2.140 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.[53] Failure to provide an annual return in accordance with section 314AB for political parties and political campaigners 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).[54]

Compatibility of the measure with the right to privacy

2.141 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 names of senior staff of candidates, third party campaigners, political campaigners and of political parties in returns engages and limits the right to privacy.[55]

2.142 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.[56]

2.143 While the objective of transparency in the electoral system was noted as being 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

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

54 See proposed section 314AB(1).

55 SOC, [10].

56 SOC, [10]-[11].

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.

2.144 The initial analysis also raised 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'. 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.

2.145 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to privacy.

Minister's response

2.146 In relation to the compatibility of this measure with the right to privacy, the minister's response states:

> As set out in the Statement of Compatibility, these limitations are justifiable on the basis that they promote transparency of the electoral system. Senior staff of persons and entities covered by these requirements freely choose to play an influential role in public debate. As evidenced by media coverage, there are significant implications and public interest in these matters. Requiring these details to be reported to, and published by, the Australian Electoral Commission is directly connected to the Bill's objective of promoting transparency.
>
> Given the public interest, the measure is a proportionate limitation on the impacted individuals' right to privacy. Many of these individuals are already public figures, and the new requirements serve to consolidate this information and make it more readily accessible to ordinary citizens.

2.147 While the objective of transparency in the electoral system is a legitimate objective for the purposes of human rights, the minister's response does not address the specific concerns in relation to the breadth of the definitions of 'senior staff', particularly as it applies to third party campaigners. In particular, while the minister states that persons covered by the requirements are those who 'freely choose to play an influential role in public debate', it is noted that the bill itself is broader in scope and not only applies to senior decision-makers but also to persons who 'participate' in decision making. It remains unclear whether persons who merely participate in making, but do not make, decisions can be said to 'play a prominent role in public debate'. It also remains unclear whether disclosing personal information of senior staff members of third party campaigners, who may not have significant connections to the political process and for whom the disclosure

threshold is lower ($13,500), is rationally connected to the legitimate transparency objective.

Committee response

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

2.149 Based on the information provided, it is not possible to conclude that the disclosure of names of senior staff of candidates, third party campaigners, political campaigners and of political parties is rationally connected to or a proportionate limitation on the right to privacy.

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

2.150 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 [2.82] to [2.89].

2.151 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. Another relevant factor is the purpose or nature of the penalty, including whether the penalty is designed to deter or punish. No information is provided on this point.

2.152 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.

2.153 The committee drew the attention of the minister to its *Guidance Note 2* and sought 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.

Minister's response

2.154 On this aspect of the measure, the minister's response refers to his previous comments regarding civil penalties for failure to register as 'from an implementation perspective, registration triggers the obligation to report'.

2.155 As discussed earlier in relation to the civil penalties relating to the registration requirement, the potential number of persons who would be liable may be narrow for political campaigners. Equally, the application of the penalties to

political parties and candidates also appears to be limited to a particular regulatory context. However, as discussed earlier, the potential number of persons who may be liable to the civil penalties may be broad for third party campaigners, given the breadth of the definitions that give rise to the obligation to register.

2.156 As to the severity of the penalty, for the reasons discussed earlier in relation to the civil penalties for failing to register, the potential that the penalties may be payable per day for each day the return is not provided means the maximum penalty that may be imposed could be substantial. Thus, notwithstanding the particular regulatory context, the potentially substantial maximum penalty raises significant questions about whether this particular measure ought to be considered 'criminal' for the purposes of international human rights law. This means that criminal process guarantees are required to apply. As noted in the initial human rights analysis the measure does not appear to accord with criminal process guarantees.

Committee response

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

2.158 The preceding analysis indicates that the penalties may be considered criminal for the purposes of international human rights law. This means that criminal process rights under articles 14 and 15 of the ICCPR are required to apply. However, the bill does not appear to provide for these rights to apply, and therefore it is not possible to conclude whether these civil penalties are compatible with criminal process rights.

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; 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**)
Previous report	1 of 2018
Status	Concluded examination

Background

2.159 The committee first reported on the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017 (the bill) in its *Report 1 of 2018*, and requested a response from the Minister for Communications by 21 February 2018.[1]

2.160 The minister's response to the committee's inquiries was received on 21 February 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Civil penalty provision

2.161 Proposed section 44B of 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.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp 30-33.

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

2.162 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,[3] an end-user who posts an intimate image on the service,[4] or a hosting service provider which hosts the intimate image.[5] 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.[6]

2.163 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.[7]

Compatibility of the measure with criminal process rights

2.164 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'.[8]

2.165 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.

2.166 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, are required to apply.

2.167 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.

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

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

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

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

7 SOC, p. 10.

8 SOC, p. 9.

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.[9]

2.168 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.

2.169 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be 'criminal' if its purpose is to 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 purpose, the statement of compatibility states that the penalty seeks to encourage compliance rather than to punish. To the extent that this is the purpose of the penalty, the initial analysis stated that this is one indicator that the penalty should not be considered 'criminal' under this step of the test.

2.170 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. As noted in the initial analysis, 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'.[10] 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.

2.171 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 initial analysis assessed that the measure does not appear to

9 SOC, p. 10.

10 SOC, p. 10.

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.

2.172 The committee therefore sought 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
- 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;[11] and
    - whether the measures could be amended to accord with criminal process rights.

Minister's response

2.173 The minister's response outlines a range of factors as to why the civil penalty provisions should not be considered 'criminal' for the purposes of international human rights law, including that:

- the penalties included in the Bill are expressly civil and not criminal under Australian law;
- the civil penalties set a maximum, pecuniary-only penalty, with no possibility of imprisonment for contravention of a civil penalty provision;
- non-payment of a civil penalty order does not result in imprisonment;
- the Federal Court and Federal Circuit Court retain discretion both as to whether to issue a civil penalty order, and the specific amounts of the order, up to the maximum amounts under the Bill; and

11 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.

- in practice, the Bill prescribes a graduated approach of remedies and enforcement mechanisms, and civil penalty orders will only be sought [in] extreme cases.

Given these factors, which are outlined in more detail below, the Government considers that the penalties are not 'criminal' in nature and therefore do not engage any of the applicable criminal process rights, or require any permissible limitations or amended measures to accord with these rights.

2.174 In relation to there being no criminal sanction under Australian domestic law, the minister's response further states:

> A contravention of a civil penalty provision does not result in the possibility of imprisonment or resultant criminal record, nor does the non-payment of any civil penalty order. Additionally, the civil penalties are pecuniary only, and are necessarily high as they are intended to change behaviour, acting as a deterrent to those who are tempted to engage in this behaviour.

2.175 However, as noted in the initial human rights analysis, the classification of a penalty as civil under Australian law is not determinative. 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.

2.176 In this respect, a penalty is likely to be considered criminal in nature if the purpose of the penalty is to punish or deter *and* the penalty applies to the public in general. While the statement of compatibility stated that the purpose of the penalty was to encourage compliance, the minister's response now states that the purpose of the penalty is to deter. Given this, the penalty would be likely to be considered 'criminal' for the purposes of international human rights law. This is because the measure also applies to the public in general as it captures the conduct of a broad range of social media users. Accordingly, the nature of the penalty satisfies the test of being to deter *and* applying to the public in general. This is the case irrespective of the severity of the penalty.

2.177 Even if the penalty was not 'criminal' on the above aspect of test, the penalty may still be 'criminal' for the purposes of international human rights law if it is sufficiently severe. In this respect, it is relevant that the penalty does not result in imprisonment as deprivation of liberty is a typical criminal penalty. However, fines and pecuniary penalties may also be considered 'criminal' if they involve sufficiently significant amounts with reference to the regulatory context. In relation to the severity of the penalty, the minister's response further states:

> *Maximum penalties*
>
> Under the Bill, civil penalty order provisions contained in the *Regulatory Powers (Standards Provisions) Act 2014* are triggered if a person shares an intimate image without consent or threatens to share an intimate image without consent or fails to comply with a removal notice. The penalty

amounts are up to $105,000 for a person and up to $525,000 for a corporation.

These penalties are intended to be a strong deterrent to not engage in the sharing of intimate images without consent. They are, however, the maximum penalty amounts that may be awarded and a range of matters must first be considered by the courts before the actual amount is decided (as outlined below).

Court discretion in applying civil penalties

If the eSafety Commissioner decides to pursue a civil penalty he/she must apply to the Federal Court or the Federal Circuit Court. The courts have discretion as to whether to issue a penalty order and will decide on the penalty having regard to any relevant matter, including:

a) the nature and extent of the contravention; and

b) the nature and extent of any loss or damage suffered because of the contravention; and

c) the circumstances in which the contravention took place; and

d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

This discretion means that a perpetrator will not automatically receive the maximum penalty and ensures there are processes in place to ensure that any penalty is proportionate to the contravention.

In addition to the penalties, the Bill gives the eSafety Commissioner the power to first pursue a range of responses if there has been a contravention of the prohibition. These remedies include lighter touch remedies such as informal mechanisms, formal warnings and infringement notices. In practice, the stronger remedies, including civil penalties, are expected to only be used in exceptional cases such as a repeat offender where other remedies have been ineffective.

2.178 However, assessing the severity of the penalty for the purpose of determining whether it is 'criminal' involves looking at the maximum penalty provided for by the relevant legislation. The actual penalty imposed may also be relevant, but does not detract from the importance of the maximum initially at stake. While the civil penalties may be intended only to apply in more serious cases, there appear to be no specific legislative safeguards in this respect. In light of the severity of the maximum penalty that may be imposed for an individual (of $105,000), the stated purpose of the penalty as being to deter and the potentially broad application of the penalty, the penalty appears likely to be considered 'criminal' for the purposes of international human rights law.

2.179 The minister's response also provides some further information about consultation processes that have been undertaken and harms associated with the non-consensual sharing of intimate images:

> When drafting the Bill, my Department consulted with the Attorney-General's Department and considered the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Given the impact that the non-consensual sharing of intimate images can have on victims, the Government remains satisfied that there is sufficient justification for the civil penalty amounts and that they are not 'criminal' in nature for the purposes of international human rights law.

2.180 However, the level of harm caused by particular conduct does not mean that a penalty relating to that conduct is not 'criminal' for the purposes of international human rights law. Significantly, as noted in the initial human rights analysis, where a penalty is considered 'criminal' for the purposes of international human rights law this does not mean that it is illegitimate, unjustified or does not pursue important goals.

2.181 Rather (as noted above), where a penalty is considered 'criminal' for the purposes of international human rights law it means that criminal process rights, such as the right to be presumed innocent (including the criminal standard of proof) (article 14(2) of the ICCPR); the right not to be tried and punished twice (the prohibition against double jeopardy) (article 14(7)); the right not to incriminate oneself (article 14(3)(g)); and a guarantee against retrospective criminal laws (article 15(1), are required to apply.

2.182 As noted in the initial human rights analysis, the measure does not appear to accord with each of these 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. Further, if there were equivalent criminal provisions for the conduct prohibited by the civil penalty provisions this may raise concerns that a person could be tried and punished twice for the same conduct unless there were specific safeguards to prevent this from occurring.

2.183 While the committee requested the advice of the minister as to whether the measures were compatible with criminal process rights including whether any limitations on these rights are permissible, the minister's response does not provide any information in this respect. Accordingly, it is not possible to conclude that the civil penalty provisions accord with these rights.

Committee response

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

2.185 Based on the information provided by the minister, it appears that the penalties are likely to be considered criminal for the purposes of international

human rights law. This means that criminal process rights under articles 14 and 15 of the ICCPR are required to apply. However, it is unclear that the measure is compatible with these rights.

Foreign Influence Transparency Scheme Bill 2017

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**)
Previous report	1 of 2018
Status	Concluded examination

Background

2.186 The committee first reported on these bills in its *Report 1 of 2018*, and requested a response from the Attorney-General by 21 February 2018.[1]

2.187 The Attorney-General's response to the committee's inquiries was received on 21 February 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

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

2.188 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'[2] that are 'registrable' in relation to the foreign principal. Section 21 of the bill provides that an activity on behalf of a foreign

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 34-44.

2 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.

principal is 'registrable' if the activity is Parliamentary lobbying,[3] general political lobbying,[4] communications activity,[5] or donor activity,[6] and the activity is in Australia for the purpose of political or governmental influence.[7] Additional registration requirements and broader activities requiring registration apply to recent Cabinet Ministers, recent Ministers, members of Parliament and other senior Commonwealth position holders.[8]

2.189 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.

2.190 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;

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3 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*.

4 '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.

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

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

7 Section 21 of the bill.

8 See sections 22 and 23 of the bill.

(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.

2.191 Section 22 of the bill imposes registration requirements on recent cabinet ministers who undertake activities on behalf of a foreign principal.[9] '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 activities a recent cabinet minister needs to undertake in order to be required to register.

2.192 Proposed section 23 imposes a registration obligation on recent ministers, members of parliament[10] and other holders of senior Commonwealth positions[11] 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'.[12] 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.

2.193 There are several exemptions from registration for certain types of activity undertaken on behalf of a foreign principal, including activities undertaken for the

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9 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).

10 '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.

11 '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.

12 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.

provision of humanitarian aid or humanitarian assistance,[13] legal advice or representation,[14] diplomatic, consular or similar activities,[15] or where the person is acting in accordance with a particular religion of a foreign government,[16] where the activity is for the purpose of reporting news,[17] or where the activity is the pursuit of bona fide business or commercial interests.[18] There is also a broad power to make rules to prescribe activities as being exempt from registration.[19] The penalty for non-compliance is a criminal offence punishable by 7 years imprisonment where a person intentionally omits to apply or renew registration when undertaking registrable activity.[20]

2.194 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'.[21] 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.

2.195 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'.[22]

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

2.196 The obligation to publicly disclose, by way of registration, information about a person's relationship with a foreign principal and activities undertaken pursuant to

13 Section 24 of the bill.

14 Section 25 of the bill.

15 Section 26 of the bill.

16 Section 27 of the bill.

17 Section 28 of the bill.

18 Section 29 of the bill.

19 Section 30 of the bill.

20 Section 57 of the bill.

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

22 Section 6 of the Charges Bill.

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.[23]

2.197 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.[24] However, 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.[25]

2.198 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.[26]

2.199 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

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

24 SOC [62].

25 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").

26 SOC [71]-[73].

to represent citizens.[27] 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.[28]

2.200 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 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.[29]

2.201 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.

2.202 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.[30]

2.203 The previous analysis assessed that this is likely to be a legitimate objective for the purposes of human rights law.[31] Requiring persons who have acted on behalf of foreign principals to register also appears to be rationally connected to the achievement of this objective.

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27 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].

28 SOC [81].

29 SOC [55].

30 SOC [21], [85].

31 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).

2.204 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, as outlined in the previous analysis, concerns have been expressed as to the implications for academic freedom and reputation where an Australian university academic would be required to register upon publishing their research following 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.[32] Such behaviour would appear to fall within the types of registrable activities that a person may undertake 'on behalf of' a foreign principal, as it is an activity[33] undertaken 'with funding or supervision by the foreign principal'[34] for the purpose of influencing 'a process in relation to a federal government decision'.[35]

2.205 Similarly, it was noted that the definition of 'foreign principal' is very broad, and includes individuals who are neither an Australian citizen nor a permanent Australian resident.[36] 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

32 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)

33 This would appear to be a 'communications activity' within the definition of section 13 of the bill.

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

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

36 Section 10 of the bill.

the Charges Bill but instead will be prescribed by regulation,[37] as well as the significant criminal penalties imposed for non-compliance.[38]

2.206 In relation to proposed sections 22 and 23 of the bill (directed at recent cabinet ministers, ministers, members of parliament and holders of senior Commonwealth positions), the application of the provisions is even broader as *any* kind 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.[39]

2.207 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 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.

2.208 The initial analysis set out that 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.[40]

2.209 It was 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 where those activities are solely, or solely for the purposes of, reporting news, presenting current affairs or expressing

37 Section 6 of the Charges Bill.

38 See section 57 of the bill.

39 Explanatory Memorandum, [303].

40 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].

editorial content in news media[41]), as well as a provision allowing for rules to be made specifying additional exemptions from registration. It is not clear, however, whether these safeguards are, of themselves, sufficient. 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.[42]

2.210 Further, in relation to the right to privacy, it was 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,[43] 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.

2.211 The committee therefore sought the advice of the Attorney-General 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.

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41 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.

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

43 SOC [58].

Attorney-General's response

2.212 The Attorney-General's response explains that the registration scheme established by the bill is not a 'one size fits all approach' but rather is 'targeted to address those activities most likely to impact upon Australia's political and government systems and processes' and those activities 'most in need of transparency'. The Attorney-General explains that the definitions of 'foreign principal' and 'on behalf of' 'need to be sufficiently broad so as to achieve the Scheme's transparency objective', but that such definitions give rise to an obligation to register only when additional circumstances are present. The response further emphasised that:

> It is also important to note that a requirement to register with the Scheme does not in any way preclude a person or entity from undertaking a registrable arrangement with a foreign principal, or from undertaking registrable activities on behalf of a foreign principal, provided the person is registered to ensure the activities are transparent. This encourages and promotes the ability of decision-makers and the public to be aware of any foreign influences being brought to bear in Australia's political or governmental processes.

2.213 While the Attorney-General's response states that the measure is targeted, the response does not fully address the concern that the breadth of the definitions in the bill may allow an uncertain and potentially very broad range of conduct to fall within the scope of the scheme. It is acknowledged that the definitions of 'foreign principal' and 'on behalf of' give rise to an obligation only when additional circumstances are present, having regard to the nature of the activity (such as general political lobbying or communications activity) and the purpose of the activity ('for the purpose of political or governmental influence'). However, those additional circumstances are, of themselves, broad. For example, while the obligation to register under proposed section 21 only arises if the activity is one that falls within the table in that section, those activities (namely, parliamentary lobbying, general political lobbying, communications activity and donor activity) are defined broadly. 'Communications activity', for example, is undertaken 'if the person communicates or distributes information or material'.[44] The definition of 'lobbying' includes to 'communicate, in any way, with a person or a group of persons for the purpose of influencing any process, decision or outcome'.[45] Further, while the obligation to register is further qualified in some circumstances to apply to activities undertaken 'for the purpose of influencing Australia's political and governmental systems and

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44 Proposed section 13 of the bill. It is noted that there is an exception to this section for broadcasters and carriage service providers in section 13(3), and that publishers of periodicals do not undertake communications activity only because the publisher publishes the information (proposed section 13(4).

45 See proposed section 10 of the bill.

processes',[46] that definition is in itself very broad. It includes, for example, any direct or indirect influence on any aspect of a 'process in relation to a federal election or designated vote'.[47]

2.214 It also remains unclear how the examples provided in the initial analysis set out at [2.204] and [2.205] above constitute matters 'most likely to impact upon Australia's political and government systems and processes', but such activities nonetheless would appear to give rise to an obligation to register under the scheme. The bill would appear to require persons to register an association with a foreign principal in a very broad range of circumstances including where the association is one of collaboration rather than acting pursuant to any instructions or directions of the foreign principal. Therefore, the combined operation of these broad definitions raises concerns that aspects of the registration scheme may be overly broad for the purpose of international human rights law.

2.215 In relation to the registration requirement for recent cabinet ministers, ministers, members of parliament and holders of senior Commonwealth positions, the Attorney-General's response states:

> It is in the public interest to know when recent Cabinet Ministers and recent Ministers, members of Parliament and holders of senior Commonwealth positions undertake activities on behalf of a foreign principal in a short period immediately following the cessation of their role. Such persons have recently occupied significant positions of influence and may have had access to classified and sensitive information concerning Australian government priorities, strategies and interests. They are also likely to have a large number of influential and well-placed contacts at senior government levels, both in the Parliament and the Commonwealth public service, and have a greater ability to access those contacts to influence a political or governmental process on behalf of a foreign principal than other Australians. It is appropriate that those individuals are held to a high degree of accountability.

2.216 It is acknowledged that recent cabinet ministers, ministers, members of parliament and holders of senior Commonwealth positions occupy significant positions of influence, greater than other Australians, and that therefore a higher degree of accountability may be permissible from a human rights law perspective. However, it is noted that under existing Australian criminal law, it is an offence for

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46 Except where the foreign principal is a foreign government, in which case 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. Similarly, the obligation on recent Cabinet ministers as well as recent Ministers, members of Parliament and other holders of senior Commonwealth positions to register is not conditioned on the activities being for the purpose of political or governmental influence: see sections 22 and 23.

47 See section 12(1)(a).

persons who have ceased to be a 'Commonwealth public official'[48] from using information that the person obtained in their official capacity with the intention of dishonestly obtaining a benefit for themselves or another person.[49] As to senior Commonwealth position-holders, it is also an offence for former 'Commonwealth officers'[50] to make unauthorised disclosures of information that was protected at the time they ceased being a Commonwealth officer.[51] Therefore, notwithstanding the heightened level of access these persons may have to classified and sensitive information concerning Australia, the criminal law already protects against unlawful disclosure or use of that information. Further, as discussed above, the definition of acting 'on behalf of' a foreign principal is very broad and creates uncertainty as to what associations of recent cabinet ministers, ministers, members of parliament and holders of senior Commonwealth positions would fall within the scope of the scheme.

2.217 Ultimately, while it is acknowledged that the bill does not prohibit persons or entities from undertaking registrable activities, the requirement to register nonetheless constitutes a limitation on the freedom of expression, the freedom of association, the right to privacy and the right to take part in the conduct of public affairs. The registration requirement may additionally have significant reputational impacts on those required to register insofar as it may convey to the public that persons or entities may be influenced by foreign principals. Concerns remain, therefore, that the measure is not sufficiently circumscribed.

2.218 As to the exemptions in the bill, with particular reference to the exemption for news media, the Attorney-General's response explains:

> The exemption for news media at section 28 serves the important purpose of safeguarding the right to freedom of expression. The exemption applies to activities undertaken on behalf of a foreign business or foreign individual if the activity is solely, or solely for the purposes of, reporting news, presenting current affairs or expressing editorial content in news media. This exemption ensures that Australian media outlets do not need to register for following the direction of a foreign parent company or foreign owner, and recognises that requiring such entities to register

48 The definition of 'Commonwealth public official' includes a Minister, a Parliamentary Secretary, a member of either House of Parliament, an APS employee, individuals employed by the Commonwealth otherwise than under the *Public Service Act 1999*, and officers or employees of Commonwealth authorities: see the Dictionary to the Commonwealth Criminal Code.

49 See section 142.2 of the Commonwealth Criminal Code.

50 'Commonwealth officers' is defined in section 3 of the Crimes Act 1914 (Cth) to mean a person holding officer under, or employed by the Commonwealth including persons appointed or engaged under the Public Service Act 1999.

51 See section 70 of the Crimes Act 1914.

> would unjustifiably expand the scope of the Scheme and would be unlikely to add to its transparency objective.
>
> The exemption for news and press services does not apply to state-owned news and press services. There is a public interest in knowing when news and press services are directed by a foreign government to influence Australian governmental and political processes.
>
> The definition of 'communications activity' at section 13 expressly excludes the transmission of information or material by broadcasters and carriage service providers or publication of information or material by print media organisations, if that information or material is produced by another person (see subsections 13(3) and 13(4)). This further safeguards the right to freedom of expression by making it clear that the Scheme's obligations are always placed on the person who has the arrangement with the foreign principal to engage in communications activities, or undertakes communications activities on behalf of the foreign principal, for the purpose of political or governmental influence. Broadcasters, carriage services providers and publishers do not undertake communications activities merely because information is communicated or distributed via their services.

2.219 In relation to the exemptions from registration more broadly, the Attorney-General's response states that 'the exemptions seek to ensure that the Scheme remains targeted to those activities most in need of transparency and assists in minimising the regulatory burden of the Scheme'.

2.220 The exemptions for news media, as well as the other exemptions from registration contained in the bill, operate as safeguards and are relevant in determining the proportionality of the measure. However, it is not clear that these safeguards are sufficient having regard to the breadth of potential associations and activities that may be registrable discussed above. For example, as noted in the initial analysis, there are other activities and associations that may be captured by the bill that are not subject to an exemption, such as bona fide academic or scientific research, which are exempt under comparable registration schemes in other countries.[52] Further, most of the exemptions themselves apply only to activities that are 'solely, or solely for the purposes of' the particular exempt category and so would not appear, for example, to cover conduct which is primarily (but not solely) within the exempt category.[53] As such the measure does not appear to be the least rights restrictive approach to achieving the legitimate objective of the measure.

2.221 In relation to the right to privacy and the power of the Secretary to make available to the public 'any other information prescribed by the rules', the Attorney-General's response states:

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

53 See proposed sections 24,25,27(1)(b),28(1)(b), 29(1)(b).

> Paragraph 43(1)(c) provides flexibility for rules to prescribe additional information that should be made publicly available which were not foreshadowed at the time of establishment of the Scheme. This is particularly important given the Scheme's primary aim is to provide transparency about foreign influence in Australia's political and governmental processes. Achieving this objective inherently requires information to be made public so that decision-makers and members of the community can access it.
>
> The rules will be legislative instruments under the *Legislation Act 2003* and would be subject to the normal disallowance processes. Any rules will also comply with the *Privacy Act 1988*, and will be guided by the Australian Privacy Principles. The department would consult with the Information Commissioner and relevant stakeholders in the development of rules, to ensure they do not unnecessarily infringe upon the right to privacy.
>
> Additional measures to review the human rights implications of the Bill include provisions providing for an annual report to Parliament on the operation of the Scheme (section 69) and for a review of the Scheme's operation within five years of commencement (section 70). The annual report must be tabled in both Houses of Parliament, providing opportunity for both government and public scrutiny. The review of the Scheme will ensure that the Scheme is operating as intended and strikes an appropriate balance between achieving its transparency objective and the regulatory burden for registrants. Both provisions provide opportunity for the public and Parliament to raise concerns about the Scheme's operation, including in relation to limitations on human rights.

2.222 It is acknowledged that some flexibility may be required in the operation of the scheme in order to accommodate matters that were not foreshadowed at the time of the scheme's establishment. However, while the Privacy Act contains a range of general safeguards it is not a complete answer to this issue because the *Privacy Act 1988* (Privacy Act) and the Australian Privacy Principles (APPs) contain a number of exceptions to the prohibition on disclosure of personal information. 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.[54] This means that the Privacy Act and the APPs may not operate as an effective safeguard of the right to privacy for the purposes of international human rights law. The need for flexibility must also be balanced against the requirement under the ICCPR that relevant legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[55] Therefore, concerns remain that the broad scope of the proposed power for the Secretary to

54 APP 9; APP 6.2(b).

55 *NK v Netherlands,* Human Rights Committee Communication No.2326/2013 (10 January 2018) [9.5].

make available information prescribed by the rules could be exercised in ways that may risk being incompatible with the right to privacy. However, safeguards in any legislative instrument enacted pursuant to this power may be capable of addressing these concerns, and the committee will consider the human rights compatibility of any legislative instrument enacted pursuant to proposed section 43(1)(c) when it is received.

Committee response

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

2.224 The information provided by the Attorney-General and the preceding analysis indicates that aspects of the measure may be incompatible with the right to freedom of expression, the right to freedom of association, the right to privacy, and the right to take part in the conduct of public affairs. This is because the definitions in the bill of 'on behalf of', 'foreign principal' and 'for the purpose of political and governmental influence' do not appear to be sufficiently circumscribed to constitute a proportionate limitation on these rights.

2.225 In relation to the right to privacy, the information provided by the Attorney-General and the preceding analysis indicates that, noting the broad scope of the proposed power in section 43(1)(c) of the bill, there may be human rights concerns in relation to its operation. This is because the scope is such that it could be used in ways that may risk being incompatible with the right to privacy. However, safeguards in any legislative instrument enacted pursuant to the proposed power may be capable of addressing some of these concerns. If the bill is passed, the committee will consider the human rights implications of any legislative instrument introduced pursuant to section 43(1)(c) once it is received.

2.226 Mr Leeser deliberately did not participate in consideration of this report entry as he wished to reserve his position pending further consideration of the bill 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

2.227 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.

2.228 '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).[56] 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.[57]

2.229 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.[58]

2.230 As set out in the previous analysis, the definition of 'foreign principal' is very broad, and includes individuals who are neither an Australian citizen nor a permanent Australian resident.[59] 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. The previous analysis stated that 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.

2.231 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.

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56 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'.

57 *Althammer v Austria*, Human Rights Committee Communication no. 998/01 (8 August 2003) [10.2].

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

59 Section 10 of the bill.

2.232 As discussed at [2.203] 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.

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

2.234 As the statement of compatibility does not acknowledge that the foreign influence transparency scheme engages the right to equality and non-discrimination the committee sought the advice of the minister as to the compatibility of the foreign influence transparency scheme with this right.

Attorney-General's response

2.235 In response to the committee's inquiries in this regard, the Attorney-General's response states that the bill does not 'target any particular country, nationality or diaspora community' and that any limitation on the right to equality and non-discrimination is permissible as 'these limitations are reasonable and necessary to achieve the legitimate objective of the Bill'.[60] The Attorney-General also provides a general description of the operation of the registration scheme as it applies to 'activities for the purpose of governmental or political influence'. The Attorney-General further states:

> The Bill does not in any way discriminate on the basis of nationality or a particular political or other opinion. Nor does it seek to prohibit an individual or organisation from having or expressing particular political or other opinions or from having political associations. Instead, the Bill requires individuals and organisations to register where they are undertaking activities that may influence Australia's governmental and political processes on behalf of a foreign principal. This is essential to achieve the legitimate transparency objective of the Scheme.

60 The Attorney-General's response also states that the bill may engage the right to equality and non-discrimination 'by distinguishing a certain section of the Australian public and establishing legislative provisions that apply only to that section', namely recent cabinet ministers, ministers, members of parliament and holders of senior Commonwealth positions. The committee does not consider that this would be likely to raise concerns as to the right to equality and non-discrimination under international human rights law.

2.236 However, while the bill may not directly target persons on the basis of nationality or national origin, as noted in the previous analysis, the concern in relation to the bill is that the scheme may *indirectly* discriminate on the basis of nationality or national origin, as the registration requirement may have a disproportionate negative effect on persons or entities that have a foreign membership base. The Attorney-General's response does not fully address this issue.

Committee response

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

2.238 Based on the information provided, the committee is unable to conclude whether the measure is compatible with the right to equality and non-discrimination.

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

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	Concluded examination

Background

2.240 The committee first reported on the National Broadcasters Legislation Amendment (Enhanced Transparency) Bill 2017 (the bill) in its *Report 1 of 2018*, and requested a response from the Minister for Communications by 21 February 2018.[1]

2.241 The minister's response to the committee's inquiries was received on 21 February 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

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

2.242 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.[2] Similarly, for individuals who are not employees but are subject to an 'on air talent contract',[3] the bill requires

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 50-53.

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

3 '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.

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.[4]

Compatibility of the measure with the right to privacy

2.243 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) protects against unlawful or arbitrary interferences with privacy, including respect for a person's private information and private life, particularly the storing, use and sharing of personal information.

2.244 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.

2.245 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.[5]

2.246 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 contractors 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.
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> …
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> This reporting obligation will allow the public to have visibility of how proactive the national broadcasters are in closing any identified gender salary gaps.[6]

2.247 The initial analysis stated that promoting public transparency and scrutiny relating to the use of public revenues is likely to be a legitimate objective for the

4 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.

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

6 SOC, p. 6.

purposes of international human rights law,[7] 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.

2.248 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 personal circumstances and private life.[8]

2.249 In relation to proportionality, the statement of compatibility explains:

> 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

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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, [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]).

8 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].

> objective of promoting public transparency and scrutiny and reducing the gender salary gap.[9]

2.250 While the statement of compatibility 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 information provided why this should be the case. As noted in the initial analysis, 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.

2.251 The committee therefore requested 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.

Minister's response

2.252 The minister's response restates the objectives of the measure to ensure more detailed scrutiny of high expenditure, enable better assessments of whether the ABC and SBS are efficiently using taxpayers' money, promote transparency and achieve policy outcomes such as reducing the gender salary gap. As noted in the initial human rights analysis, these objectives are likely to be legitimate for the purposes of international human rights law and the measures appear to be rationally connected to these objectives.

2.253 In relation to the proportionality of the measure, the minister's response states that the less rights-restrictive alternatives suggested in the initial human rights analysis would not ensure the objectives of the measure are fully realised. The response further states:

> The alternative of requiring the 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) would provide for more transparency than is currently the case. However, this approach falls short of achieving the stated transparency outcomes for this measure, and helps to obscure potential gender and age discrimination, unconscious bias, and poor expenditure decisions. It also reduces the capacity for

9 SOC, pp. 6-7.

> public scrutiny of what should be publicly accessible information. Without transparency, the public loses faith that the ABC and SBS are using funding appropriately and are fair and equitable in doing so. As a taxpayer funded entity, it is appropriate to have this level of transparency.

2.254 While it is acknowledged that the public has a legitimate interest in how a publicly funded organisation allocates its funding, that interest must be balanced with the seriousness of the interference with the right to privacy of the persons concerned. As noted in the initial human rights analysis, disclosure of a person's salary constitutes a significant intrusion on a person's personal and financial circumstances and private life.[10] Further, all persons, even those who are public figures, enjoy a legitimate expectation of protection of and respect for their private life.[11] Having regard to the seriousness of the intrusion into a person's personal and financial circumstances, it is not necessarily the case that the identifiable salaries of on-air talent at the ABC or SBS 'should be publicly accessible information'. The statement of compatibility and minister's response do not fully address why particularised disclosure of individuals is needed to achieve the objective.

2.255 Further, in relation to the minister's statement that disclosing employee and on-air talent salaries would reveal poor expenditure decisions, it is noted that the ABC board is already required 'to ensure that the functions of the [ABC] are performed efficiently and with the maximum benefit of people to Australia'.[12] The SBS board is similarly required to ensure 'the efficient and cost effective functioning of the SBS' and to cooperate with the ABC 'to maximise the efficiency of publicly funded sectors of Australian broadcasting'.[13] It remains unclear how publicly disclosing the names, positions and salaries of employees and on-air talent would provide for greater accountability of expenditure decisions than that which is already required by law.

2.256 Finally, as noted in the initial human rights analysis, in order to be compatible with the right to privacy, the measure should only be as extensive as is strictly necessary to achieve its legitimate objective. While the initial analysis stated that promoting transparency and scrutiny as to the use of public revenues is likely to be a legitimate objective, this is not to suggest that legitimate transparency objectives equate to (or justify) wholescale disclosure of personal information to the

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10 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].

11 See for example *Von Hannover v Germany,* European Court of Human Rights Application No.59320/2000 (24 September 2004) [69].

12 Section 8(3), *Australian Broadcasting Corporation Act 1983*.

13 Section 10, *Special Broadcasting Service Act 1991*.

public. In the statement of compatibility, it was stated that transparency was 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'.[14] On this basis, it remains unclear how less rights-restrictive measures, such as de-identified or anonymised information disclosing the number or proportion of female employees and on-air talent earning over $200,000 compared to males in the same position, or the ages of employees and on-air talent in age bands, would not achieve this objective. While this may provide less information than the publication of names, positions and salaries, it would provide sufficient information to identify how funds are spent and if those funds are being spent in a way that discriminates on the basis of gender or age. To the extent the minister's response appears to suggest that transparency as to *how* funds are spent necessarily involves publication of *who* those funds are spent on (and the amounts spent on those persons), the measure appears to be overly broad.

Committee response

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

2.258 The information provided by the minister and the preceding analysis indicates that the measure is likely to be incompatible with the right to privacy.

14 SOC, p. 6.

National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Purpose	Seeks to amend various Acts in relation to criminal law to: amend espionage offences; introduce new foreign interference offences targeting covert, deceptive or threatening actions by foreign entities; amend Commonwealth secrecy offences; introduce comprehensive new sabotage offences; amend various offences, including treason; introduce a new theft of trade secrets offence; introduce a new aggravated offence for providing false and misleading information in the context of security clearance processes; and allow law enforcement agencies to have access to telecommunications interception powers. The bill also seeks to make amendments relevant to the Foreign Influence Transparency Scheme, including seeking to amend the Foreign Influence Transparency Scheme Act 2017 (currently a bill before Parliament)
Portfolio	Attorney-General
Introduced	House of Representatives, 7 December 2017
Rights	Freedom of expression; right to an effective remedy; privacy; freedom of association; presumption of innocence; to take part in public affairs (see **Appendix 2**)
Previous report	2 of 2018
Status	Concluded examination

Background

2.259 The committee first reported on this bill in its *Report 2 of 2018*, and requested a response from the Attorney-General by 28 February 2018.[1]

2.260 The Attorney-General's response to the committee's inquiries was received on 15 March 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Secrecy provisions

2.261 Schedule 2 of the bill would amend the *Crimes Act 1914* (Crimes Act) and the *Criminal Code Act 1995* (Criminal Code) to introduce a range of new criminal offences

1 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 2-36.

related to the disclosure or use of government information. These replace existing offences.[2]

Offences relating to 'inherently harmful information'

2.262 Proposed subsections 122.1(1)-(2) of the Criminal Code provide that a person commits an offence if the person communicates or deals[3] with information that is 'inherently harmful information' in circumstances where the information was made or obtained by that or any other person by reason of being, or having been, a 'Commonwealth officer'[4] or otherwise engaged to perform work for a Commonwealth entity.

2.263 Proposed subsections 122.1(3)-(4) would also criminalise removing or holding 'inherently harmful information' outside a proper place of custody and failing to comply with a lawful direction regarding the retention, use or disposal of such information. These proposed offences carry a maximum term of imprisonment of between 5 to 15 years.

2.264 'Inherently harmful information' is defined to include:

- security classified information;[5]
- information the communication of which would, or could reasonably be expected to, damage the security or defence of Australia;
- information that was obtained by, or made by or on behalf of, a domestic intelligence agency or a foreign intelligence agency in connection with the agency's functions;
- information that was provided by a person to the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under a law or otherwise by compulsion of law;

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2 Currently, section 70 of the Crimes Act criminalises the disclosure of information by Commonwealth officers, obtained due to their role, in circumstances where they have a duty not to disclose such information. Similarly, section 79 of the Crimes Act also currently criminalises the disclosure of 'official secrets'. The bill proposes to replace these provisions.

3 Under proposed subsection 90.1(1) of the Criminal Code a person 'deals' with information if the person receives or obtains it; collects it; possesses it; makes a record of it; copies it alters it; conceals it; communicates it; publishes it; or makes it available.

4 'Commonwealth officer' would be defined broadly to include (a) an APS employee; (b) an individual appointed or employed by the Commonwealth otherwise than under the *Public Service Act 1999*; (c) a member of the Australian Defence Force; (d) a member or special member of the Australian Federal Police; (e) an officer or employee of a Commonwealth authority; (f) an individual who is a contracted service provider for a Commonwealth contract: Proposed section 121.1 of the Criminal Code.

5 Strict liability applies to the element of the offence of whether the information is inherently harmful to the extent the information is security classified information: See, proposed subsection 122.1(4) and (5) of the Criminal Code.

- information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency.[6]

Offences of conduct causing harm to Australia's interests

2.265 Under proposed section 122.2 of the Criminal Code it is an offence for a person to communicate, deal with or remove or hold information (outside a proper place of custody) where this conduct causes, or is likely to cause, harm to Australia's interests and the information was made or obtained by the person, or any other person, by reason of being, or having been, a 'Commonwealth officer'[7] or otherwise engaged to perform work for a Commonwealth entity. These offences carry maximum penalties of between 5 and 15 years imprisonment.

Aggravated offences

2.266 In relation to the existing offences under sections 122.1 and 122.2, proposed section 122.3 of the Criminal Code would introduce an aggravated offence where additional circumstances apply.[8] These aggravated offences carry a maximum penalty of between 10 and 20 years imprisonment.

Unauthorised disclosure by Commonwealth officers and former Commonwealth officers

2.267 Proposed section 122.4 of the Criminal Code provides that a person commits an offence if they communicate information which they are required under Commonwealth law not to disclose where the information was made or obtained by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.

Defences

2.268 Proposed section 122.5 of the Criminal Code provides for a number of defences to each of the offences in proposed sections 122.1-122.4 including where:

- the person was exercising a power or performing a function or duty in their capacity as a Commonwealth officer or someone otherwise engaged to perform work for a Commonwealth entity;

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6 See, proposed section 121.1 of the Criminal Code.

7 See, proposed section 121.1 of the Criminal Code.

8 This includes where the information in relation to the offence has a security classification of 'secret' or above; the record containing the information is marked 'for Australian eyes only' or as prescribed by regulation; the offence involves 5 or more records with a security classification; the offence involves the person altering a record to remove its security classification; or at the time the person committed the offence the person held an Australian Government security clearance. Strict liability applies as to whether 5 or more documents had a security classification.

- the person acted in accordance with an agreement or arrangement to which the Commonwealth was a party;
- the information is already public with the authority of the Commonwealth;
- the information is communicated to the Inspector-General of Intelligence and Security, the Commonwealth Ombudsman, the Enforcement Integrity Commissioner or their staff for the purpose of performing a function or duty;
- the information is communicated in accordance with the *Public Interest Disclosure Act 2013*;
- the information is communicated to a court or tribunal;
- the information is dealt with or held in the 'public interest'[9] in the person's capacity as a journalist for the purposes of fair and accurate reporting;
- the information has been previously published and the person has reasonable grounds for believing that the communication will not cause harm to Australia's interests or the security or defence of Australia; and
- the person has reasonable grounds for believing that making or obtaining the information was required or authorised by Australian law and it is communicated to the person to whom the information relates or with the express or implied consent of the person.

2.269 The defendant bears an evidential burden in relation to these defences.

Compatibility of the measures with the right to freedom of expression

2.270 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. The initial human rights analysis stated that, by criminalising the disclosure of information as well as particular forms of use, the proposed secrecy provisions engage and limit the right to freedom of expression.

2.271 The committee has previously examined the secrecy provisions now contained in the *Australian Border Force Act 2015* (Border Force Act) and assessed that they may be incompatible with the right to freedom of expression.[10] The measures proposed in the bill raise similar concerns in relation to freedom of expression but appear to be broader in scope than those now contained in the Border Force Act. It was noted that concerns have also previously been raised by United Nations (UN) supervisory mechanisms about the chilling effect of Australian

9 What is not in the 'public interest' is defined in proposed section 122.5 (7).

10 See, Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 6-12; *Report 11 of 2017* (17 October 2017) pp. 72-83.

secrecy provisions on freedom of expression.[11] The type of concerns raised, including that civil society organisations, whistle-blowers, trade unionists, teachers, social workers, health professionals and lawyers may face criminal charges 'for speaking out and denouncing the violations' of the rights of individuals appear to apply equally in respect of the measures in this bill.

2.272 Measures limiting the right to freedom of expression may be permissible where the measures pursue a legitimate objective, are rationally connected to that objective, and are a proportionate way to achieve that objective.[12]

2.273 The statement of compatibility acknowledges that the measures engage and limit the right to freedom of expression but argues that such limitations are permissible.[13] In relation to the objective of the bill, the statement of compatibility states:

> The objective of the Bill is to modernise and strengthen Australia's espionage, foreign interference, secrecy and related laws to ensure the protection of Australia's security and Australian interests. Foreign actors are currently seeking to harm Australian interests on an unprecedented scale, posing a grave threat to Australia's sovereignty, prosperity and national security. This threat is a substantial concern for the Australian Government. If left unchecked, espionage and foreign interference activities may diminish public confidence in the integrity of political and government institutions, compromise Australia's military capabilities and alliance relationships, and undercut economic and business interests within Australia and overseas.

2.274 While generally these matters are capable of constituting legitimate objectives for the purposes of international human rights law, the initial analysis noted that it would have been useful if the statement of compatibility had provided information as to the importance of these objectives in the context of the specific secrecy measures.

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11 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders (Visit to Australia)*, 18 October 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E; François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, Thirty-fifth session, Human Rights Council, A/HRC/35/25/Add.3 (24 April 2017) [86].

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

13 Statement of compatibility (SOC) pp. 22-23.

2.275 The statement of compatibility provides limited information as to whether the limitations imposed by the measures are rationally connected to (that is, effective to achieve) these stated objectives.

2.276 In relation to the proportionality of the measures, the statement of compatibility refers to UN Human Rights Committee General Comment No. 34 on the right to freedom of expression which says that state parties must ensure that secrecy laws are crafted so as to constitute permissible limitations on human rights. The UN Human Rights Committee noted in General Comment No 34 that it is not a permissible limitation on the right to freedom of expression, for example:

> …to invoke such [secrecy] laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.[14]

2.277 However, it appears that, as drafted, the proposed measures in question may give rise to just such concerns.

Breadth and scope of information

2.278 While the statement of compatibility states that the 'offences in section 122.1 apply only to information within narrowly defined categories of inherently harmful information', it was unclear that these categories are sufficiently circumscribed in respect of the stated objectives of the measures to meet this description. Rather than being 'narrowly defined' the definition of 'inherently harmful information', to which the offences under proposed section 122.1 apply, appears to be very broad.

2.279 As set out above at [2.264], 'inherently harmful information' is defined to include security classified information; information expected to prejudice security, defence or international relations of Australia; information from a domestic intelligence agency or a foreign intelligence agency; information that was provided by a person to the Commonwealth to comply with an obligation under a law, as well as a range of other matters. The breadth of the current and possible definitions therefore raised concerns as to whether the limitation is proportionate.

2.280 For example, the category of 'security classified information' is to be defined by regulation[15] and may potentially apply to a broad range of government documents. In this respect, the Australian government *Information security*

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14 SOC, p. 22: UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, (12 September 2011) [30].

15 Explanatory Memorandum (EM) p. 229.

management guidelines set out when government information is or should be marked as security classified and indicate that the scope of the documents captured by security classifications is likely to be broad.[16]

2.281 Further, the explanatory memorandum acknowledges that the category of 'any information provided by a person to the Commonwealth to comply with another law' is wide. It explains that this category would include information required to be provided to regulatory agencies, by carriage services and Commonwealth authorities. While the statement of compatibility refers generally to the 'gravity of the threat posed' by these categories, the initial analysis stated that it was unclear whether each category of 'inherently harmful information' is necessary to achieve the stated objective of the measures. It appears that some of the categories could capture the communication of information that is not harmful or not significantly harmful to Australia's national interests or not intended to cause harm. This raised a concern that the measure may not be the least rights restrictive way of achieving its stated objectives and may be overly broad.

2.282 The proposed offences in section 122.2 relating to communicating, dealing with or removing or holding information where this conduct causes, or is likely to cause, harm to Australia's interests also applies to a potentially broad range of information.[17] The definition of information that 'causes harm to Australia's interests' is very broad and includes categories that appear less harmful. For example, it includes interfering with any process concerning breach of a Commonwealth law that has a civil penalty. As civil penalty provisions relate to civil processes, the imposition of a criminal sanction for an unauthorised disclosure of information appears to be serious. The initial analysis noted that it would capture interfering with, for example,

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16 See, Australian Government, *Information security management guidelines Australian Government security classification system* (April 2015) https://www.protectivesecurity.gov.au/informationsecurity/Documents/INFOSECGuidelinesAustralianGovernmentSecurityClassificationSystem.pdf.

17 See, proposed section 121.1 of the Criminal Code: 'cause harm to Australia's interests' includes 'interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of: (i) a criminal offence against; or (ii) a contravention of a provision, that is subject to a civil penalty, of: a law of the Commonwealth; or (b) interfere with or prejudice the performance of functions of the Australian Federal Police under: (i) paragraph 8(1)(be) of the Australian Federal Police Act 9 1979 (protective and custodial functions); or (ii) the Proceeds of Crime Act 2002; or (c) harm or prejudice Australia's international relations in relation to information that was communicated in confidence: (i) by, or on behalf of, the government of a foreign country, an authority of the government of a foreign country or an international organisation; and (ii) to the Government of the Commonwealth, to an authority of the Commonwealth, or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth; or (d) harm or prejudice Australia's international relations in any other way; or (e) harm or prejudice relations between the Commonwealth and a State or Territory; or (f) harm or prejudice the health or safety of the public or a section of the public.

the investigation of relatively minor conduct such as failing to return an identity card as soon as practicable (which carries a maximum penalty of 1 penalty unit or $210)[18] or providing a community radio broadcasting service without a licence (which carries a maximum penalty of 50 penalty units or $10,500).[19] It was unclear that the level of harm is sufficiently connected to the stated objective of the measure. Accordingly, it appeared proposed section 122.2 and the categories of harm to Australia's interests may also be overly broad with respect to the stated objective of the measures.

2.283 As set out above, proposed section 122.4 of the Criminal Code criminalises unauthorised disclosures of information by former and current Commonwealth officers where they were under a duty not to disclose. The statement of compatibility states that this provision is a modernised version of current section 70 of the Crimes Act and as such 'section 122.4 does not establish a new limitation on the ability of such persons to communicate information'.[20] However, while proposed section 122.4 is similar to current section 70 of the Crimes Act, this does not address human rights concerns with the proposed provision. The concerns about whether the section 122.4 offence is sufficiently circumscribed arise from there being no harm requirement and it potentially applying to any information a person has learnt while engaged by the Commonwealth regardless of its nature. Further, the breadth of any 'duty not to disclose' is potentially broad as it arises under any law of the Commonwealth. This accordingly raised concerns that section 122.4 may be overly broad with respect to the stated objective of the measures.

2.284 More generally, the breadth of the information subject to these offences would appear to also capture even government information that is not likely to be harmful to Australia's national interests. As the initial analysis noted, it is likely to also capture a range of information the disclosure of which may be considered in the public interest or may merely be inconvenient. This raised serious questions about whether the limitation on the right to freedom of expression is proportionate. As noted by the UN Special Rapporteur on the right to freedom of expression '[i]t is not legitimate to limit disclosure in order to protect against embarrassment or exposure of wrongdoing, or to conceal the functioning of an institution'.[21]

Breadth and scope of application

2.285 The classes of people to which the offences in proposed sections 122.1-122.4 applies are extremely broad and these sections could criminalise expression on a broad range of matters by a broad range of people, including

18 *Privacy Act 1988* section 68A;

19 *Broadcasting Services Act 1992* section 135.

20 SOC, p. 22.

21 David Kaye, Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, 70th sess, UN Doc A/70/361 (8 September 2015) 5 [8]

Australian Public Service employees; members of the Australian Defence Force and the Australian Federal Police; people providing services to government; contractors performing services for the government such as social workers, teachers, medical professionals or lawyers.

2.286 The proposed offences in section 122.1-122.3 go further than this and do not merely cover the conduct of those who are, or have been, engaged or employed in some manner by the Commonwealth government. They would also criminalise the conduct of anyone (in other words, 'outsiders') who communicates, receives, obtains or publishes the categories of government information described above at [2.278]–[2.282].

2.287 For example, the initial analysis noted that it would appear that a journalist who deals with (which is defined very broadly to include 'receives') unsolicited security classified information made by a Commonwealth employee would commit a criminal offence under section 122.1.[22] It is possible that the defence that the information is dealt with or held in the 'public interest' in the person's capacity as a journalist engaged in fair and accurate reporting could potentially be available. However, if the receipt of the information was not in the 'public interest'[23] because, for example, it is likely to harm the health or safety of a section of the public then the defence would appear not to apply. Further, the defence also requires that the journalist is engaged in 'fair and accurate reporting' such that there may be a range of circumstances where it does not apply. This is notwithstanding that the receipt of the information in question may be unsolicited and the journalist may or may not be aware of the security classification.[24] It also raised a related concern that the measure, as drafted, could apply to the mere receipt of information regardless of what the journalist (for example) does with the information afterwards. This raised a particular concern that the offence provisions in section 122.1 could have a chilling

22 Under proposed subsection 90.1(1) of the Criminal Code a person 'deals' with information if the person receives or obtains it; collects it; possesses it; makes a record of it; copies it; alters it; conceals it; communicates it; publishes it; or makes it available.

23 Proposed section 122.5(7) provides that, dealing with or holding information is not in the public interest if (a) dealing with or holding information that would be an offence under section 92 of the *Australian Security Intelligence Organisation Act 1979* (publication of identity of ASIO employee or ASIO affiliate); (b) dealing with or holding information that would be an offence under section 41 of the *Intelligence Services Act 2001* (publication of identity of staff); (c) dealing with or holding information that would be an offence under section 22, 22A or 22B of the *Witness Protection Act 1994* (offences relating to Commonwealth, Territory, State participants); (d) dealing with or holding information that will or is likely to harm or prejudice the health or safety of the public or a section of the public.

24 Strict liability applies to the element of the offence of whether the information is inherently harmful to the extent the information is security classified information: See, proposed subsection 122.1(4) and (5) of the Criminal Code.

effect on reporting and that the defences may act as an insufficient safeguard in relation to the right to freedom of expression.

2.288 More generally, where the 'inherently harmful information' is not already publicly available and the person is not a journalist, the initial analysis stated that it appears that by dealing with information, the person may be guilty of an offence under section 122.1 even where they have not solicited such information or are unaware that it is, for example, subject to a security classification. Proposed sections 122.1-122.3 would also appear to capture professional conduct by advisers such as lawyers who may be asked to advise whether a person would commit an offence. For example, it would appear to constitute an offence for a lawyer to make a photocopy of a security classified document which a client has received for the purposes of providing the client with legal advice about whether they can disclose or publish the document. It would also appear to be a criminal offence, if the lawyer were to merely receive or make a record of the document in this context. There does not appear to be an applicable defence in relation to such conduct.

2.289 Indeed, there are serious questions about whether the proposed statutory defences provide adequate safeguards in respect of the right to freedom of expression. For example, in addition to the matters raised above, the defences may not sufficiently protect disclosure of information that may be in the public interest or in aid of government accountability and oversight so as to be a proportionate limit on human rights. While there is a defence where information was disclosed in accordance with the *Public Interest Disclosure Act 2013* (PID Act), it is unclear that this would provide adequate protection. The UN Special Rapporteur on human rights defenders has recently urged the government to 'substantially strengthen the Public Interest Disclosure framework to ensure effective protection to whistleblowers',[25] noting that 'many potential whistleblowers will not take the risk of disclosing because of the complexity of the laws, severity and scope of the penalty, and extremely hostile approach by the Government and media to whistleblowers'.[26] There is no general public interest defence in relation to the proposed measures. The initial human rights analysis also raised questions as to whether some of the defences such as those contained in sections 122.5(3) and (4) extend to preparatory acts such as printing or photocopying.

2.290 Further, the penalties for the offences in schedule 2 of the bill are serious and range from 2 to 20 years. The severity of such penalties is also relevant to whether the limitation on the right to freedom of expression is proportionate.

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25 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders (Visit to Australia)*, 18 October 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E.

26 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders (Visit to Australia)*, 18 October 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E.

Finally, the initial analysis stated that it is unclear how the proposed provisions will interact with existing secrecy provisions such as, for example, under the Border Force Act. In this respect, as noted above, the proposed measures appear to capture a much broader range of conduct than that currently prohibited under the Border Force Act.

2.291 The committee therefore sought the advice of the Attorney-General as to:

- how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill;
- whether the limitations are reasonable and proportionate to achieve the stated objective (including in relation to the breadth of information subject to secrecy provisions, the adequacy of safeguards and the severity of criminal penalties); and
- how the measures will interact with existing secrecy provisions such as those under the Border Force Act which has been previously considered by the committee.

2.292 In relation to the proportionality of the measures, in light of the information requested above, if it is intended that the proposed secrecy provisions in schedule 2 proceed, advice was also sought as to whether it would be feasible to amend them to:

- appropriately circumscribe the range of 'inherently harmful information' to which the offence in proposed section 122.1 applies;
- appropriately circumscribe the definition of what information 'causes harm to Australia's interests' for the purposes of section 122.2;
- appropriately circumscribe the definition of 'deals' with information for the purposes of offences under proposed sections 122.1-122.4;
- appropriately circumscribe the scope of information subject to the prohibition on disclosure under proposed section 122.4 (by, for example, introducing a harm element);
- limit the offences in schedule 2 to persons who are or have been engaged by the Commonwealth as an employee or contractor;
- expand the scope of safeguards and defences (including, for example, a general 'public interest' defence, an unsolicited information defence, a broader journalism defence, and the provision of legal advice defence);
- reduce the severity of the penalties which apply; and
- include a sunset clause in relation to the secrecy provisions in schedule 2.

Attorney-General's response

2.293 The Attorney-General states that he has proposed a number of amendments to the bill, which are aimed at ensuring that the scope of the secrecy offences is 'reasonable and proportionate to achieve the objective of protecting Australia from harm'. Broadly, the amendments aim to narrow the scope of some key definitions and the offences that relate to non-Commonwealth officers; remove strict liability from some offences; and to strengthen the defence for journalists. As discussed further below, some of these amendments are likely to assist with the proportionality of the limitation on the right to freedom of expression.

2.294 In relation to how the measures are effective to achieve the stated objectives of the bill, the Attorney-General's response states:

> It is crucial for the types of information listed in the Bill, as amended, to be protected by general secrecy offences. The Bill seeks to criminalise a range of foreign intelligence activity against Australia, which the Australian Secret Intelligence Organisation (ASIO) assesses is occurring on an unprecedented scale. The existing secrecy offences are inadequate to deter conduct leading up to espionage and foreign interference, and fail to take into account the current operational environment.
>
> Publication and communication of sensitive information substantially raises the risk of foreign actors exploiting that information to cause harm to Australia's interests or to advance their own interests. For example, foreign actors may use the information to build a malicious capability in order to influence a political or governmental process of an Australian government or the exercise of an Australian democratic or political right.
>
> The disclosure of harmful information can erode public confidence in the integrity of Australia's institutions and undermine Australian societal values. It can also jeopardise the willingness of international partners to share sensitive information with Australia.
>
> The general secrecy offences in the Bill complement the espionage and foreign interference offences, both of which require proof of a connection to a foreign principal. The general secrecy offences are an essential part of the overall framework as they ensure the unauthorised disclosure of harmful information, that is made or obtained by the Commonwealth, can be prosecuted even if a foreign principal is not involved, is not yet involved, or the link to a foreign principal cannot be proved beyond a reasonable doubt.

2.295 Subject to particular secrecy provisions discussed further below, based on this information it appears that, in general, the proposed secrecy offences are capable of being rationally connected to (that is, effective to achieve) the stated objective.

2.296 As to whether the limitations are reasonable and proportionate to achieve the stated objective, the response outlines the nature of particular threats posed and

refers to its submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS). The Attorney-General's response also outlines a range of information in response to the committee's questions which went to matters of whether the limitation on the right to freedom of expression is proportionate.

Breadth and scope of definition: 'inherently harmful information'

2.297 The Attorney-General's response as to whether it would be feasible to appropriately circumscribe the range of 'inherently harmful information' to which secrecy offences in section 122.1 apply,[27] states:

> The proposed amendments to the Bill amend the definition of security classification in sections 90.5 and 121.1. Under the new definition, security classification will mean a classification of TOP SECRET or SECRET, or any other equivalent classification or marking prescribed by the regulations. Consistent with the Australian Government's Information Security Management Guidelines (available at www.protectivesecurity.gov.au), information should be classified as TOP SECRET if the unauthorised release of the information could cause exceptionally grave damage to the national interest. Information should be classified as SECRET if the unauthorised release of the information could cause serious damage to the national interest, organisations or individuals.
>
> The new definition will not allow for lower protective markings to be prescribed in the regulations and will only allow equivalent classifications or markings to be prescribed. This will allow flexibility to ensure the definition can be kept up to date if new protective markings of equivalent seriousness are introduced, or to ensure information bearing former protective markings of equivalent seriousness can continue to be protected.
>
> It is worth noting that the proposed amendments also remove the provisions that apply strict liability to information that has a security classification. The effect of these amendments is that, in addition to proving that information or article had a security classification, the prosecution will also have to prove that the defendant was reckless as to the fact that the information or article had a security classification. Consistent with section 5.4 of the Criminal Code Act 1995 (Criminal Code), this will require proof that the person was aware of a substantial risk that the information had a security classification and, having regard to the circumstances known to him or her, it was unjustified to take the risk.
>
> Paragraph (d) of the definition of 'inherently harmful information' will be removed. This paragraph applied to information that was provided by a person to the Commonwealth or an authority of the Commonwealth in

27 As set out above, proposed section 122.1 criminalises communication, dealing with or handling 'inherently harmful information.

> order to comply with an obligation under law or otherwise by compulsion of law.

2.298 These amendments will address some of the concerns in relation to the breadth of the definition of 'inherently harmful information'. Narrowing the definition of 'inherently harmful information' so that only information classified as SECRET or TOP SECRET, rather than all classified documents, is captured by the definition assists to better circumscribe the proposed offence. Similarly, the removal of some other categories of documents from the definition of 'inherently harmful information' also assists to better circumscribe the offence.

2.299 Additionally, as outlined in the Attorney-General's response the definition of 'inherently harmful information' will be restricted to secrecy offences involving current or former Commonwealth employees or contractors. The Attorney-General's response notes that the 'offences for non-Commonwealth officers are much narrower and will only apply where the information is classified TOP SECRET or SECRET or the person's disclosure of, or dealing with, information causes or will cause harm.' However, it is noted that the definition of 'inherently harmful information' is still broad in the context of the proposed measures.

Breadth and scope of definition: 'causes harm to Australia's interests'

2.300 The Attorney-General's response notes that the committee expressed concern about the breadth of the proposed offences in section 122.2 relating to communicating, dealing with or removing or holding information where this conduct causes, or is likely to cause, harm to Australia's interests.[28] In relation to whether it would be feasible to appropriately circumscribe the definition of what information 'causes harm to Australia's interests' for the purposes of section 122.2, the Attorney-General states:

> The definition of 'cause harm to Australia's interests' will be narrowed in the proposed amendments to the Bill by removing subparagraph (a)(ii) –

28 See, proposed section 121.1 of the Criminal Code: 'cause harm to Australia's interests' includes 'interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of: (i) a criminal offence against; or (ii) a contravention of a provision, that is subject to a civil penalty, of: a law of the Commonwealth; or (b) interfere with or prejudice the performance of functions of the Australian Federal Police under: (i) paragraph 8(1)(be) of the Australian Federal Police Act 1979 (protective and custodial functions); or (ii) the Proceeds of Crime Act 2002; or (c) harm or prejudice Australia's international relations in relation to information that was communicated in confidence: (i) by, or on behalf of, the government of a foreign country, an authority of the government of a foreign country or an international organisation; and (ii) to the Government of the Commonwealth, to an authority of the Commonwealth, or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth; or (d) harm or prejudice Australia's international relations in any other way; or (e) harm or prejudice relations between the Commonwealth and a State or Territory; or (f) harm or prejudice the health or safety of the public or a section of the public.

> interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a contravention of a provision, that is subject to a civil penalty, of a law of the Commonwealth.
>
> The amendments will also remove paragraph (d) of the definition – harm or prejudice Australia's international relations in any other way, and paragraph (e) – harm or prejudice relations between the Commonwealth and a State or Territory.
>
> The remaining categories of information covered by the definition of 'cause harm to Australia's interests' all require proof of harm to, interference with, or prejudice to, one of the listed categories. These reflect essential public interests. The Explanatory Memorandum provides further information justifying the inclusion of these categories in paragraphs 1283 to 1301.

2.301 These amendments circumscribe the definition of 'causing harm to Australia's interests' such that the level of harm required to give rise to the offence is higher than initially drafted. The amendments therefore address a number of concerns in relation to the breadth of the definition of 'causing harm to Australia's interests.' However, the range of matters remaining within the definition is still quite broad in the context of the proposed offences.

Breadth of definition of 'deals' with information

2.302 As set out above, the bill proposes to criminalise not only communicating particular government information but also 'dealing' with such information. In relation to whether it would be feasible to appropriately circumscribe the definition of 'deals' with information for the purposes of offences under proposed sections 122.1-122.4, the Attorney-General states:

> The definition of deals in section 90.1 of the Bill has been broadened to cover the full range of conduct that can constitute secrecy and espionage offences. This is to ensure the offences comprehensively addresses the full continuum of criminal behaviour that is undertaken in the commission of espionage offences, and to allow authorities to intervene at any stage.
>
> The penalties for the secrecy offences are tiered to ensure that penalties are commensurate with the seriousness and culpability of offending. The higher penalty will apply where a person actually communicates information. Offences relating to other dealings with information will carry lower penalties. In each case, the fault element of intention will apply to the physical element of the offence that a person communicates or deals with information. Consistent with section 5.2 of the Criminal Code, this means that the person must have meant to engage in the conduct.
>
> Accordingly, the definition of 'deals' is appropriately circumscribed and proportionate to the objective of the Bill.

2.303 While the maximum penalty for 'dealing' with particular categories of government information is lower than the offences of communicating such

information, the maximum penalties remain substantial. As such, whether the definition of 'deals'[29] with information is sufficiently circumscribed is an important factor in determining whether the limitation is a proportionate limitation on the right to freedom of expression.

2.304 Noting the information provided by the Attorney-General, the application of the fault element of intention to the physical element of the offence is relevant to whether the measure is sufficiently circumscribed. Based on this information, it appears that unintentional conduct may not fall within the scope of the proposed offences. In this respect, the Attorney-General's response specifically addresses the committee's concern that a journalist who receives unsolicited information could be liable for a secrecy offence and states in the context of proposed amendments to the bill that:

> The fault element of intention always applies to the physical elements of offences involving conduct. Therefore, the prosecution would have to prove beyond reasonable doubt that the journalist intentionally communicated or dealt with the information. Under the amended Bill, if a journalist were to receive unsolicited information, and that information had a security classification, strict liability will no longer apply to the element relating to security classification. This means that, in addition to proving that information or article had a security classification, the prosecution will also have to prove that the defendant was reckless as to the fact that the information or article had a security classification. Consistent with section 5.4 of the Criminal Code, this will require proof that the person was aware of a substantial risk that the information had a security classification and, having regard to the circumstances known to him or her, it was unjustified to take the risk.

2.305 The advice provided about this example, including the application of the fault element and the amendment to remove the strict liability element, addresses a number of concerns in relation to the proportionality of the measure. However, given that 'deals' is defined to include 'receive' there may still be a degree of uncertainty or confusion as to whether a person does or does not have the requisite intention with respect to that conduct (that is, receiving information).

2.306 Further, there remains a broad scope of conduct which will be captured by the definition of 'deals' with categories of government information. It would appear to criminalise an academic who makes a record of a document with a secret security classification for the purposes of academic research. Additionally, as noted above, it would appear to criminalise the conduct of a lawyer who 'deals' with a document with a secret classification by photocopying it for the purposes of giving legal advice

29 Under proposed subsection 90.1(1) of the Criminal Code a person 'deals' with information if the person receives or obtains it; collects it; possesses it; makes a record of it; copies it; alters it; conceals it; communicates it; publishes it; or makes it available.

to a client about whether they can disclose it. In this respect, the Attorney-General's response states:

> It is not intended that the offences cover situations where a person is seeking legal advice about their ability to communicate information or in relation to the application of the offences. A specific defence could provide clarity for such activities.

2.307 As such, further amendments are required to address this concern.

Scope of information subject to proposed section 122.4 offence

2.308 As noted above, proposed section 122.4 criminalises the disclosure of information by current and former Commonwealth staff where they were under an obligation under Commonwealth law not to disclose such information. In relation to whether it would be feasible to appropriately circumscribe the scope of information subject to the prohibition on disclosure under proposed section 122.4, such as introducing a harm element, the Attorney-General states:

> Section 122.4 replaces and narrows section 70 of the Crimes Act. As stated at paragraph 1274 of the Explanatory Memorandum, it is unclear whether a duty at common law or in equity would be a relevant duty for the purposes of the existing offence. New section 122.4 will only apply where a Commonwealth officer had a duty not to disclose information and that duty arises under Commonwealth law.
>
> Where the Parliament has seen fit to impose a duty on a Commonwealth officer not to disclose information, a breach of such a duty is a serious matter. It is important to note that, in addition to proving that the person is under a duty not to disclose information, the prosecution will also need to prove that the person was reckless as to this element. Consistent with section 5.4 of the Criminal Code, this means that the person will need to be aware of a substantial risk that he or she is under a duty not to disclose the information and, having regard to the facts and circumstances known to him or her, it is unjustifiable to take the risk.
>
> As such, it is not necessary for the offence to require proof of additional harm.

2.309 It is noted that the current existence of a broadly framed secrecy offence does not address human rights concerns in relation to the proposed measures. Further, while noting that there are current non-disclosure obligations under Commonwealth laws, it is unclear whether or not these existing obligations are compatible with the right to freedom of expression.

2.310 As such, criminalising such disclosures may not be a permissible limit on this right given that the offence would appear to apply to very broad categories of government documents. It is unclear that each of these categories would have a necessary connection to the stated objective. As noted above, the UN Human Rights Committee has stated that it is not a permissible limitation on the right to freedom of expression 'to invoke such [secrecy] laws to suppress or withhold from the public

information of legitimate public interest that does not harm national security.'[30] Given the breadth of the proposed offence, the measure does not appear to be the least rights restrictive approach to achieving its stated objective.

Breadth and scope of application

2.311 As noted above, the initial human rights analysis noted that the classes of people to which the offences in proposed sections 122.1-122.4 applied were broad and do not merely cover the conduct of those who are, or have been, engaged or employed in some manner by the Commonwealth government. In relation to whether it would be feasible to amend the offences in schedule 2 to restrict them to persons who are or have been engaged by the Commonwealth as an employee or contractor, the Attorney-General states:

> The proposed amendments to the Bill address the committee's concerns about the application of many of the secrecy offences to both Commonwealth and non-Commonwealth officers.
>
> The amendments create separate offences that apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply to the most serious and dangerous conduct. This recognises that secrecy offences should apply differently to Commonwealth and non-Commonwealth officers given that the former have a higher duty to protect such information and are well versed in security procedures.
>
> Sections 122.1 and 122.2 will only apply to a person who made or obtained the information by reason of being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.
>
> New offences in section 122.4A will apply to non-Commonwealth officers who communicate or deal with a narrower subset of information than the offences at sections 122.1 and 122.2.
>
> The new offence at subsection 122.4A(1) will apply where:
>
> - a person intentionally communicates information
> - the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
> - the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
> - any one or more of the following applies:

30 SOC, p. 22: UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, (12 September 2011) [30].

- the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
- the communication of the information damages the security or defence of Australia and the person is reckless as to this
- the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this
- the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

This offence will carry a maximum penalty of 10 years imprisonment, which is lower than the penalty applying to the offences relating to communication of information by current or former Commonwealth officers at subsections 122.1(1) and 122.2(1).

The new offence at subsection 122.4A(2) will apply where:

- a person intentionally deals with information (other than by communicating it)
- the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- any one or more of the following applies:
  - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
  - the dealing damages the security or defence of Australia and the person is reckless as to this
  - the dealing interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this
  - the dealing harms or prejudices the health or safety of the Australian public or a section of the Australian public.

This offence will carry a maximum penalty of three years imprisonment, which is lower than the 10 year penalty applying to the offences relating to dealings with information by current or former Commonwealth officers at subsections 122.1(2) and 122.2(2).

> The effect of limiting all secrecy offences to Commonwealth employees or contractors would significantly limit the Bill's application and undermine its policy rationale to protect Australia's national security. Protecting Australia from espionage and foreign interference relies heavily on having strong protections for information, especially where disclosure causes harm to an essential public interest. In the same way as any person can commit espionage, any person can threaten Australia's safety, security and stability through the unauthorised disclosure of harmful information.

2.312 The framing of these separate offences addresses some concerns in relation to the application of offences to non-Commonwealth officers. This is likely to assist the proportionality of the measure noting that the offences applying to non-Commonwealth officers are narrower in scope. However, the scope of these offences is still very broad and applies to a large range of individuals.

Severity of the penalties

2.313 In view of initial concerns that the severity of penalties may impact upon the proportionality of the limitation, the Attorney-General's response states:

> Commonwealth criminal law policy, as set out in the *Guide to Framing Commonwealth Offences* provides that each offence should have a single maximum penalty that is adequate to deter or punish a worst case offence, including repeat offences. The maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme.
>
> In the case of the secrecy offences, the disclosure of information could, as a worst case scenario, lead to loss of life. For example, the disclosure of information concerning human sources or officers operating under assumed identities may compromise the safety of those individuals. In light of this worst case scenario, the maximum penalties are considered appropriate. A sentencing court has the discretion to set the penalty at an appropriate level to reflect the relative seriousness against the facts and circumstances of the particular case.
>
> Under the amended Bill, the secrecy offences applicable to Commonwealth officers and non Commonwealth officers will attract different penalties. This reflects the higher level of culpability on the part of Commonwealth officers who are entrusted by the Australian Government with sensitive information, have a duty to protect such information, and are trained in security procedures. For example, the new offence at subsection 122.4A(1) for non-Commonwealth officers will carry a maximum penalty of 10 years imprisonment, which is lower than the penalty applying to the offences for Commonwealth officers relating to communication of inherently harmful at subsections 122.1(1) and information causing harm to Australia's interests at subsection 122.2(1), both of which attract a maximum penalty of 15 years imprisonment. Similarly the new offence at subsection 122.4A(2) for non-Commonwealth

> officers who intentionally deal with information will carry a lower penalty than the offences applicable to Commonwealth officers in 122.1(2) and 122.2(2).

2.314 The amendment to provide for lower maximum penalties for non-Commonwealth officers may assist with the proportionality of the limitation on the right to freedom of expression. It is acknowledged in this respect that Commonwealth officers may have greater levels of training and responsibilities in relation to government documents. However, the maximum penalties in all categories remain extremely serious.

Interaction with existing secrecy provisions

2.315 In relation to how the measures will interact with existing secrecy provisions such as those under the Border Force Act, the Attorney-General's response states:

> The purpose of the secrecy provisions in the Bill is to create overarching offences in the Criminal Code, which have a general application. The offences capture dealings with information, which would be likely to cause harm to Australia's interests or national security. It is important that this conduct is adequately captured by the criminal law. This means the offences in the Bill may overlap with more specific secrecy offences in other legislation, and, over time, it may be appropriate for these specific offences to be removed to the extent of the overlap.
>
> The secrecy provisions in the Border Force Act are specific offences that only apply to a person who is, or has been, an 'entrusted person' and they disclose 'Immigration and Border Protection Information,' as defined in section 4(1) of the Border Force Act.
>
> Some of the listed information in the Border Force Act is likely to fall within the categories of 'inherently harmful information' and information that 'causes harm to Australia's interests' or is 'likely to cause harm to Australia's interests' under Division 122 of the Bill. For example, 'information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia' is included in the Border Force Act as 'Immigration and Border Protection Information', as well as in the Bill as 'inherently harmful information.'
>
> However, the Bill also covers information not included in the Border Force Act, for example, in relation to 'information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency' within the definition of 'inherently harmful information.' It is important for dealings of this kind to be captured – unauthorised disclosure has the potential to prejudice investigations and operations, and compromise people's safety.
>
> Whereas the secrecy offences in the Border Force Act apply to 'entrusted persons' (being the Secretary, the Australian Border Force Commissioner and Immigration and Border Protection workers), the secrecy offences in

> the Bill apply to both Commonwealth officers and non Commonwealth officers.

2.316 While the Attorney-General has usefully clarified that there may be overlap between the proposed and existing offences, this raises concerns that the bill may create uncertainties for a range of individuals about the scope of their non-disclosure obligations. This, in turn, may act as a disincentive for disclosure of information in the public interest where it does not prejudice national security. Accordingly, such uncertainties may have an adverse impact on whether the proposed secrecy offences are a proportionate limitation on the right to freedom of expression.

Scope of safeguards and defences

2.317 The Attorney-General's response outlines a range of safeguards in relation to the proposed secrecy offences including an additional defence for those engaged in reporting news:

> The offences have appropriate safeguards and will be further strengthened by changes in the proposed amendments to the Bill. The defence for journalists at subsection 122.5(6) will be strengthened by:
>
> - removing any requirement for journalists to demonstrate that their reporting was 'fair and accurate,' ensuring that the defence is available where a journalist reasonably believes that their conduct was in the public interest, and
> - clarifying that the defence is available for editorial and support staff as well as journalists themselves.

2.318 This amendment assists with the proportionality of the measure by expanding the availability of the defence. As such the amendment provides greater scope to freedom of expression. It is noted that the Attorney-General intends that the defence would also be available to editorial and support staff, which is an important safeguard. However, as drafted, the defence is not explicit as to who may be covered and how far the defence extends. In this context, it is unclear whether an administrative officer who is asked by a journalist to photocopy a particular government document would be able to show that they reasonably believed that photocopying it was in the public interest. Further, it is unclear whether individuals engaged in non-traditional forms of journalism such as bloggers would be able to rely on the defence.

2.319 The Attorney-General advises that amendments to the bill will be developed which will also clarify that the defences in section 122.5 do not affect any immunities that exist in other legislation. Such amendments may address concerns about the extent to which existing immunities, including for example, parliamentary privilege, would provide protection from prosecution. Such clarification could also provide more certainty in relation to the scope afforded to freedom of expression.

2.320 In relation to whether it would be feasible to include a general public interest defence in respect of the secrecy provisions, the Attorney-General's response states:

> The inclusion of a general public interest defence is not warranted. In relation to the new secrecy offences for non-Commonwealth officers, it is unlikely that conduct genuinely in the public interest could fall within the parameters of the offences and outside the defences in section 122.5. For example, it is difficult to envisage how the harms listed in subsections 122.4A(1), and listed below, could be within the public interest:
>
> - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
> - the communication of the information damages the security or defence of Australia and the person is reckless as to this
> - the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this
> - the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public

2.321 The Attorney-General further notes that there are established mechanisms for Commonwealth officers to make public interest disclosures under the PID Act and proposed subsection 122.5(4) provides a defence for information communicated in accordance with that Act. However, there have been serious concerns raised in relation to whether the PID Act provides sufficient protection of the right to freedom of expression. For example, the UN Special Rapporteur on Human Rights Defenders expressed concerns about protections for whistle-blowers under the PID Act and urged the government:

> …to conduct a broad review of the cumulative impact of counter-terrorism and national security legislation on defenders and journalists, including the adequacy of whistleblower protection provided by the Public Interest Disclosure Act 2013, with a view to ensuring full protection of freedom of expression.[31]

2.322 As such it is unclear that current public interest disclosure provisions provide an adequate and effective safeguard in the context of the proposed offences.

2.323 In relation to whether it would be feasible for the secrecy provisions to be subject to a sunset provision, the Attorney-General's response stated that this would not be appropriate as:

> …their repeal from the statute book would leave disclosure of harmful information without criminal sanction. It would also risk malicious actors

31 UN Special Rapporteur on the situation of human rights defenders, Report of the Special Rapporteur on the situation of human rights defenders on his mission to Australia, A/HRC/37/51/Add.3 (28 February 2018) [28].

structuring their activities around the sunsetting of the offences in order to avoid criminal liability.

2.324 The Attorney-General suggested that, if the committee considers it necessary, it would be preferable to provide for a statutory review of the general espionage offences after a fixed period (for example, five years). Having a range of oversight and review mechanisms is a further factor which is a relevant safeguard in relation to the proportionality of the measure.

2.325 While there have been some amendments to the proposed secrecy offences which address a number of concerns, some concerns as to the proportionality of the limitation on the right to freedom of expression remain. The combination of elements means there is a risk that the offences as drafted are overly broad and may inappropriately restrict a range of communications and conduct beyond what is necessary to achieve the stated objective of the measure.

Committee response

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

2.327 The range of amendments to the bill address a number of the concerns raised in the initial human rights analysis in respect of the human rights compatibility of the proposed secrecy offences.

2.328 However, the preceding analysis indicates that concerns remain as to the compatibility of the proposed secrecy offences with the right to freedom of expression.

2.329 The committee notes that the Attorney-General's response indicates that he may consider further amendments to provide additional safeguards. Such amendments may positively impact upon whether the measures impose a proportionate limitation on the right to freedom of expression. Once such amendments are developed, the committee requests a copy of these amendments and an explanation as to how these amendments affect the limitation on the right to freedom of expression.

2.330 The committee recommends, in accordance with the Attorney-General's suggestion, that should the bill be passed, the measures in schedule 2 should be subject to a review after five years in operation.

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

Compatibility of the measure with the right to an effective remedy

2.332 The right to an effective remedy requires states parties to the ICCPR to ensure a right to an effective remedy for violations of human rights. The prohibition

on disclosing information may affect human rights violations coming to light, which may adversely affect the ability of individual members of the public to know about possible violations of human rights and seek redress as required by the right to an effective remedy. The engagement of this right was not addressed in the statement of compatibility and accordingly no assessment was provided about this issue.

2.333 The committee therefore sought the advice of the Attorney-General as to whether the measure is compatible with the right to an effective remedy.

Attorney-General's response

2.334 In relation to this inquiry, the Attorney-General's response states that the secrecy offences are compatible with the right to an effective remedy:

> While the secrecy offences engage the right to an effective remedy, that right is not limited due to a number of defences in Division 122 which protect disclosure in certain circumstances. These defences concern:
>
> - information communicated to the IGIS, the Commonwealth Ombudsman or the Law Enforcement Integrity Commissioner under subsection 122.5(3). These agencies provide important oversight of the intelligence community, law enforcement agencies and the public service. It is intended that the general secrecy offences should in no way impinge on the ability of the Inspector-General, the Ombudsman, or the Integrity Commissioner, or their staff, to exercise their powers, or to perform their functions or duties.
> - information communicated in accordance with the PID Act under subsection 122.5(4). The PID Act establishes a legislative scheme to investigate allegations of wrongdoing in the Commonwealth public sector and provide robust protections for current or former public officials who make qualifying public interest disclosures under the scheme. It is intended that the general secrecy offences should in no way impinge on the operation of the PID Act.
> - information communicated to a court or tribunal under subsection 122.5(5). This will ensure people have the ability to disclose information, including voluntarily, in order to participate in proceedings before a court or tribunal, and
> - journalists under subsection 122.5(6). This defence ensures journalists have the ability to disclose information to the public on possible violations of rights where such a disclosure is in the public interest. The amended legislation strengthens the defence for journalists by removing any requirement for journalists to demonstrate that their reporting was 'fair and accurate' and clarifying that the defence is also available for editorial and support staff.

2.335 Such safeguards appear to address key aspects of the right to an effective remedy. However, as set out above, there are some questions about the scope of

each of these defences and the level of safeguard they provide as a matter of law and practice.

2.336 The PID Act may provide an avenue through which human rights violations may come to light, consistent with the right to an effective remedy. For example, the definition of 'disclosable conduct' in section 29 of the PID Act includes conduct engaged in by an agency, public official or contracted service provider for a commonwealth contract that:

(a) is based, in whole or in part, on improper motives; or

(b) is unreasonable, unjust or oppressive; or

(c) is negligent.[32]

2.337 However, the UN Special Rapporteur on human rights defenders has recently urged the government to improve 'awareness, training and implementation' in relation to the PID Act noting that 'many potential whistleblowers reportedly considered the risks of disclosure high because of the complexity of the laws, severity and scope of the penalty, and hostile approach by the Government and media to whistleblowers'.[33] Indeed, it may be unclear to individuals the extent to which the PID Act would provide adequate protection to those who disclose information on human rights grounds (particularly where conduct may be in accordance with Australian law but not international human rights law).

Committee response

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

2.339 In light of the safeguards identified in the Attorney-General's response, the committee notes that the measure may be compatible with the right to an effective remedy. However, the committee draws to the parliament's attention the recent comments of the United Nations Special Rapporteur on the situation of human rights defenders on the adequacy of the Public Interest Disclosure framework.

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

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32 Section 29 of the *Public Interest Disclosure Act 2013*

33 UN Special Rapporteur on the situation of human rights defenders, Report of the Special Rapporteur on the situation of human rights defenders on his mission to Australia, A/HRC/37/51/Add.3 (28 February 2018) [28].

Compatibility of the measure with the right to be presumed innocent

2.341 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. The right to be presumed innocent usually requires that the prosecution prove each element of the offence (including fault elements and physical elements).

2.342 Strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need for the prosecution to prove fault. In the case of a strict liability offence, the prosecution is only required to prove the physical elements of the offence. The defence of honest and reasonable mistake of fact is, however, available to the defendant. Strict liability may be applied to whole offences or to elements of offences.

2.343 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 also 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 legislation, these defences or exceptions may effectively reverse the burden of proof and 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.

2.344 Reverse burden and strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

Strict liability element

2.345 As outlined above, strict liability applies to the element of the offence in proposed section 122.1 that the information dealt with or communicated is 'inherently harmful information' to the extent that the information is security classified information. The statement of compatibility acknowledges that this measure engages and may limit the right to be presumed innocent but argues that this limitation is permissible.[34]

2.346 However, the initial analysis identified a number of concerns with the approach and therefore requested the advice of the Attorney-General as to:

- whether the limitation is a reasonable and proportionate measure to achieve a legitimate objective (including the scope of application to persons who may

34 SOC, p. 16.

not be aware of the security classification; the ability of courts to consider whether a security classification is inappropriate; and any safeguards); and

- if the measure proceeds, whether it would be feasible to amend proposed section 122.1 to provide a prosecution must not be initiated or continued unless it is appropriate that the substance of the information had a security classification at the time of the conduct.

Attorney-General's response regarding strict liability element

2.347 In relation to the strict liability which applies to the element of the offence in proposed section 122.1, the Attorney-General's response states:

> As noted above, strict liability will be removed from elements of the offences relating to information or articles carrying a security classification in the proposed amendments to the Bill. This means the prosecution will be required to prove, beyond reasonable doubt, that the information or article had a security classification, and that the defendant was reckless as to whether the information or article had a security classification. Consistent with section 5.4 of the Criminal Code, this means the person will need to be aware of a substantial risk that the information or article carried a security classification and, having regard to the circumstances known to the person, it was unjustifiable to take that risk.

2.348 The removal of the strict liability element of the offence addresses the concerns outlined in the initial analysis relating to the compatibility of this aspect of the offence with the presumption of innocence.

Reverse burden offences

2.349 As set out above, proposed section 122.5 provides offence-specific defences to the offences in sections 122.1-122.4. In doing so, the provisions reverse the evidential burden of proof as subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.350 The explanatory memorandum and statement of compatibility include some information about the reverse evidential burden. However, the justification for reversing the evidential burden of proof is generally that the defendant 'should be readily able to point to' the relevant evidence[35] or the defendant is 'best placed' to know of the relevant evidence.[36] However, this does not appear to be sufficient to constitute a proportionate limitation on human rights. It was unclear that reversing the evidential burden is necessary as opposed to including additional elements within the offence provisions themselves.

35 See, EM pp. 276-283.

36 See explanatory memorandum, p. 88.

2.351 In this respect, proposed section 122.1 appears to be framed broadly to potentially make the work that any Commonwealth officer or engaged contractor does when dealing with security classified information an offence. It is a defence to prosecution of this offence, if a person is acting in their capacity as a Commonwealth officer. However, the effect of this would appear to leave officers or contractors acting appropriately in the course of their duties open to a criminal charge and then place the evidential burden of proof on them to raise evidence to demonstrate that they were in fact acting in accordance with their employment. This raised questions as to whether the current construction of the offence, with the reverse evidential burden in the statutory defence, is a proportionate limitation on the right to be presumed innocent.

2.352 Indeed, as noted in the initial analysis, it appears in some circumstances, it would be very difficult for Commonwealth officers to discharge the evidential burden. For example, the Inspector-General of Intelligence and Security (IGIS) explains that if a current or former IGIS officer was charged under proposed section 122 of the Criminal Code 'it would, for all practical purposes, be impossible for them to discharge the evidential burden of proving that the alleged dealing with or communication of information contrary to the proposed offences was undertaken in the course of their duties'. This is because they would 'potentially commit an offence under section 34(1) of the [*Inspector-General of Intelligence and Security Act 1986*] by disclosing that information in their defence at trial, or providing it to law enforcement officials investigating the potential commission of an offence'.[37]

2.353 In relation to the reverse evidential burdens, the committee requested the advice of the Attorney-General as to:

- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including why the reverse evidential burdens are necessary and the scope of conduct caught by the offence provisions);
- whether there are existing secrecy provisions that would prevent a defendant raising a defence and discharging the evidential burden, and if so, whether this is proportionate to the stated objective; and
- whether it would be feasible to amend the measures so that the relevant matters (currently in defences) are included as elements of the offence or alternatively, to provide that despite section 13.3 of the Criminal Code, a defendant does not bear an evidential (or legal) burden of proof in relying on the offence-specific defences.

37 See, Inspector-General of Intelligence and Security, Submission 13, Parliamentary Joint Committee on Intelligence and Security inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 pp. 5-6.

Attorney-General's response regarding reverse burden offences

2.354 In relation to the reverse evidential burdens, the Attorney-General's response provides the following information:

> It is reasonable to reverse the onus of proof in certain circumstances, including where a matter is peculiarly within the knowledge of the defendant and where it would be significantly more difficult and costly for the prosecution to disprove the matter than for the defendant to establish the matter. The justification contained in the Explanatory Memorandum for casting lawful authority as a defence for the espionage and foreign interference offences applies equally to the secrecy offences. For example, in relation to the foreign interference offences, paragraph 1116 states:
>
> > It is appropriate for these matters relating to lawful authority to be cast as defences because the source of the alleged authority for the defendant's actions is peculiarly within the defendant's knowledge. It is significantly more cost-effective for the defendant to assert this matter rather than the prosecution needing to disprove the existence of any authority, from any source.
>
> It would be difficult and more costly for the prosecution to prove, beyond a reasonable doubt, that the person did not have lawful authority. To do this, it would be necessary to negative the fact that there was authority for the person's actions in any law or in any aspect of the person's duty or in any of the instructions given by the person's supervisors (at any level). Conversely, if a Commonwealth officer had a particular reason for thinking that they were acting in accordance with a law or with their duties, it would not be difficult for them to describe where they thought that authority arose. The defendant must discharge an evidential burden of proof, which means pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (section 13.3 of the Criminal Code).
>
> The reversal of proof provisions are proportionate, as the prosecution will still be required to prove each element of the offence beyond a reasonable doubt before a defence can be raised by the defendant. Further, if the defendant discharges an evidential burden, the prosecution will also be required to disprove those matters beyond reasonable doubt, consistent with section 13.1 of the Criminal Code…
>
> It would not be appropriate to replace the defences in section 122.5 and instead include additional elements in the secrecy offences. This would mean that in every case the prosecution would need to disprove all of the matters listed in the defences in section 122.5, including for example that:
>
> - the information was not communicated to the IGIS, the Commonwealth Ombudsman or the Law Enforcement Integrity Commissioner
> - the information was not communicated in accordance with the PID Act

- the information was not communicated to a court or tribunal
- the person was not engaged in reporting news, presenting current affairs or expressing editorial content in the news media and did not have a reasonable belief that his or her dealing with the information was in the public interest.

Proving all of these matters beyond reasonable doubt would be burdensome and costly when compared to the approach taken in the Bill of providing defences for the defendant to raise, as appropriate and as relevant to the individual facts and circumstances of the particular case.

2.355 It is acknowledged that the offence-specific defences impose an evidential rather than legal burden of proof on the defendant and that the prosecution will still be required to prove other elements of the offence beyond a reasonable doubt. However, while the Attorney-General's response argues that one basis on which the reverse burden of proof is permissible is that the offence-specific defences are peculiarly within the knowledge of the defendant, it does not explain how the matters in each of these defences are actually peculiarly within the knowledge of the defendant. For example, it is unclear that the defence that the information has already been communicated or made available to the public is peculiarly within the knowledge of the defendant.

2.356 Further, while it may be 'difficult and more costly' for the prosecution to establish that a person did not, for example, have lawful authority to engage in the conduct set out in the offences, it is unclear from the information provided that this is a sufficient justification for reversing the burden of proof for the purposes of international human rights law.

2.357 In relation to the proportionality of the reverse burdens in the context of their application to IGIS officials and existing immunities, the Attorney-General advises that amendments to the bill will be developed:

> …to ensure IGIS officials do not bear an evidential burden in relation to the defences in section 122.5 of the Bill. The amendments will also broaden the defences at subsections 122.5(3) and (4) to cover all dealings with information, and clarify that the defences in section 122.5 do not affect any immunities that exist in other legislation.

2.358 Such amendments would address the specific concern that some Commonwealth officers may be unable to lawfully raise evidence relating to whether they were acting in the course of their duties due to the sensitive national security nature of their work and secrecy requirements under other legislation. It may also address concerns about the extent to which existing immunities, including for example, parliamentary privilege, would provide protection from prosecution in the context of the right to be presumed innocent. Such clarification could also provide more certainty in relation to the scope afforded to freedom of expression.

2.359 However, more broadly the concern remains that offences as proposed would still leave non-IGIS Commonwealth officers acting appropriately in the course of their employment open to a criminal charge and place the evidential burden of proof on these officers to raise evidence to demonstrate that they were in fact acting in accordance with their employment. As such, the reverse evidential burden in the statutory defence does not appear to be a proportionate limitation on the right to be presumed innocent.

Committee response

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

2.361 The committee welcomes the removal of the strict liability element of the offence in proposed section 122.1. In light of this amendment, this aspect of the offence is likely to be compatible with the right to be presumed innocent.

2.362 However, the preceding analysis indicates that concerns remain in relation to the compatibility of the reverse evidential burdens with the presumption of innocence.

2.363 In relation to the reverse burdens, the committee notes that the Attorney-General's response indicates that further amendments will be developed to broaden defences, to clarify that other immunities (such as parliamentary privilege) are not affected by the offences and provide that the reverse burden does not apply to IGIS officers. If these amendments proceed, they may have a positive impact on the proportionality of the limitation on the right to be presumed innocent. Once such amendments are developed, the committee requests a copy of these amendments and an explanation as to how these amendments affect the limitation on the right to be presumed innocent.

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

Offences relating to espionage

2.365 Schedule 1 of the bill seeks to amend a number of offences in the Criminal Code including those relating to foreign actors and persons who act on their behalf against Australia's interests.

2.366 While the Criminal Code currently contains espionage offences, schedule 1 would create a broader range of new espionage offences.[38] The new offences would

38 EM, p. 26.

criminalise a broad range of dealings with information, including both classified and unclassified information, including making it an offence:[39]

- to deal with (including to possess or receive)[40] information or an article that has a security classification[41] or concerns Australia's national security where the person intends, or is reckless as to whether, the conduct will prejudice Australia's national security or advantage the national security[42] of a foreign country and the conduct results or will result in the information or article being made available to a foreign principal[43] or someone acting on behalf of a foreign principal;[44]
- to deal with information, even where it does not have a security classification or concern Australia's national security, where the person intends, or is reckless as to whether, the conduct will prejudice Australia's national security where the conduct results or will result in the information or article being made available to a foreign principal or someone acting on behalf of a foreign principal;[45] and
- to deal with information or an article which has a security classification or concerns Australia's national security where the conduct results or will result

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39 EM, p. 26.

40 Under proposed subsection 90.1(1) a person deals with information or an article if the person: (a) receives or obtains it; (b) collects it; (c) possesses it; (d) makes a record of it; (e) copies it; (f) alters it; (g) conceals it; (h) communicates it; (i) publishes it; (j) makes it available.

41 'Security classification' is to have the meaning prescribed by regulation: Proposed section 90.5.

42 Proposed section 90.4 defines '*national security'* of Australia or a foreign country as (a) the defence of the country; (b) the protection of the country or any part of it, or the people of the country or any part of it, from defined activities (espionage; sabotage; terrorism; political violence; activities intended and likely to obstruct, hinder or interfere with the performance of the defence force; foreign interference); (c) the protection of the integrity of the country' s territory and borders from serious threats; (d) the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or a defined activity; (e) the country's political, military or economic relations with another country or other countries.

43 Proposed section 90.2 of the Criminal Code defines 'foreign principal' as: (a) a foreign government principal; (b) a public international organisation (c) a terrorist organisation (d) an entity or organisation owned, directed or controlled by a foreign principal within the meaning of paragraph (b) or (c); (e) an entity or organisation owned, directed or controlled by 2 or more foreign principals.

44 Proposed section 91.1 of the Criminal Code. Strict liability applies to the element of whether information has a security classification.

45 Proposed section 91.2 of the Criminal Code.

in the information or article being made available to a foreign principal or someone acting on behalf of the foreign principal.[46]

2.367 In addition to these new espionage offences, it would be an offence:

- to engage in espionage[47] on behalf of a foreign principal;[48]
- to solicit or procure a person to engage in espionage;[49]or
- to prepare or plan for an offence of espionage.[50]

2.368 These offences carry a maximum penalty of between 20 years and life imprisonment. The bill contains a number of limited defences to the offences.[51]

Compatibility of the measures with the right to freedom of expression

2.369 By criminalising disclosure and use of information in particular circumstances, the measures engage and limit the right to freedom of expression. The statement of compatibility does not expressly acknowledge that the proposed espionage offences engage and limit this right and accordingly does not provide a full assessment of whether the limitation is permissible.

2.370 The objective of the bill identified above, summarised as protecting Australia's security and Australian interests, is likely to be capable of being a legitimate objective for the purposes of international human rights law. However, it was unclear from the information provided whether these specific measures are rationally connected and proportionate to that objective.

2.371 For a measure to be a proportionate limitation on the right to freedom of expression it must be sufficiently circumscribed. In this respect, it appears that the offences as drafted capture a very broad range of conduct. For example, under the offence of dealing with security classified information under proposed section 91.3, it appears that a journalist, by publishing any information subject to a security classification online, will commit an offence. This is because online publication would

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46 Proposed section 91.3. Strict liability applies to the element of whether information has a security classification.

47 Proposed section 91.8 defines 'espionage' by reference to offences in Division A, sections 91.1, 91.2, 91.3, 91.6.

48 Proposed section 91.8.

49 Proposed section 91.11. This section defines 'espionage' by reference to offences in Division A, sections 91.1, 91.2, 91.3, 91.6 and Division B, section 91.8.

50 Proposed section 91.12. This section defines 'espionage' by reference to offences in Division A, sections 91.1, 91.2, 91.3, 91.6 and Division B, section 91.8.

51 See, proposed sections 91.4, 91.9, 91.13. For example, it is a defence where the person dealt with the information or article in accordance with Commonwealth law; the person acted in accordance with an agreement or arrangement to which the Commonwealth was a party; the information is already public with the authority of the Commonwealth.

necessarily make the information available to a foreign principal. Noting that a large number of government documents may be defined as security classified,[52] the extent of the limitation on the right to freedom of expression imposed by these offences is extensive.

2.372 Further, the initial analysis stated that it would appear to still be an offence for a journalist in the above example even if the information were unclassified if it concerned 'Australia's national security'. The concept of 'national security'[53] in the bill is very broadly defined so that reporting on a range of matters of public significance may be captured including, for example, political, military or economic relations with another country. There did not appear to be any applicable defences available unless the materials were already in the public domain with the Commonwealth's authorisation.[54] Indeed, the proposed offence under section 91.3 applies without any requirement of intention to harm and without any requirement that the person has in mind a particular foreign principal or principals.

2.373 It also appears that these offences may capture the conduct of civil society organisations. For example, if a civil society organisation disclosed unclassified information it had received from a whistleblower to UN bodies, international non-government organisations or foreign governments about, for example, Australia's human rights record, this would appear to be covered by the proposed offence under section 91.3. This is because such information could affect Australia's relations with a foreign country or countries and it would accordingly fall within the definition of 'concerning Australia's national security'. Under the proposed provisions, which make it an offence to deal with information concerning Australia's 'national security' and where that information is made available to foreign principals, there does not appear to be an applicable defence for civil society organisations available unless the information has already been made public with the authorisation of the Commonwealth.

2.374 As such, this raised concerns that the offences as drafted may be overly broad with respect to their stated objective. It was also unclear from the statement of compatibility whether there are adequate and effective safeguards, including

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52 'Security classification' is to have the meaning prescribed by regulation: Proposed 90.5.

53 Proposed section 90.4 defines '*national security'* of Australia or a foreign country as (a) the defence of the country; (b) the protection of the country or any part of it, or the people of the country or any part of it, from defined activities (espionage; sabotage; terrorism; political violence; activities intended and likely to obstruct, hinder or interfere with the performance of the defence force, foreign interference); (c) the protection of the integrity of the country' s territory and borders from serious threats; (d) the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or a defined activity; (e) the country's political, military or economic relations with another country or other countries.

54 See proposed section 91.4 of the Criminal Code.

relevant defences, to ensure the limitation on the right to freedom of expression is proportionate.

2.375 The committee therefore sought the advice of the Attorney-General as to:

- how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill; and
- whether the limitations are reasonable and proportionate to achieve the stated objective (including in relation to the breadth and types of information subject to espionage provisions, the scope of the definition of 'national security' and the adequacy of safeguards).

2.376 Additionally, in light of the information requested above, if it is intended that the espionage offences proceed, advice was also sought as to whether it would be feasible to amend them to:

- appropriately circumscribe the range of information to which the offences apply;
- appropriately circumscribe the definition of what information concerns 'Australia's national interests' where making such information available to a foreign national would constitute a criminal offence;
- appropriately circumscribe the definition of 'deals' with information for the purposes of espionage offences under proposed sections 91.1-91.13;
- appropriately circumscribe the scope of conduct covered by proposed section 91.3 (by, for example, introducing a harm element);
- expand the scope of safeguards and defences; and
- include a sunset clause in relation to the espionage provisions in schedule 1.

Attorney-General's response

2.377 The Attorney-General's response provides a range of information about the proposed espionage offences including in the context of contemporary challenges to national security. The response states that 'dealings with unclassified information, if accompanied by the requisite intention to harm Australia, can be as damaging as the passage of classified information.' On this basis, the proposed espionage offences would appear to be rationally connected to the stated objective.

2.378 The Attorney-General's response additionally provides information relevant to whether the measure constitutes a proportionate limitation on the right to freedom of expression. The response argues that the 'offences are structured to capture the full range of harmful espionage conduct, while also being appropriately circumscribed to ensure they do not capture non-threatening activities.' In this

respect, the Attorney-General addresses the committee's specific questions as to the proportionality of the limitation as well as the impact of further amendments.

Breadth of information to which offences apply

2.379 The Attorney-General's response states that 'it is appropriate for the espionage offences to apply to a broad range of information, including unclassified material. Activities up to communication of information, such as possession, altering, concealing or receiving, can be damaging in themselves as well as part of a course of conduct leading up to disclosure.' It is acknowledged that there may be some circumstances in which the disclosure of unclassified information may adversely affect Australia's national interests. However, at the same time the potential breadth of government information that may be covered by the offences is considerable. In this respect, it is further noted that this is in a context where many of the proposed espionage offences do not require actual harm to Australia's national security or a specific risk of harm to Australia's national security.

Breadth of definition of 'deals' with information

2.380 Consistent with the above, the Attorney-General's response states that the definition of 'deals' is broad in order to cover the full range of conduct that can constitute secrecy and espionage offences. The Attorney-General's response states the fault element of intention will apply to the physical element of the offence that a person communicates or deals with information. Accordingly, it appears that unintentional conduct may not fall within the scope of the proposed espionage offences. This is an important factor as to whether the measure is sufficiently circumscribed. However, there remains a broad scope of conduct which will be captured by the definition of 'deals' with categories of government information.

Scope of definition of information concerning Australia's national security

2.381 The Attorney-General argues that the definition of what information concerns 'Australia's national security', where making such information available to a foreign national would constitute a criminal offence, is appropriate. He states that it has been drafted to be consistent with definitions in other Commonwealth legislation and to ensure it reflects contemporary matters. However, the breadth of this definition continues to raise concerns as to the range of conduct that may be captured by the espionage offence. It would appear that if a civil society organisation disclosed information it had received from a government whistleblower to a UN body about Australia's human rights record this conduct may be an offence under subsection 91.2(2). This would be the case if the civil society organisation was 'reckless' as to whether their conduct will prejudice Australia's 'national security' which is defined to include Australia's relations with a foreign country or countries.

Amendments to proposed section 91.3

2.382 The Attorney-General's response outlined a number of amendments to proposed section 91.3. The response explains that under these amendments the espionage offence in section 91.3 would apply where:

- a person intentionally deals with information or an article
- the person deals with the information or article for the primary purpose of making the information or article available to a foreign principal or a person acting on behalf of a foreign principal
- the person's conduct results or will result in the information being made to a foreign principal or a person acting on behalf of a foreign principal and the person is reckless as to this element, and
- the information or article has a security classification and the person is reckless as to this element.

2.383 The Attorney-General's response further explains the scope and impact of these amendments:

> These amendments ensure that conduct that results in security classified information being passed to a foreign principal is punishable as an espionage offence where the person's primary purpose in dealing with the information was to make it available to a foreign principal. Consistent with the definition of 'security classification' in section 90.5 of the amended Bill, this offence will only apply where the information is classified TOP SECRET or SECRET (or an equivalent classification prescribed in the regulations).
>
> The inclusion of this additional element ensures that the offence will not inappropriately cover the publication of information by a journalist whose conduct indirectly makes the information available to a foreign principal, but whose primary purpose is to report news or current affairs to the public.

2.384 These amendments address a number of the concerns set out in the committee's initial analysis in respect of the scope of the proposed offence in section 91.3. In particular, these amendments would address the particular concern set out at [2.372] that the offence as previously framed would criminalise the publication of any classified information on the internet by a journalist. While online publication would still make the information available to a foreign principal, it will only be a criminal offence where the journalist had a 'primary purpose' of making the classified information available to a foreign national.

2.385 Narrowing the definition of the types of information that are subject to the proposed offence in section 91.3 also assists to better circumscribe the measure. The amendments remove information or documents 'concerning Australia's national security' from being subject to the offence. The offence will be limited to dealing with 'security classified' information which will be restricted to information classified as Secret or Top Secret. These amendments appear to address the committee's

concerns related to the example outlined at [2.373] in respect of conduct that may be captured by the proposed offence in section 91.3.

2.386 However, it is noted that there continues to be a range of conduct potentially captured by the proposed offence in section 91.3. For example, if a civil society organisation communicated classified information to UN bodies in circumstances where the primary purpose of that organisation's conduct is to make the information available to a foreign principal (that is, the UN) this would appear to continue to be captured by the offence. Noting there does not appear to be an applicable defence, there could be a particular concern if classifications of Secret and Top Secret were applied to government documents in an overly broad manner.

Safeguards and review

2.387 In relation to whether it would be feasible for the espionage offences to be subject to a sunset provision, the Attorney-General's response stated that this would not be appropriate as:

> …their repeal from the statute book would leave disclosure of harmful information vulnerable to foreign principals by persons intending to, or reckless as to whether their conduct will, prejudice Australia's national security or advantage the national security of a foreign principal without criminal sanction. It would also risk malicious actors structuring their activities around the sunsetting of the offences in order to avoid criminal liability.

2.388 The Attorney-General suggested that, if the committee considers it necessary, it would be preferable to provide for a statutory review of the general espionage offences after a fixed period (for example, five years). Having a range of oversight and review mechanisms is a further factor which is a relevant safeguard in relation to the proportionality of the measure.

2.389 While there have been some amendments to the proposed espionage offences which address a number of concerns, some concerns as to the proportionality of the limitation on the right to freedom of expression remain. The combination of elements means there is a risk that the offences as drafted are overly broad and may inappropriately restrict a range of communications and conduct beyond what is necessary to achieve the stated objective of the measure.

Committee response

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

2.391 The amendments to the bill (including to section 91.3) will address some concerns about the compatibility of that offence with the right to freedom of expression.

2.392 However, overall, the preceding analysis indicates that concerns remain as to the compatibility of the proposed espionage offences with the right to freedom of expression.

2.393 The committee recommends, in accordance with the Attorney-General's suggestion, that should the bill be passed, the measures in schedule 1 should be subject to a review after five-years in operation.

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

Compatibility of the measure with the right to be presumed innocent

2.395 As noted above, strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need for the prosecution to prove fault. Strict liability applies to the element of the offence that the information is security classified information.

2.396 Consistently with the concerns in relation to the above strict liability offence (see [2.341] – [2.344]), the initial analysis noted that it is unclear from the information provided whether there could be circumstances where a security classification marking has been removed but the substance of the document is still security classified. It may also be difficult for persons who are not Commonwealth employees to ascertain whether or not a particular marking on a government document held a 'security classification'.

2.397 Further, there is a concern that the application of a strict liability element to whether information had a 'security classification' means that a person may be found guilty of an offence even where it was not appropriate that the information in question had a security classification. That is, there may be circumstances where information has a security classification which was not appropriately applied or is no longer appropriate.

2.398 The committee therefore requested the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure to achieve a legitimate objective (including the scope of application to persons who may not be aware of the security classification; the ability of courts to consider whether a security classification is inappropriate; and any safeguards).

Attorney-General's response

2.399 In relation to this inquiry, the Attorney-General's response states:

> Strict liability will be removed from elements in espionage offences relating to information of articles with a security classification in the proposed amendments to the Bill. This means the prosecution will be required to prove, beyond reasonable doubt, that the information or article had a security classification, and that the defendant was reckless as

> to whether the information or article had a security classification. Consistent with section 5.4 of the Criminal Code, this means the person will need to be aware of a substantial risk that the information or article carried a security classification and, having regard to the circumstances known to the person, it was unjustifiable to take that risk.

2.400 The removal of the strict liability element of the offence addresses the concerns outlined in the initial analysis relating to the compatibility of this aspect of the offence with the presumption of innocence.

Committee response

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

2.402 The committee welcomes the removal of the strict liability element of the offence in proposed section 91.3. In light of this amendment, this offence is likely to be compatible with the right to be presumed innocent.

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

Compatibility of the measure with the right to an effective remedy

2.404 As noted above, the right to an effective remedy requires states parties to ensure a right to an effective remedy for violations of human rights. The breadth of the proposed offence could also affect human rights violations coming to light and being addressed as required by the right to an effective remedy. The engagement of this right was not addressed in the statement of compatibility and accordingly no assessment was provided about this issue.

2.405 The committee therefore sought the advice of the Attorney-General as to whether the measure is compatible with the right to an effective remedy.

Attorney-General's response

2.406 In relation to the right to an effective remedy, the Attorney-General's response states:

> While the espionage offences may engage the right to an effective remedy under article 2(3) of the ICCPR, that right is not limited.
>
> It would not be appropriate for victims of human rights violations to seek redress by committing an espionage offence, which would involve intention or recklessness to prejudice Australia's national security or advantage the national security of a foreign country, or dealing with information classified as TOP SECRET or SECRET for the primary purpose of providing the information to a foreign principal under section 91.3.

2.407 While it is accepted that there are some avenues through which it may not be appropriate to seek redress, there are concerns that the proposed offences may inappropriately restrict a range of communications and conduct beyond what is necessary to achieve the stated objective of the measure. This is particularly as the definition of 'national security' is very broad as is the definition of a 'foreign principal'. Noting that the definition of foreign principal includes a public international organisation such as the UN,[55] it is unclear whether there could be circumstances where a whistleblower may feel that they are unable to report information about alleged breaches of human rights to, for example, the UN due to the scope of these definitions. This may both prevent such breaches from coming to light, and prevent victims seeking redress.

2.408 In the domestic context the PID Act may provide an avenue through which human rights violations may come to light, consistent with the right to an effective remedy. However, as noted above at [2.335] –[2.337], the UN Special Rapporteur on human rights defenders has recently urged the government to improve 'awareness, training and implementation' in relation to the PID Act noting that 'many potential whistleblowers reportedly considered the risks of disclosure high because of the complexity of the laws, severity and scope of the penalty, and hostile approach by the Government and media to whistleblowers'.[56]

Committee response

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

2.410 The committee notes that the measure may be compatible with the right to an effective remedy. However, the committee draws to the parliament's attention the recent comments of the United Nations Special Rapporteur on the situation of human rights defenders on the adequacy of the Public Interest Disclosure framework.

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

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55 Proposed section 90.2 of the Criminal Code defines 'foreign principal' as: (a) a foreign government principal; (b) a public international organisation (c) a terrorist organisation (d) an entity or organisation owned, directed or controlled by a foreign principal within the meaning of paragraph (b) or (c); (e) an entity or organisation owned, directed or controlled by 2 or more foreign principals.

56 UN Special Rapporteur on the situation of human rights defenders, Report of the Special Rapporteur on the situation of human rights defenders on his mission to Australia, A/HRC/37/51/Add.3 (28 February 2018) [28].

Foreign interference offences

2.412 Schedule 1 of the bill introduces new offences relating to foreign interference. The proposed offences would apply where a person's conduct is covert or deceptive, involves threats or menaces or involves a failure to disclose particular connections with a foreign principal or involves preparing for an offence.[57] For example, the offences of foreign interference involving 'targeted persons' provides:

- that a person engages in conduct on behalf of or in collaboration with a foreign principal, or a person acting on behalf of a foreign principal, where the conduct is directed, funded or supervised by a foreign principal (or person acting on their behalf) and the person intends or is reckless as to whether the conduct influences another person (the target) in relation to:
  - a political or government process of the Commonwealth or state or territory; or
  - the target's exercise of an Australian democratic or political right or duty;

  in circumstances where the person conceals from, or fails to disclose to, the target.[58]

2.413 Proposed sections 92.7 to 92.9 also criminalise the provision of support or funding to foreign intelligence agencies.

2.414 The foreign interference offences each carry a maximum term of imprisonment of between 10 and 15 years.[59] The bill contains a number of limited defences to the offences.[60]

Compatibility of the measures with the right to freedom of expression

2.415 By criminalising types of conduct which influence another person, the measures engage and limit the right to freedom of expression. The statement of compatibility does not expressly acknowledge that the proposed foreign interference offences engage and limit this right and accordingly does not provide a full assessment of whether the limitation is permissible.

2.416 The initial analysis assessed that the objective of the bill identified above, summarised as protecting Australia's security and Australian interests, is likely to be

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57 Proposed section 90.2 of the Criminal Code defines 'foreign principal' as: (a) a foreign government principal; (b) a public international organisation (c) a terrorist organisation (d) an entity or organisation owned, directed or controlled by a foreign principal within the meaning of paragraph (b) or (c); (e) an entity or organisation owned, directed or controlled by 2 or more foreign principals.

58 Proposed sections 92.2 (2), 92.3(2).

59 Proposed sections 92.3-92.10.

60 Proposed sections 92.5, 92.11.

capable of being a legitimate objective for the purposes of international human rights law. However, as with the espionage offences discussed above, it was unclear from the information provided whether the measures are rationally connected and proportionate to that objective.

2.417 In relation to the proportionality of the limitation, aspects of the offences appear to be overly broad with respect to the stated objective of the measure. The offences appear to capture a very broad range of conduct, including conduct engaged in by civil society organisations. It is common for civil society organisations to work in collaboration to form international coalitions about campaigns or work with public international organisations. It was noted that public international organisations would fall within the definition of a 'foreign principal'.[61] Accordingly, in this context, if a member of an Australian civil society organisation were to lobby an Australian parliamentarian to adopt a particular policy in the context of a campaign this may constitute a criminal offence under proposed subsection 92.2(2) if the person fails to disclose that their organisation is, for example, collaborating with public international organisations. There do not appear to be any relevant defences to such conduct.[62] This also raised a concern that there appear to be insufficient safeguards, including relevant defences, to protect freedom of expression.

2.418 Further, the offences of providing support to a foreign intelligence agency appear to be very broad. For example, if 'support' were to be given its ordinary meaning, the offence could potentially cover the publication of a news article which reported positively about the activities of a foreign intelligence organisation. There do not appear to be any relevant defences in relation to this kind of conduct.[63]

2.419 The committee therefore sought the advice of the Attorney-General as to:

- how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill; and
- whether the limitations are reasonable and proportionate to achieve the stated objective (including in relation to the breadth of the offences and the adequacy of safeguards).

2.420 In light of the information requested above, if it is intended that the foreign interference offences proceed, advice was also sought as to whether it would be feasible to amend them to:

- appropriately circumscribe the range of conduct to which the offences apply;
- expand the scope of safeguards and defences; and

61 Proposed section 90.2 of the Criminal Code.

62 Proposed section 92.5.

63 Proposed section 92.11.

- include a sunset clause in relation to the foreign interference provisions in schedule 1.

Attorney-General's response

2.421 The Attorney-General's response provides a range of information about the proposed foreign interference offences. In relation to how the measures are effective to achieve the stated objectives of the bill, the Attorney-General's response explains that:

> The foreign interference offences are rationally connected to the objectives of the Bill, being to protect Australia's security and Australian interests. Foreign actors and intelligence services are increasingly engaged in a variety of foreign interference activities relating to Australia. Foreign interference is characterised by clandestine and deceptive activities undertaken by foreign actors seeking to cause significant harm to Australia's national interests, or to advance their own objectives.
>
> The proposed offences in Division 92 are characterised by conduct that influences Australia's political or governmental processes, interferes in Australia's democratic processes, supports the intelligence activities of a foreign principal or prejudices Australia's national security. The offences also require proof that the defendant's conduct was covert or deceptive, involved threats or menaces or targeted a person without disclosing the nature of the defendant's connection to a foreign principal. In combination, this conduct poses threats to Australia's safety and security.

2.422 As such the offences appear to be rationally connected to the stated objectives.

2.423 The Attorney-General's response additionally provides information relevant to whether the measure constitutes a proportionate limitation on the right to freedom of expression. The response argues that the 'offences are a reasonable way to achieve the Bill's legitimate objectives. The offences are proportionate to the serious threat to Australia's sovereignty, prosperity and national security posed by foreign interference activities'.

2.424 In relation to the breadth of the definitions contained in the proposed offences, the Attorney-General's response states:

> It is appropriate to define foreign principal broadly to include public international organisations. This is consistent with the definition in section 70.1 of the Criminal Code. It is appropriate that the foreign interference offences cover such organisations, which may include civil society organisations, as a person could equally seek to interfere in Australia's democratic processes or prejudice Australia's national security on behalf of such actors in some circumstances. The conduct described by the committee at paragraph 1.90 [of the committee's initial report] would not necessarily fall within the proposed foreign interference offences. The person must have intentionally failed to disclose their collaboration with a

> public international organisation, and been reckless as to influencing the political process. This will require the person to have been aware of a substantial risk that their conduct would influence the political process and, having regard to the circumstances known to him or her, it was unjustified to take the risk.

2.425 Accordingly, the response provides useful clarifications about the scope of the proposed offences. It appears, for example, that an unintentional failure by a civil society organisation to disclose its collaboration with a public international organisation in the course of seeking to influence a member of parliament would not necessarily fall within the offences. While this clarification is relevant to the proportionality of the limitation, it appears that there would still be a broad range of conduct that is potentially captured by the provisions. For example, if the civil society organisation made a strategic decision not to mention a collaboration with such an organisation (for any number of reasons), in seeking to influence a member of parliament, it is unclear whether this could be captured by the proposed offences.

2.426 In relation to the breadth of the offence of providing support to foreign intelligence agencies, the Attorney-General's response states:

> The committee has expressed concerns in relation to the offences for providing support to foreign intelligence agencies in sections 92.7 and 92.8. However, the word 'support' is narrower than suggested by the committee. As stated in the Explanatory Memorandum at paragraph 1061, the term 'support':
>
> > ...is intended to cover assistance in the form of providing a benefit or other practical goods and materials, as well as engaging in conduct intended to aid, assist or enhance an organisations activities, operations or objectives.
>
> The offences are modelled on the terrorist organisation offences in the Criminal Code. It is also a requirement of these offences that the prosecution prove beyond reasonable doubt that the person intended to provide support to an organisation and that the person knows, or is reckless as to whether, the organisation is a foreign intelligence agency.

2.427 On this basis, it appears that the particular offence of providing support to foreign intelligence agencies may be sufficiently circumscribed.

2.428 In relation to the existence of safeguards in respect of the proposed foreign interference offences, the Attorney-General's response states:

> The offences are further circumscribed by defences in section 92.11 for dealing with information in accordance with a law of the Commonwealth, in accordance with an arrangement or agreement to which the Commonwealth is party, or in the person's capacity as a public official.
>
> It would not be appropriate to include additional defences, for example, to excuse foreign interference on the basis that it is 'in the public interest.' Noting the elements of the offence, it is unlikely that conduct that within

> the scope of the foreign interference offences could be said to also be 'in the public interest'.

2.429 However, as noted above, as currently drafted, there are some aspects of the proposed foreign interference offences which may be overly broad with respect to achieving the stated objective of the measure. One option for addressing such concerns would be to provide for a broader range of defences.

2.430 In relation to whether it would be feasible for the foreign interference offences to be subject to a sunset provision, the Attorney-General's response stated that this would not be appropriate:

> … given that the purpose of the Bill is to fill the current gap in the criminal law, which is contributing to a permissive operating environment for malicious foreign actors engaging in foreign interference activities in Australia. It would also risk malicious actors structuring their activities around the sunsetting of the offences in order to avoid criminal liability.

2.431 The Attorney-General suggested that, if the committee considers it necessary, it would be preferable to provide for a statutory review of the general foreign interference offences after a fixed period (for example, five years). Having a range of oversight and review mechanisms is a further factor which is a relevant safeguard in relation to the proportionality of the measure.

2.432 While the Attorney-General has provided a range of information which addresses some concerns, concerns as to the proportionality of the limitation on the right to freedom of expression remain. There is a risk some of the foreign interference offences as drafted are overly broad and may inappropriately restrict a range of communications and conduct beyond what is necessary to achieve the stated objective of the measure.

Committee response

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

2.434 The Attorney-General has provided a range of information which has addressed some human rights concerns in relation to the proposed foreign interference offences. In this respect, based on the information provided, it appears that the offence of providing support to foreign intelligence agencies is likely to be compatible with the right to freedom of expression.

2.435 However, in relation to other proposed foreign interference offences, the preceding analysis indicates that these may not be a proportionate limit on the right to freedom of expression.

2.436 The committee recommends, in accordance with the Attorney-General's suggestion, that should the bill be passed, the measures should be subject to a review after five years in operation.

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

Presumption against bail

2.438 Section 15AA of the Crimes Act provides for a presumption against bail for persons charged with, or convicted of, certain Commonwealth offences unless exceptional circumstances exist. Schedule 1 would update references to offences and apply the presumption against bail to the proposed offences in Division 80 and 91 of the Criminal Code (urging violence, advocating terrorism, genocide, offences relating to espionage).[64] It would also apply the presumption against bail to the new foreign interference offences where it is alleged that the defendant's conduct involved making a threat to cause serious harm or a demand with menaces.[65]

Compatibility of the measure with the right to release pending trial

2.439 The right to liberty includes the right to release pending trial. Article 9(3) of the ICCPR provides that the 'general rule' for people awaiting trial is that they should not be detained in custody. The UN Human Rights Committee has stated on a number of occasions that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or flee from the jurisdiction.[66] As the measure creates a presumption against bail it engages and limits this right.[67]

2.440 In relation to the presumption against bail, the statement of compatibility states:

> The presumption against bail is appropriately reserved for serious offences recognising the need to balance the right to liberty and the protection of the community.[68]

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64 See, EM, p. 215.

65 EM, p. 216.

66 See, UN Human Rights Committee, *Smantser v Belarus* (1178/03); *WBE v the Netherlands* (432/90); *Hill and Hill v Spain* (526/93).

67 See, *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010): the ACT Supreme Court declared that a provision of the Bail Act 1992 (ACT) was inconsistent with the right to liberty under section 18 of the ACT *Human Rights Act 2004* which required that a person awaiting trial not be detained in custody as a 'general rule'. Section 9C of the Bail Act required those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before having a normal assessment for bail undertaken.

68 SOC, p. 13.

2.441 The statement of compatibility accordingly identifies the objective of the presumption as 'the protection of the community'.[69] The initial analysis noted that, in a broad sense, incapacitation through imprisonment could be capable of addressing community protection, however, no specific information was provided in the statement of compatibility about whether the measure is rationally connected to (that is, effective to achieve) the stated objective. In particular, it would be relevant whether the offences to which the presumption applies create particular risks while a person is on bail.

2.442 The presumption against bail applies not only to those convicted of the defined offences, but also those who are accused and in respect of which there has been no determination of guilt. That is, while the objective identified in the statement of compatibility refers to 'community protection' it applies more broadly to those that are accused of particular offences.

2.443 In this respect, the presumption against bail goes further than requiring that bail authorities and courts consider particular criteria, risks or conditions in deciding whether to grant bail. It was not evident from the information provided that the balancing exercise that bail authorities and courts usually undertake in determining whether to grant bail would be insufficient to address the stated objective of 'community protection' or that courts would fail to consider the serious nature of an offence in determining whether to grant bail.[70] This raised a specific concern that the measure may not be the least rights restrictive alternative, reasonably available, as required for it to constitute a proportionate limit on human rights.

2.444 In relation to the proportionality of the measure, the statement of compatibility further states that:

> For offences subject to a presumption against bail the accused will nevertheless be afforded [the] opportunity to rebut the presumption. Further, the granting or refusing of bail is not arbitrary, as it is determined by a court in accordance with the relevant rules and principles of criminal procedure.[71]

2.445 However, a presumption against bail fundamentally alters the starting point of an inquiry as to the grant of bail. That is, unless there is countervailing evidence, a person will be incarcerated pending trial. In this respect, the bill does not specify the threshold for rebutting this presumption, including what constitutes 'exceptional circumstances' to justify bail.

2.446 While bail may continue to be available in some circumstances, based on the information provided, it was unclear that the presumption against bail is a

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69 SOC, p. 13.

70 See, *Crimes Act 1914* section 15AB.

71 SOC, p. 13.

proportionate limitation on the right to release pending trial.[72] Relevantly, in the context of the *Human Rights Act 2004* (ACT) (ACT HRA), the ACT Supreme Court considered whether a presumption against bail under section 9C of the *Bail Act 1992* (ACT) (ACT Bail Act) was incompatible with section 18(5) of the ACT HRA. Section 18(5) of the ACT HRA relevantly provides that a person awaiting trial is not to be detained in custody as a general rule. However, section 9C of the ACT Bail Act contains a presumption against bail in respect of particular offences and requires those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before the usual assessment as to whether bail should be granted is undertaken. The ACT Supreme Court considered these provisions and decided that section 9C of the ACT Bail Act was not consistent with the requirement in section 18(5) of the ACT HRA that a person awaiting trial not be detained in custody as a general rule.[73]

2.447 The committee therefore sought the advice of the Attorney-General as to:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective (including whether offences to which the presumption applies create particular risks while a person is on bail);
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective including:
    - why the current balancing exercise undertaken by bail authorities and courts is insufficient to address the stated objective of the measure;
    - whether less rights restrictive alternatives are reasonably available (such as adjusting criteria to be applied in determining whether to grant bail rather than a presumption against bail);
    - the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances; and
    - advice as to the threshold for rebuttal of the presumption against bail including what is likely to constitute 'exceptional circumstances' to justify bail.

Attorney-General's response

2.448 The Attorney-General's response provides the following information on the presumption against bail in the bill:

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72 See, *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010).

73 See, *In the matter of an application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010).

> A presumption against bail is appropriate for the offences in Division 80 and 91 of the Criminal Code and the foreign interference offences in subsections 92.2(1) and 92.3(1) where it is alleged that the defendant's conduct involved making a threat to cause serious harm or a demand with menaces. The offences that are subject to a presumption against bail are very serious offences. The presumption against bail will limit the possibility of further harmful offending, the communication of information within the knowledge or possession of the accused, interference with evidence and flight out of the jurisdiction. Communication with others is particularly concerning in the context of the conduct targeted by these offences.
>
> The existing espionage, treason and treachery offences are currently listed in subparagraph 15AA(2)(c) of the *Crimes Act 1914* (Crimes Act) – inclusion of offences in Division 80 and 91 merely updates subparagraph 15AA(2)(c) given that the existing offences are being repealed. For these offences, it is important to note that, consistent with subparagraphs 15AA(2)(c)(i) and (ii), the presumption against bail will only apply if the person's conduct is alleged to have caused the death of a person or carried a substantial risk of causing the death of a person.
>
> For the foreign interference offences in subsections 92.2(1) and 92.3(1), the presumption against bail will only apply where it is alleged that any part of the conduct the defendant engaged in involved making a threat to cause serious harm or a demand with menaces. This limitation recognises the significant consequences for an individual's personal safety and mental health if the conduct involves serious harm (consistent with the definition of 'serious harm' in the Dictionary to the Criminal Code) or making a 'demand with menaces' (as defined in section 138.2 of the Criminal Code).
>
> For offences subject to a presumption against bail the accused will nevertheless be afforded [the] opportunity to rebut the presumption. Further, the granting or refusing of bail will always be at the discretion of the judge hearing the matter.

2.449 It is acknowledged that the offences to which the presumption against bail would apply are very serious and are restricted to particular serious forms of alleged conduct. In this respect, the Attorney-General's response appears to indicate that the offences and alleged conduct to which the presumption applies create particular risks while a person is on bail. On this basis, the presumption against bail would appear in broad terms to be rationally connected to the stated objective of 'community protection'.

2.450 However, beyond pointing to the alleged seriousness of the conduct and stating that the accused will be afforded the opportunity to rebut the presumption against bail, the Attorney-General's response provides limited information as to the proportionality of the measure. The Attorney-General has not provided any information as to why the current balancing exercise undertaken by bail authorities and courts is insufficient to address the stated objective of the measure. Further, providing a rebuttable presumption will continue to allow for judicial discretion as to

whether pre-trial detention is warranted in a particular case. Yet, a presumption against bail fundamentally alters the starting point of an inquiry as to the grant of bail. That is, unless there is countervailing evidence, a person will be incarcerated pending trial. International jurisprudence indicates that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or flee from the jurisdiction.[74] There is a potential risk that if the threshold for displacing the rebuttable presumption is too high it may result in loss of liberty where it is not reasonable, necessary and proportionate in the individual case. In this respect, the Attorney-General does not provide any information about the threshold for displacing the rebuttable presumption. Accordingly, the measure may not be a proportionate limitation on the right to be released pending trial.

Committee response

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

2.452 The preceding analysis indicates that there is a risk that if the threshold for displacing the rebuttable presumption against bail is too high, it may result in loss of liberty in circumstances that may be incompatible with the right to release pending trial.

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

Telecommunications and serious offences

2.454 Schedule 4 of the bill extends the definition of a 'serious offence' in subsection 5D(1)(e) of Part 1.2 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to include the offences provided for in the bill including sabotage, espionage, foreign interference, other threats to security, theft of trade secrets involving government principals, an aggravated offence for giving false and misleading information as well as secrecy offences under proposed section 122.[75] A 'serious offence' for the purpose of the TIA Act is one in respect of which declared agencies can apply for interception warrants to access the content of communications.[76]

74 See, UN Human Rights Committee, *Smantser v Belarus* (1178/03); *WBE v the Netherlands* (432/90); *Hill and Hill v Spain* (526/93).

75 EM, pp. 298-301.

76 See TIA Act section 46.

Compatibility of the measure with the right to privacy

2.455 The right to privacy includes 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. By extending the definition of 'serious offence' and thereby permitting agencies to apply for a warrant to access private communications for investigation of such offences, the measure engages and limits the right to privacy.

2.456 As the TIA Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Human Rights Act).[77] The committee is therefore faced with the difficult task of assessing the human rights compatibility of extending the potential access to private communications under the TIA Act without the benefit of a foundational human rights assessment of the Act. On a number of previous occasions the committee has recommended that the TIA Act would benefit from a foundational review of its human rights compatibility.[78]

2.457 The statement of compatibility identifies that the measure engages and limits the right to privacy and argues that it constitutes a permissible limitation on this right. Limitations on the right to privacy will be permissible where they are not arbitrary such that they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

2.458 In relation to the objective of the measures, the statement of compatibility provides that:

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77 The committee has considered proposed amendments to the TIA Act on a number of previous occasions: See, Parliamentary Joint Committee on Human Rights, Law Enforcement Integrity Legislation Amendment Bill 2012, *Fifth Report of 2012* (October 2012) pp. 21-21; Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *Fifteenth Report of the 44th Parliament* (14 November 2014) pp. 10-22; *Twentieth report of the 44th Parliament* (18 March 2015) pp. 39-74; and *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 133-139; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, *Thirty-second report of the 44th Parliament* (1 December 2015) pp. 3-37 and *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 85-136; the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2016* (22 November 2016) pp. 2-8 and *Report 1 of 2017* (16 February 2017) pp. 35-44; and the Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017* (8 August 2017) pp. 30-33.

78 See, for example, Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access – Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017* (8 August 2017) p. 33; Investigation and Prosecution Measures Bill 2017, *Report 12 of 2017* (28 November 2017) p. 88.

> The gravity of the threat posed to Australia's national security by espionage, foreign interference and related activities demonstrates the need to take reasonable steps to detect, investigate and prosecute those suspected of engaging in such conduct. The current lack of law enforcement and intelligence powers with respect to these activities has resulted in a permissive operating environment for malicious foreign actors, which Australian agencies are unable to effectively disrupt and mitigate.[79]

2.459 The initial analysis assessed that this is likely to constitute a legitimate objective for the purposes of international human rights law. Providing law enforcement agencies access to telecommunications content to investigate serious categories of crime is likely to be rationally connected to this objective.

2.460 In relation to the proportionality of the measure, the statement of compatibility points to the threshold requirements for issuing a warrant:

> Before issuing an interception warrant, the relevant authority must be satisfied that the agency is investigating a serious offence, the gravity of the offence warrants intrusion into privacy and the interception is likely to support the investigation. This threshold acts as a safeguard against the arbitrary or capricious use of the interception regime and also ensures that any interception will be proportionate to the national security objective.[80]

2.461 This is likely to be a relevant safeguard to assist to ensure that the limitation on the right to privacy is necessary. The statement of compatibility further points to independent oversight mechanisms such as the Commonwealth Ombudsman.

2.462 Notwithstanding these important safeguards, the initial analysis stated that there are still some questions in relation to whether the expansion of the definition of 'serious offence' is permissible in the context of the underlying scheme under the TIA Act. In this respect, it appears that while some of the offences are very serious, others are less so. Further information as to why allowing warranted access for the investigation of each criminal offence is necessary would be useful to determining whether the limitation is proportionate.

2.463 In order to constitute a proportionate limitation on the right to privacy, a limitation must only be as extensive as is strictly necessary. However, it was unclear from the statement of compatibility who or what devices could be subject to warranted access under the TIA Act. It was also unclear what safeguards there are in place with respect to the use, storage and retention of telecommunications content. As such, it was unclear whether the expanded definitions of 'serious offences' would be permissible limitations.

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79 SOC, p. 19.

80 SOC, pp. 19-20.

2.464 The committee therefore requested the advice of the Attorney-General as to:

- whether the expanded definition of 'serious offence' in the context of existing provisions of the TIA Act constitutes a proportionate limit on the right to privacy (including why allowing warranted access for the investigation of each criminal offence is necessary; who or what devices could be subject to warranted access; and what safeguards there are with respect to the use, storage and retention of telecommunications content); and
- whether an assessment of the TIA Act could be undertaken to determine its compatibility with the right to privacy.

Attorney-General's response

2.465 In relation to the definition of 'serious offence', the Attorney-General's response provides the following information:

> The offences are appropriately included as 'serious offences' for the purpose of the powers contained in the *Telecommunications (Interception and Access) Act 1979* (TIA Act). Including the proposed offences within the remit of the TIA scheme will allow agencies listed in the TIA Act, in prescribed circumstances and subject to appropriate authorisation processes, to intercept communications, access stored communications and access telecommunications data.
>
> It is important for such agencies to have appropriate powers to investigate each offence, including under the TIA Act. The covert and hidden nature of the conduct targeted by the offences can make them more difficult to detect and investigate through other means. By their nature, espionage and foreign interference often involve complex networks of people, technological sophistication and avoidance of paper and traceable communications. Approved interception of and access to telecommunications information would complement the range of other investigative options available to agencies in investigating these offences.
>
> The seriousness of each offence, coupled with the ability for malicious actors to use electronic means to further conduct in support of the offences, justifies the inclusion of the proposed offences in the definition of 'serious offence' in the TIA Act. The seriousness of each suite of offences, and the gravity of the consequences of the conduct they criminalise, is outlined below:
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> - Sabotage offences (Division 82): The sabotage offences criminalise conduct causing damage to a broad range of critical infrastructure, including any infrastructure, facility, premises, network or electronic system that belongs to the Commonwealth or that is located in Australia and [that] provides the public with utilities and services. The offences also capture damage to any part of the infrastructure of a telecommunications network. They are necessarily included in the

definition of 'serious offence' under the TIA Act because of the serious implications for business, governments and the community disruption to public infrastructure could have.

- Other threats to security – advocating mutiny (Division 83): Mutiny has potentially significant consequences for the defence of Australia. The primary responsibility of the Australian Defence Force is to defend Australia and Australia's interests. By seeking to overthrow the defence force of Australia, acts of mutiny clearly threaten Australia's national security and public order.
- Other threats to security – assisting prisoners of war to escape (Division 83): Assisting prisoners of war can undermine Australia's defence and national security, especially as escaped prisoners may provide assistance to a foreign adversary and cause harm to public safety.
- Other threats to security – military-style training (Division 83): The military-style training offence criminalises the provision, receipt or participation in military-style training where the training is provided on behalf of a foreign government. The offence seeks to ensure that foreign countries are unable to marshal forces within Australia, which could pose extremely serious threats to the defence and security of Australia.
- Other threats to security – interference with political rights and duties (Division 83): Conduct that interferes with political rights and duties, and involves the use of force, violence, intimidation or threats, is a grave threat to Australia's democracy, undermines public confidence in institutions of government and stifles open debate which underpins Australia's democratic society.
- Espionage (Division 91): The espionage offences criminalise dangerous and harmful conduct aimed at prejudicing Australia's national security or advantaging the national security of a foreign country. Acts of espionage have the potential to diminish public confidence in the integrity of political and government institutions, compromise Australia's military capabilities and alliance relationships, and undercut economic and business interests within Australia and overseas.
- Foreign interference (Division 92): These offences criminalise harmful conduct undertaken by foreign principals to damage or destabilise Australia's system of government and political process, to the detriment of Australia's interests or to create an advantage for the foreign country. Foreign interference involves covert, deceptive or threatening actions by foreign actors who intend to influence Australia's democratic or government processes or to harm Australia, and can be severely damaging to Australia's security and national interests.

- Theft of trade secrets involving foreign government principal (Division 92A): The theft of trade secrets offence seeks to combat the increasing threat of data theft, business interruption and economic espionage, by or on behalf of foreign individuals and entities. Interference in Australia's commercial dealings and trade relations by or on behalf of foreign governments can have serious consequences for Australia's national security and economic interests.
- Aggravated offence for giving false or misleading information (Section 137.1A): A person who succeeds in obtaining or maintaining an Australian Government clearance on the basis of false or misleading information may gain access to highly classified or privileged information. If the person seeks to communicate or deal with that information in an unauthorised manner, including by passing it to a foreign principal, this could significantly damage Australia's national security.
- Secrecy of Information (Division 122): Disclosure of inherently harmful information or information that causes harm to Australia's interests can have significant consequences for Australia's national security, in particular if that information is advantageous to a foreign principal's national security and support espionage and foreign interference activities.

2.466 In relation to whether the proposed measure is a proportionate limitation on the right to privacy, the Attorney-General's response states:

> Including the offences within the TIA Act scheme is a proportionate means to achieve the Bill's legitimate objectives.
>
> Under Chapter 2 of the TIA Act, interception warrants may be issued in respect of a person's telecommunications service, if they would be likely to assist an investigation of a serious offence in which either that person is involved, or another person is involved with whom the particular person is likely to communicate using the service. If there are reasonable grounds for suspecting that a particular person is using, or is likely to use, more than one telecommunications service, the issuing judge may issue a warrant in respect of the named person, allowing access to communications made using a service or device. In both cases, the judge must have regard to the nature and extent of interference with the person's privacy, the gravity of the conduct constituting the offence, the extent to which information gathered under the warrant would be likely to assist an investigation, and other available methods of investigation.
>
> Under Chapter 3 of the TIA Act, stored communications warrants may be issued in respect of a person. Such warrants allow an agency, subject to any conditions and restrictions specified in the warrant, to access a stored communication that was made by the person in respect of whom the warrant was issued, or that another person has made and for which the intended recipient is the person in respect of whom the warrant was

issued. A judge or AAT member can only issue a warrant if there are reasonable grounds for suspecting that a particular carrier holds the stored communications, and information gathered under warrant would be likely to assist in the agency's investigation of a serious contravention in which the person is involved. A serious contravention is defined in section 5E of the TIA Act to include a serious offence, as well as offences punishable by imprisonment of at least 3 years and offences punishable by at least 180 penalty units. The judge or AAT member must have regard to the nature and extent of interference with the person's privacy, the gravity of the conduct constituting the offence, the extent to which information gathered under the warrant would be likely to assist an investigation, and other available methods of investigation.

The TIA Act contains strict prohibitions on communicating, using and making records of communications. Agencies are also required to destroy stored communications when they are no longer required for the purpose for which they were obtained. The Commonwealth Ombudsman and state oversight bodies inspect and report on agency use of interception powers to ensure law enforcement agencies exercise their authority appropriately. Agencies are required to keep comprehensive records to assist the Ombudsman and state oversight bodies for these purposes.

Additionally, agencies are required to report annually to the Minister on the:

- interceptions carried out by the agency, including
    - the use made by the agency of information obtained by interceptions
    - the communications of information to persons other than officers of the agency
    - the number of arrests made on the basis of accessed information, and
    - the usefulness of information obtained.
- stored communications accessed by agencies, including:
    - how many applications were made and warrants issued
    - the number of arrests made on the basis of the accessed information, and
    - how many court proceedings used the records in evidence.

Both the Ombudsman and Minister must table reports in Parliament each year to enable public scrutiny.

2.467 In view of the serious nature of the offences and the safeguards outlined in the Attorney-General's response, it appears that the measure may be a proportionate limit on the right to privacy.

2.468 In response to whether an assessment of the TIA Act could be undertaken to determine its compatibility with the right to privacy, the response states:

> The Government keeps privacy implications and the safeguards within the TIA Act under constant review.
>
> Although the TIA Act is not required to be subject to a human rights compatibility assessment, the Attorney-General's Department has provided extensive advice regarding the operation of the TIA Act to this committee and other Parliamentary bodies. In response to recommendation 18 of the *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* by the PJCIS in 2013, the Government agreed to comprehensively revise the TIA Act in a progressive manner. If legislation is introduced to reform the Act, the Department will undertake a human rights compatibility assessment at that time.

2.469 While it appears that the measure in this bill may be a proportionate limit on the right to privacy, a foundational human rights assessment of the TIA Act would assist the committee's consideration, more generally, of proposed measures that amend or extend that Act.

Committee response

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

2.471 The preceding analysis and the information provided indicate that the measure in context may be compatible with the right to privacy.

2.472 Noting the committee's view that the *Telecommunications (Interception and Access) Act 1979* would benefit from a full review of its compatibility with the right to privacy, including the sufficiency of safeguards, the committee welcomes the Attorney-General's advice that the TIA Act will be comprehensively revised in a progressive manner and any reforms to the Act will include the required human rights compatibility assessment.

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

Amendments to the Foreign Influence Transparency Scheme legislation

2.474 Schedule 5 seeks to amend the definition of 'general political lobbying' in section 10 of the Foreign Influence Transparency Bill 2017 (the foreign influence bill) to include within the definition lobbying of 'a person or entity that is registered under the *Commonwealth Electoral Act* as a political campaigner'.[81] The effect of the

81 See item 3 of part 2 of schedule 5.

amendments is that a person may be liable to register under the proposed foreign influence transparency scheme where they lobby a registered political campaigner on behalf of a foreign principal 'for the purpose of political or governmental influence'.[82]

2.475 The reference to 'political campaigner' in item 3 incorporates the proposed amendments to the *Commonwealth Electoral Act 1918* that are currently before Parliament in the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the electoral funding bill). As such, section 2 of the bill provides that if either of the foreign influence bill or electoral funding bill does not pass, part 2 of schedule 5 will not commence.

2.476 'Political campaigner' is defined in the electoral funding bill to mean a person or entity that incurs 'political expenditure' during the current, or in any of the previous three, financial years of $100,000 or more.[83] 'Political expenditure' is expenditure incurred for a 'political purpose', the latter of which is defined in the electoral funding bill to include (relevantly) 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, and 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).[84]

2.477 Item 4 of Schedule 5 of the bill also seeks to amend section 12 of the foreign influence bill to expand the circumstances in which an activity is done for 'political or governmental influence'. The amendments provide that a person will undertake activity on behalf of a foreign principal for the purpose of political or governmental influence if the purpose of the activity is to influence, directly or indirectly, any aspect of 'processes in relation to a person or entity registered under the *Commonwealth Electoral Act 1918* as a political campaigner'.[85] Item 5 further adds to section 12 examples of 'processes in relation to' a registered political campaigner:

> (a) processes in relation to the campaigner's:
>
> (i) constitution; or
>
> (ii) platform; or
>
> (iii) policy on any matter of public concern; or

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82 See explanatory memorandum to the bill, p. 303.

83 See proposed section 287F of the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (the electoral funding bill). Additionally, an entity must register as a political campaigner if their political expenditure 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.

84 Proposed section 287(1) of the electoral funding bill.

85 Proposed section 12(1)(g) in item 4 of schedule 5 of the bill.

(iv) administrative or financial affairs (in his or her capacity as a campaigner, if the campaigner is an individual); or

(v) membership; or

(vi) relationship with foreign principals within the meaning of paragraph (a),(b) or (c) of the definition of *foreign principal* in section 10,[86] or with bodies controlled by such foreign principals;

(b) the conduct of the campaigner's campaign in relation to a federal election or designated vote;

(c) the selection (however done) of officers of the campaigner's executive or delegates to its conferences;

(d) the selection (however done) of the campaigner's leader and any spokespersons for the campaign.

Compatibility of the measure with multiple rights

Previous committee comment on the Foreign Influence Transparency Scheme Bill

2.478 The committee first considered the foreign influence bill in its *Report 1 of 2018*[87] and at pages 189-206 of this report. The committee relevantly concluded that aspects of the measure may be incompatible with the right to freedom of

86 Foreign principal means: (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.

87 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 34-44.

expression,[88] the right to freedom of association, [89] the right to privacy, [90] and the right to take part in the conduct of public affairs. [91]

2.479 The committee raised concerns in relation to limitations on these rights due to the breadth of the definitions of 'foreign principal', 'on behalf of' and 'for the purpose of political or governmental influence', and whether those definitions caught within the scope of the scheme an uncertain and potentially very broad range of conduct. For example, concerns were raised that the definition of 'foreign principal' coupled with the definition of 'on behalf of' was very broad:

> 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.[92]

2.480 The committee concluded that the scope of these definitions and their potential application were overly broad, and consequently that the registration scheme did not appear to be sufficiently circumscribed to constitute a proportionate limitation on these rights.[93] On this basis, the analysis concluded that the measure may be incompatible with the right to freedom of expression, the right to freedom of association, and the right to take part in the conduct of public affairs.

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88 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.

89 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.

90 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 informational privacy, including the right to control the dissemination of information about one's private life.

91 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.

92 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 43.

93 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 41.

Previous committee comment on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

2.481 The committee has considered the electoral reform bill in its *Report 1 of 2018*[94] and at pages 154-180 of this report.

2.482 In its initial analysis, the committee raised concerns in relation to the compatibility of the obligation to register as a 'political campaigner' 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. In particular, the committee noted that concerns arose in relation to the breadth of the definition of 'political expenditure' that triggers the obligation to register as a political campaigner. 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. This would appear to capture activities that arise in an election 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. The human rights analysis stated that it was 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.

2.483 In its concluding report on the electoral reform bill, the human rights analysis concluded that the registration obligations on *political campaigners* may be a proportionate limitation on the right to freedom of expression, the right to freedom of association, the right to privacy, and the right to take part in the conduct of public affairs. This was because the expenditure threshold of $100,000 for political campaigners indicated that, notwithstanding the broad definitions, in practice only a small number of persons and entities would be affected.

Compatibility of the amendments

2.484 The statement of compatibility to the bill does not specifically address the amendments that are introduced by schedule 5 of the bill. However, as these amendments broaden the scope of the foreign influence transparency scheme by including lobbying of 'political campaigners' on behalf of foreign principals, the existing human rights concerns with the operation of the foreign influence bill and the electoral funding bill are equally applicable here. The initial analysis raised concerns as to whether the definition of 'political campaigner' was sufficiently circumscribed and whether the amendments would give rise to uncertainty as to which persons and entities were required to register.

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94 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 11-29.

2.485 The initial analysis also raised concerns about the expanded definition of 'political or governmental influence' to include processes relating to the internal functioning of the political campaigner, such as its constitution, administration and membership. It was not clear how introducing a registration obligation on persons or entities who lobby political campaigners in such circumstances is rationally connected to the stated objective of the foreign influence bill (namely, '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'[95]). Further, concerns also arise as to whether the expanded definition of 'political or governmental influence' is proportionate, having regard to the principle that limitations must be sufficiently circumscribed to ensure that they are only as extensive as is strictly necessary to achieve their objective.

2.486 The committee therefore sought the advice of the Attorney-General as to whether the amendments to the Foreign Influence Transparency Scheme Bill 2017 introduced by schedule 5 pursue a legitimate objective, are rationally connected and proportionate to that objective.

Attorney-General's response

2.487 The Attorney-General's response states that the objective of the amendments to the foreign influence transparency scheme introduced by the bill is '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'. As noted in the human rights analysis of the foreign influence transparency scheme, this is likely to be a legitimate objective for the purposes of international human rights law.

2.488 As to the expanded definition of 'general political lobbying' to include lobbying political campaigners, the Attorney-General's response states:

> Extending the definition of 'general political lobbying' in section 10 of the FITS Bill to include lobbying of political campaigners registered under the *Commonwealth Electoral Act 1918* is rationally connected to the objective of the Scheme and does not unjustifiably impose limitations on human rights. The effect of the amendments is that a person or entity may be liable to register where they lobby political campaigners on behalf of a foreign principal. Whether a person is liable to register will also depend on whether the lobbying is undertaken for the purpose of political or governmental influence and whether any relevant exemptions apply.

95 Statement of compatibility to the foreign influence bill, [21], [85].

> As political campaigners occupy a significant position of influence within the Australian political system, it is appropriate that the Scheme provide transparency of the nature and extent of foreign influence being brought to bear over such persons and entities. If not disclosed, this type of foreign influence exerted through intermediaries has the potential to impact political campaigners' positions on public policy which could, ultimately, undermine Australia's political sovereignty.
>
> The term political campaigner is appropriately defined in order to meet the Scheme's objective while limiting its impact on human rights and cost of compliance… The financial threshold of expenditure by political campaigners imports proportionality into the Scheme and ensures it is targeted to activities most in need of transparency.

2.489 Having regard to the conclusion that the registration requirement for 'political campaigners' in the electoral reform bill may be a proportionate limitation on human rights, and based on the information provided by the Attorney-General, expanding the definition of 'general political lobbying' to include lobbying 'political campaigners' (which, as noted earlier, is likely in practice to be limited to a small number of persons and entities) does not, of itself, appear to significantly expand the scope of the proposed registration scheme. However, for the reasons discussed below, the amendments apply in the context of an already very broad registration scheme.

2.490 By expanding the scope of 'activity for the purpose of political or governmental influence' to include processes in relation to political campaigners, concerns remain that, overall, the amendments to the registration scheme introduced by schedule 5 to the bill may be overly broad. In this respect, the Attorney-General's response states:

> In order for the Scheme to meet its legitimate objective, it is necessary for the definition 'political or governmental influence' to cover the full range of processes in relation to registered political campaigners. Political campaigning is an inherently political activity, by its nature designed to influence elections, government and parliamentary decision-making, or the creation and implementation of laws and policies. It is important that the concept of 'political or governmental influence' recognises that the lobbying of political campaigners can occur in a number of ways and throughout the political cycle. A person may seek to influence the internal functioning of the political campaigner, such as its constitution, administration or membership, in order to affect the political campaigner's external activities, including in relation to their policy position or election strategy. For example, a person acting on behalf of a foreign principal may seek to adjust a political campaigner's funding decisions as an indirect method of influencing policy priorities. The definition of 'political or governmental influence' furthers the legitimate objective of the Scheme to bring public awareness to the range of activities in need of greater transparency.

2.491 The examples provided by the Attorney-General provide useful information as to the types of activities that the Attorney-General considers would fall within the scope of the registration scheme, and how the internal processes of political campaigners may give rise to a registration obligation. However, concerns remain insofar as the obligation to register remains very broad when read with the definition of 'on behalf of a foreign principal'. It would appear to mean that persons would be required to register where they 'lobby'[96] a political campaigner 'in collaboration with'[97] a foreign principal in relation purely to their internal processes (such as reform of their constitution). It is not clear whether such conduct could be described as 'inherently political activity'.

2.492 It is also noted that the expanded definition of the expression 'activity for the purpose of political or governmental influence' would appear to apply generally to the activities in the scheme where this purpose is a requirement and not just to persons undertaking the activity of 'general political lobbying' (including lobbying of political campaigners) on behalf of a foreign principal. For example, it also expands the operation of other activities in proposed section 21 of the foreign influence bill, such as the obligation to register where persons undertake 'communications activity'[98] on behalf of a foreign principal in Australia 'for the purpose of political or governmental influence'.[99] When read with the broad definitions of acting 'on behalf of' (which includes acting 'in the service of' or 'in collaboration with') a 'foreign principal', it appears that a person could be required to register if undertaking communications activity in collaboration with a foreign principal (such as publishing academic research undertaken pursuant to a grant from a foreign principal) where the purpose of that research is to consider the internal processes of a political campaigner, such as processes relating to their membership. Again, concerns remain as to whether such conduct is effective to achieve and proportionate to the legitimate objective of the measure to enhance transparency as to influencing Australia's elections, government and parliamentary decision making and law-making.

2.493 Overall, the amendments to the definition of 'activity for the purpose of political or governmental influence' expand an already broad definition which the committee has considered in the context of the foreign influence bill to raise concerns as to compatibility with the right to freedom of expression, the right to

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96 Lobbying is defined in section 10 of the foreign influence bill to include communicating in any way with a person or group of persons for the purpose of influencing any process, decision or outcome, and representing the interests of a person in any process.

97 This would constitute acting 'on behalf of' a foreign principal pursuant to section 11 of the foreign influence bill.

98 A person undertakes communications activity if the person communicates or distributes information or material.

99 See section 21 of the foreign influence bill.

freedom of association, the right to privacy, and the right to take part in the conduct of public affairs. By expanding this already broad definition, these concerns as to human rights compatibility apply equally to the proposed amendments introduced by Schedule 5.

Committee response

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

2.495 The preceding analysis indicates that the amendments to the foreign influence transparency scheme introduced by schedule 5 of the bill may be incompatible with the right to freedom of expression, the right to freedom of association, the right to privacy, and the right to take part in the conduct of public affairs.

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

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)
Right	Privacy (see **Appendix 2**)
Previous report	1 of 2018
Status	Concluded examination

Background

2.497 The committee reported on this 2017 Determination[1] in its *Report 1 of 2018*, and requested a response from the President of the Senate and the Speaker of the House of Representatives (the presiding officers) by 21 February 2018.[2]

2.498 Correspondence dated 6 December 2017 and 20 February 2018 was received from the presiding officers about this issue. This correspondence is discussed below and is reproduced in full at **Appendix 3**.

2.499 The 2017 Determination, which amends the 2013 Determination,[3] 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).[4]

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

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 54-58.

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

4 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; *Report 2 of 2017* (21 March 2017) pp 109-110; Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) pp. 37-40.

APS Directions: 2013 and 2016

2.500 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.[5]

2.501 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, including right to privacy concerns in relation to the requirement to notify termination decisions on the basis of a breach of the Code of Conduct in the Gazette.[6]

2.502 In response to the concerns raised by the committee, the Australian Public Service Commissioner (the Commissioner) reviewed the measures on two occasions. As a result, the APS 2013 directions were initially amended in 2014 to remove most requirements to publish termination decisions in respect of APS employees. Further to this, in June 2017 the Commissioner informed the committee that, after consultation with APS agencies, he agreed that publication arrangements of employment terminations for breaches of the Code of Conduct should not continue to be accessible to the general public.[7] Instead, the Commissioner intended to establish a new secure database which agencies could access to 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.[8] The committee welcomed this response and noted that this approach would substantially address the right to privacy concerns in relation to the measure.[9]

Parliamentary Determinations: 2013 and 2016

2.503 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

5 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.

6 Other concerns related to the right to equality and non-discrimination and the right to privacy in relation to notification of termination of employment on the ground of physical or mental disability.

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

8 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 40.

9 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 40.

therefore reported on the 2013 Determination raising substantially the same issues.[10]

2.504 Although the APS 2013 Directions were initially amended in 2014, the 2013 Determination remained in place until the 2016 Determination was made.[11] 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. [12]

2.505 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 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

Compatibility of the measure with the right to privacy

2.506 The statement of compatibility notes that the 2017 Determination replicates changes previously made to address the committee's concerns in respect of the 2013 Determination,[16] but it does not address the continuing concern about the remade requirement to publish notification of termination on the grounds of a breach of the Code of Conduct.

2.507 As outlined in the committee's previous reports, this limitation is unlikely to be permissible as a matter of international human rights law. To be a proportionate limitation 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

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

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

12 See section 39(1)(e).

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 Statement of compatibility, Attachment B.

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. Alternatively, it would be possible to publish information without naming the employee, which would still serve to maintain public confidence that serious misconduct is being dealt with properly.[17]

2.508 As the statement of compatibility for the 2017 Determination does not address this further issue, the committee sought advice from the presiding officers as to whether an approach similar to that taken by the Commissioner will also be implemented with respect to the Australian Parliamentary Service.

Presiding officers' response and correspondence

2.509 Correspondence from the presiding officers notes the Commissioner's decision to discontinue arrangements for publishing terminations of employment for breaching the Code of Conduct and instead establish a secure database of employment terminations not accessible to the public, with corresponding amendments to be made to the Australian Public Service Commissioner's Directions 2016.

2.510 The presiding officers confirmed that they intend to take a similar approach and remain committed to working with the Commissioner to either utilise the APSC database or establish alternative arrangements. The presiding officers further advised that the Department of Parliamentary Services will follow up with the Australian Public Service Commission as to progress on the proposed database and report back to the Parliamentary Administration Advisory Group at its next meeting in March 2018.

Committee response

2.511 The committee thanks the presiding officers for their correspondence and has concluded its examination of this issue.

2.512 The committee welcomes the commitment by the presiding officers to work with the Commissioner to establish a secure database of employment terminations for breaches of the Code of Conduct which will not be accessible to the general public and to make associated amendments to the 2017 Determination once the database is established.

2.513 The proposed approach would substantially address the right to privacy concerns in relation to the current measure.

2.514 The committee looks forward to reviewing the amendments to the directions when they are made.

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17 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.

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 Human Rights Commission Repeal (Duplication Removal) Bill 2018;
- Consular Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (United Arab Emirates) Determination 2018 [F2018L00074];
- Marine Safety (Domestic Commercial Vessel) Levy (Consequential Amendments) Bill 2018;
- Narcotic Drugs Amendment (Cannabis) Regulations 2018 [F2018L00106]; and
- National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2018.

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

- Family Law Amendment (Parenting Management Hearings) Bill 2017; and
- Road Vehicle Standards Bill 2018.

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
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
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Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017 – Response to the Parliamentary Joint Committee on Human Rights

Dear Chair Ian

I refer to your letter dated 7 February 2018 in relation to the Parliamentary Joint Committee on Human Rights' (the Committee's) assessment of the Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017 (the Bill).

I welcome the opportunity to respond to the Committee's comments and provide the following advice under each.

Committee's comment

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).

Response

Proposed subsections 74F(2), 74H(2), 74J(2) and 74K(2) of the Bill confer on the Australian Communications and Media Authority (ACMA) the power to specify, by legislative instrument, additional information relating to a foreign person that they would need to provide to the ACMA.

This power will provide the ACMA with the capacity to collect any additional information that may be necessary to compile and maintain the proposed Register of Foreign Owners of Media Assets (the Register). This is a reserve power that would be used in exceptional circumstances only, if at all. There are also safeguards in place to ensure that this power will not be exercised in such a way as to be incompatible with international human rights law.

- The power will be exercised by way of a legislative instrument, meaning it will be subject to Parliamentary scrutiny.
- I also expect that the ACMA will consult with the Office of the Australian Information Commissioner before making any such instrument.

Moreover, any additional information sought by the ACMA using this power will relate to the legitimate fulfilment of its functions in relation to the Register, and there is no intention that this reserve power would be used to collect additional personal information. In this regard, it should be noted that the ACMA, as an Australian government agency, is bound by and subject to the provisions of the *Privacy Act 1988* (Privacy Act), which include adherence to the Australian Privacy Principles (APP). Among other things, these principles require APP entities to consider the privacy of personal information, including ensuring that APP entities manage personal information in an open and transparent manner.

The APPs also require the ACMA to take such steps as are reasonable in the circumstances to protect information from misuse, interference and loss, and from unauthorised access, modification or disclosure. In a practical sense, I expect that the ACMA will ensure that access to any personal or commercially sensitive information that it collects will only be accessible by those people performing the administration of the Register and on a strictly 'need to know' basis. I also expect that it will implement robust measures to prevent privacy breaches, which may include the establishment of firewalls, network segmentation, role-based access controls, physical security, and auditing and training of its personnel.

In the event that the ACMA no longer requires the information that it collects, the ACMA is required to take such steps as are reasonable in the circumstances to destroy the information, or to ensure that the information is de-identified. It was not necessary to expressly set out the requirements of the Privacy Act in the Bill given that, as an APP entity, the ACMA is required to adhere to these obligations. Section 13 of the Privacy Act imposes significant penalties for serious interferences with privacy.

The measures contained in the Bill are proportionate and appropriately balance the privacy interests of individuals with the policy objective of transparency that the implementation of the Register aims to achieve.

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 purposes 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)).

Response

The Bill's civil penalty provisions, proposed under subsections 74F(3), 74H(3), 74K(3) and 74K(4), should not constitute a criminal penalty under international human rights law. They are not classified as 'criminal' under Australian law, and are dealt with in accordance with the rules and procedures that apply in relation to civil matters.

The purpose of the penalty is not to punish or deter, but rather to ensure that the Register can be a reliable and current source of information about the levels and sources of foreign investment in Australian media companies at any particular time. It is common practice for non-compliance with government regulation to result in the imposition of an administrative penalty.

Moreover, the penalty does not apply to the public in general, but is restricted to foreign persons in a specific regulatory context, being those foreign persons who are required to provide the ACMA with information prescribed by the Bill. Therefore, the only people captured by these provisions are foreign individuals and body corporates with company interests in excess of two and a half per cent in Australian media companies. This will be predominantly corporate entities who are required to report given the nature of investments in the media industry.

The amounts payable under the civil penalty provisions are reasonable and ensure that there is proportionality between the seriousness of the contravention and the quantum of the penalty sought. The effective operation of the Register will be predicated on the information contained within it being reliable and accurate, and the penalties have been set at a level that should ensure compliance in relation to the Register's reporting obligations. These penalty amounts are consistent with the maximum amount that is generally recommended (one-fifth of the maximum penalty that a court could impose on a person, but which is not more than 12 units for an individual and 60 units for a body corporate).

In relation to the Committee's concerns regarding the penalty provisions applying to each day of contravention, I would note that the ACMA has the capacity to exercise forbearance in determining whether to seek the cumulative penalty payable under the Bill. This would involve the ACMA considering, among other things, the circumstances surrounding the contravention. While the penalty contained in the Bill should not be considered criminal for the purposes of international human rights law, I do note that the Bill preserves the privilege against self-incrimination. This is an important safeguard and protection for entities and persons that may be required to disclose information under the Register.

Thank you for your consideration of these issues.

Yours sincerely

MITCH FIFIELD

21/2/18

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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 7 February 2018 regarding the human rights compatibility of the *Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) (Documents) Amendment Instrument 2017 (No. 1).*

As noted by the Committee in its *Report 1 of 2018*, this instrument amends the *Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017* (the Documents List). Goods mentioned in the Documents List 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.*

The Documents List is periodically updated to reflect Australia's obligations under relevant United Nations Security Council resolutions (UNSCRs) to prohibit trade in certain items to North Korea. The Documents List thereby gives effect in Australian law to obligations imposed by UNSCRs.

The Government recognises the need to ensure Australians have sufficient certainty about which goods are subject to sanctions. The documents specified by the Documents List are an internationally accepted reference for those industries, persons and companies that trade in such goods. For example, INFCIRC/254/Part 1 and INFCIRC/254/Part 2 referred to in *Report 1 of 2018,* are the guidelines implemented by the Nuclear Suppliers Group for nuclear-exports and nuclear-related exports aimed at ensuring that nuclear trade for peaceful purposes does not contribute to the proliferation of nuclear weapons or other nuclear explosive devices.

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In addition, the Department of Foreign Affairs and Trade provides a free service (via the Online Sanctions Administration System) whereby members of the public can submit inquiries about whether a proposed transaction is subject to Australia's sanctions laws. This would include an assessment as to whether a good is an import or export sanctioned good under the Documents List.

In light of these factors, the Government's view is that the instrument is compatible with human rights, including the quality of law test and the right to a fair hearing, the right to a fair trial and the right to liberty.

As requested by the Committee, the statement of compatibility with human rights (SCHR) for the next amending instrument for the Documents List will include a substantive assessment of human rights compatibility along the lines I have described above. I will also amend the SCHR for the *Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) (Documents) Amendment Instrument 2017 (No. 1)* to include such an assessment.

I trust this information is of assistance.

Yours sincerely

Julie Bishop

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Leader of the Government in the Senate

REF: MC18-000337

Mr Ian Goodenough MP
Chair, Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair

I thank the Parliamentary Joint Committee on Human Rights for its consideration of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill).

The Bill updates and harmonises Commonwealth law regarding political finance, ensuring Australia's most influential political actors are subject to consistent transparency, disclosure and reporting requirements, and are banned from accepting foreign political donations.

These measures are important to maintaining Australians' confidence in the integrity of our political system.

I am pleased to provide the attached response to the questions raised by the Committee in its Report 1 of 2018.

I trust that the information provided is of assistance to the Committee.

Kind regards

Mathias Cormann
Minister for Finance

2 February 2018

Response of the Minister for Finance to the Parliamentary Joint Committee on Human Rights in relation to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

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

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'.

Response

I consider the Bill's requirements are sufficiently circumscribed and proportionate, given the significant public interest in promoting the transparency of our political system. I set out my reasons in relation to registration below, noting that the reasons provided here apply equally to the Committee's other comments on the Bill.

As stated in the Bill's Statement of Compatibility with Human Rights (Statement of Compatibility), registration of key non-party political actors promotes the rights of citizens to participate in elections by assisting them to understand the source of political communication. These key non-party actors are already required to identify themselves in political communications by the *Electoral and Other Legislation Amendment Act 2017* (Authorisation Amendment Act). Registration will complement the Authorisation Amendment Act's transparency reforms by:

a) allowing voters to form a view on the effect of political expenditure; and

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

Registration with the Australian Electoral Commission will be simple and involve the provision of information readily available to the applicant. No fees will apply.

The Bill narrows the current definition of 'political expenditure', as currently set out in the Authorisation Amendment Act. This definition captures expenditure promoting political views. Whether or not the views or the issue are partisan in nature is immaterial to whether they are political in nature, and therefore the transparency of expenditure used to raise the prominence of such views in public debate is in the public interest.

It is also in the public interest for citizens to be able to identify where an issue is prominent in public debate because its supporters or detractors incurred a significant amount of expenditure. Without such transparency, citizens could reasonably infer that the issue was a priority for government intervention, at the cost of other, perhaps more worthy or pressing, issues.

There are expected to be around 50 entities that will be required to register as a third party or political campaigner, taking historic reporting patterns into account.

With respect to the definition of 'associated entity', new subsection 287H(5) clarifies the meaning of 'associated entity'. I disagree with the Committee's analysis, given the ease of registration and this clarification, that the Bill's registration requirements in relation to associated entities could discourage or prevent people from forming an association.

Civil penalties for failure to register

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.

Response

The Bill's registration requirements apply to those who spend significant amounts of money attempting to influence the results of an election, and those associated with registered political parties. Based on historic reporting, around 50 entities are expected to be registered as third parties or political campaigners, and around 200 entities as associated entities. There is likely to be some overlap between these two groups (so it is not accurate to add the two figures). Many of these entities will already be subject to annual reporting requirements under the *Commonwealth Electoral Act 1918.*

The maximum civil penalty amount is lower for third parties due to their lower levels of political expenditure. Lower levels of political expenditure are less likely to distort public debate. Third parties may have comparatively fewer financial resources available to them, or fewer connections with registered political parties. This indicates that a lower penalty amount for third parties would have a similar deterrent effect to the higher amounts applied to political campaigners and associated entities in context.

Civil courts are experienced in making civil penalty orders at levels within the maximum amount specified in legislation to reflect the individual circumstances of a case. As the Bill triggers Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014*, subsection 82(6) of that Act applies. This subsection provides that, in determining the pecuniary penalty, the court must take into account all relevant matters including:

(a) the nature and extent of the contravention;

(b) the circumstances in which the contravention took place; and

(c) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

The requirement for courts to consider a range of factors makes it unlikely that the maximum penalty would be imposed in each and every instance. Therefore, the relevant consideration in setting a civil penalty amount is the most egregious instances of non-compliance. In the context of the Bill's registration requirements, the most egregious instance of non-compliance could, for example, involve a large, well-funded organisation or wealthy individual deliberately concealing from the public the fact that they were incurring large amounts of political expenditure in order to influence the composition of the legislative and executive arms of the Australian Government. Such an outcome would be potentially very beneficial to the entity or individual and very detrimental to the civil and political rights of Australians more broadly. I therefore consider the penalties are more than justified in context.

Purpose of the penalties
When setting civil pecuniary penalties, deterrence is the primary factor considered (see the High Court's discussion in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at [55] and [59]). The Bill's civil penalties are intended to deter non-compliance.

Committee comment

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)).

Response

As set out in the Statement of Compatibility, and taking the Committee's guidance into account, I do not consider the penalties are criminal for the purposes of international human rights law.

Guaranteeing the rights in the Committee's comments in paragraph 1.70 would involve criminalising the requirements.

Restrictions on foreign political donations – Compatibility with the right to a fair trial and fair hearing rights

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).

Response

Section 302E
I draw the Committee's attention to my above comments in relation to registration requirements relying on the concept of 'political purpose', noting the public interest in this case involves citizens' freedom from undue influence or interference when exercising their right to vote.

Section 302G
Effective anti-avoidance provisions like section 302G are essential to the effectiveness of the foreign donations restrictions. Ineffective provisions cannot be proportional, as they do not achieve the public interest which they intend to promote.

Penalties relating to foreign political donations – Compatibility with the right to a fair trial and fair hearing rights

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.

Response

With respect to the regulatory context, I refer the Committee to my previous comments regarding the civil penalties for failure to register as, from an implementation perspective, registration triggers the obligation to comply with the foreign donations ban. This means that the regulatory context is highly similar. However, I draw the Committee's attention to the increasing incidence of foreign interference in domestic political processes reported through the free press as a key consideration for the foreign donations restrictions.

Similarly to the registration requirements, the relative size of the foreign donations penalties has been calibrated according to the deterrent effect in context.

Committee comment

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)).

Response

As set out in the Statement of Compatibility, and taking the Committee's guidance into account, I do not consider the penalties are criminal for the purposes of international human rights law. Guaranteeing the rights in the Committee's comments in paragraph 1.93 would involve removing the parallel civil penalty, and relying on the Bill's criminal offenses for the foreign donations restrictions.

Reporting of non-financial particulars in returns – Compatibility with the right to privacy

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
- 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).

Response

As set out in the Statement of Compatibility, these limitations are justifiable on the basis that they promote transparency of the electoral system. Senior staff of persons and entities covered by these requirements freely choose to play an influential role in public debate. As evidenced by media coverage, there are significant implications and public interest in these matters. Requiring these details to be reported to, and published by, the Australian Electoral Commission is directly connected to the Bill's objective of promoting transparency.

Given the public interest, the measure is a proportionate limitation on the impacted individuals' right to privacy. Many of these individuals are already public figures, and the new requirements serve to consolidate this information and make it more readily accessible to ordinary citizens.

Reporting of non-financial particulars in returns – Compatibility with the right to a fair trial and hearing rights

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.

Response

With respect to the regulatory context, I refer the Committee to my previous comments regarding the civil penalties for failure to register, as, from an implementation perspective, registration triggers the obligation to report. This means that the regulatory context is very similar.

Similarly to the registration requirements, the relative size of the reporting penalties have been calibrated according to the deterrent effect in context.

Committee comment

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)).

Response

As set out in the Statement of Compatibility, and taking the Committee's guidance into account, I do not consider the penalties are criminal for the purposes of international human rights law.

Guaranteeing the rights in the Committee's comments in paragraph 1.109 would involve criminalising the requirements.

SENATOR THE HON MITCH FIFIELD
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Sl.111
PARLIAMENT HOUSE
CANBERRA ACT 2600

Response to Parliamentary Joint Committee on Human Rights

Dear Mr Goodenough

Thank you for your letter of 7 February 2018 regarding the Parliamentary Joint Committee on Human Rights' (the Committee) assessment of the Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Bill 2018 (the Bill).

The Bill will introduce a federal civil penalty regime targeted at among other things, perpetrators who share intimate images without consent. The regime's civil penalties will allow the Office of the eSafety Commissioner (eSafety Office) to take action to quickly remove intimate images posted online without consent, or to address the threat of intimate images being shared without consent. Penalties of up to $105,000 for individuals and up to $525,000 for corporations can be applied for contraventions of the prohibition.

The Committee, in the *Human rights scrutiny report: Report 1 2018*, sought my advice as to whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be considered 'criminal' in nature for the purposes of international human rights law.

The Committee also sought my advice as to whether the Bill could accordingly engage criminal process rights (i.e. the rights to a fair trial; not incriminate oneself; not to be tried and punished twice for an offence; and a guarantee against retrospective criminal laws); whether any limitations on these rights imposed by the measures are permissible; and whether measures could be amended to accord with criminal process rights. This letter responds to those comments.

The Statement of Compatibility with Human Rights contained in the current Explanatory Memorandum accompanying the Bill outlines the rationale for the civil penalty amounts and circumstances in which they may apply. It notes that they are reasonable, proportionate and necessary. In line with that statement, I remain satisfied that the civil penalty amounts contained in the Bill are justified due to the significant harm that can be caused to victims of non-consensual sharing of intimate images.

In relation to the Committee's concerns, and taking into account the Committee's Guidance Note 2 on offence provisions, civil penalties and human rights, the following factors also support the view that the penalties are not criminal in nature:

- the penalties included in the Bill are expressly civil and not criminal under Australian law;
- the civil penalties set a maximum, pecuniary-only penalty, with no possibility of imprisonment for contravention of a civil penalty provision;
- non-payment of a civil penalty order does not result in imprisonment;
- the Federal Court and Federal Circuit Court retain discretion both as to whether to issue a civil penalty order, and the specific amounts of the order, up to the maximum amounts under the Bill; and
- in practice, the Bill prescribes a graduated approach of remedies and enforcement mechanisms, and civil penalty orders will only be sought is extreme cases.

Given these factors, which are outlined in more detail below, the Government considers that the penalties are not 'criminal' in nature and therefore do not engage any of the applicable criminal process rights, or require any permissible limitations or amended measures to accord with these rights.

No criminal sanction under domestic Australian law

A contravention of a civil penalty provision does not result in the possibility of imprisonment or resultant criminal record, nor does the non-payment of any civil penalty order. Additionally, the civil penalties are pecuniary only, and are necessarily high as they are intended to change behaviour, acting as a deterrent to those who are tempted to engage in this behaviour.

Maximum penalties

Under the Bill, civil penalty order provisions contained in the *Regulatory Powers (Standards Provisions) Act 2014* are triggered if a person shares an intimate image without consent or threatens to share an intimate image without consent or fails to comply with a removal notice. The penalty amounts are up to $105,000 for a person and up to $525,000 for a corporation.

These penalties are intended to be a strong deterrent to not engage in the sharing of intimate images without consent. They are, however, the maximum penalty amounts that may be awarded and a range of matters must first be considered by the courts before the actual amount is decided (as outlined below).

Court discretion in applying civil penalties

If the eSafety Commissioner decides to pursue a civil penalty he/she must apply to the Federal Court or the Federal Circuit Court. The courts have discretion as to whether to issue a penalty order and will decide on the penalty having regard to any relevant matter, including:

a) the nature and extent of the contravention; and
b) the nature and extent of any loss or damage suffered because of the contravention; and

c) the circumstances in which the contravention took place; and
d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

This discretion means that a perpetrator will not automatically receive the maximum penalty and ensures there are processes in place to ensure that any penalty is proportionate to the contravention.

In addition to the penalties, the Bill gives the eSafety Commissioner the power to first pursue a range of responses if there has been a contravention of the prohibition. These remedies include lighter touch remedies such as informal mechanisms, formal warnings and infringement notices. In practice, the stronger remedies, including civil penalties, are expected to only be used in exceptional cases such as a repeat offender where other remedies have been ineffective.

Consultation

When drafting the Bill, my Department consulted with the Attorney-General's Department and considered the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Given the impact that the non-consensual sharing of intimate images can have on victims, the Government remains satisfied that there is sufficient justification for the civil penalty amounts and that they are not 'criminal' in nature for the purposes of international human rights law.

Thank you for providing the opportunity to respond to these issues. I trust this information will be of assistance.

Yours sincerely

MITCH FIFIELD
20/2/18

The Hon Christian Porter MP
Attorney-General

MC18-001618
21 FEB 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600
human.rights@aph.gov.au

Dear ~~Mr Goodenough MP~~ Ian

Thank you for your letter of 7 February 2018 requesting my response to enquiries of the Parliamentary Joint Committee on Human Rights (the Committee) regarding the human rights compatibility of Foreign Influence Transparency Scheme Bill 2017 and the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017.

I have considered the Committee's assessment of the proposed legislation as set out in its Report 1 of 2018 and enclose responses to the matters that the Committee has raised.

As I have stated publicly, I am open to considering amendments to the proposed legislation. These will be considered in the context of the report of the Parliamentary Joint Committee on Intelligence and Security, which is currently conducting an inquiry into the Foreign Influence Transparency Scheme Bill and is due to report by 23 March 2018.

Thank you again for the opportunity to respond to the Committee's concerns.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Response to the Parliamentary Joint Committee on Human Rights Report 1 of 2018 – Foreign Influence Transparency Scheme Bill 2017 and Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017

Response to the Parliamentary Joint Committee on Human Rights
Report 1 of 2018
Foreign Influence Transparency Scheme Bill 2017
Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017

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

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, 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.

Response

The Committee's report notes that a limitation on human rights may be proportionate if 'sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective' (paragraph 1.140). In paragraph 1.139 of its report the Committee recognises the objective of the Foreign Influence Transparency Scheme Bill (the Bill) as being legitimate. The objective of the Bill, as stated in the Statement of Compatibility with Human Rights (Statement of Compatibility) at paragraph 21, 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.

The Foreign Influence Transparency Scheme (the Scheme) established by the Bill has been carefully targeted to ensure that it does not unjustifiably impose limitations on human rights. An individual or entity will only be required to register under the Scheme if undertaking a registrable activity on behalf of a foreign principal, and if no relevant exemptions apply. The Scheme is targeted to address those activities most likely to impact upon Australia's political and government systems and processes.

A number of specific circumstances must exist for a person or entity to be required to register. These are:

- the identity of the foreign principal
- the nature of the activities undertaken
- the purpose for which the activities are undertaken, and
- in some cases, whether a person has recently held a senior public position in Australia, such as a former member of Parliament.

The definitions of 'foreign principal' in section 10 and undertaking an activity 'on behalf of' a foreign principal in section 11 need to be sufficiently broad so as to achieve the Scheme's transparency objective. However, these sections do not alone give rise to a requirement to register under the Scheme – additional circumstances must always be present before a requirement to register arises. For example, registrable activities at section 21 of the Bill must be undertaken for the purpose of influencing Australia's political and governmental systems and processes.

The Bill does not apply a 'one size fits all' approach to the requirement to register. For example, donor activity (as defined in section 10) is only registrable when undertaken on behalf of a foreign government, foreign public enterprise or foreign political organisation. A person will not need to register if they are engaging in donor activities on behalf of a foreign businesses and foreign individual. In this way, the application of the Scheme has been limited only to the activities and circumstances most in need of transparency, which is a targeted approach that is proportionate to the legitimate objective of the Scheme.

It is also important to note that a requirement to register with the Scheme does not in any way preclude a person or entity from undertaking a registrable arrangement with a foreign principal, or from undertaking registrable activities on behalf of a foreign principal, provided the person is registered to ensure the activities are transparent. This encourages and promotes the ability of decision-makers and the public to be aware of any foreign influences being brought to bear in Australia's political or governmental processes.

Exemptions

The exemptions in Division 4 of Part 2 of the Bill further limit the Scheme's application. Exemptions established by the Bill include:

- activities undertaken to provide humanitarian aid or assistance (section 24)
- legal advice or representation (section 25)
- diplomatic, consular, United Nations and other relevant staff (section 26)
- certain religious activities (section 27)
- news media (section 28)
- commercial negotiations regarding bona fide business or commercial interests (subsection 29(1)), and
- persons employed by, or operating under the name of, the foreign principal (subsection 29(2)).

The exemption for news media at section 28 serves the important purpose of safeguarding the right to freedom of expression. The exemption applies to activities undertaken on behalf of a foreign business

or foreign individual if the activity is solely, or solely for the purposes of, reporting news, presenting current affairs or expressing editorial content in news media. This exemption ensures that Australian media outlets do not need to register for following the direction of a foreign parent company or foreign owner, and recognises that requiring such entities to register would unjustifiably expand the scope of the Scheme and would be unlikely to add to its transparency objective.

The exemption for news and press services does not apply to state-owned news and press services. There is a public interest in knowing when news and press services are directed by a foreign government to influence Australian governmental and political processes.

The definition of 'communications activity' at section 13 expressly excludes the transmission of information or material by broadcasters and carriage service providers or publication of information or material by print media organisations, if that information or material is produced by another person (see subsections 13(3) and 13(4)). This further safeguards the right to freedom of expression by making it clear that the Scheme's obligations are always placed on the person who has the arrangement with the foreign principal to engage in communications activities, or undertakes communications activities on behalf of the foreign principal, for the purpose of political or governmental influence. Broadcasters, carriage services providers and publishers do not undertake communications activities merely because information is communicated or distributed via their services.

Together with targeted registrable activities, the exemptions seek to ensure that the Scheme remains targeted to those activities most in need of transparency and assists in minimising the regulatory burden of the Scheme. The Bill's registration and transparency requirements do not prevent any person from engaging in any arrangements or activities on behalf of a foreign principal. The Bill requires registration, to inform the Australian Government and the public about the forms and sources of foreign influence in Australia's political and governmental processes. This is appropriate to serve the legitimate transparency objective of the Scheme.

The Bill's registration and reporting obligations should not affect the freedom of the press. Rather than constraining the rights to freedom of expression and opinion, the Bill in fact protects and promote these rights by supporting consumers of news media to be aware of, and understand, any foreign influences behind particular communications activities that are linked to Australia's political and governmental processes.

Right to Privacy

The Bill requires minimal information to be provided by registrants upfront, which helps to safeguard registrants' right to privacy. The information to be collected is limited to that which will be essential for the effective administration of the Scheme (see Division 2 of Part 4 - Register of scheme information), to provide decision-makers and the public with visibility of the foreign influences in Australia's political and governmental processes, and to allow for appropriate investigations into potential non-compliance with the Scheme. Only a subset of information provided will be made publicly available, further safeguarding registrants' right to privacy (see section 43).

The Committee identifies that paragraph 43(1)(c) of the Bill, which provides that the Secretary can make available to the public 'any other information prescribed by the rules' is a potential limitation on the right to privacy. Subsection 43(1) provides that the Secretary must make certain information publicly available in relation to each person registered in relation to a foreign principal, including information prescribed in the rules. Paragraph 43(1)(c) provides flexibility for rules to prescribe

additional information that should be made publicly available which were not foreshadowed at the time of establishment of the Scheme. This is particularly important given the Scheme's primary aim is to provide transparency about foreign influence in Australia's political and governmental processes. Achieving this objective inherently requires information to be made public so that decision-makers and members of the community can access it.

The rules will be legislative instruments under the *Legislation Act 2003* and would be subject to the normal disallowance processes. Any rules will also comply with the *Privacy Act 1988,* and will be guided by the Australian Privacy Principles. The department would consult with the Information Commissioner and relevant stakeholders in the development of rules, to ensure they do not unnecessarily infringe upon the right to privacy.

Additional measures to review the human rights implications of the Bill include provisions providing for an annual report to Parliament on the operation of the Scheme (section 69) and for a review of the Scheme's operation within five years of commencement (section 70). The annual report must be tabled in both Houses of Parliament, providing opportunity for both government and public scrutiny. The review of the Scheme will ensure that the Scheme is operating as intended and strikes an appropriate balance between achieving its transparency objective and the regulatory burden for registrants. Both provisions provide opportunity for the public and Parliament to raise concerns about the Scheme's operation, including in relation to limitations on human rights.

The compatibility of the Scheme with the right to equality and non-discrimination

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 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.

Response

The right to equality and non-discrimination is set out at articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 2(1) provides that each state undertakes to respect and ensure to all individuals the rights recognised in the ICCPR, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In General Comment No. 18, the UN Human Rights Committee recognised that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant.

It is important to note that the Scheme does not prohibit the involvement of foreign principals, nor those individuals who represent their interests, in Australia's political and governmental processes. It does not target any particular country, nationality or diaspora community. Rather, the Scheme seeks to provide transparency to all Australians about the forms and sources of foreign influence in Australia's government and political processes by all foreign principals.

The Scheme simply imposes a requirement, which applies equally to all registrants regardless of the foreign country involved, that when a person is undertaking activities on behalf of a foreign principal, this is made transparent to the decision-maker and the Australian public, so that they are able to accurately assess the interests being brought to bear in respect of a particular decision or process.

As per the committee's report, the Bill could be interpreted as limiting the right to equality and non-discrimination by requiring registration of those individuals or organisations that undertake certain activities on behalf of a foreign principal for the purpose of political or governmental influence and by establishing distinguishable obligations for former Cabinet Ministers, Ministers, members of Parliament and senior public officials. However, these limitations are reasonable and necessary to achieve the legitimate objective of the Bill, which is described at paragraph 21 of the Statement of Compatibility as being:

> 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.

Activities for the purpose of governmental or political influence

Only certain activities or arrangements to undertake activities on behalf of a foreign principal are registrable under the Scheme.

The activities which attract a requirement to register include parliamentary lobbying, general political lobbying, communications activity, and donor activity. Former members of Parliament, Ministers, Cabinet Ministers and senior Commonwealth public officials may also be required to register under the Scheme, if they are employed by, or act on behalf of, a foreign principal immediately after leaving their public role – it is not necessary that these individuals undertake any of the activities listed above.

An activity is undertaken for the purpose of political or governmental influence if a purpose of the activity is to influence, whether directly or indirectly, any aspect of a process in relation to Australian democratic processes (see section 12).

The Bill has been intentionally drafted so that activities undertaken on behalf of a foreign government will always be registrable, unless an exemption applies. Foreign governments have the potential to exercise greater influence over Australian political and governmental processes, and have the ability to utilise proper diplomatic channels to exert such influence. There is therefore a strong public interest in knowing about activities undertaken on behalf of foreign governments, where they are undertaken outside diplomatic channels.

The Bill does not in any way discriminate on the basis of nationality or a particular political or other opinion. Nor does it seek to prohibit an individual or organisation from having or expressing particular political or other opinions or from having political associations. Instead, the Bill requires individuals and organisations to register where they are undertaking activities that may influence Australia's governmental and political processes on behalf of a foreign principal. This is essential to achieve the legitimate transparency objective of the Scheme.

Activities undertaken by former Cabinet Ministers, Ministers, members of Parliament and senior public officials

Sections 22 and 23 of the FITS Bill create separate registration requirements for recent Cabinet Ministers and recent Ministers, members of Parliament and holders of senior Commonwealth positions. These categories of individuals are also excluded from relying on some of the exemptions available to other persons in Division 4 of Part 2 of the Bill, including the exemptions for religion at section 27 and for news media at section 28.

In creating these specific registration requirements for these categories of individuals, the FITS Bill engages the right to non-discrimination and equality by distinguishing a certain section of the Australian public and establishing legislative provisions that apply only to that section. However, this is reasonable and necessary to support the legitimate transparency purpose of the Scheme.

It is in the public interest to know when recent Cabinet Ministers and recent Ministers, members of Parliament and holders of senior Commonwealth positions undertake activities on behalf of a foreign principal in a short period immediately following the cessation of their role. Such persons have recently occupied significant positions of influence and may have had access to classified and sensitive information concerning Australian government priorities, strategies and interests. They are also likely to have a large number of influential and well-placed contacts at senior government levels, both in the Parliament and the Commonwealth public service, and have a greater ability to access those contacts to influence a political or governmental process on behalf of a foreign principal than other Australians. It is appropriate that those individuals are held to a high degree of accountability.

While the Scheme creates separate obligations for these individuals, it does not prohibit them from entering into arrangements with, or engaging in activities on behalf of, a foreign principal. The Scheme simply establishes registration requirements to ensure the Australian public and government decision-makers are aware of their connection to the foreign principal. This supports the legitimate transparency objective of the Scheme and protects the rights to opinion and freedom of expression, freedom of association and participation in public affairs and elections by encouraging and promoting a political system that is transparent.

The definitions of 'recent Cabinet Minister' and 'recent Minister or member of Parliament' in section 10 are time-limited –the categories are limited to individuals who ceased in that role within the previous three years and no longer hold such a position. Similarly, the definition of 'recent holder of a senior Commonwealth position' in section 10 is limited to persons who held a senior Commonwealth position within the last 18 months and no longer hold that position. A further limitation applies in relation to recent Ministers, members of Parliament and holders of senior Commonwealth positions. Activities undertaken on behalf of a foreign principal are only registrable under section 23 when '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.'

Accordingly, any limitations on the right to equality and non-discrimination are reasonable, necessary and proportionate to achieve the legitimate transparency objective of the Scheme.

SENATOR THE HON MITCH FIFIELD
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
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National Broadcasters Legislation Amendment (Enhanced Transparency) Bill 2017 – Response to the Parliamentary Joint Committee on Human Rights

Dear Chair Ian

I refer to your letter dated 7 February 2018 in relation to the Parliamentary Joint Committee on Human Rights' (the Committee's) assessment of the National Broadcasters Legislation Amendment (Enhanced Transparency) Bill 2017 (the Bill).

I welcome the opportunity to respond to the Committee's comments and provide the following advice under each.

Committee comments

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).*

Response

The Committee appears to recognise that, although this Bill may place limitations on the right of privacy, it does so with the intent of serving the following legitimate objectives:

- the objective of ensuring a more detailed scrutiny of this area of high expenditure and for better assessments as to whether the ABC and SBS are efficiently using taxpayers' money; and

- the objective of promoting public transparency and scrutiny and achieving policy outcomes such as reducing the gender salary gap.

The measures in the Bill will require the ABC and SBS to not only be more transparent in reporting how they allocate funding to pay high salaries, but how equitable they are in that allocation – for instance, in respect of male to female salaries.

I note the Committee is concerned that the objectives might be achieved through less restrictive measures. I am of the view that the measures are, in fact, a proportionate response to the objectives, and that the alternatives suggested by the Committee will not ensure these objectives are fully realised.

The alternative of requiring the 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) would provide for more transparency than is currently the case. However, this approach falls short of achieving the stated transparency outcomes for this measure, and helps to obscure potential gender and age discrimination, unconscious bias, and poor expenditure decisions. It also reduces the capacity for public scrutiny of what should be publicly accessible information. Without transparency, the public loses faith that the ABC and SBS are using funding appropriately and are fair and equitable in doing so. As a taxpayer funded entity, it is appropriate to have this level of transparency.

I consider that, given the enhanced transparency objectives underpinning the Bill, the requirement to publish actual salaries and remuneration is a reasonable and proportionate limitation on the right to privacy.

Thank you for your consideration of these issues.

Yours sincerely

MITCH FIFIELD

27/2/18

The Hon Christian Porter MP
Attorney-General

MC18-001708

14 MAR 2018

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

Thank you for your letter of 14 February 2018 requesting my response to enquiries of the Parliamentary Joint Committee on Human Rights (the Committee) regarding the human rights compatibility of National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (the Bill).

I have considered the Committee's assessment of the Bill as set out in its Report 2 of 2018 and enclose responses to the matters that the Committee has raised.

I also enclose a copy of proposed parliamentary amendments to the Bill which I recently provided to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to assist in its inquiry into the Bill. The proposed parliamentary amendments amend the secrecy offences in Schedule 2 of the Bill to:

- narrow the definitions of inherently harmful information and causes harm to Australia
- create separate offences that apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply to the most serious and dangerous conduct, and
- strengthen the defence for journalists at section 122.5(6) by:
    - removing any requirement of journalists to demonstrate that their reporting was 'fair and accurate'
    - ensuring the defence is available where a journalist reasonably believes that their conduct was in the public interest, and
    - clarifying that the defence is available for editorial and support staff as well as journalists themselves.

In addition to these matters, the amendments address the definition of security classification, the breadth of the offence at section 91.3 and the application of strict liability to elements of the offence relating to security classified information.

I am open to considering further amendments to the proposed legislation in the context of the PJCIS report which is due in April 2018.

I trust this information is of assistance to the Committee in finalising its assessment of the Bill.

Thank you again for the opportunity to respond to the Committee's concerns.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Response to the Parliamentary Joint Committee on Human Rights Report 2 of 2018 – National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Draft parliamentary amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Response to the Parliamentary Joint Committee on Human Rights

Human rights scrutiny report 2 of 2018

National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Secrecy provisions – compatibility with the right to freedom of expression

Committee Comment

1.37 The committee therefore seeks the advice of the Attorney-General as to:

- how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill;
- whether the limitations are reasonable and proportionate to achieve the stated objective (including in relation to the breadth of information subject to the secrecy provisions, the adequacy of safeguards and the severity of criminal penalties); and
- how the measures will interact with existing secrecy provisions such as those under the Border Force Act which has been previously considered by the committee.

1.38 In relation to the proportionality of the measures, in light of the information requested above, if it is intended that the proposed secrecy provisions in schedule 2 proceed, advice is also sought as to whether it would be feasible to amend them to:

- appropriately circumscribe the range of 'inherently harmful information' to which the offence in proposed section 122.1 applies;
- appropriately circumscribe the definition of what information 'causes harm to Australia's interests' for the purposes of section 122.2;
- appropriately circumscribe the definition of 'deals' with information for the purposes of the offences under proposed sections 122.1-122.4;
- appropriately circumscribe the scope of information subject to the prohibition on disclosure under proposed section 122.4 (by, for example, introducing a harm element);
- limit the offences in schedule 2 to persons who are or have been engaged by the Commonwealth as an employee or contractor;
- expand the scope of safeguards and defences (including, for example, a general 'public interest' defence, an unsolicited information defence, a broader journalism defence, and the provision of legal advice defence);
- reduce the severity of the penalties which apply; and
- include a sunset clause in relation to the secrecy provisions in schedule 2.

Response

I have provided amendments to the general secrecy offences in Schedule 2 of the Bill to the Parliamentary Joint Committee on Intelligence and Security (PJCIS). The amended secrecy offences have been carefully scoped to ensure they appropriately cover harmful conduct, often undertaken by

our adversaries to support espionage and foreign interference activity. The amendments to the offences in Schedule 2 ensure the offences are reasonable and proportionate to achieve the objective of protecting Australia from harm, including from espionage and foreign interference.

The changes are summarised below.

- The definition of 'inherently harmful information' will be narrowed by:
    - amending the definition of security classification in section 90.5 (at Item 16 of Schedule 1 of the Bill) and section 121.1 (at Item 6 of Schedule 2 of the Bill) will be amended to mean a classification of TOP SECRET or SECRET, or any other equivalent classification or marking prescribed by the regulations.
    - removing paragraph (d) applying to information that was provided by a person to the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under a law or otherwise by compulsion of law.
- The definition of 'cause harm to Australia's interests' will be narrowed by removing:
    - subparagraph (a)(ii) – interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a provision, that is subject to a civil penalty, of a law of the Commonwealth
    - paragraph (d) – harm or prejudice Australia's international relations in any other way, and
    - paragraph (e) – harm or prejudice relations between the Commonwealth and a State or Territory.
- Separate offences will apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply where:
    - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this element
    - the communication of the information damages the security or defence of Australia and the person is reckless as to this element
    - the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this element
    - the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.
- The definition of 'Commonwealth officer' will clarify that the definition does not include officers or employees of, or persons engaged by, the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation.
- The defence for journalists will be strengthened by:
    - removing any requirement of journalists to demonstrate that their reporting was 'fair and accurate'
    - ensuring the defence is available where a journalist reasonably believes that their conduct was in the public interest, and

    - clarifying that the defence is available for editorial and support staff as well as journalists themselves.

- Strict liability will be removed from elements of the offences relating to information or articles carrying a security classification.

How the measures meet the objectives of the Bill

It is crucial for the types of information listed in the Bill, as amended, to be protected by general secrecy offences. The Bill seeks to criminalise a range of foreign intelligence activity against Australia, which the Australian Secret Intelligence Organisation (ASIO) assesses is occurring on an unprecedented scale. The existing secrecy offences are inadequate to deter conduct leading up to espionage and foreign interference, and fail to take into account the current operational environment.

Publication and communication of sensitive information substantially raises the risk of foreign actors exploiting that information to cause harm to Australia's interests or to advance their own interests. For example, foreign actors may use the information to build a malicious capability in order to influence a political or governmental process of an Australian government or the exercise of an Australian democratic or political right.

The disclosure of harmful information can erode public confidence in the integrity of Australia's institutions and undermine Australian societal values. It can also jeopardise the willingness of international partners to share sensitive information with Australia.

The general secrecy offences in the Bill complement the espionage and foreign interference offences, both of which require proof of a connection to a foreign principal. The general secrecy offences are an essential part of the overall framework as they ensure the unauthorised disclosure of harmful information, that is made or obtained by the Commonwealth, can be prosecuted even if a foreign principal is not involved, is not yet involved, or the link to a foreign principal cannot be proved beyond a reasonable doubt.

Reasonableness and proportionality

The secrecy offences, as amended, are a reasonable way to achieve the Bill's legitimate objective of protecting Australia from espionage and foreign interference. They are proportionate to the grave threat to Australia's sovereignty, prosperity and national security. My department's submission to the PJCIS Inquiry into the Bill contains further detail at pages 6-7 on the nature and extent of the contemporary threat posed by espionage and foreign interference activity, as well as a number of unclassified case studies at Appendix A.

The definitions of 'inherently harmful information' and information that 'causes harm to Australia's interests' in section 122.1 are limited to information which harms Australia's essential public interests. The offences, as amended, apply more broadly to current and former Commonwealth officers who are subject to particular obligations and requirements as part of their employment. The offences for non-Commonwealth officers are much narrower and will only apply where the information is classified TOP SECRET or SECRET or the person's disclosure of, or dealing with, information causes or will cause harm.

The defences in section 122.5 also limit the circumstances in which a person will be criminally responsible for the secrecy offences, providing appropriate safeguards for freedom of expression. Defences are available for:

- people dealing with information in their capacity as a Commonwealth officer or under arrangement (subsection 122.5(1))
- information that is already public (subsection 122.5(2))
- information communicated to the Inspector-General of Intelligence and Security (IGIS), the Commonwealth Ombudsman or the Law Enforcement Integrity Commissioner (subsection 122.5(3)
- information communicated in accordance with the *Public Interest Disclosure Act 2013* (PID Act) (subsection 122.5(4))
- information communicated to a court or tribunal (subsection 122.5(5))
- persons dealing with information in their capacity as a person engaged in reporting news, presenting current affairs or expressing editorial content in news media (subsection 122.5(6))
- information that has been previously communicated (subsection 122.5(8)), and
- information relating to a person (subsection 122.5(9)).

Interaction with existing secrecy offences, including in the Australian Border Force Act 2015

The committee references its 2017 scrutiny report on amendments to the secrecy provisions in the *Australian Border Force Act 2015* (Border Force Act) and seeks comment on how the secrecy offences in the Bill interact with existing secrecy offences.

The purpose of the secrecy provisions in the Bill is to create overarching offences in the Criminal Code, which have a general application. The offences capture dealings with information, which would be likely to cause harm to Australia's interests or national security. It is important that this conduct is adequately captured by the criminal law. This means the offences in the Bill may overlap with more specific secrecy offences in other legislation, and, over time, it may be appropriate for these specific offences to be removed to the extent of the overlap.

The secrecy provisions in the Border Force Act are specific offences that only apply to a person who is, or has been, an 'entrusted person' and they disclose 'Immigration and Border Protection Information,' as defined in section 4(1) of the Border Force Act.

Some of the listed information in the Border Force Act is likely to fall within the categories of 'inherently harmful information' and information that 'causes harm to Australia's interests' or is 'likely to cause harm to Australia's interests' under Division 122 of the Bill. For example, 'information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia' is included in the Border Force Act as 'Immigration and Border Protection Information', as well as in the Bill as 'inherently harmful information.'

However, the Bill also covers information not included in the Border Force Act, for example, in relation to 'information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency' within the definition of 'inherently harmful information.' It is important for dealings of this kind to be captured – unauthorised disclosure has the potential to prejudice investigations and operations, and compromise people's safety.

Whereas the secrecy offences in the Border Force Act apply to 'entrusted persons' (being the Secretary, the Australian Border Force Commissioner and Immigration and Border Protection workers), the secrecy offences in the Bill apply to both Commonwealth officers and non-Commonwealth officers.

Committee comment regarding possible amendments

The committee has sought advice about whether it would be feasible to:

- appropriately circumscribe the range of 'inherently harmful information' to which the offence in proposed section 122.1 applies;
- appropriately circumscribe the definition of what information 'causes harm to Australia's interests' for the purposes of section 122.2;
- appropriately circumscribe the definition of 'deals' with information for the purposes of the offences under proposed sections 122.1-122.4;
- appropriately circumscribe the scope of information subject to the prohibition on disclosure under proposed section 122.4 (by, for example, introducing a harm element);
- limit the offences in schedule 2 to persons who are or have been engaged by the Commonwealth as an employee or contractor;
- expand the scope of safeguards and defences (including, for example, a general 'public interest' defence, an unsolicited information defence, a broader journalism defence, and the provision of legal advice defence);
- reduce the severity of the penalties which apply; and
- include a sunset clause in relation to the secrecy provisions in schedule 2.

These issues are addressed below, by reference to the amendments to the draft Bill circulated to the PJCIS where appropriate.

The definition of 'inherently harmful information'

The committee's concerns with the definition of 'inherently harmful information' related to the breadth of the definitions of 'security classified information' (at paragraph (a)) and 'any information provided by a person to the Commonwealth to comply with another law' (at paragraph (d)).

The proposed amendments to the Bill amend the definition of security classification in sections 90.5 and 121.1. Under the new definition, security classification will mean a classification of TOP SECRET or SECRET, or any other equivalent classification or marking prescribed by the regulations. Consistent with the Australian Government's Information Security Management Guidelines (available at www.protectivesecurity.gov.au), information should be classified as TOP SECRET if the unauthorised release of the information could cause exceptionally grave damage to the national interest. Information should be classified as SECRET if the unauthorised release of the information could cause serious damage to the national interest, organisations or individuals.

The new definition will not allow for lower protective markings to be prescribed in the regulations and will only allow equivalent classifications or markings to be prescribed. This will allow flexibility to ensure the definition can be kept up to date if new protective markings of equivalent seriousness are

introduced, or to ensure information bearing former protective markings of equivalent seriousness can continue to be protected.

It is worth noting that the proposed amendments also remove the provisions that apply strict liability to information that has a security classification. The effect of these amendments is that, in addition to proving that information or article had a security classification, the prosecution will also have to prove that the defendant was reckless as to the fact that the information or article had a security classification. Consistent with section 5.4 of the *Criminal Code Act 1995* (Criminal Code), this will require proof that the person was aware of a substantial risk that the information had a security classification and, having regard to the circumstances known to him or her, it was unjustified to take the risk.

Paragraph (d) of the definition of 'inherently harmful information' will be removed. This paragraph applied to information that was provided by a person to the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under law or otherwise by compulsion of law.

The definition of information which 'causes harm to Australia's interests'

The committee expressed concerns about the breadth of the definition of 'causes harm to Australia's interests', particularly the inclusion of information relating to breaches of Commonwealth law that has a civil penalty (subparagraph (a)(ii)).

The definition of 'cause harm to Australia's interests' will be narrowed in the proposed amendments to the Bill by removing subparagraph (a)(ii) – interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a contravention of a provision, that is subject to a civil penalty, of a law of the Commonwealth.

The amendments will also remove paragraph (d) of the definition – harm or prejudice Australia's international relations in any other way, and paragraph (e) – harm or prejudice relations between the Commonwealth and a State or Territory.

The remaining categories of information covered by the definition of 'cause harm to Australia's interests' all require proof of harm to, interference with, or prejudice to, one of the listed categories. These reflect essential public interests. The Explanatory Memorandum provides further information justifying the inclusion of these categories in paragraphs 1283 to 1301.

The definition of 'deals' with information

The definition of deals in section 90.1 of the Bill has been broadened to cover the full range of conduct that can constitute secrecy and espionage offences. This is to ensure the offences comprehensively addresses the full continuum of criminal behaviour that is undertaken in the commission of espionage offences, and to allow authorities to intervene at any stage.

The penalties for the secrecy offences are tiered to ensure that penalties are commensurate with the seriousness and culpability of offending. The higher penalty will apply where a person actually communicates information. Offences relating to other dealings with information will carry lower penalties. In each case, the fault element of intention will apply to the physical element of the offence that a person communicates or deals with information. Consistent with section 5.2 of the Criminal Code, this means that the person must have meant to engage in the conduct.

Accordingly, the definition of 'deals' is appropriately circumscribed and proportionate to the objective of the Bill.

The scope of information in section 122.4 and introducing a harm element

Section 122.4 replaces and narrows section 70 of the Crimes Act. As stated at paragraph 1274 of the Explanatory Memorandum, it is unclear whether a duty at common law or in equity would be a relevant duty for the purposes of the existing offence. New section 122.4 will only apply where a Commonwealth officer had a duty not to disclose information and that duty arises under Commonwealth law.

Where the Parliament has seen fit to impose a duty on a Commonwealth officer not to disclose information, a breach of such a duty is a serious matter. It is important to note that, in addition to proving that the person is under a duty not to disclose information, the prosecution will also need to prove that the person was reckless as to this element. Consistent with section 5.4 of the Criminal Code, this means that the person will need to be aware of a substantial risk that he or she is under a duty not to disclose the information and, having regard to the facts and circumstances known to him or her, it is unjustifiable to take the risk.

As such, it is not necessary for the offence to require proof of additional harm.

Limit the offences to Commonwealth employees or contractors

The proposed amendments to the Bill address the committee's concerns about the application of many of the secrecy offences to both Commonwealth and non-Commonwealth officers.

The amendments create separate offences that apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply to the most serious and dangerous conduct. This recognises that secrecy offences should apply differently to Commonwealth and non-Commonwealth officers given that the former have a higher duty to protect such information and are well versed in security procedures.

Sections 122.1 and 122.2 will only apply to a person who made or obtained the information by reason of being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.

New offences in section 122.4A will apply to non-Commonwealth officers who communicate or deal with a narrower subset of information than the offences at sections 122.1 and 122.2.

The new offence at subsection 122.4A(1) will apply where:

- a person intentionally communicates information
- the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- any one or more of the following applies:

- the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
- the communication of the information damages the security or defence of Australia and the person is reckless as to this
- the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this
- the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

This offence will carry a maximum penalty of 10 years imprisonment, which is lower than the penalty applying to the offences relating to communication of information by current or former Commonwealth officers at subsections 122.1(1) and 122.2(1).

The new offence at subsection 122.4A(2) will apply where:

- a person intentionally deals with information (other than by communicating it)
- the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- any one or more of the following applies:
    - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
    - the dealing damages the security or defence of Australia and the person is reckless as to this
    - the dealing interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this
    - the dealing harms or prejudices the health or safety of the Australian public or a section of the Australian public.

This offence will carry a maximum penalty of three years imprisonment, which is lower than the 10 year penalty applying to the offences relating to dealings with information by current or former Commonwealth officers at subsections 122.1(2) and 122.2(2).

The effect of limiting all secrecy offences to Commonwealth employees or contractors would significantly limit the Bill's application and undermine its policy rationale to protect Australia's national security. Protecting Australia from espionage and foreign interference relies heavily on having strong protections for information, especially where disclosure causes harm to an essential public interest. In the same way as any person can commit espionage, any person can threaten Australia's safety, security and stability through the unauthorised disclosure of harmful information.

Scope of safeguards and defences

The offences have appropriate safeguards and will be further strengthened by changes in the proposed amendments to the Bill. The defence for journalists at subsection 122.5(6) will be strengthened by:

- removing any requirement for journalists to demonstrate that their reporting was 'fair and accurate,' ensuring that the defence is available where a journalist reasonably believes that their conduct was in the public interest, and
- clarifying that the defence is available for editorial and support staff as well as journalists themselves.

The inclusion of a general public interest defence is not warranted. In relation to the new secrecy offences for non-Commonwealth officers, it is unlikely that conduct genuinely in the public interest could fall within the parameters of the offences and outside the defences in section 122.5. For example, it is difficult to envisage how the harms listed in subsections 122.4A(1), and listed below, could be within the public interest:

- the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
- the communication of the information damages the security or defence of Australia and the person is reckless as to this
- the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this
- the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public

There are established mechanisms for Commonwealth officers to make public interest disclosures under the PID Act and subsection 122.5(4) provides a defence for information communicated in accordance with that Act.

The committee's report raises concerns that a journalist who receives unsolicited information could be liable for a secrecy offence. The fault element of intention always applies to the physical elements of offences involving conduct. Therefore, the prosecution would have to prove beyond reasonable doubt that the journalist intentionally communicated or dealt with the information. Under the amended Bill, if a journalist were to receive unsolicited information, and that information had a security classification, strict liability will no longer apply to the element relating to security classification. This means that, in addition to proving that information or article had a security classification, the prosecution will also have to prove that the defendant was reckless as to the fact that the information or article had a security classification. Consistent with section 5.4 of the Criminal Code, this will require proof that the person was aware of a substantial risk that the information had a security classification and, having regard to the circumstances known to him or her, it was unjustified to take the risk.

It is not intended that the offences cover situations where a person is seeking legal advice about their ability to communicate information or in relation to the application of the offences. A specific defence could provide clarity for such activities.

Penalties

Commonwealth criminal law policy, as set out in the *Guide to Framing Commonwealth Offences* provides that each offence should have a single maximum penalty that is adequate to deter or punish a worst case offence, including repeat offences. The maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme.

In the case of the secrecy offences, the disclosure of information could, as a worst case scenario, lead to loss of life. For example, the disclosure of information concerning human sources or officers operating under assumed identities may compromise the safety of those individuals. In light of this worst case scenario, the maximum penalties are considered appropriate. A sentencing court has the discretion to set the penalty at an appropriate level to reflect the relative seriousness against the facts and circumstances of the particular case.

Under the amended Bill, the secrecy offences applicable to Commonwealth officers and non-Commonwealth officers will attract different penalties. This reflects the higher level of culpability on the part of Commonwealth officers who are entrusted by the Australian Government with sensitive information, have a duty to protect such information, and are trained in security procedures. For example, the new offence at subsection 122.4A(1) for non-Commonwealth officers will carry a maximum penalty of 10 years imprisonment, which is lower than the penalty applying to the offences for Commonwealth officers relating to communication of inherently harmful at subsections 122.1(1) and information causing harm to Australia's interests at subsection 122.2(1), both of which attract a maximum penalty of 15 years imprisonment. Similarly the new offence at subsection 122.4A(2) for non-Commonwealth officers who intentionally deal with information will carry a lower penalty than the offences applicable to Commonwealth officers in 122.1(2) and 122.2(2).

Sunset clause

It is appropriate for the general secrecy offences to include a sunset clause, given that their repeal from the statute book would leave disclosure of harmful information without criminal sanction. It would also risk malicious actors structuring their activities around the sunsetting of the offences in order to avoid criminal liability.

If the committee considers it necessary, it would be preferable to provide for a statutory review of the general secrecy offences after a fixed period (for example, five years).

Secrecy provisions – compatibility with the right to an effective remedy

Committee Comment

1.42 The committee therefore seeks the advice of the Attorney-General as to whether the measure is compatible with the right to an effective remedy.

Response

Article 2(3) of the ICCPR protects the right to an effective remedy for any violation of rights and freedoms recognised by the ICCPR, including the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State.

While the secrecy offences engage the right to an affective remedy, that right is not limited due to a number of defences in Division 122 which protect disclosure in certain circumstances. These defences concern:

- information communicated to the IGIS, the Commonwealth Ombudsman or the Law Enforcement Integrity Commissioner under subsection 122.5(3). These agencies provide important oversight of the intelligence community, law enforcement agencies and the public service. It is intended that the general secrecy offences should in no way impinge on the ability of the Inspector-General, the Ombudsman, or the Integrity Commissioner, or their staff, to exercise their powers, or to perform their functions or duties.
- information communicated in accordance with the PID Act under subsection 122.5(4). The PID Act establishes a legislative scheme to investigate allegations of wrongdoing in the Commonwealth public sector and provide robust protections for current or former public officials who make qualifying public interest disclosures under the scheme. It is intended that the general secrecy offences should in no way impinge on the operation of the PID Act.
- information communicated to a court or tribunal under subsection 122.5(5). This will ensure people have the ability to disclose information, including voluntarily, in order to participate in proceedings before a court or tribunal, and
- journalists under subsection 122.5(6). This defence ensures journalists have the ability to disclose information to the public on possible violations of rights where such a disclosure is in the public interest. The amended legislation strengthens the defence for journalists by removing any requirement for journalists to demonstrate that their reporting was 'fair and accurate' and clarifying that the defence is also available for editorial and support staff.

Secrecy provisions – compatibility with the right to be presumed innocent

Committee Comment

1.57 In relation to the strict liability which applies to the element of the offence in proposed section 122.1, the committee therefore requests the advice of the Attorney-General as to:

- whether the limitation is a reasonable and proportionate measure to achieve a legitimate objective (including the scope of application to persons who may not be aware of the security classification; the ability of courts to consider whether a security classification is inappropriate; and any safeguards); and
- if the measure proceeds, whether it would be feasible to amend the proposed section 122.1 to provide a prosecution must not be initiated or continued unless it is appropriate that the substance of the information had a security classification at the time of the conduct.

1.58 In relation to the reverse evidential burdens, the committee requests the advice of the Attorney-General as to:

- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including why the reverse evidential burdens are necessary and the scope of conduct caught by the offence provisions);
- whether there are existing secrecy provisions that would prevent a defendant raising a defence and discharging the evidential burden, and if so, whether this is proportionate to the stated objective; and

- whether it would be feasible to amend the measures so that the relevant matters (currently in defences) are included as elements of the offence or alternatively, to provide that despite section 13.3 of the Criminal Code, a defendant does not bear an evidential (or legal) burden of proof in relying on the offence-specific defences.

Response

Strict liability – security classified information

As noted above, strict liability will be removed from elements of the offences relating to information or articles carrying a security classification in the proposed amendments to the Bill. This means the prosecution will be required to prove, beyond reasonable doubt, that the information or article had a security classification, and that the defendant was reckless as to whether the information or article had a security classification. Consistent with section 5.4 of the Criminal Code, this means the person will need to be aware of a substantial risk that the information or article carried a security classification and, having regard to the circumstances known to the person, it was unjustifiable to take that risk.

Reverse evidential burdens

The construction of the secrecy offences and specific defences is a reasonable and proportionate measure to achieve the Bill's stated objective of protecting Australia's security and Australian interests.

It is reasonable to reverse the onus of proof in certain circumstances, including where a matter is peculiarly within the knowledge of the defendant and where it would be significantly more difficult and costly for the prosecution to disprove the matter than for the defendant to establish the matter. The justification contained in the Explanatory Memorandum for casting lawful authority as a defence for the espionage and foreign interference offences applies equally to the secrecy offences. For example, in relation to the foreign interference offences, paragraph 1116 states:

> It is appropriate for these matters relating to lawful authority to be cast as defences because the source of the alleged authority for the defendant's actions is peculiarly within the defendant's knowledge. It is significantly more cost-effective for the defendant to assert this matter rather than the prosecution needing to disprove the existence of any authority, from any source.

It would be difficult and more costly for the prosecution to prove, beyond a reasonable doubt, that the person did not have lawful authority. To do this, it would be necessary to negative the fact that there was authority for the person's actions in any law or in any aspect of the person's duty or in any of the instructions given by the person's supervisors (at any level). Conversely, if a Commonwealth officer had a particular reason for thinking that they were acting in accordance with a law or with their duties, it would not be difficult for them to describe where they thought that authority arose. The defendant must discharge an evidential burden of proof, which means pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (section 13.3 of the Criminal Code).

The reversal of proof provisions are proportionate, as the prosecution will still be required to prove each element of the offence beyond a reasonable doubt before a defence can be raised by the defendant. Further, if the defendant discharges an evidential burden, the prosecution will also be required to disprove those matters beyond reasonable doubt, consistent with section 13.1 of the Criminal Code.

Amendments to the draft Bill will be developed to ensure IGIS officials do not bear an evidential burden in relation to the defences in section 122.5 of the Bill. The amendments will also broaden the defences at subsections 122.5(3) and (4) to cover all dealings with information, and clarify that the defences in section 122.5 do not affect any immunities that exist in other legislation.

It would not be appropriate to replace the defences in section 122.5 and instead include additional elements in the secrecy offences. This would mean that in every case the prosecution would need to disprove all of the matters listed in the defences in section 122.5, including for example that:

- the information was not communicated to the IGIS, the Commonwealth Ombudsman or the Law Enforcement Integrity Commissioner
- the information was not communicated in accordance with the PID Act
- the information was not communicated to a court or tribunal
- the person was not engaged in reporting news, presenting current affairs or expressing editorial content in the news media and did not have a reasonable belief that his or her dealing with the information was in the public interest.

Proving all of these matters beyond reasonable doubt would be burdensome and costly when compared to the approach taken in the Bill of providing defences for the defendant to raise, as appropriate and as relevant to the individual facts and circumstances of the particular case.

Espionage offences – compatibility with the right to freedom of expression

Committee Comment

1.72 The committee therefore seeks the advice of the Attorney-General as to:

- how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill; and
- whether the limitations are reasonable and proportionate to achieve the stated objective (including in relation to the breadth and types of information subject to espionage provisions, the scope of the definition of 'national security' and the adequacy of safeguards).

1.73 In light of the information requested above, if it is intended that the espionage offences proceed, advice is also sought as to whether it would be feasible to amend them to:

- appropriately circumscribe the range of information to which the offences apply;
- appropriately circumscribe the definition of what information concerns 'Australia's national interests' where making such information available to a foreign national would constitute a criminal offence;
- appropriately circumscribe the definition of 'deals' with information for the purposes of the espionage offences under proposed section 91.1-91.3;
- appropriately circumscribe the scope of conduct covered by proposed section 91.3 (by, for example, introducing a harm element);
- expand the scope of safeguards and defences; and
- include a sunset clause in relation to the espionage provisions in Schedule 1.

Response

How the measures meet the objectives of the Bill

The proposed espionage offences in Division 91 necessarily cover the full range of espionage conduct being engaged in by Australia's foreign adversaries. The new offences criminalise a broad range of dealings with information, including possessing or receiving, and protect a broader range of information, including unclassified material. The current methodology of Australia's adversaries means that dealings with unclassified information, if accompanied by the requisite intention to harm Australia, can be as damaging as the passage of classified information. It is important to note that dealings with such information are only criminal if the defendant intends, or is reckless as to whether their conduct will, harm Australia's national security. The person will also have to deal with information in a way that makes it available to a foreign principal.

The definition of national security in section 90.4 of the Bill is exhaustive and has been drafted consistent with definitions in other Commonwealth legislation, to ensure it reflects contemporary matters relevant to a nation's ability to protect itself from threats. This includes the definition of 'security' in section 4 of the *Australian Security Intelligence Organisation* (ASIO Act) and the definition of 'national security' in section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act). The NSI Act definition substantially implemented the recommendations of the Australian Law Reform Commission (ALRC) in *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report 98, June 2004).

The new offences will not just target the person who discloses the information, but also the actions of the foreign principal who receives the information. This is appropriate to ensure that espionage offences apply to the full suite of harmful conduct designed to harm Australia's national security or advantage the national security of a foreign country. The offences of espionage on behalf of a foreign principal in subdivision B of Division 91 are circumscribed in that the prosecution must prove that the person who received the information did so with an intention to, or reckless as to whether their conduct would, prejudice Australia's national security or advantage the national security of a foreign country.

The new offences in Division 91 will also criminalise soliciting or procuring a person to engage in espionage and will introduce a new preparation or planning offence, which will allow law enforcement agencies to intervene at an earlier stage to prevent harmful conduct occurring. Serious harm can flow from activities which seek to solicit or procure a person to engage in espionage, especially if the foreign principal is successful in obtaining classified information that will prejudice Australia's national security. These offences will allow law enforcement to deal with the conduct at the time it occurs, without the need to wait until an espionage offence is committed or sensitive information is actually passed to a foreign principal.

The proposed amendments to the Bill will narrow the scope of the espionage offence at section 91.3, so that the offence will apply where:

- a person intentionally deals with information or an article
- the person deals with the information or article for the primary purpose of making the information or article available to a foreign principal or a person acting on behalf of a foreign principal

- the person's conduct results or will result in the information being made to a foreign principal or a person acting on behalf of a foreign principal and the person is reckless as to this element, and
- the information or article has a security classification and the person is reckless as to this element.

These amendments ensure that conduct that results in classified information being passed to a foreign principal is punishable as an espionage offence where the person's primary purpose in dealing with the information was to make it available to a foreign principal. The inclusion of this additional element ensures that the offence will not inappropriately cover the publication of information by a journalist whose conduct indirectly makes the information available to a foreign principal, but whose primary purpose is to report news or current affairs to the public.

Reasonableness and proportionality

The espionage offences are a reasonable and proportionate way to achieve the Bill's objectives. The Attorney-General's Department submission to the PJCIS Inquiry into the Bill contains further detail on the nature and extent of the contemporary threat posed by espionage and foreign interference activity, including a number of unclassified case studies.

Espionage can cause severe harm to Australia's national security, compromising Australia's military capabilities and alliance relationships, and can pose a grave threat to Australia's economic stability and wellbeing. The offences are structured to capture the full range of harmful espionage conduct, while also being appropriately circumscribed to ensure they do not capture non-threatening activities. As noted above, the prosecution must prove beyond reasonable doubt that the defendant intended to, or was reckless as to whether their conduct would, harm Australia's national security. The information must also have been made available to a foreign principal. The fault element of intention will apply to the physical element of the offence that a person communicates or deals with the information. Consistent with subsection 5.2(1) of the Criminal Code, this means that the person must have meant to engage in the conduct – mere receipt of information would not necessarily satisfy this fault element.

The offences are appropriately limited by defences in subsection 91.4(1) for dealing with information in accordance with a law of the Commonwealth, in accordance with an arrangement or agreement to which the Commonwealth is party, or in the person's capacity as a public official. It is also a defence under subsection 91.4(2) if the person deals with information that has already been communicated or made available to the public with the authority of the Commonwealth.

The offence in section 91.3 will be narrowed as part of my amendments, which will further ensure the measures in the Bill are a proportionate and reasonable way to meet the Bill's objectives. Conduct that results in classified information being passed to a foreign principal will be punishable under section 91.3 where the person's primary purpose in dealing with the information was to make it available to a foreign principal. The inclusion of this additional element ensures that the offence will not inappropriately cover the publication of information by a journalist whose conduct indirectly makes the information available to a foreign principal, but whose primary purpose is to report news or current affairs to the public. Strict liability will also be removed from the security classification element of the espionage offences in section 91.1 and section 91.3.

Committee comment regarding possible amendments

The committee has sought advice about whether it would be feasible to:

- appropriately circumscribe the range of information to which the offences apply
- appropriately circumscribe the definition of what information concerns 'Australia's national interests' where making such information available to a foreign national would constitute a criminal offence
- appropriately circumscribe the definition of 'deals' with information for the purposes of espionage offences under proposed sections 91.1-91.13
- appropriately circumscribe the scope of conduct covered by proposed section 91.3 (by, for example, introducing a harm element)
- expand the scope of safeguards and defences, and
- include a sunset clause in relation to the espionage provisions in Schedule 1.

These issues are addressed below, by reference to the proposed amendments to the Bill where appropriate.

The range of information to which the offences apply

For the reasons described above, it is appropriate for the espionage offences to apply to a broad range of information, including unclassified material. Activities up to communication of information, such as possession, altering, concealing or receiving, can be damaging in themselves as well as part of a course of conduct leading up to disclosure.

The current methodology of Australia's adversaries means that dealing with unclassified information, if accompanied by the requisite intention to, or recklessness as to whether the conduct will, harm Australia, can be as damaging as the passage of classified information. The fault element of intention will apply to the physical element of the offence that a person communicates or deals with the information.

In relation to the offence in section 91.3, the inclusion of an additional 'primary purpose' element in the amended offence (at paragraph 91.3(1)(aa)) means that conduct will only be punishable under that offence where the person's primary purpose in dealing with the information was to make it available to a foreign principal.

Information concerning Australia's national security

The definition of national security in section 90.4 of the Bill is exhaustive and has been drafted consistent with definitions in other Commonwealth legislation, to ensure it reflects contemporary matters relevant to a nation's ability to protect itself from threats. This includes the definition of 'security' in section 4 of the *Australian Security Intelligence Organisation* (ASIO Act) and the definition of 'national security' in section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act). The NSI Act definition substantially implemented the recommendations of the ALRC in *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report 98, June 2004).

The definition of 'deal'

The definition of deal in section 90.1 of the Bill covers the full range of harmful conduct that can constitute espionage and secrecy offences. This is to ensure the offences comprehensively address the continuum of criminal behaviour which may be undertaken in the commission of espionage offences, and allow authorities to intervene at any stage. While the definition of 'deal' is necessarily broad, a person will only be criminally responsible for an espionage offence where every element of the offence is satisfied. For example, a person will only commit an offence under subsection 91.1(1) where he or she deals with security classified information or information concerning Australia's security, and the person intends for the conduct to prejudice Australia's national security or advantage the national security of a foreign country, and this results or will result in the information being made available to a foreign principal.

The fault element of intention will apply to the physical element of the espionage offences that a person communicates or deals with information. Consistent with subsection 5.2(1) of the Criminal Code, this means that the person must have meant to engage in the conduct. The mere receipt of information without intention will not satisfy this element.

The scope of section 91.3

The amendments also narrow the scope of the offence at section 91.3. Under the proposed amendments, section 91.3 will apply where:

- a person intentionally deals with information or an article
- the person deals with the information or article for the primary purpose of making the information or article available to a foreign principal or a person acting on behalf of a foreign principal
- the person's conduct results or will result in the information being made to a foreign principal or a person acting on behalf of a foreign principal and the person is reckless as to this element, and
- the information or article has a security classification and the person is reckless as to this element.

These amendments ensure that conduct that results in security classified information being passed to a foreign principal is punishable as an espionage offence where the person's primary purpose in dealing with the information was to make it available to a foreign principal. Consistent with the definition of 'security classification' in section 90.5 of the amended Bill, this offence will only apply where the information is classified TOP SECRET or SECRET (or an equivalent classification prescribed in the regulations).

The inclusion of this additional element ensures that the offence will not inappropriately cover the publication of information by a journalist whose conduct indirectly makes the information available to a foreign principal, but whose primary purpose is to report news or current affairs to the public.

Sunset clause

It is not appropriate for the espionage offences to include a sunset clause, given that their repeal from the statute book would leave disclosure of harmful information vulnerable to foreign principals by persons intending to, or reckless as to whether their conduct will, prejudice Australia's national

security or advantage the national security of a foreign principal without criminal sanction. It would also risk malicious actors structuring their activities around the sunsetting of the offences in order to avoid criminal liability.

If the committee considers it necessary, it would be preferable to provide for a statutory review of the espionage offences after a fixed period (for example, five years).

Espionage offences – compatibility with the right to be presumed innocent

Committee Comment

1.78 The committee therefore requests the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure to achieve a legitimate objective (including the scope of application to persons who may not be aware of the security classification, the ability of courts to consider whether a security classification is inappropriate, and any safeguards).

Response

Strict liability will be removed from elements in espionage offences relating to information of articles with a security classification in the proposed amendments to the Bill. This means the prosecution will be required to prove, beyond reasonable doubt, that the information or article had a security classification, and that the defendant was reckless as to whether the information or article had a security classification. Consistent with section 5.4 of the Criminal Code, this means the person will need to be aware of a substantial risk that the information or article carried a security classification and, having regard to the circumstances known to the person, it was unjustifiable to take that risk.

Espionage offences – compatibility with the right to an effective remedy

Committee Comment

1.81 The committee therefore seeks the advice of the Attorney-General as to whether the measure is compatible with the right to an effective remedy.

Response

While the espionage offences may engage the right to an effective remedy under article 2(3) of the ICCPR, that right is not limited.

It would not be appropriate for victims of human rights violations to seek redress by committing an espionage offence, which would involve intention or recklessness to prejudice Australia's national security or advantage the national security of a foreign country, or dealing with information classified as TOP SECRET or SECRET for the primary purpose of providing the information to a foreign principal under section 91.3.

Foreign interference offences – compatibility with the right to freedom of expression

Committee Comment

1.94 The committee therefore seeks the advice of the Attorney-General as to:

- how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill; and
- whether the limitations are reasonable and proportionate to achieve the stated objective (including in relation to the breadth of the offences and adequacy of the safeguards)

1.95 In light of the information requested above, if it is intended that the foreign interference offences proceed, advice is also sought as to whether it would be feasible to amend them to:

- appropriately circumscribe the range of conduct to which the offences apply;
- expand the scope of safeguards and defences; and
- include a sunset clause in relation to the foreign interference provisions in schedule 1.

Response

How the measures meet the objectives of the Bill

The foreign interference offences are rationally connected to the objectives of the Bill, being to protect Australia's security and Australian interests. Foreign actors and intelligence services are increasingly engaged in a variety of foreign interference activities relating to Australia. Foreign interference is characterised by clandestine and deceptive activities undertaken by foreign actors seeking to cause significant harm to Australia's national interests, or to advance their own objectives.

The proposed offences in Division 92 are characterised by conduct that influences Australia's political or governmental processes, interferes in Australia's democratic processes, supports the intelligence activities of a foreign principal or prejudices Australia's national security. The offences also require proof that the defendant's conduct was covert or deceptive, involved threats or menaces or targeted a person without disclosing the nature of the defendant's connection to a foreign principal. In combination, this conduct poses threats to Australia's safety and security.

Reasonableness and proportionality

The foreign interference offences are a reasonable way to achieve the Bill's legitimate objectives. The offences are proportionate to the serious threat to Australia's sovereignty, prosperity and national security posed by foreign interference activities. The Attorney-General's Department submission to the PJCIS Inquiry into the Bill contains further detail on the nature and extent of the contemporary threat posed by espionage and foreign interference activity, including a number of unclassified case studies.

It is appropriate to define foreign principal broadly to include public international organisations. This is consistent with the definition in section 70.1 of the Criminal Code. It is appropriate that the foreign interference offences cover such organisations, which may include civil society organisations, as a person could equally seek to interfere in Australia's democratic processes or prejudice Australia's national security on behalf of such actors in some circumstances. The conduct described by the committee at paragraph 1.90 would not necessarily fall within the proposed foreign interference offences. The person must have intentionally failed to disclose their collaboration with a public

international organisation, and been reckless as to influencing the political process. This will require the person to have been aware of a substantial risk that their conduct would influence the political process and, having regard to the circumstances known to him or her, it was unjustified to take the risk.

The committee has expressed concerns in relation to the offences for providing support to foreign intelligence agencies in sections 92.7 and 92.8. However, the word 'support' is narrower than suggested by the committee. As stated in the Explanatory Memorandum at paragraph 1061, the term 'support':

> is intended to cover assistance in the form of providing a benefit or other practical goods and materials, as well as engaging in conduct intended to aid, assist or enhance an organisations activities, operations or objectives.

The offences are modelled on the terrorist organisation offences in the Criminal Code. It is also a requirement of these offences that the prosecution prove beyond reasonable doubt that the person intended to provide support to an organisation and that the person knows, or is reckless as to whether, the organisation is a foreign intelligence agency.

The offences are further circumscribed by defences in section 92.11 for dealing with information in accordance with a law of the Commonwealth, in accordance with an arrangement or agreement to which the Commonwealth is party, or in the person's capacity as a public official.

It would not be appropriate to include additional defences, for example, to excuse foreign interference on the basis that it is 'in the public interest.' Noting the elements of the offence, it is unlikely that conduct that within the scope of the foreign interference offences could be said to also be 'in the public interest'.

Sunset clause

It is not appropriate for the foreign interference offences to include a sunset clause, given that the purpose of the Bill is to fill the current gap in the criminal law, which is contributing to a permissive operating environment for malicious foreign actors engaging in foreign interference activities in Australia. It would also risk malicious actors structuring their activities around the sunsetting of the offences in order to avoid criminal liability.

If the committee considers it necessary, it would be preferable to provide for a statutory review of the espionage offences after a fixed period (for example, five years).

Presumption against bail – compatibility with the right to be released pending trial

Committee Comment

1.107 The committee seeks the advice of the Attorney-General as to:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective (including whether offences to which the presumption applies create particular risks while a person is on bail);
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective including:

- why the current balancing exercise undertaken by bail authorities and courts is insufficient to address the stated objective of the measure;
- whether less rights restrictive alternatives are reasonably available (such as adjusting criteria to be applied in determining whether to grant bail rather than a presumption against bail);
- the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances; and
- advice as to the threshold for rebuttal of the presumption against bail including what is likely to constitute 'exceptional circumstances' to justify bail.

Response

A presumption against bail is appropriate for the offences in Division 80 and 91 of the Criminal Code and the foreign interference offences in subsections 92.2(1) and 92.3(1) where it is alleged that the defendant's conduct involved making a threat to cause serious harm or a demand with menaces. The offences that are subject to a presumption against bail are very serious offences. The presumption against bail will limit the possibility of further harmful offending, the communication of information within the knowledge or possession of the accused, interference with evidence and flight out of the jurisdiction. Communication with others is particularly concerning in the context of the conduct targeted by these offences.

The existing espionage, treason and treachery offences are currently listed in subparagraph 15AA(2)(c) of the *Crimes Act 1914* (Crimes Act) – inclusion of offences in Division 80 and 91 merely updates subparagraph 15AA(2)(c) given that the existing offences are being repealed. For these offences, it is important to note that, consistent with subparagraphs 15AA(2)(c)(i) and (ii), the presumption against bail will only apply if the person's conduct is alleged to have caused the death of a person or carried a substantial risk of causing the death of a person.

For the foreign interference offences in subsections 92.2(1) and 92.3(1), the presumption against bail will only apply where it is alleged that any part of the conduct the defendant engaged in involved making a threat to cause serious harm or a demand with menaces. This limitation recognises the significant consequences for an individual's personal safety and mental health if the conduct involves serious harm (consistent with the definition of 'serious harm' in the Dictionary to the Criminal Code) or making a 'demand with menaces' (as defined in section 138.2 of the Criminal Code).

For offences subject to a presumption against bail the accused will nevertheless be afforded to opportunity to rebut the presumption. Further, the granting or refusing of bail will always be at the discretion of the judge hearing the matter.

Telecommunications and serious offences – compatibility with the right to privacy

Committee Comment

1.120 The committee therefore requests the advice of the Attorney-General as to:

- whether the expanded definition of 'serious offence' in the context of existing provisions of the TIA Act constitutes a proportionate limit on the right to privacy (including why allowing warranted access for the investigation of each criminal offence is necessary; who or what

devices could be subject to warranted access; and what safeguards there are with respect to the use, storage and retention of telecommunications content); and

- whether an assessment of the TIA Act could be undertaken to determine its compatibility with the right to privacy.

Response

Serious offence

The offences are appropriately included as 'serious offences' for the purpose of the powers contained in the *Telecommunications (Interception and Access) Act 1979* (TIA Act). Including the proposed offences within the remit of the TIA scheme will allow agencies listed in the TIA Act, in prescribed circumstances and subject to appropriate authorisation processes, to intercept communications, access stored communications and access telecommunications data.

It is important for such agencies to have appropriate powers to investigate each offence, including under the TIA Act. The covert and hidden nature of the conduct targeted by the offences can make them more difficult to detect and investigate through other means. By their nature, espionage and foreign interference often involve complex networks of people, technological sophistication and avoidance of paper and traceable communications. Approved interception of and access to telecommunications information would complement the range of other investigative options available to agencies in investigating these offences.

The seriousness of each offence, coupled with the ability for malicious actors to use electronic means to further conduct in support of the offences, justifies the inclusion of the proposed offences in the definition of 'serious offence' in the TIA Act. The seriousness of each suite of offences, and the gravity of the consequences of the conduct they criminalise, is outlined below:

- Sabotage offences (Division 82): The sabotage offences criminalise conduct causing damage to a broad range of critical infrastructure, including any infrastructure, facility, premises, network or electronic system that belongs to the Commonwealth or that is located in Australia and the provides the public with utilities and services. The offences also capture damage to any part of the infrastructure of a telecommunications network. They are necessarily included in the definition of 'serious offence' under the TIA Act because of the serious implications for business, governments and the community disruption to public infrastructure could have.
- Other threats to security – advocating mutiny (Division 83): Mutiny has potentially significant consequences for the defence of Australia. The primary responsibility of the Australian Defence Force is to defend Australia and Australia's interests. By seeking to overthrow the defence force of Australia, acts of mutiny clearly threaten Australia's national security and public order.
- Other threats to security – assisting prisoners of war to escape (Division 83): Assisting prisoners of war can undermine Australia's defence and national security, especially as escaped prisoners may provide assistance to a foreign adversary and cause harm to public safety.
- Other threats to security – military-style training (Division 83): The military-style training offence criminalises the provision, receipt or participation in military-style training where the training is provided on behalf of a foreign government. The offence seeks to ensure that

foreign countries are unable to marshal forces within Australia, which could pose extremely serious threats to the defence and security of Australia.

- Other threats to security – interference with political rights and duties (Division 83): Conduct that interferes with political rights and duties, and involves the use of force, violence, intimidation or threats, is a grave threat to Australia's democracy, undermines public confidence in institutions of government and stifles open debate which underpins Australia's democratic society.
- Espionage (Division 91): The espionage offences criminalise dangerous and harmful conduct aimed at prejudicing Australia's national security or advantaging the national security of a foreign country. Acts of espionage have the potential to diminish public confidence in the integrity of political and government institutions, compromise Australia's military capabilities and alliance relationships, and undercut economic and business interests within Australia and overseas.
- Foreign interference (Division 92): These offences criminalise harmful conduct undertaken by foreign principals to damage or destabilise Australia's system of government and political process, to the detriment of Australia's interests or to create an advantage for the foreign country. Foreign interference involves covert, deceptive or threatening actions by foreign actors who intend to influence Australia's democratic or government processes or to harm Australia, and can be severely damaging to Australia's security and national interests.
- Theft of trade secrets involving foreign government principal (Division 92A): The theft of trade secrets offence seeks to combat the increasing threat of data theft, business interruption and economic espionage, by or on behalf of foreign individuals and entities. Interference in Australia's commercial dealings and trade relations by or on behalf of foreign governments can have serious consequences for Australia's national security and economic interests.
- Aggravated offence for giving false or misleading information (Section 137.1A): A person who succeeds in obtaining or maintaining an Australian Government clearance on the basis of false or misleading information may gain access to highly classified or privileged information. If the person seeks to communicate or deal with that information in an unauthorised manner, including by passing it to a foreign principal, this could significantly damage Australia's national security.
- Secrecy of Information (Division 122): Disclosure of inherently harmful information or information that causes harm to Australia's interests can have significant consequences for Australia's national security, in particular if that information is advantageous to a foreign principal's national security and support espionage and foreign interference activities.

Proportionality

Including the offences within the TIA Act scheme is a proportionate means to achieve the Bill's legitimate objectives.

Under Chapter 2 of the TIA Act, interception warrants may be issued in respect of a person's telecommunications service, if they would be likely to assist an investigation of a serious offence in which either that person is involved, or another person is involved with whom the particular person is likely to communicate using the service. If there are reasonable grounds for suspecting that a particular person is using, or is likely to use, more than one telecommunications service, the issuing judge may issue a warrant in respect of the named person, allowing access to communications made

using a service or device. In both cases, the judge must have regard to the nature and extent of interference with the person's privacy, the gravity of the conduct constituting the offence, the extent to which information gathered under the warrant would be likely to assist an investigation, and other available methods of investigation.

Under Chapter 3 of the TIA Act, stored communications warrants may be issued in respect of a person. Such warrants allow an agency, subject to any conditions and restrictions specified in the warrant, to access a stored communication that was made by the person in respect of whom the warrant was issued, or that another person has made and for which the intended recipient is the person in respect of whom the warrant was issued. A judge or AAT member can only issue a warrant if there are reasonable grounds for suspecting that a particular carrier holds the stored communications, and information gathered under warrant would be likely to assist in the agency's investigation of a serious contravention in which the person is involved. A serious contravention is defined in section 5E of the TIA Act to include a serious offence, as well as offences punishable by imprisonment of at least 3 years and offences punishable by at least 180 penalty units. The judge or AAT member must have regard to the nature and extent of interference with the person's privacy, the gravity of the conduct constituting the offence, the extent to which information gathered under the warrant would be likely to assist an investigation, and other available methods of investigation.

The TIA Act contains strict prohibitions on communicating, using and making records of communications. Agencies are also required to destroy stored communications when they are no longer required for the purpose for which they were obtained.The Commonwealth Ombudsman and state oversight bodies inspect and report on agency use of interception powers to ensure law enforcement agencies exercise their authority appropriately. Agencies are required to keep comprehensive records to assist the Ombudsman and state oversight bodies for these purposes.

Additionally, agencies are required to report annually to the Minister on the:

- interceptions carried out by the agency, including
    - the use made by the agency of information obtained by interceptions
    - the communications of information to persons other than officers of the agency
    - the number of arrests made on the basis of accessed information, and
    - the usefulness of information obtained.
- stored communications accessed by agencies, including:
    - how many applications were made and warrants issued
    - the number of arrests made on the basis of the accessed information, and
    - how many court proceedings used the records in evidence.

Both the Ombudsman and Minister must table reports in Parliament each year to enable public scrutiny.

Assessment of the TIA Act

The Government keeps privacy implications and the safeguards within the TIA Act under constant review.

Although the TIA Act is not required to be subject to a human rights compatibility assessment, the Attorney-General's Department has provided extensive advice regarding the operation of the TIA Act to this committee and other Parliamentary bodies. In response to recommendation 18 of the *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* by the PJCIS in 2013, the Government agreed to comprehensively revise the TIA Act in a progressive manner. If legislation is introduced to reform the Act, the Department will undertake a human rights compatibility assessment at that time.

Foreign Influence Transparency Scheme – compatibility with the multiple rights

Committee comment

1.137 The committee therefore seeks the advice of the Attorney-General as to whether the amendments to the Foreign Influence Transparency Scheme Bill 2017 introduced by Schedule 5 pursue a legitimate objective, are rationally connected and proportionate to that objective. In particular:

- whether introducing a requirement for persons to register under the foreign influence transparency scheme when they lobby a 'political campaigner' on behalf of a foreign principal is sufficiently circumscribed, having regard to the definition of 'political campaigner' in the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017; and

- whether expanding the definition of 'political or governmental influence' to include matters raised in item 5 of schedule 5 is rationally connected to the objective of the foreign influence transparency scheme, and whether it is sufficiently circumscribed so as to constitute a proportionate limitation on human rights.

Response

Inclusion of political campaigners

The legitimate objective of the Foreign Influence Transparency Scheme (the Scheme) created by the Foreign Influence Transparency Scheme Bill (FITS Bill) is stated in the FITS Bill's Statement of Compatibility with Human Rights at paragraph 21:

> 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.

Extending the definition of 'general political lobbying' in section 10 of the FITS Bill to include lobbying of political campaigners registered under the *Commonwealth Electoral Act 1918* is rationally connected to the objective of the Scheme and does not unjustifiably impose limitations on human rights. The effect of the amendments is that a person or entity may be liable to register where they lobby political campaigners on behalf of a foreign principal. Whether a person is liable to register will also depend on whether the lobbying is undertaken for the purpose of political or governmental influence and whether any relevant exemptions apply.

As political campaigners occupy a significant position of influence within the Australian political system, it is appropriate that the Scheme provide transparency of the nature and extent of foreign

influence being brought to bear over such persons and entities. If not disclosed, this type of foreign influence exerted through intermediaries has the potential to impact political campaigners' positions on public policy which could, ultimately, undermine Australia's political sovereignty.

The term political campaigner is appropriately defined in order to meet the Scheme's objective while limiting its impact on human rights and cost of compliance. A political campaigner will be defined by reference to amendments to the *Commonwealth Electoral Act 1918* currently before Parliament as part of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Electoral Funding Bill). A political campaigner will mean a person or entity that incurs 'political expenditure' during the current, or in any of the previous three, financial years of $100,000 or more. 'Political expenditure' is defined broadly as expenditure for political purposes, including, as noted by the committee, 'the public expression by any means of views on an issue that is, or is likely to be, before electors in an election.' This ensures that the range of activities undertaken by political campaigners, which may influence Australia's political and governmental processes, is captured. The financial threshold of expenditure by political campaigners imports proportionality into the Scheme and ensures it is targeted to activities most in need of transparency.

The exemptions in Division 4 of Part 2 of the FITS Bill further limit the Scheme's application in relation to political campaigners. Exemptions are provided for:

- activities undertaken to provide humanitarian aid or assistance (section 24)
- legal advice or representation (section 25)
- diplomatic, consular, United Nations and other relevant staff (section 26)
- certain religious activities (section 27)
- news media (section 28)
- commercial negotiations regarding bona fide business or commercial interests (subsection 29(1)), and
- persons employed by, or operating under the name of, the foreign principal (subsection 29(2)).

It is important to note that a requirement to register with the Scheme does not in any way preclude a person or entity from undertaking a registrable arrangement with a foreign principal, or from undertaking registrable activities on behalf of a foreign principal. This encourages and promotes the ability of decision-makers and the public to be aware of any foreign influences being brought to bear in Australia's political or governmental processes.

Definition of political or governmental influence

As noted above, a person who undertakes general political lobbying of political campaigners on behalf of a foreign principal is required to register under the Scheme where they do so for the purpose of 'political or governmental influence' and an exemption does not apply.

In order for the Scheme to meet its legitimate objective, it is necessary for the definition 'political or governmental influence' to cover the full range of processes in relation to registered political campaigners. Political campaigning is an inherently political activity, by its nature designed to influence elections, government and parliamentary decision-making, or the creation and implementation of laws and policies. It is important that the concept of 'political or governmental influence' recognises that the lobbying of political campaigners can occur in a number of ways and throughout the political cycle. A person may seek to influence the internal functioning of the political campaigner, such as its constitution, administration or membership, in order to affect the political

campaigner's external activities, including in relation to their policy position or election strategy. For example, a person acting on behalf of a foreign principal may seek to adjust a political campaigner's funding decisions as an indirect method of influencing policy priorities. The definition of 'political or governmental influence' furthers the legitimate objective of the Scheme to bring public awareness to the range of activities in need of greater transparency.

Right to Privacy

The FITS Bill requires minimal information to be provided by registrants upfront, which helps to safeguard registrants' right to privacy. The information to be collected is limited to that which is essential for the effective administration of the Scheme (see Division 2 of Part 4 of the FITS Bill - Register of scheme information), to provide decision-makers and the public with visibility of the foreign influences in Australia's political and governmental processes, and to allow for appropriate investigations into potential non-compliance with the Scheme. Only a subset of information provided will be made publicly available, further safeguarding registrants' right to privacy (see section 43).

2016-2017-2018

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

OPC drafter to complete	
1. Do any of these amendments need a message? (See H of R Practice, sixth ed, pp. 423-427, and OGC advice.) If yes: • List relevant amendments— • Prepare message advice (see DD 4.9) • Give a copy of the amendments and the message advice to the Legislation area.	No
2. Are these amendments for consideration by the Senate? If yes, go on to question 3.	No
3. Should any of these amendments be moved in the Senate as requests? (See OGC advice) If yes: • List relevant amendments— • Prepare section 53 advice and fax to relevant Ministers, the PLO in the Senate and the PLO in the House of Reps (see DD 4.9); • Give a copy of the request advice to the Legislation area with the copy of the amendments (see question 1).	No

National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

(Government)

(1) Schedule 1, item 16, page 22 (lines 9 and 10), omit subsection 90.5(1), substitute:

(1) ***Security classification*** means:

(a) a classification of secret or top secret; or

(b) any other equivalent classification or marking prescribed by the regulations.

[definition of security classification]

(2) Schedule 1, item 17, page 23 (lines 25 and 26), omit subsection 91.1(3).

[strict liability]

(3) Schedule 1, item 17, page 25 (after line 3), after paragraph 91.3(1)(a), insert:

(aa) the person deals with the information or article for the primary purpose of making the information or article available to a foreign principal or a person acting on behalf of a foreign principal; and

[primary purpose of dealing]

(4) Schedule 1, item 17, page 25 (lines 7 to 9), omit paragraph 91.3(1)(c), substitute:

(c) the information or article has a security classification.

[dealing with security classified information]

(5) Schedule 1, item 17, page 25 (lines 11 to 14), omit subsection 91.3(2), substitute:

(2) For the purposes of paragraphs (1)(aa) and (b), the person must intend the information or article to be made available to a foreign principal or a person acting on behalf of a foreign principal, even if:

(a) the person does not have in mind any particular foreign principal; or

(b) the person has in mind more than one foreign principal.

[primary purpose of dealing]

(6) Schedule 1, item 17, page 25 (line 15), omit subsection 91.3(3).

[strict liability]

(7) Schedule 1, item 17, page 26 (lines 19 and 20), omit subparagraph 91.6(1)(b)(i).

[security classification]

(8) Schedule 1, item 17, page 27 (line 4), omit subsection 91.6(3).

[strict liability]

(9) Schedule 2, item 6, page 50 (lines 1 to 6), omit paragraph (a) of the definition of ***cause harm to Australia's interests*** in subsection 121.1(1), substitute:

(a) interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth; or

[cause harm to Australia's interests]

(10) Schedule 2, item 6, page 50 (lines 22 to 25), omit paragraphs (d) and (e) of the definition of ***cause harm to Australia's interests*** in subsection 121.1(1).

[cause harm to Australia's interests]

(11) Schedule 2, item 6, page 50 (line 26), omit "the public", substitute "the Australian public".

[cause harm to Australia's interests]

(12) Schedule 2, item 6, page 50 (line 27), omit "the public", substitute "the Australian public".

[cause harm to Australia's interests]

(13) Schedule 2, item 6, page 51 (line 4), omit "contract.", substitute "contract;".

[reporting news etc.]

(14) Schedule 2, item 6, page 51 (line 4), at the end of the definition of ***Commonwealth officer*** in subsection 121.1(1), add:

; but does not include an officer or employee of, or a person engaged by, the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation.

[reporting news etc.]

(15) Schedule 2, item 6, page 51 (line 5), omit "the meaning given by subsection 90.1(1)", substitute "the same meaning as in Part 5.2".

[definition of deal]

(16) Schedule 2, item 6, page 51 (after line 5), at the end of the definition of ***deal*** in subsection 121.1(1), add:

Note: For the definition of ***deal*** in that Part, see subsections 90.1(1) and (2).

[definition of deal]

(17) Schedule 2, item 6, page 51 (after line 12), after the definition of ***domestic intelligence agency*** in subsection 121.1(1), insert:

foreign military organisation means:

(a) the armed forces of the government of a foreign country; or

(b) the civilian component of:

(i) the Department of State of a foreign country; or

(ii) a government agency in a foreign country;

that is responsible for the defence of the country.

[reporting news etc.]

(18) Schedule 2, item 6, page 51 (lines 23 to 26), omit paragraph (d) of the definition of ***inherently harmful information*** in subsection 121.1(1).

[inherently harmful information]

(19) Schedule 2, item 6, page 52 (after line 2), after the definition of ***Regulatory Powers Act*** in subsection 121.1(1), insert:

security classification has the meaning given by section 90.5.

[definition of security classification]

(20) Schedule 2, item 6, page 52 (line 4), omit "(within the meaning of section 90.4)".

[definition of security classification]

(21) Schedule 2, item 6, page 53 (line 2), omit the heading to section 122.1, substitute:

122.1 Communication and other dealings with inherently harmful information by current and former Commonwealth officers etc.

[offences by current and former Commonwealth officers etc.]

(22) Schedule 2, item 6, page 53 (line 7), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(23) Schedule 2, item 6, page 53 (line 18), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(24) Schedule 2, item 6, page 54 (line 1), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(25) Schedule 2, item 6, page 54 (line 13), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(26) Schedule 2, item 6, page 54 (lines 18 and 19), omit subsection 122.1(5).

[strict liability]

(27) Schedule 2, item 6, page 54 (line 20), omit the heading to section 122.2, substitute:

122.2 Conduct by current and former Commonwealth officers etc. causing harm to Australia's interests

[offences by current and former Commonwealth officers etc.]

(28) Schedule 2, item 6, page 54 (line 29), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(29) Schedule 2, item 6, page 55 (line 13), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(30) Schedule 2, item 6, page 55 (line 31), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(31) Schedule 2, item 6, page 56 (line 13), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(32) Schedule 2, item 6, page 56 (lines 24 to 26), omit subparagraph 122.3(1)(b)(i).

[security classification]

(33) Schedule 2, item 6, page 57 (line 15), omit subsection 122.3(3).

[strict liability]

(34) Schedule 2, item 6, page 57 (lines 23 and 24), omit the heading to section 122.4, substitute:

122.4 Unauthorised disclosure of information by current and former Commonwealth officers etc.

[offences by current and former Commonwealth officers etc.]

(35) Schedule 2, item 6, page 58 (after line 1), after section 122.4, insert:

122.4A Communicating and dealing with information by non-Commonwealth officers etc.

Communication of information

(1) A person commits an offence if:

(a) the person communicates information; and

(b) the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(c) the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(d) any one or more of the following applies:

(i) the information has a security classification of secret or top secret;

(ii) the communication of the information damages the security or defence of Australia;

(iii) the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth;

(iv) the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

Note: For exceptions to the offences in this section, see section 122.5.

Penalty: Imprisonment for 10 years.

Other dealings with information

(2) A person commits an offence if:

(a) the person deals with information (other than by communicating it); and

(b) the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(c) the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(d) any one or more of the following applies:

(i) the information has a security classification of secret or top secret;

(ii) the dealing with the information damages the security or defence of Australia;

(iii) the dealing with the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against of a law of the Commonwealth;

(iv) the dealing with the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

Penalty: Imprisonment for 3 years.

Proof of identity not required

(3) In proceedings for an offence against this section, the prosecution is not required to prove the identity of the other person referred to in paragraph (1)(c) or (2)(c).

[offences by others]

(36) Schedule 2, item 6, page 60 (lines 1 to 10), omit subsection 122.5(6), substitute:

Information dealt with or held by persons engaged in reporting news etc.

(6) It is a defence to a prosecution for an offence by a person against this Division relating to the dealing with or holding of information that:

(a) the person dealt with or held the information in the person's capacity as a person engaged in reporting news, presenting current affairs or expressing editorial content in news media; and

(b) at that time, the person reasonably believed that dealing with or holding the information was in the public interest (see subsection (7)).

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).

[reporting news etc.]

(37) Schedule 2, item 6, page 60 (lines 11 and 12), omit "paragraph (6)(a), dealing with or holding information is not", substitute "paragraph (6)(b), a person may not reasonably believe that dealing with or holding information is".

[reporting news etc.]

(38) Schedule 2, item 6, page 60 (lines 25 to 27), omit paragraph 122.5(7)(d), substitute:

(d) either:

(i) in relation to an offence against subsection 122.4A(1) or (2) that applies because of subparagraph 122.4A(1)(d)(iv) or (2)(d)(iv)—dealing with or holding information that, at that time, will or is likely to result in the death of, or serious harm to, a person; or

(ii) otherwise—dealing with or holding information that, at that time, will or is likely to harm or prejudice the health or safety of the Australian public or a section of the Australian public;

[reporting news etc.]

(39) Schedule 2, item 6, page 60 (after line 27), at the end of subsection 122.5(7), add:

(e) dealing with or holding information for the purpose of directly or indirectly assisting a foreign intelligence agency or a foreign military organisation.

[reporting news etc.]

PARLIAMENT OF AUSTRALIA

Speaker of the House of Representatives *President of the Senate*

20 February 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Suite R G 30
Parliament House

Dear Mr Goodenough

We refer to your letter of 7 February 2018 requesting our response in relation to the human rights compatibility of the *Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures) Determination 2017* as set out in the Committee's Report 1 of 2018.

Specifically, the Committee seeks advice as to whether arrangements for publishing terminations of employment for breaching the Code of Conduct in the Public Service *Gazette* will be discontinued by the Parliamentary Service and replaced with a new secure database of relevant information that is not accessible to the general public and whether the *Parliamentary Service Determination 2013* will be amended to reflect this approach.

In December 2017 we wrote to you following receipt of advice from the Australian Public Service Commissioner about the Commissioner's decision to discontinue arrangements for publishing terminations of employment for breaching the Code of Conduct and instead establish a secure database of employment terminations not accessible to the public, with corresponding amendments to the Australian Public Service Commissioner's Directions 2016. We advised that we will work with the Commissioner in relation to the proposed database and that once the database is established we will make appropriate amendments to the Determination. In the event the database is not accessible to the Parliamentary Departments, alternative arrangements will be put in place before the Determination is amended.

We confirm for the Committee that we remain committed to working with the Commissioner on these terms and that the Department of Parliamentary Services will follow up with the Australian Public Service Commission on their progress on the proposed database and report back to the Parliamentary Administration Advisory Group at its next meeting in early March 2018.

Yours sincerely

THE HON TONY SMITH MP

SENATOR THE HON SCOTT RYAN

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PARLIAMENT OF AUSTRALIA

Speaker of the House of Representatives | *President of the Senate*

06 DEC 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Suite R G 30
Parliament House

Dear Mr Goodenough

We refer to the Australian Public Service Commissioner's response to your request for advice about the compatibility of the Australian Public Service Commissioner's Directions 2016 with the right to privacy. In particular, the Committee's concerns about the publication of names of employees in the Public Service *Gazette* whose employment is terminated for breaching the Australian Public Service Code of Conduct (Code of Conduct).

We understand that in response to the Committee's concerns, the Commissioner has advised that he will cease the current notification arrangements. In its place, the Commissioner will establish a secure database of employees whose employment is terminated for breaching the Code of Conduct.

We note the Committee has recognised that similar concerns apply to Parliamentary Service employees who breach the Parliamentary Service Code of Conduct.

We will work with the Commissioner in relation to the proposed database. Once the database is established, we will make appropriate amendments to the *Parliamentary Service Determination 2013*. In the event the database is not accessible to the Parliamentary Departments, alternative arrangements will be put in place before the Determination is amended.

Yours sincerely

THE HON TONY SMITH MP

SENATOR THE HON SCOTT RYAN

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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;

---

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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