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.
>
> …
>
> 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:
>
> - 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