

# Chapter 1

## New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 27 and 30 March 2017 (consideration of 2 bills from this period has been deferred);<sup>1</sup>
  - legislative instruments received between 10 March and 6 April 2017 (consideration of 5 legislative instruments from this period has been deferred);<sup>2</sup> and
  - bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

1.3 The committee has concluded its examination of the previously deferred Civil Law and Justice Legislation Amendment Bill 2017 and makes no further comment on the bill.<sup>3</sup>

### Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.<sup>4</sup> Instruments raising human rights concerns are identified in this chapter.

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

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

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, [http://www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/Journals\\_of\\_the\\_Senate](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate).

3 See Parliamentary Joint Committee on Human Rights, *Report 3 of 2017* (28 March 2017) 21.

4 See Parliament of Australia website, *Journals of the Senate*, [http://www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/Journals\\_of\\_the\\_Senate](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate).

1.6 In addition to the bill above, the committee has also concluded its examination of the previously deferred National Disability Insurance Scheme (Plan Management) Amendment Rules 2017 [F2017L00073] and makes no further comment on the instrument.<sup>5</sup>

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5 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 117.

## Response required

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

### Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017

<b>Purpose</b>	Seeks to make a range of amendments to the <i>Australian Federal Police Act 1979</i> , <i>Crimes Act 1914</i> , and the <i>Criminal Code Act 1995</i> including clarifying the functions of the Australian Federal Police to enable cooperation with international organisations, and non-government organisations; clarifying the custody notification obligations of investigating officials when they intend to question an Aboriginal person or Torres Strait Islander; creating separate offence regimes for 'insiders' and 'outsiders' for the disclosure of information relating to controlled operations in the <i>Crimes Act 1914</i>
<b>Portfolio</b>	Justice
<b>Introduced</b>	House of Representatives, 30 March 2017
<b>Rights</b>	Privacy; life; freedom from torture, cruel, inhuman or degrading treatment or punishment (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### Functions of the Australian Federal Police – assistance and sharing information

1.8 Schedule 1 of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the bill) seeks to make amendments to the *Australian Federal Police Act 1979* (AFP Act) to enable the Australian Federal Police (AFP) to provide assistance and cooperation to international organisations and non-government organisations in relation to the provision of police services or police support services.

1.9 Under section 4 of the AFP Act 'police services' is defined as services by way of the prevention of crime and the protection of persons from injury or death, and property from damage, whether arising from criminal acts or otherwise. 'Police support services' means services related to: (a) the provision of police services by an Australian or foreign law enforcement agency; or (b) the provision of services by an Australian or foreign intelligence or security agency; or (c) the provision of services by an Australian or foreign regulatory agency.

### **Compatibility of the measure with the human rights**

1.10 The statement of compatibility states that this measure allows for information sharing with a range of bodies such as Interpol, United Nations organisations and non-government organisations (NGOs) and accordingly:

...may engage the right to protection against arbitrary and unlawful interferences with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), as the amendments to the AFP Act provide for information sharing with international organisations, including international judicial bodies.<sup>1</sup>

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

1.12 The statement of compatibility states that the objective of the measure is to ensure:

the AFP can engage fully with international organisations, including judicial bodies, and NGOs, in relation to the provision of police services and police support services.<sup>2</sup>

1.13 This is likely to be, in broad terms, a legitimate objective for the purposes of international human rights law. However, there are questions about the adequacy of safeguards that are in place with respect to AFP assistance and cooperation with such bodies including the sharing of information.

1.14 First, in respect of the right to privacy, the statement of compatibility notes that the use and disclosure of information will be subject to existing protections under the *Privacy Act 1988* (Privacy Act). However, it is not readily apparent from the statement of compatibility the extent to which the minister considers that the existing safeguards in the Privacy Act will apply with respect to AFP sharing of information with international organisations and NGOs.

1.15 The relevant principle under the Privacy Act pertaining to the use or disclosure of personal information (Australian Privacy Principle 6) contains a broad exception to the general requirement that an agency must not use or disclose 'personal information' for a secondary purpose, where the use or disclosure of information is 'required or authorised by or under an Australian law'.<sup>3</sup> The statement of compatibility does not address whether the measure would constitute an authorisation for the purposes of Australian Privacy Principle 6.2. The legislation does not state that it provides an authorisation for the purpose of any Australian Privacy

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1 Explanatory memorandum (EM) 8.

2 EM 8.

3 Australian Privacy Principle 6.2 (b).

Principle (by contrast to express statements to that effect included in some other legislation).<sup>4</sup>

1.16 There is a further exception for the use or disclosure of information that is reasonably necessary for enforcement activities conducted by or on behalf of an enforcement body. This exception would appear not to apply as the definition of 'enforcement body' under the Privacy Act does not extend beyond Australian agencies or other bodies. However, the statement of compatibility does not address whether the minister considers that information sharing with international organisations and NGOs may fall within this exception.

1.17 Second, the sharing of information overseas in the context of law enforcement raises concerns in respect of the right to life.

1.18 Under international human rights law every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation on state parties to protect people from being killed by others or identified risks. While the International Covenant on Civil and Political Rights (ICCPR) does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another nation state. As the United Nations Human Rights Committee (UNHRC) has made clear, this not only prohibits deporting or extraditing a person to a country where they may face the death penalty, but also prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UNHRC stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.<sup>5</sup>

1.19 The sharing of information internationally under the proposed function in schedule 1 could accordingly engage the right to life. This issue is not addressed in the statement of compatibility.

1.20 Third, a related issue potentially raised by the measure is the possibility that sharing of information, or cooperation in investigation, may result in torture, or cruel, inhuman and degrading treatment or punishment. It is noted that the right to be free from torture and cruel, inhuman and degrading treatment is absolute under

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4 See, for example, *National Health Security Act 2007* section 19; *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* section 70.34; *Tax Agent Services Act 2009* section 70.34; *Product Stewardship Act 2011* section 60.

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

international law and can never be subject to permissible limitations.<sup>6</sup> This issue was not addressed in the statement of compatibility, including any relevant safeguards.

### **Committee comment**

**1.21** The preceding analysis raises questions as to whether the measure is compatible with the right to privacy, the right to life and the prohibition on torture, cruel, inhuman and degrading treatment.

**1.22** In relation to the right to privacy, the committee therefore seeks the advice of the Minister for Justice as to the proportionality of the measure including the availability of effective and adequate safeguards, including the extent to which the provisions of the *Privacy Act 1988* will act as a safeguard against the use and disclosure of personal information for a secondary purpose.

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

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

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

## Defence Legislation Amendment (2017 Measures No. 1) Bill 2017

<b>Purpose</b>	<p>This bill seeks to amend several Acts relating to defence to:</p> <ul style="list-style-type: none"> <li>• allow a positive test result for prohibited substances to be disregarded under certain circumstances;</li> <li>• simplify termination provisions to align with the new Defence Regulation 2016 [F2016L01568];</li> <li>• ensure greater protections for all Reservists in relation to their employment and education;</li> <li>• include the transfer of hydrographic, meteorological and oceanographic functions from the Royal Australian Navy to the Australian Geospatial-Intelligence Organisation; and</li> <li>• align a small number of provisions in the <i>Australian Defence Force Cover Act 2015</i> with other military superannuation schemes and provide clarity in definitions</li> </ul>
<b>Portfolio</b>	Defence
<b>Introduced</b>	House of Representatives, 29 March 2017
<b>Rights</b>	Fair trial; to be presumed innocent; not to be tried and punished twice; not to incriminate oneself (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### Civil penalty provisions

1.25 Schedule 2, Part 2 of the Defence Legislation Amendment (2017 Measures No. 1) Bill 2017 (the bill) seeks to amend the *Defence Reserve Service (Protection) Act 2001* (the Act) so that various existing criminal offences in the Act are also civil penalty provisions. The range of existing criminal offences to which the new civil penalty provisions would apply relate to discrimination in employment and partnerships, and discrimination against commission agents and contractors. Each of these criminal offences carries a penalty of 30 penalty units (currently \$5400). The proposed corresponding civil penalty would be 100 penalty units (currently \$18,000).<sup>1</sup>

1.26 Schedule 2, Part 2 of the bill also seeks to amend the Act to introduce a new offence provision. The offence in proposed section 76B relates to victimisation of a person for reasons that include where the person has made a complaint, given

1 If the Crimes Amendment (Penalty Unit) Bill 2017 passes the parliament a penalty unit will increase to \$210 so that 100 penalty units would be \$21,000.

information or documents, or brought proceedings under the Act. Contravention of proposed section 76B would amount to a criminal offence with 30 penalty units and the proposed civil penalty would be 100 penalty units.

1.27 Schedule 2, Part 3 of the bill also seeks to amend the Act to introduce three new offence provisions. The new offence in proposed section 18A relates to dissolving a partnership, expelling a partner from a partnership, requiring a partner to forfeit their share in a partnership, or subjecting another partner to detriment concerning the partnership. The new offence in proposed section 23A prohibits the harassment of a protected worker,<sup>2</sup> partner or protected co-worker,<sup>3</sup> if it is engaged in because the subject of the harassment may volunteer to render defence service, is rendering defence service, or has previously rendered defence service.

1.28 Contravention of proposed sections 76B, 18A and 23A would amount to a criminal offence with 30 penalty units and the proposed civil penalty would be 100 penalty units.

### ***Compatibility of the measure with criminal process rights***

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

1.30 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law may be a difficult one and often requires a contextual assessment. It is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.<sup>4</sup> 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

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2 Protected worker is defined as being an employee, commission agent or contractor, a person seeking to become an employee, commission agent or contractor, or an officer or employee of a commission agent or contractor. See explanatory memorandum (EM) 32.

3 The definition of protected co-worker incorporates relationships where people are working together, even if they are not strictly employed by the same person. See EM 32.

4 *Guidance Note 2* – see Appendix 4.



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presumed innocent (including the criminal standard of proof) and the right not to be tried and punished twice (the prohibition against double jeopardy) apply.<sup>5</sup>

1.31 It is acknowledged that, as set out in the statement of compatibility, many of the civil penalty provisions are intended to promote the right to safe and healthy working conditions and 'enhance the anti-discrimination protections in the Act, and introduce new anti-victimisation and anti-harassment provisions.'<sup>6</sup>

1.32 As mentioned above, the committee's *Guidance Note 2* sets out detailed guidance in relation to civil penalty provisions and provides that 'where a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of international human rights law'.<sup>7</sup>

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

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

1.35 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. In this regard, the explanatory memorandum explains:

Civil penalty provisions provide a less cumbersome and technical enforcement process than criminal prosecutions. Contraventions of the Act can be insidious and indirect, making it difficult to prove an offence beyond reasonable doubt. For example, establishing that an employee was dismissed or disadvantaged for a prohibited reasons will often be very difficult to prove to the criminal standard, whereas the standard of proof for a civil penalty could be met. Including a civil penalty regime will provide an important deterrent to indirect discrimination against Reserve members. Civil penalties are also more appropriate when dealing with government employers, who are not liable to criminal remedies.<sup>8</sup>

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5 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) of the ICCPR are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as 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)).

6 Statement of compatibility (SOC) 9.

7 *Guidance Note 2* – see Appendix 4.

8 EM 28.

1.36 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 apply to the public in general. The reference to the deterrent effect of the proposed regime is therefore relevant and may indicate that the provisions are 'criminal' for the purposes of international human rights law. On the other hand, there is no indication that the regime is intended to be punitive, and it appears restricted to a particular employment context rather than applying to the public in general.

1.37 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 relative to the penalty that may be imposed for a corresponding criminal offence is relevant.

1.38 The amount of the pecuniary penalties that would be imposed under the proposed civil penalty provisions in the bill is 100 penalty units (currently \$18000). The penalties that would be imposed for the corresponding criminal offences is 30 penalty units (currently \$5400). As such, the civil penalties that would be imposed for the same offences under the Act are substantially higher than the penalties that may be imposed for the corresponding criminal offences (currently \$12600 higher). These higher penalties may indicate that the civil penalties could be considered 'criminal'.

1.39 The above analysis therefore raises questions about whether the civil penalties may be considered 'criminal' for the purposes of international human rights law. As set out above, the consequence of the provisions being 'criminal' would be that the civil penalty provisions in the bill must be shown to be consistent with the criminal process rights set out in articles 14 and 15 of the ICCPR. The statement of compatibility has not provided information to address whether each of the proposed civil penalty provisions may be considered 'criminal', and if so, whether the measures accord with criminal process rights. Accordingly, it is difficult to fully assess the human rights compatibility of the civil penalties without this further information.

### **Committee comment**

**1.40 The committee draws the attention of the Minister for Defence to its *Guidance Note 2* and seeks the advice of the minister as to whether:**

- **the civil penalty provisions introduced by the bill may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and**

- if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measures 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))).

## Fair Work Amendment (Corrupting Benefits) Bill 2017

<b>Purpose</b>	<p>This bill seeks to amend the <i>Fair Work Act 2009</i> to:</p> <ul style="list-style-type: none"> <li>• make it a criminal offence to give a registered organisation, or a person associated with a registered organisation a corrupting benefit;</li> <li>• make it a criminal offence to receive or solicit a corrupting benefit;</li> <li>• make it a criminal offence for a national system employer other than an employee organisation to provide, offer or promise to provide any cash or in kind payment, other than certain legitimate payments to an employee organisation or its prohibited beneficiaries;</li> <li>• make it a criminal offence to solicit, receive, obtain or agree or obtain any such prohibited payment;</li> <li>• require full disclosure by employers and unions of financial benefits they stand to gain under an enterprise agreement before employee vote on the agreement</li> </ul>
<b>Portfolio</b>	Employment
<b>Introduced</b>	House of Representatives, 22 March 2017
<b>Rights</b>	Fair trial; not to be tried and punished twice (double jeopardy) (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### New offences and concurrent operation of state laws

1.41 The Fair Work Amendment (Corrupting Benefits) Bill 2017 (the bill) proposes to introduce a number of offence provisions, including in relation to the giving, receiving or soliciting of 'corrupting benefits' or making certain payments. Proposed section 536C provides that the new part introducing these offences does not exclude or limit the concurrent operation of a state or territory law. It states that even if an act or omission (or similar act or omission) would constitute an offence under this proposed Part and would constitute an offence or be subject to a civil penalty under state or territory law, these offence provisions can operate concurrently.

#### ***Compatibility of the measure with the right to a fair trial***

1.42 A specific guarantee of the right to a fair trial in the determination of a criminal charge includes the right not to be tried and punished twice for an offence for which a person has already been finally convicted or acquitted (sometimes referred to as the principle of double jeopardy) (see, article 14(7) of the International Covenant on Civil and Political Rights (ICCPR)).

1.43 The effect of proposed section 536C of the *Fair Work Act 2009* appears to be that a person could be liable to be tried and punished for an act or omission under a state or territory law as well under this proposed Commonwealth law. Accordingly, the right not to be tried and punished twice for an offence is engaged and may be limited by the measure.

1.44 It is not clear if any state or territory offences (for example, criminalising corrupt benefits) may be the same or substantially the same offences as the new offences proposed (for example, the corrupting benefits offences), and if so, what effect proposed section 536C may have on the right not to be tried or punished again for the same offence.

1.45 It is noted that section 4C of the *Crimes Act 1914* provides that a person is not liable for being tried and punished twice under Commonwealth law if they have been punished for that offence under the law of a state or the law of a territory. While this is an important safeguard, it does not address possible prosecution under a state or territory law after being prosecuted under commonwealth law.

1.46 This matter is not addressed in the statement of compatibility. The committee's usual expectation is that, where a human right is engaged, the statement of compatibility provide a reasoned explanation of why the measure is compatible with that right. This conforms with the committee's *Guidance Note 1*, and the Attorney-General's Department's guidance on the preparation of statements of compatibility.

1.47 The United Nations Human Rights Committee, in General Comment 32, provides the following guidance to nation states with respect to the right not to be tried and punished twice for the same offence under article 14(7) of the ICCPR:

Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted in absentia who requests it, but applies to the second conviction. Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience.

The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial. Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.

This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant. Furthermore, it does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States. This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions.<sup>1</sup>

### **Committee comment**

**1.48 The preceding analysis raises questions about the compatibility of the measure with the right to a fair trial and in particular the right not to be tried and punished twice for an offence for which a person has already been finally convicted or acquitted. The statement of compatibility has not identified or addressed this potential limitation.**

**1.49 The committee therefore seeks the advice of the Minister for Employment as to whether the measure limits the right not to be tried and punished twice for an offence which is the same, or substantially the same, as an offence for which the person has already been finally convicted or acquitted.**

### **Strict liability offences**

1.50 Proposed section 536F makes it an offence for a national system employer to give cash or an in kind payment to an employee organisation or prohibited beneficiary in circumstances where the defendant (or certain related persons) employs a person who is (or is entitled to be) a member of that organisation and whose industrial interests the organisation is entitled to represent. Proposed subsection (2) states that strict liability applies to paragraphs (1)(a), (c) and (d) of the offence, namely:

- that the defendant is a national system employer other than an employee organisation;
- that the other person (to whom cash or in kind payments are made) is an employee organisation or a prohibited beneficiary in relation to an employee organisation; and
- that the defendant, a spouse, or associated entity of the defendant or a person who has a prescribed connection with the defendant, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

1.51 The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

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1 UN Human Rights Committee, *General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN.Doc CCPR/C/GC/32 (2007).

1.52 In addition, proposed section 536G makes it an offence to receive or solicit a cash or in kind payment. Proposed subsection (2) states that strict liability applies to paragraph 1(c) which provides that if the provider of the cash or in kind payment were to provide the benefit to the defendant or another person, the provider or another person would commit an offence against subsection 536F(1). The offence carries a maximum penalty of 2 years imprisonment or 500 penalty units for an individual (2500 for a body corporate).

### ***Compatibility of the measures with the right to be presumed innocent***

1.53 As set out above, article 14(2) of the 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). 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 available to the defendant. Strict liability may apply to whole offences or to elements of offences.

1.54 Strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.<sup>2</sup>

1.55 While the statement of compatibility acknowledges that the offences engage and limit the right to be presumed innocent, it argues that this limitation is permissible. The statement of compatibility argues that that the attachment of strict liability is necessary to pursue the legitimate objective of eliminating illegitimate cash or in kind payments.<sup>3</sup> However, the statement of compatibility does not explain how the imposition of strict liability is effective to achieve, or a proportionate means of achieving, this objective.<sup>4</sup> Further information from the minister in this regard will assist the committee to conclude whether the measure permissibly limits the right to be presumed innocent.

### **Committee comment**

**1.56 Noting that strict liability offences engage and limit the right to be presumed innocent, the preceding analysis raises questions about whether the strict liability offences are a permissible limitation on this right.**

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2 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources).

3 Statement of compatibility (SOC) viii.

4 See, SOC viii.

**1.57** The committee draws to the attention of the Minister for Employment its *Guidance Note 2* which sets out information specific to strict liability offences.

**1.58** The committee requests the further advice of the minister as to:

- how the strict liability offence is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.



## Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

<b>Purpose</b>	Amends the <i>Fair Work Act 2009</i> to: <ul style="list-style-type: none"> <li>• increase maximum civil penalties for certain serious contraventions of the Act;</li> <li>• hold franchisors and holding companies responsible for certain contraventions of the Act by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them;</li> <li>• clarify the prohibition on employers unreasonably requiring their employees to make payments in relation to the performance of work;</li> <li>• provide the Fair Work Ombudsman with evidence-gathering powers similar to those available to corporate regulators such as the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission</li> </ul>
<b>Portfolio</b>	Employment
<b>Introduced</b>	House of Representatives, 1 March 2017
<b>Rights</b>	Fair trial; right to be presumed innocent; not to be tried and punished twice; not to incriminate oneself; privacy (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### Civil penalty provisions

1.59 Schedule 1, Part 1 of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the bill) would increase the maximum civil penalties for failure to comply with certain provisions of the *Fair Work Act 2009* (Fair Work Act) and would introduce a new civil penalty provision for 'serious contraventions' of certain existing provisions of the Fair Work Act.<sup>1</sup> The maximum penalty for a 'serious contravention' would be 600 penalty units (\$108,000).<sup>2</sup>

1.60 Proposed section 557A provides that a contravention is a 'serious contravention' if the conduct was deliberate and part of a systematic pattern of

1 See proposed section 539(2).

2 See proposed section 539(2). If the Crimes Amendment (Penalty Unit) Bill 2017 passes the parliament a penalty unit will increase to \$210 so that 600 penalty units would be \$126,000.

conduct relating to one or more persons. The range of existing civil penalty provisions to which the 'serious contravention' provision would apply are mostly in respect of conduct by employers, however, some of the provisions also apply to individual persons including employees.<sup>3</sup> Depending on the particular civil penalty provision under the Fair Work Act, there may be a range of persons and organisations that may seek to have a civil penalty imposed including an employee, an employer, an employee organisation, an employer organisation or an inspector.<sup>4</sup>

1.61 Schedule 1, Part 2-5 of the bill would also introduce a number of new civil penalty provisions which can apply to individuals including for failing to comply with a notice from the Fair Work Ombudsman (FWO), hindering or obstructing the FWO or providing false information or documents.<sup>5</sup>

### ***Compatibility of the measure with criminal process rights***

1.62 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 increased civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

1.63 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law may be a difficult one and often requires a contextual assessment. It is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out

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3 The range of existing civil penalty provisions to which the 'serious contravention' provision would apply include: for an employer contravening national employment standards (section 44 of the Fair Work Act); for a person contravening a term of a modern award (section 45 of the Fair Work Act); for a person contravening a term of an enterprise agreement (section 50 of the Fair Work Act); for a person contravening a workplace determination (section 280 of the Fair Work Act); for an employer contravening a national minimum wage order (section 293 of the Fair Work Act); for an employer contravening a term of an equal remuneration order (section 305 of the Fair Work Act); for an employer failing to comply with requirements regarding the method and frequency of payments (section 323 of the Fair Work Act); for an employer requiring an employee to unreasonably spend any part of an amount payable in relation to the performance of work (section 325 of the Fair Work Act); for an employer to fail to comply with obligations with respect to annual earnings (section 328 of the Fair Work Act); for an employer failing to comply with requirements to make and keep certain employee records; (section 535 of the Fair Work Act); for an employer failing to comply with requirements with respect to payslips (section 536 of the Fair Work Act).

4 See Fair Work Act section 539.

5 See proposed sections 712(B)(1); 717(1); 718A(1).

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some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.<sup>6</sup>

1.64 Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is necessarily illegitimate or unjustified. Rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the right not to be tried and punished twice (the prohibition against double jeopardy) and the right not to incriminate oneself apply.<sup>7</sup>

1.65 The statement of compatibility usefully refers to the committee's *Guidance Note 2* and undertakes an assessment of whether the civil penalty provisions in the bill should be considered to be 'criminal' for the purposes of international human rights law.<sup>8</sup> The provisions are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law.

1.66 In relation to the nature and purpose of the penalty, a 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 proceedings are instituted by a public authority with statutory powers of enforcement. In this regard, the statement of compatibility argues that the nature of the penalty means that it should not be considered 'criminal':

The penalties only apply to the regulatory regime of the Fair Work Act (e.g. employers), rather than to the public in general. While the FWO has enforcement powers, in many cases enforcement does not rest solely with the FWO. Proceedings in relation to the underpayment of wages or record keeping failures for example may also be brought by an affected employee or union...These factors all suggest that the civil penalties imposed by the Fair Work Act are civil rather than criminal in nature.<sup>9</sup>

1.67 This argument supports the civil character of the relevant provisions under international human rights law, however a countervailing consideration is that the Fair Work Act governs terms of employment very broadly, such that it is unclear whether the regime can categorically be said not to apply to the public in general.

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6 *Guidance Note 2* – see Appendix 4.

7 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as 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)).

8 Explanatory memorandum (EM), Statement of compatibility (SOC) 3.

9 EM, SOC 3-4.

1.68 In relation to the severity of the penalty, a penalty is likely to be considered criminal for the purposes of international human rights law if it carries a term of imprisonment or a substantial pecuniary sanction. A maximum penalty of 600 penalty units (\$108,000)<sup>10</sup> is proposed in relation to a number of the provisions. In relation to the severity of the penalty, the statement of compatibility argues that the provisions should not be considered 'criminal' as:

The severity of the relevant civil penalties should be considered low. They are pecuniary penalties (rather than a more severe punishment like imprisonment) and there is no sanction of imprisonment for non-payment of penalties. Only courts may apply a pecuniary penalty. The pecuniary penalties are set at levels which are considered to be consistent with the nature and severity of the corresponding contraventions.<sup>11</sup>

1.69 Further, according to the explanatory memorandum, the severity of the increased or new penalties proposed in the bill are aimed at addressing concerns about the preventing the exploitation of vulnerable workers.<sup>12</sup> The explanatory memorandum states that the bill:

...addresses concerns that civil penalties under the Fair Work Act are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business. The Bill will increase relevant civil penalties to an appropriate level so the threat of being fined acts as an effective deterrent to potential wrongdoers.<sup>13</sup>

1.70 This provides one argument as to why the penalties may be considered civil, rather than criminal, in nature insofar as they apply to employers found to have contravened the relevant protections in the Fair Work Act. However, there is a significant, broader range of conduct in respect of which the increased or new civil penalties will apply. While most of the provisions apply to employers, some of the provisions may apply to individuals including employees.

1.71 For example, the failure of an individual employee together with other employees to comply with a workplace determination may result in the application of a significant civil penalty of 600 penalty units (\$108,000), a 10-fold increase from the current maximum penalty of 60 penalty units.<sup>14</sup> 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

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10 If the Crimes Amendment (Penalty Unit) Bill 2017 passes the parliament a penalty unit will increase to \$210 so that 600 penalty units would be \$126,000.

11 EM, SOC 5.

12 See EM i; EM, SOC 5.

13 EM i.

14 See item 8; see also section 280 of the Fair Work Act.

international human rights law. It is unclear how the application of this substantial increase in the civil penalty to any contravention of a term of a workplace determination by 'a person' addresses the concerns regarding exploitation of vulnerable workers by employers identified in the explanatory memorandum.

1.72 Accordingly, the statement of compatibility has not provided sufficient information to address whether those increased civil penalties proposed in the bill which apply to individuals including employees may be considered criminal and, if so, whether the measure accords with the right to a fair trial.

### **Committee comment**

**1.73 The committee seeks the advice of the Minister for Employment as to whether the civil penalty provisions in the bill may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*), addressing in particular:**

- **whether the severity of the civil penalties that may be imposed on individuals including employees is such that the penalties may be considered criminal;**
- **whether the increases in the maximum civil penalties could be limited so as to, not apply, or to be reduced, in respect of individuals including employees; 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)), 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)).**

### **Requirement to comply with Fair Work Ombudsman Notice – coercive information-gathering powers**

1.74 The bill proposes to provide the FWO with a range of evidence gathering powers. Proposed section 712A would empower the FWO to require a person, by notice (FWO notice) to give information, produce documents or attend before the FWO to answer questions where the FWO reasonably believes the person has information or documents relevant to an investigation.<sup>15</sup> Failure to comply with the FWO notice may result in a civil penalty of 600 penalty units (\$108,000).<sup>16</sup>

1.75 Under proposed section 713(1) a person is not excused from giving information, producing a record or document or answering a question under the

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15 See proposed section 712B.

16 See proposed section 712B; EM 17.

FWO notice on the basis that to do so might tend to incriminate the person.<sup>17</sup> Proposed section 713(3) provides that information provided by an individual under a FWO notice is not admissible in evidence against the individual in proceedings. This is subject to exceptions in relation to failures to comply with the FWO notice and false and misleading information. It is also subject to exceptions for particular criminal offences under the Criminal Code under section 137.1 or 137.2 relating to false and misleading information and section 149.1 in relation the obstruction of Commonwealth officials.<sup>18</sup>

***Compatibility of the measure with the right to privacy***

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

1.77 The breadth of this power to compel individuals to provide information including private and confidential information and attend for questioning is a serious and extensive limitation on the right to privacy. The power applies even in respect of information which may tend to incriminate the individual and serious penalties may be imposed for non-compliance.<sup>19</sup>

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

1.79 The statement of compatibility acknowledges that the powers would engage the right to privacy and identifies the objective of the powers as:

...helping to achieve positive investigative outcomes where existing powers have been demonstrated to fall short...New powers will enable the most serious cases involving the exploitation of vulnerable workers to be properly [sic] investigated and help ensure the lawful payment of wages.<sup>20</sup>

1.80 In broad terms achieving positive investigative outcomes in relation to serious cases of exploitation and ensuring the lawful payment of wages is likely to be a legitimate objective for the purposes of international human rights law.

1.81 However, the statement of compatibility provides very limited information as to whether the measure will be rationally connected to, or a proportionate way of,

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17 See proposed section 713.

18 See proposed section 713.

19 See proposed section 713(1).

20 EM, SOC 6.

achieving this objective. There is no reasoning or evidence provided as to how it is anticipated that the powers will be effective in achieving their objective.

1.82 Instead the statement of compatibility states that the new powers are similar to those provided in other regimes, but provides no further details as to the effectiveness of these existing powers. It is noted that the fact some other bodies may have coercive evidence gathering powers does not mean those regimes are justifiable limits on the right to privacy, nor does it necessarily mean that such powers will be justifiable limits in this particular context. The committee has previously considered similar coercive evidence gathering powers in the workplace relations context for the building and construction industry, and could not conclude that such powers were compatible with the right to privacy.<sup>21</sup> The committee's consideration of similar measures and its previous concerns about human rights compatibility were not addressed in the statement of compatibility.

1.83 To be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. However, there are serious questions about whether such powers constitute a proportionate limit on the right to privacy in this case.

1.84 First, the breadth of the powers in question seems to be much broader than necessary to address the stated objective of the measure. The powers are not limited to achieving positive investigative outcomes in relation to the exploitation of workers and ensuring the lawful payment of wages. Rather the information that might be compelled applies to a broad range of industrial matters. This could include, for example, matters relating to the regulation of industrial action by employees. Accordingly, the proposed powers appear to be insufficiently circumscribed with reference to the stated objective of the measure.

1.85 Second, the statement of compatibility argues that the 'FWO's graduated approach to compliance and enforcement means that these powers will only be used where other co-operative approaches [sic] have failed or are inappropriate.<sup>22</sup> However, no such restriction on the use of these powers is contained in the bill. This means that the powers could be used in a much broader range of circumstances and accordingly raises further questions about whether the measure as drafted is sufficiently circumscribed.

1.86 Third, it is unclear whether there are sufficient safeguards to ensure that the measure is a proportionate limit on human rights. The statement of compatibility

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21 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66; Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

22 EM, SOC 6.

addresses some safeguards that may be available in relation to the exercise of the measure including providing 14 days' notice to a person and permitting a person's lawyer to be present during questioning. However, the absence of external review of an FWO notice at the time it is made may substantially reduce the adequacy of these safeguards. For example, there is no requirement that an application be made to the Administrative Appeals Tribunal (AAT) for the grant of a notice as was the case with previous legislation which regulated particular industries. It is noted that such a process could assist to ensure a FWO notice is necessary in an individual case.<sup>23</sup> The statement of compatibility does not address the apparent lack of external safeguards that would apply *prior* to issuing an FWO notice, nor what oversight mechanisms will exist in relation to the regime.

1.87 Fourth, as noted above, the committee has previously considered similar coercive evidence gathering powers in the workplace relations context and could not conclude that such powers were compatible with the right to privacy.<sup>24</sup> Australia has also been criticised for similar coercive information gathering powers by international treaty monitoring bodies on the basis of the breadth of the powers conferred and the absence of adequate safeguards on a number of occasions.<sup>25</sup>

1.88 Fifth, it is unclear whether such extensive coercive powers, which go beyond those that are usually available to police in the context of criminal investigations, are proportionate to the investigation of industrial matters. It is noted in this respect that section 713(1) also abrogates the privilege against self-incrimination. The question arises as to whether the measure is the least rights restrictive way of achieving the stated objective of the measure as required to be a permissible limit on the right to privacy.

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23 See *Fair Work (Building Industry) Act 2012* section 45 (now repealed).

24 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66; Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

25 International Labour Organization, Committee on Freedom of Association, Case No 2326 (Australia), June 2006; See Committee on Freedom of Association, Case No 2326 (Australia), Report in which the committee requests to be kept informed of development - Report No 338, November 2005, paras 454-456; Case No 2326 (Australia), Effect given to the recommendations of the committee and the Governing Body - Report No 353, March 2009, paras 21-24; Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries, International Labour Conference, 102nd Session, 2013, p 537 (in the context of the Labour Inspection Convention, 1947 (No 81).



## Committee comment

**1.89** The preceding analysis raises questions about the compatibility of proposed coercive powers to compel individuals to provide information and attend for questioning with the right to privacy.

**1.90** The committee therefore seeks the advice of the Minister for Employment as to:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including with regard to the matters set out at [1.82] to [1.88].

### ***Compatibility of the measure with the right to not to incriminate oneself***

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

1.92 Proposed section 713(1) engages and limits this right by providing that a person is not excused from giving information, producing a record or document or answering a question under a FWO notice on the basis that to do so might tend to incriminate that person.

1.93 While the right not to incriminate oneself may be permissibly limited provided the limitation is appropriately justified, this right was not assessed in the statement of compatibility so no justification was provided. The committee's usual expectation where a measure limits a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective. This conforms with the committee's *Guidance Note 1*,<sup>26</sup> and the Attorney-General's Department's guidance on the preparation of statements of compatibility.<sup>27</sup>

1.94 While the statement of compatibility does not provide an assessment of the measure against the right not to incriminate oneself, the explanatory memorandum provides some relevant information:

Abrogating the privilege against self-incrimination is necessary to ensure the FWO has all the available, relevant information to properly carry out its statutory functions. It is particularly important to address non-

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26 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014) – Appendix 4.

27 See Attorney-General's Department, *Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues* at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Documents/Template2.pdf>.

compliance by those determined to disregard workplace laws... those who may be best placed to give information about possible contraventions of workplace laws may have had some level of involvement in those contraventions or may have contravened another law. If the privilege is not abrogated, there may be no reason for such individuals to provide information to the FWO.<sup>28</sup>

1.95 It can readily be accepted that the removal of the privilege against self-incrimination means that more information might be obtained by the FWO to carry out its functions. However, without further information, this explanation does not sufficiently identify a legitimate objective, that is, one which addresses a pressing and substantial concern, for the purposes of international human rights law.<sup>29</sup>

1.96 Assuming that the measure pursues the stated objective in relation to the right to privacy, outlined above, of achieving positive investigative outcomes in relation to serious cases of exploitation and ensuring the lawful payment of wages, there remain questions as to whether the measure is rationally connected to and a proportionate means of achieving that objective.

1.97 The availability of use and derivative use immunities can be one important factor in determining whether the limit on the right not to incriminate oneself is proportionate. It is noted that partial use immunity would be provided for criminal offences, meaning no information or documents obtained under a FWO notice would be admissible in evidence in proceedings subject to exceptions.<sup>30</sup> However, no derivative use immunity is provided (which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person). The lack of a derivative use immunity raises questions about whether the measure is the least rights restrictive way of achieving its objective.

1.98 While not addressed in the statement of compatibility, the explanatory memorandum provides some information as to why a derivative use immunity has not been provided:

Provision of a derivative use immunity means that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings, even if the additional evidence would have been uncovered by the regulator through independent investigation processes. A related issue is that it can be very difficult and time-consuming in a complex investigation to prove whether evidence was obtained as a consequence of the protected evidence or obtained independently.<sup>31</sup>

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28 EM 19.

29 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility* (December 2014) – Appendix 4.

30 See proposed section 713(3).

31 EM 21.

1.99 It is noted, however, that administrative difficulties, in and of themselves, are unlikely to be a sufficient reason for not providing a derivative use immunity, if this is otherwise a less rights restrictive way of achieving the objective of the measure.

### **Committee comment**

**1.100** The preceding analysis raises questions about the compatibility of the coercive information gathering powers in the bill with the right not to incriminate oneself.

**1.101** The statement of compatibility has not identified or addressed the limitation on the right not to incriminate oneself. The committee therefore seeks the advice of the Minister for Employment as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and
- whether a derivative use immunity could be included in proposed section 713(3) to ensure information or evidence indirectly obtained from a person compelled to answer questions or provide information or documents under a FWO notice cannot be used in evidence against that person.

## Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017

<b>Purpose</b>	Seeks to amend various Acts administered by the Prime Minister to update outdated provisions; repeal two Acts; align annual reporting requirements of the Auditor-General with his or her responsibility to the Parliament; and provide new powers to royal commissions to require a person to provide information or a statement in writing; and increases the penalty from six months' to two years' imprisonment for failure of a witness to attend a royal commission
<b>Portfolio</b>	Indigenous Affairs
<b>Introduced</b>	House of Representatives, 30 March 2017
<b>Rights</b>	Privacy; reputation; fair trial; not to incriminate oneself (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### Background

1.102 The Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017 (the bill) seeks to amend several provisions of the *Royal Commissions Act 1902* (RC Act). The committee has previously raised concerns in relation to the powers of royal commissions as they affect a range of human rights including the right to a fair trial, the right not to incriminate oneself, the right to privacy and reputation, right to freedom of expression, right to liberty and the right to freedom of assembly.<sup>1</sup>

### Coercive powers of Royal Commissions—increased penalty for failing to attend a Royal Commission as a witness

1.103 Section 3 of the RC Act provides that a person served with a summons to appear as a witness before a royal commission shall not fail to attend unless excused or released. The bill seeks to increase the maximum penalty for a failure to attend from six months' imprisonment or a \$1000 fine to two years' imprisonment.

1 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; and *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also, *Third report of 2013* (13 March 2013); and *Seventh report of 2013* (5 June 2013) 91.

1.104 Section 6A(2) of the RC Act provides that a person appearing as a witness is not excused from answering a question on the ground that the answer might tend to incriminate that person.

***Compatibility of the measure with the right not to incriminate oneself***

1.105 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 the International Covenant on Civil and Political Rights (ICCPR) include the right not to incriminate oneself (article 14(3)(g)).

1.106 The RC Act is designed to enable the establishment of royal commissions with significant information gathering powers but not law enforcement powers. Royal commissions have historically been established to inquire into often complex and systemic issues that have thwarted traditional law enforcement efforts. Accordingly, the investigative functions of a royal commission sit, in part, outside the protections of the right to a fair trial as a royal commission is not determining a criminal charge but undertaking a broader examination of an issue.

1.107 However, the right to a fair trial, and more particularly the right not to incriminate oneself, is directly relevant where a person is required to give information to a royal commission which may incriminate themselves and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges. By increasing the penalty for a witness who fails to attend and give evidence to a royal commission in circumstances where the witness will not be afforded the privilege against self-incrimination, the measure engages and limits the right not to incriminate oneself. Current section 6P of the RC Act permits a royal commission to disclose evidence relating to a contravention of a law to certain persons and bodies including the police and the Director of Public Prosecutions (DPP) in these circumstances.

1.108 While the right not to incriminate oneself may be subject to permissible limitations in a range of circumstances, the statement of compatibility does not acknowledge that this right is engaged and limited, so does not provide an assessment as to whether the limitation is justifiable under international human rights law.

1.109 The statement of compatibility briefly discusses the abrogation of the right not to incriminate oneself (although without acknowledging the limitation placed upon that right), and the availability of a 'use' immunity such that where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person.<sup>2</sup>

1.110 The availability of immunities is relevant to whether a measure is a proportionate limitation on the right not to incriminate oneself. However, it is noted that no 'derivative use' immunity is provided in this case and this may be relevant to

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2 Explanatory memorandum (EM) 5. See section 6DD.

the question of whether the limitation is proportionate.<sup>3</sup> This issue was not addressed in the statement of compatibility.

1.111 Furthermore, the statement of compatibility does not acknowledge the committee's previous concerns, stated on a number of occasions, with respect to related powers and the effect that strengthening these powers may have.<sup>4</sup>

### **Committee comment**

**1.112 The statement of compatibility does not acknowledge that the measure engages and limits the right not to incriminate oneself and therefore does not provide an assessment of whether that limitation is justifiable. The committee therefore seeks the advice of the Minister for Indigenous Affairs as to:**

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether a derivative use immunity would be workable.**

### ***Compatibility of the measure with the right to privacy***

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

1.114 By increasing the penalty for failure to appear as a witness and answer questions, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure engages and limits the right to privacy.

1.115 While the right to privacy may be subject to permissible limitations in a range of circumstances, this particular limitation on the right to privacy was not addressed in the statement of compatibility.

1.116 The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and

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3 A 'derivative use' immunity provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.

4 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also *Third Report of 2013* (13 March 2013) 42; and *Seventh Report of 2013* (5 June 2013) 91.

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evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

### **Committee comment**

**1.117 The statement of compatibility has not identified or addressed the limitation on the right to privacy imposed by the measure. The committee therefore seeks the advice of the Minister for Indigenous Affairs as to:**

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

### **Coercive powers of Royal Commissions—Power to require person to give information or statement in writing**

1.118 The bill seeks to amend section 2(3B) of the RC Act to give a royal commission the power to issue a notice requiring a person to give information or a statement in writing.

1.119 Section 6A(1) of the RC Act provides that a person is not excused from producing a document or other thing on the basis that it might incriminate that person.

1.120 Section 6P of the RC Act provides that a royal commission is empowered to disclose evidence relating to a contravention of the law to certain persons and bodies including the police and the DPP.

### ***Compatibility of the measure with the right to privacy***

1.121 As set out above, the right to privacy includes respect for informational privacy, including the right to respect for private and confidential information and the right to control the dissemination of information about one's private life.

1.122 As the measure would provide powers for a royal commission to require, on a compulsory basis, a person to give a written statement or written information (including private and confidential information), the measure engages and limits the right to privacy. It does so in circumstances where the person providing the document is not afforded the privilege against self-incrimination.<sup>5</sup>

1.123 Information provided under such powers may be disclosed to the police or DPP under section 6P of the RC Act. By expanding the range of information that may be compulsorily acquired and then subject to disclosure, the measure further engages and limits the right to privacy.

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5 RC Act section 6A(1).

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

1.125 The statement of compatibility acknowledges that the measure engages and limits the right to privacy but argues that the limitation is permissible on the basis that:

The collection and use of that personal information is a proportionate limitation of the right to privacy in pursuit of a legitimate objective to ensure a Royal Commission can fully inquire into, and report on, matters of public importance.<sup>6</sup>

1.126 In broad terms, ensuring that a royal commission can fully inquire into matters of public importance is likely to be a legitimate objective for the purposes of international human rights law. As noted above, royal commissions have historically been established to inquire into often complex and systemic issues that have thwarted traditional law enforcement efforts.

1.127 The compulsory provision of information is also likely to be rationally connected to this objective as the collection of further information may assist the royal commission's inquiry function. However, the statement of compatibility has not demonstrated that the measure imposes a proportionate limitation on the right to privacy in pursuit of that legitimate objective. In particular, the statement of compatibility has provided no information about why the measure is necessary to achieve the legitimate objective nor addressed whether there are adequate safeguards in place with respect to the exercise of this power.

1.128 Additionally, as noted above, the statement of compatibility does not acknowledge the committee's previous concerns with respect to related measures that expand existing powers.<sup>7</sup>

### **Committee comment**

**1.129 The committee therefore seeks the advice of the Minister for Indigenous Affairs as to whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including the availability of less rights restrictive measures and the existence of relevant safeguards).**

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6 EM 5.

7 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also *Third Report of 2013* (13 March 2013) 42; and *Seventh Report of 2013* (5 June 2013) 91.



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**Compatibility of the measure with the right not to incriminate oneself**

1.130 As set out above, article 14 of the ICPPR protects the right not to incriminate oneself. The measure engages and limits this right as the requirement to give information or a statement in writing applies regardless of whether such information might incriminate the person.

1.131 It is noted in this respect that such information may be disclosed to the police or DPP under existing powers.<sup>8</sup> By expanding the range of information that may be compulsorily acquired and then subject to disclosure, in circumstances where the person was not afforded the privilege against self-incrimination, the measure further engages and limits the right not to incriminate oneself.

1.132 The statement of compatibility does not acknowledge that this right is engaged and limited so does not provide an assessment as to whether the limitation is justifiable under international human rights law.

1.133 As set out above, the legitimate objective of the measure appears to be 'to ensure a Royal Commission can fully inquire into, and report on, matters of public importance'.<sup>9</sup> The measure also appears to be rationally connected to this legitimate objective.

1.134 However, the statement of compatibility has not demonstrated that the measure imposes a proportionate limitation on the right not to incriminate oneself in pursuit of that legitimate objective. As set out above at [1.110], the availability of immunities is relevant to whether a measure is a proportionate limitation on the right not to incriminate oneself. However, no 'derivative use' immunity is provided in the RC Act and this may be relevant to the question of whether the limitation is proportionate.

**Committee comment**

**1.135 The statement of compatibility does not acknowledge that the measure engages and limits the right not to incriminate oneself and therefore does not provide an assessment of whether that limitation is justifiable. The committee therefore seeks the advice of the Minister for Indigenous Affairs as to:**

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether a derivative use immunity would be workable.**

**Compatibility of the coercive powers of royal commissions with multiple rights**

1.136 In addition to the right not to incriminate oneself and the right to privacy, the committee has previously raised concerns in relation to the powers of royal

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8 RC Act section 6P.

9 EM 5.

commissions including against the right to reputation, the right to freedom of expression, the right to liberty and the right to freedom of assembly on a number of occasions.<sup>10</sup> The statement of compatibility does not acknowledge or address the committee's previous concerns with respect to related powers.

1.137 The Australian Law Reform Commission also identified a number of human rights concerns in relation to royal commissions in its 2009 report, *Making Inquiries: A statutory framework*.<sup>11</sup>

1.138 The existing RC Act was legislated prior to the establishment of the committee, and for that reason, 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*. A full human rights assessment of proposed measures which extend or amend existing legislation requires an assessment of how such measures interact with the existing legislation. The committee is therefore faced with the difficult task of assessing the human rights compatibility of amendments without the benefit of a foundational human rights assessment of the RC Act from the Minister for Indigenous Affairs.

### **Committee comment**

**1.139 The committee seeks the advice of the Minister for Indigenous Affairs as to whether a foundational assessment of the *Royal Commissions Act 1902* could be undertaken to determine its compatibility with human rights (including in respect of matters previously raised by the committee).**

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10 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 14; *Thirty-eighth report of the 44th Parliament* (3 May 2016) 21. See also, *Third Report of 2013* (13 March 2013) 42; and *Seventh Report of 2013* (5 June 2013) 91.

11 See Australian Law Reform Commission, *Making Inquiries: A statutory framework* (2009).

## Social Services Legislation Amendment Bill 2017

<b>Purpose</b>	Contains a number of reintroduced measures including extension of the ordinary waiting period to persons claiming youth allowance (other) or parenting payments
<b>Portfolio</b>	Social Services
<b>Introduced</b>	Senate, 22 March 2017
<b>Right</b>	Social security (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### Background

1.140 The Social Services Legislation Amendment Bill 2017 (the bill) contains a number of reintroduced measures which have previously been examined by the committee. The following schedules to the bill have previously been found to be compatible with human rights:

- Schedule 1—Indexation;<sup>1</sup>
- Schedule 2—Automation of income stream review processes;<sup>2</sup> and
- Schedule 4—Family tax benefit.<sup>3</sup>

1.141 In relation to Schedule 3—Ordinary Waiting Periods, the committee previously considered this measure in a number of reintroduced bills.<sup>4</sup> In its *Twelfth report of the 44th Parliament* the committee concluded that the measure, as well as

1 Previously contained in the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 51.

2 Previously contained in the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 52.

3 Previously contained in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014. See Parliamentary Joint Committee on Human Rights, *Fourteenth report of the 44th Parliament* (28 October 2014) 94-95.

4 Previously contained in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014. See Parliamentary Joint Committee on Human Rights, *Ninth report of the 44th Parliament* (15 July 2014) 78-80; and *Twelfth report of the 44th Parliament* (24 September 2014) 61-62. The measure has since been included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014, Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015, Social Services Legislation Amendment (Youth Employment) Bill 2015, Social Services Legislation Amendment (Youth Employment) Bill 2016 and Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017.

a number of other measures contained in the bill, was compatible with the right to social security and the right to an adequate standard of living on the basis of budget constraints articulated at the time constituting a legitimate objective for the purposes of international human rights law.

1.142 The bill passed both Houses of Parliament on 29 March 2017 and received Royal Assent on 12 April 2017.

### **Schedule 3—Ordinary Waiting Periods**

1.143 Schedule 3 of the bill extends the ordinary waiting period to youth allowance (other) and the parenting payment. The ordinary waiting period is a one-week period that new claimants must serve before they are able to start accessing payments, and currently applies to recipients of newstart allowance and sickness allowance. A number of exemptions and waivers are available in certain circumstances, including for persons experiencing severe financial hardship.

#### ***Compatibility of the measure with the right to social security and right to an adequate standard of living***

1.144 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.

1.145 The committee has previously considered that the measure engages and limits the right to social security and an adequate standard of living. This is because, in imposing a waiting period for further recipients of social security payments, the measure is a retrogressive measure or backward step for the purposes of international human rights law.<sup>5</sup>

1.146 As noted above at [1.141], the committee concluded at that time that the measures were likely to be compatible in the context of budgetary constraints constituting a legitimate objective for the purposes of international human rights law.<sup>6</sup>

1.147 As set out in the committee's *Guidance Note 1*, in order to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. The statement of compatibility does not explain how the

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5 For more information on retrogressive measures see *Guidance Note 1* at Appendix 4.

6 See Parliamentary Joint Committee on Human Rights, *Twelfth report of the 44th Parliament* (24 September 2014) 61-62.

measure still pursues the same pressing or substantial concern of budgetary restraints as it did during the committee's consideration of the measure more than two years ago.

1.148 The statement of compatibility sets out an objective of the measures as 'ensuring a sustainable and well-targeted payment system'.<sup>7</sup> While this may be considered legitimate for the purposes of international human rights law, a legitimate objective must be supported by a reasoned and evidence-based explanation. No information is provided in the statement of compatibility as to why the reforms are necessary from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare scheme. Further, while some information is provided about emergency payments where a person is unable to meet basic necessities during the waiting period, it is noted that the qualifying criteria for these emergency payments is also being tightened by the bill.<sup>8</sup> In this context, it is unclear whether there will be persons who are left without means of meeting basic necessities during the waiting period. The availability of emergency payments will affect the proportionality of the limitation.

### **Committee comment**

**1.149 The preceding analysis indicates that the right to social security and right to an adequate standard of living are engaged and limited by the measure. The above analysis raises questions as to whether the measure is a permissible limitation on those rights.**

**1.150 The committee therefore seeks further advice from the Minister for Social Services as to:**

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

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

1.151 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. As women are the primary recipients of parenting payments, and social security payments more broadly, reductions to access to such payments under the bill would

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7 Explanatory memorandum (EM), statement of compatibility (SOC) 26.

8 EM, SOC 23.

disproportionately impact upon this group and the right to equality and non-discrimination is therefore also engaged.

1.152 The statement of compatibility acknowledges the engagement of this right, and sets out that:

As more than 90 per cent of parenting payment recipients are women, the changes may more significantly impact on women in that regard. However, the changes are reasonable and proportionate to achieving the legitimate objective of providing consistency across similar working age payments by ensuring that all new claimants meet their own living costs for a short period before receiving Government assistance, where they are able.<sup>9</sup>

1.153 As noted above at [1.147], for the purposes of international human rights law a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. It has not been set out in the statement of compatibility why 'providing consistency across payments' is a legitimate objective, or why it is necessary to extend the ordinary waiting period to recipients of further social security payments at this time.

### **Committee comment**

**1.154 The right to equality and non-discrimination (indirect discrimination) is engaged and limited by the measure by reason of its particular impact on women. The above analysis raises questions as to whether the measure is a permissible limitation on those rights.**

**1.155 The committee therefore seeks further advice from the Minister for Social Services as to:**

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

## Treasury Laws Amendment (2017 Measures No. 1) Bill 2017

<b>Purpose</b>	Amends the <i>Income Tax Assessment Act 1997</i> to ensure that investors who invest through an interposed trust are able to access the certain capital gain concessions; and the <i>Australian Securities and Investments Commission Act 2001</i> to specify that the sharing of confidential information by the Australian Securities and Investments Commission with the Commissioner of Taxation is authorised use and disclosure of that information
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives, 16 February 2017
<b>Right</b>	Privacy (see <b>Appendix 2</b> )
<b>Status</b>	Seeking additional information

### Background

1.156 The bill passed both Houses of Parliament on 27 March 2017.

### Sharing of confidential information with the Commissioner of Taxation

1.157 Schedule 2 of the Treasury Laws Amendment (2017 Measures No. 1) Bill 2017 (the bill) amended subsection 127(2A) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to allow the Australian Securities and Investments Commission (ASIC) to share confidential information with the Commissioner for Taxation (commissioner) without first needing to be satisfied that doing so would enable or assist the commissioner to perform or exercise their functions or powers.

### **Compatibility of the measure with the right to privacy**

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

1.159 Schedule 2 of the bill engages and limits the right to privacy by allowing ASIC to share confidential information with the commissioner. The right to privacy may be subject to permissible limitations where it pursues a legitimate objective, is rationally connected to, and proportionate to achieving, that objective.

1.160 The statement of compatibility recognises that the right to privacy is engaged, but explains the measure as follows:

The amendment to the process for ASIC to share information with the Commissioner of Taxation mirrors the existing power for the Commissioner of Taxation to share confidential information with ASIC under Division 355 of Schedule 1 to the *Taxation Administration Act 1953*.

Mirroring the information sharing process between ASIC and the Commissioner of Taxation will enable effective and timely collaboration during investigations into illegal and high risk activities. The amendment is a reasonable change as it will allow ASIC and the Commissioner of Taxation to more effectively work together to ensure compliance with corporate and taxation laws.

Furthermore, the amendment is appropriate as it will ensure that the process for ASIC to share confidential information with the Commissioner of Taxation is consistent with the process for ASIC to share confidential information with the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the relevant Minister.

...A simpler and more efficient information sharing arrangement between ASIC and the Commissioner of Taxation is justified as it will benefit the community by enabling better monitoring of illegal and other high-risk activities by the Commissioner of Taxation and strengthen corporate compliance with taxation law.<sup>1</sup>

1.161 Under the existing law, the ASIC may share confidential information with the commissioner if the ASIC is satisfied that the information will enable or assist the commissioner to perform or exercise their functions or powers. This approach would appear to have allowed for the sharing of confidential information in fairly broad terms.

1.162 The objective of the measure appears to be to enable the commissioner to 'conduct timely compliance activity and better protect the integrity of Australia's tax system'.<sup>2</sup> While this objective may be legitimate for the purposes of international human rights law, the statement of compatibility does not provide information to demonstrate how the existing law was not sufficiently simple or effective. It is therefore unclear whether the limitation on the right to privacy is proportionate to the stated objective; in particular, it is unclear whether the measure is the least rights restrictive approach to achieving the objective of the measure. In order to be a permissible limit on the right to privacy, regimes that permit the disclosure of personal and confidential information need to be sufficiently circumscribed. Disclosure of information should be restricted to that private and confidential information which is strictly necessary to achieve the stated objective of the measure.

1.163 The removal of the requirement for there to be an assessment by ASIC that sharing confidential information would enable or assist the commissioner to fulfil their functions raises the concern that the measure may not be sufficiently circumscribed. The statement of compatibility does not explain why such an assessment is not required, or is inappropriate.

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1 Explanatory memorandum (EM), statement of compatibility (SOC) 18-19.

2 EM, SOC 18.



1.164 Nor does the statement of compatibility identify whether sufficient safeguards are in place to ensure that the unnecessary sharing of personal or confidential information will not have an adverse effect on individuals whose information has been shared. The assessment previously required by ASIC may have assisted to ensure that only necessary sharing of information took place. The statement of compatibility identifies safeguards which remain under the proposed legislation, including restrictions on the scope of information that can be requested by the commissioner, and Division 355 of Schedule 1 to the *Taxation Administration Act 1953*, which makes the unauthorised disclosure of confidential information an offence. However, these safeguards alone do not appear to be sufficient to demonstrate that the limitation on the right to privacy is proportionate in light of the concerns raised above.

### **Committee comment**

**1.165 The right to privacy is engaged and limited by the ability for the Australian Securities and Investments Commission to share confidential information with the Commissioner for Taxation without first needing to be satisfied that doing so would enable or assist the Commissioner for Taxation to perform or exercise their functions or powers. The preceding analysis raises questions as to whether the measure is a proportionate limit on the right to privacy including whether there are the less rights restrictive ways to achieve the stated objective of the measure.**

**1.166 Accordingly, the committee requests the advice of the Treasurer as to whether:**

- **there are less rights restrictive ways to achieve the objective of the measure; and**
- **there are safeguards in place to demonstrate that the limitation on the right to privacy is proportionate to the objective sought to be achieved.**

## Advice only

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

### Banking and Financial Services Commission of Inquiry Bill 2017

<b>Purpose</b>	Seeks to establish a parliamentary inquiry into the banking and financial services sector that reports to Parliament on particular matters
<b>Sponsors</b>	Senators Whish-Wilson, Hanson, Hinch, Lambie, Roberts and Xenophon
<b>Introduced</b>	Senate, 23 March 2017
<b>Rights</b>	Fair hearing; not to incriminate oneself; privacy; freedom of expression; freedom of assembly (see <b>Appendix 2</b> )
<b>Status</b>	Advice only

#### **Requirement to provide evidence in circumstances where the privilege against self-incrimination is not provided**

1.168 The Banking and Financial Services Commission of Inquiry Bill 2017 (the bill) seeks to establish a Parliamentary Commission of Inquiry (Commission) into the banking and financial services sector. Part 3 of the bill would confer wide powers on the Commission to inquire into and report to the Parliament in relation to the banking and financial services industry. These powers include summoning witnesses and requiring witnesses to answer questions or provide documents or things, powers of arrest and powers to issue search warrants.

1.169 Proposed section 17 creates an offence of failure by witnesses to attend a hearing or produce documents, which is subject to a penalty of imprisonment for six months. Section 33 permits the Commission to disclose information or evidence relating to a contravention of a law to certain persons and bodies including the police.

#### ***Compatibility of the measure with the right to not to incriminate oneself***

1.170 Specific guarantees of the right to a fair trial in the determination of a criminal charge, guaranteed by article 14 the International Covenant on Civil and Political Rights (ICCPR), include the right not to incriminate oneself (article 14(3)(g)).

1.171 Requiring a witness to answer questions even if it may incriminate them engages and limits the right not to incriminate oneself. This right may be subject to

permissible limitations where the measure pursues a legitimate objective, and is rationally connected to, and proportionate to achieving, that objective. However, the statement of compatibility does not address this limitation on the right not to incriminate oneself.

1.172 Additionally, the bill does not appear to provide any use or derivative use immunity in relation to self-incriminating evidence. Use and derivative use immunities prevent compulsorily disclosed information (or anything obtained as an indirect consequence of making a compulsory disclosure) from being used in evidence against a witness.<sup>1</sup> The inclusion of use and derivative use immunities is relevant to an assessment of the proportionality of any measure that limits the right not to incriminate oneself.

### ***Compatibility of the measure with the right to privacy***

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

1.174 By creating an offence for failure to appear as a witness and answer questions, the measure engages and limits the right to privacy. While the right to privacy may be subject to permissible limitations in a range of circumstances, this particular limitation on the right to privacy was not addressed in the statement of compatibility.

1.175 The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

### **Contempt of Commission**

1.176 Proposed section 26 of the bill provides that a person commits an offence if they:

- wilfully disturb or disrupt a hearing of the Commission;
- make any statement that is false or defamatory of the Commission; or
- commit any wilful contempt of the Commission.

1.177 The penalty for the offence is imprisonment for up to 12 months.

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1 A derivative use immunity prevents the use of material that has been compulsorily disclosed to 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.' See *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 380 per Lord Wilberforce at 443.

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

1.178 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. It protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression. The right to peaceful assembly is the right of people to gather as a group for a specific purpose.

1.179 Prohibiting any wilful disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of expression and the right to freedom of assembly. These rights may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to, and proportionate to achieving, that objective. However, the statement of compatibility does not provide any analysis or justification for the limitation on the freedom of expression and the right to freedom of assembly. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, set out in paragraph [1.8] above.

1.180 It is not clear whether the restriction imposed may have the effect of criminalising forms of expression and assembly, for example, a demonstration organised by persons to protest against what they consider as the excessive or inappropriate use of the powers of the Commission or other matters relating to the work of the Commission. As currently drafted, there may be a danger that the provisions may limit legitimate criticism of, or objection to, the Commission and its activities and may be overly broad.

**Issue of arrest warrants by the Commission**

1.181 Proposed section 12 of the bill provides that if a person served with a summons to attend before the Commission as a witness fails to attend in accordance with the summons, the member of the Commission may issue a warrant to arrest the person.

1.182 This warrant authorises the arrest of the witness, the bringing of the witness before the Commission and the detention of the witness in custody for that purpose until the witness is released by order of the member of the Commission. Proposed section 13 enables the Commission to issue search warrants.

***Compatibility of the measure with the right to liberty***

1.183 The right to liberty, which prohibits arbitrary detention, requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.184 Empowering the Commission to issue arrest warrants and to authorise the detention of a witness, rather than requiring application to a court, engages and limits the right to liberty.

1.185 The statement of compatibility does not provide an assessment of how this measure engages and limits the right to liberty. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, set out in paragraph [1.175] above.

1.186 It is noted that, while the *Royal Commissions Act 1902* (RC Act) provides a power for royal commissions to issue arrest warrants, the committee has previously raised human rights concerns in relation to these powers.<sup>2</sup>

### **Issue of search warrants by the Commission**

1.187 Proposed section 13 would enable the Commission to issue search warrants.

#### ***Compatibility of the measure with the right to privacy***

1.188 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The power of the Commission to issue search and entry warrants engages and limits the right to privacy. The statement of compatibility does not provide an assessment of how this measure engages and limits the right to privacy.

1.189 The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, set out in paragraph [1.175] above.

1.190 It is noted that the RC Act does not contain a power equivalent to that in proposed section 13 of the bill to issue search warrants. Rather, royal commissions or their members may apply to a judge of a prescribed court for the issue of a search warrant.<sup>3</sup> This indicates that the power may be broader than is necessary.

### **Committee comment**

**1.191 Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the legislation proponents and the Parliament.**

**1.192 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponents.**

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2 This committee has previously sought further information as to whether the arrest powers in the *Royal Commissions Act 1902* are compatible with the prohibition against arbitrary detention; see Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013) 48; and *Seventh Report of 2013* (5 June 2013) 91-92. See also the Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework (ALRC Report 111)* (10 February 2010) para 11.48 and Recommendation 11-3.

3 See *Royal Commissions Act 1902*, subsection 4(1).

## Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017

<b>Purpose</b>	Seeks to amend the <i>Criminal Code Act 1995</i> to prohibit the wearing of full face coverings in public places under the jurisdiction of the Commonwealth if the threat level under the National Terrorism Threat Advisory System is higher than 'possible'
<b>Sponsor</b>	Senator Lambie
<b>Introduced</b>	Senate, 8 February 2017
<b>Rights</b>	Freedom of thought and religion; equality and non-discrimination (see <b>Appendix 2</b> )
<b>Status</b>	Advice only

### Prohibition on wearing face coverings

1.193 The Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017 (the bill) seeks to create a new Part 9.10 in the *Criminal Code Act 1995* (the Criminal Code) to make unlawful the wearing of full face coverings in public places which are under the jurisdiction of the Commonwealth if the threat level under the National Terrorism Threat Advisory System is higher than 'possible'. Proposed Part 9.10 also creates an offence if a person compels another person to wear a full face covering in a public place, which is subject to imprisonment for six months or 200 penalty units (or imprisonment for 12 months or 400 penalty units if the other person is under 18).

1.194 A 'public place' is defined in the bill as any place to which the public has access as of right or by invitation, and includes the interior of a vehicle that is in a public place. It does not include a place of worship, or a place where a marriage or civil ceremony is being held.

1.195 Certain exemptions would apply to persons who are wearing a full face covering for prescribed purposes including in relation to their occupation; for safety reasons; for participation in recreational or sporting activities; or for a genuine artistic purpose.

### ***Compatibility of the measure with the right to freedom of thought and religion***

1.196 The right to exercise one's religious or other belief or opinion includes the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress). The right to exercise one's belief can be limited given its potential impact on others. The right can be limited as long as it can be demonstrated that the limitation is reasonable and proportionate and is

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necessary to protect public safety, order, health or morals or the rights of others (as a legitimate objective).

1.197 By prohibiting the wearing of full face coverings in public places, the bill engages and may limit the right to freedom of thought and religion, as certain individuals may wear this form of dress as a religious practice, that is, in the exercise of religious belief.

1.198 The statement of compatibility acknowledges that religious freedoms may be impacted by the measures, and sets out the purpose of the bill as to increase national security and public safety. While national security and public safety may be considered a legitimate objective for the purposes of international human rights law, it is not clear how the measures would be effective to achieve, or a proportionate means of achieving, this objective.

1.199 No evidence is provided in the statement of compatibility as to how the introduction of the new offences will enhance public safety or prevent the occurrence of violent acts which threaten national security. Further, no information has been provided which links the wearing of full face coverings to the carrying out of violent acts, or any occasions where such acts have occurred in Australia which may indicate that the wearing of face coverings could constitute a substantial threat to public safety. The statement of compatibility notes that:

When people have the intention of committing a crime, in many cases, they attempt to conceal their identity so they have the best chance of evading the law.<sup>1</sup>

1.200 It is noted that there may be many ways in which a person can conceal their identity, including, but not limited to, the wearing of a full face covering. It is not explained why full face coverings alone must be the subject of such provisions aimed at preventing the concealment of one's identity.

1.201 Even if the measure were effective to achieve its stated objective, concerns arise as to whether the measure is a proportionate limit on freedom of thought and religion. To criminalise the wearing of religious dress in public is a serious limitation on the exercise of religious belief. While there are a number of prescribed exemptions for persons wearing a full face covering in certain circumstances, it is noted that none of these exemptions apply for the purposes of genuine religious belief. It is noted that in order to be a proportionate limitation on human rights a measure must be the least rights restrictive way of achieving its stated objective.

1.202 Further, the scope of the offence is not readily apparent from the offence provision. Under proposed section 395.2 an offence would only exist once the minister has made, by legislative instrument, a declaration stating that the national security threat level has been raised. It does not seem reasonable to expect members of the public to monitor the making of such declarations in order to know

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1 Explanatory memorandum (EM), statement of compatibility (SOC) 4.

when their wearing of a full face covering may or may not be prohibited. This proposed section imposes a significant burden on persons who may choose to wear face coverings on a regular basis for religious purposes. The Senate Committee for the Scrutiny of Bills has previously commented on this provision and noted that it 'is desirable for the content of an offence to be clear from the offence provision itself, so that the scope and effect of the offence is clear so those who are subject to the offence may readily ascertain their obligations'.<sup>2</sup> Having clear, accessible and precise legislative provisions, so that people know the legal consequences of their actions, is also an important principle of international human rights law.

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

1.203 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR (see Appendix 2). 'Discrimination' under the ICCPR encompasses measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).<sup>3</sup> The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular protected attribute (for example, race, sex or religion).<sup>4</sup>

1.204 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. As a large number of the persons affected by the proposed measures would be women from religious backgrounds, and Muslim backgrounds in particular, the measure would appear to disproportionately impact on this group, thereby engaging the right to equality and non-discrimination.

1.205 The statement of compatibility does not acknowledge that the right to equality and non-discrimination is engaged by the measures. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which requires that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

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2 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2017* (22 March 2017) 71.

3 The prohibited grounds of discrimination or 'protected attributes' include 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: UN Human Rights Committee, *General Comment 18, Non-discrimination* (1989).

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



**Committee comment**

**1.206** The committee draws the human rights implications of the bill in respect of the right to freedom of thought and religion and the right to equality and non-discrimination to the attention of the legislation proponent and the Parliament.

**1.207** If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent with respect to the right to freedom of thought and religion and the right to equality and non-discrimination.

## Human Rights Legislation Amendment Bill 2017

<b>Purpose</b>	<p>Previously sought to amend section 18C of the <i>Racial Discrimination Act 1975</i> to replace the words 'offend', 'insult' and 'humiliate' with 'harass' (resulting in the formulation 'harass or intimidate'), and provide that an assessment of whether an act is reasonably likely to harass or intimidate a person or group of persons is made against the standard of a reasonable member of the Australian community;</p> <p>Amends the <i>Australian Human Rights Commission Act 1986</i> to introduce a number of changes to the process for how the Australian Human Rights Commission handles complaints of unlawful discrimination and the ability of a person alleging unlawful discrimination to apply to court</p>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	Senate, 22 March 2017
<b>Rights</b>	Freedom of expression; equality and non-discrimination; freedom from serious forms of discriminatory speech; effective remedy (see <b>Appendix 2</b> )
<b>Status</b>	Advice only

### Background

1.208 On 8 November 2016, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General referred to the Parliamentary Joint Committee on Human Rights the following matters for inquiry and report:

- whether the operation of Part IIA of the *Racial Discrimination Act 1975* (RDA) (Cth) (including sections 18C and 18D) impose unreasonable restrictions on freedom of speech; and
- whether the complaints-handling procedures of the Australian Human Rights Commission (AHRC) should be reformed.

1.209 The committee approached this inquiry broadly by looking at a range of policy matters in relation to these terms of reference rather than approaching it as a technical scrutiny inquiry.

1.210 The committee received approximately 11 500 items, including approximately 10 600 form letters; 418 items accepted by the committee as submissions and published; and approximately 450 items accepted by the committee as correspondence.

1.211 The committee also held nine public hearings from 12 December 2016 through to 20 February 2017: two in Canberra, and one in every other state and territory capital city.

1.212 The committee tabled its final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, on 28 February 2017.<sup>1</sup>

1.213 Some of the matters in this bill relate to issues raised in the course of the committee's inquiry and the committee's final report including its recommendations.

1.214 The committee's scrutiny of the Human Rights Legislation Amendment Bill 2017 (the bill) below is undertaken as a technical assessment of the compatibility of the bill with seven core international human rights treaties and in accordance with its functions under section 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.215 The bill (subject to amendment) finally passed both Houses of Parliament on 31 March 2017 and received Royal Assent on 12 April 2017.

### **Proposed amendment to conduct prohibited under section 18C of the RDA**

1.216 Currently section 18C(1) of the RDA provides that it is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people;
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.<sup>2</sup>

1.217 Schedule 1 of the bill sought to remove the words 'offend', 'insult' and 'humiliate' from section 18C(1)(a) of the RDA and replace them with 'harass'.<sup>3</sup>

1.218 Schedule 1 of the bill further sought to amend the test, as judicially interpreted, of whether an act is 'reasonably likely, in all the circumstances' to have the specified effect. The bill sought to provide that an assessment of whether an act is reasonably likely to harass or intimidate a person or group of people should be

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1 See Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017). For more information on this inquiry, see the inquiry website at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights\\_inquiries/FreedomspeechAustralia](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia).

2 Section 18C is contained in Part IIA of the RDA. The title to that section, 'Prohibition of Offensive Behaviour Based on Racial Hatred', is to be taken into account when interpreting the content of specific provisions in that part: *Hagan v Trustees of Toowoomba Sports Ground Trust* [2000] FCA 1615 [34].

3 Schedule 1, item 3 (at time of first reading).

made against the standard of a reasonable member of the Australian community, rather than a reasonable member of the targeted group.<sup>4</sup>

1.219 Amendments were successfully moved in the Senate to remove Schedule 1 (containing these amendments) from the bill. The bill ultimately passed both Houses of Parliament without the proposed changes to section 18C.

### **Right to freedom of expression and the right to be free from serious forms of discriminatory expression**

1.220 The proposed amendment to section 18C raised Australia's obligations to protect freedom of expression and its obligations to protect against racial discrimination, including incitement to racial hatred.

1.221 In order to assess the human rights implications of the proposed amendment to section 18C of the RDA, it is therefore necessary to understand the scope of Australia's obligations under international law, the balance struck by the current law, and the manner and the extent to which the bill proposes to alter that balance.

#### ***Right to freedom of expression***

1.222 The International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), place obligations on States in relation to the right to freedom of expression (or freedom of speech) and the right to be free from racial discrimination, including racial 'hate speech' or serious forms of racially discriminatory speech.<sup>5</sup>

1.223 The right to freedom of opinion and expression is protected by article 19 of the ICCPR. The right to freedom of *opinion* is the right to hold opinions without interference and cannot be subject to any exception, restriction or limitation.<sup>6</sup>

1.224 The right to freedom of *expression* extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.<sup>7</sup> The right may be subject to limitations, and is subject to specific parameters (discussed further below).

1.225 The United Nations (UN) Human Rights Council has emphasised the importance of the right to freedom of expression:

The exercise of the right to freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its

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4 Schedule 1, item 4 (at time of first reading).

5 International Covenant on Civil and Political Rights (ICCPR), articles 19, 20 and 26; and International Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 4.

6 ICCPR, article 19. Part IIA of the RDA does not limit the right to hold opinions.

7 ICCPR, article 19(2).

protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.<sup>8</sup>

1.226 Article 19(3) of the ICCPR provides that the exercise of the right to freedom of expression 'carries with it special duties and responsibilities' and 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 (*ordre public*),<sup>9</sup> or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must:

- be prescribed by law;
- pursue a legitimate objective;
- be rationally connected to the achievement of that objective; and
- be a proportionate means of achieving that objective.<sup>10</sup>

***The right to freedom from discrimination and compulsory limitations on the right to freedom of expression***

1.227 Under article 20(2) of the ICCPR, parties to the treaty are required to prohibit by law 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Additionally, parties to the treaty are required under article 26 of the ICCPR to prohibit, and provide effective protection against, discrimination on grounds including race, colour and national origin.

1.228 Article 4(a) of the CERD requires states to:

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...<sup>11</sup>

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8 UN Human Rights Council, *Resolution 12/16, Freedom of opinion and expression*, UN Doc A/HRC/RES/12/16, 12 October 2009, preamble. At: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/RES/12/16](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/12/16) (viewed 8 December 2016).

9 'The expression "public order (*ordre public*)" ...may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*): *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

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

11 Where each of the treaty provisions above refer to prohibition by law, and offence punishable by law, they refer to criminal prohibition. Although Australia has ratified these treaties, Australia has made reservations in relation to both the ICCPR and CERD in relation to its inability to legislate for criminal prohibitions on race hate speech.

1.229 The provisions contained in articles 20(2) of the ICCPR and article 4 of the CERD (commonly referred to as racial 'hate speech' provisions),<sup>12</sup> are understood as constituting compulsory limitations on the right to freedom of expression.<sup>13</sup> As noted by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, such 'very specific limitations are legitimate if they are necessary in order for [the signatory to the treaty]...to fulfil an obligation to prohibit certain expressions on the grounds that they cause serious injury to the human rights of others.'<sup>14</sup>

1.230 The UN Committee on the Elimination of Racial Discrimination (UNCERD), the treaty monitoring body established under the CERD, has consistently held that article 4 of the CERD requires comprehensive legislative action to implement its terms:<sup>15</sup>

As a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively.<sup>16</sup>

1.231 The UNCERD also noted that the prohibition on 'hate speech' is integral to the elimination of racial discrimination in all of its forms.<sup>17</sup> In relation to article 4 of the CERD, the UNCERD has recommended that parties to the treaty should:

declare and effectively sanction as offences punishable by law:

- (a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;
- (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;

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12 See, UN Committee on the Elimination of Racial Discrimination (UNCERD), *General recommendation 35: Combating racist hate speech* (26 September 2013) 3.

13 See, ICCPR article 20, CERD article 4. See, also, UN Special Rapporteur, F La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, Human Rights Council, UN Doc A/HRC/14/23 (20 April 2010) [79] available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/14/23](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23) (last accessed 15 February 2017). See also submissions to the Parliamentary Joint Committee on Human Rights' inquiry, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

14 See, also, UN Special Rapporteur, F La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, Human Rights Council, UN Doc A/HRC/14/23 (20 April 2010) [79] available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/14/23](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23) (last accessed 15 February 2017).

15 UNCERD *General Recommendation 1* (5<sup>th</sup> session, 1972), *General Recommendation 7* (32<sup>nd</sup> session, 1985), *General Recommendation 15* (42<sup>nd</sup> session, 1993).

16 UNCERD, *General recommendation 35: Combating racist hate speech* (26 September 2013) [45].

17 UNCERD, *General Recommendation 15* (42<sup>nd</sup> session, 1993).

- (c) Threats or incitement to violence against persons or groups on the grounds in (b) above;
- (d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;
- (e) Participation in organizations and activities which promote and incite racial discrimination.<sup>18</sup>

1.232 It is clear that there is some latitude between the acts which are protected under article 19(2) of the ICCPR, and those acts which are required to be prohibited under article 4(a) of CERD, and articles 20(2) and 26 of the ICCPR set out above. In other words, there is legitimate scope for Australia to determine the appropriate balance between the obligation to provide protections against serious forms of discriminatory speech and the right to freedom of expression.

### ***Background to, and enactment of, Part IIA of the RDA***

1.233 Protection against forms of discriminatory speech on the basis of race were introduced into Part IIA of the RDA in 1995 through the passage of the Racial Hatred Bill 1994 (Racial Hatred Bill).

1.234 The introduction of such legislative protections against certain forms of racially discriminatory speech was informed by recommendations and findings by a number of significant inquiries which had identified gaps in legal protections available to victims of racism.<sup>19</sup>

1.235 The introduction of such legislative protections was also informed by Australia's obligations under the ICCPR and the CERD which, as set out above, impose specific obligations on states to prohibit certain serious forms of racially discriminatory expression.<sup>20</sup> Australia ratified the CERD and the ICCPR in 1975 and 1980 respectively.<sup>21</sup>

1.236 The explanatory memorandum to the Racial Hatred Bill 1994 (EM 1994) explained that the Racial Hatred Bill was intended to support social cohesion and close a gap in legal protection for victims of racist speech which had been identified by significant inquiries:

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18 See, UNCERD, *General recommendation 35: Combating racist hate speech* (26 September 2013) 3.

19 See, Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard*, Second reading speech, 15 November 1994, 3336; and Australian Law Reform Council, *Multiculturalism and the Law* (1991).

20 ICCPR article 20, CERD article 4. See, also, Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard* (16 November 1994) 3341.

21 ICCPR Entry into force for Australia 13 November 1980; CERD Entry into force for Australia 30 November 1975; Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard*, Second reading speech (15 November 1994) 3336.

The Bill closes a gap in the legal protection available to the victims of extreme racist behaviour. The Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large. The Bill is based on the principle that no person in Australia need live in fear because of his or her race, colour, or national or ethnic origin.<sup>22</sup>

1.237 While acknowledging the importance of freedom of speech, the 1994 EM states that 'the right to free speech must be balanced against other rights and interests.'<sup>23</sup>

1.238 The 1994 EM further states that the provisions now contained in Part IIA of the RDA were intended to provide a balance between freedom of speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin.<sup>24</sup> The 1994 EM noted that the drafting of the bill was intended to allow scope for public debate about important issues:

...not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas. The Bill does not apply to statements made during a private conversation or within the confines of a private home.

The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin. The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.<sup>25</sup>

1.239 Part IIA of the RDA has remained in the same form since the passage of the Racial Hatred Bill in 1995.

### ***Scope of Part IIA of the RDA***

1.240 At the federal level, Part IIA of the RDA is the legislative protection against racial vilification. Part IIA (comprising sections 18A – 18E) of the RDA provides the framework for protecting against forms of expression on the basis of race.

1.241 As set out above, section 18C of the RDA contains the operative provision making specified conduct unlawful, as a civil wrong. It provides:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
  - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people;
  - and

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22 EM 1994, 1.

23 EM 1994, 1.

24 EM 1994, 1.

25 EM 1994, 1.



(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

1.242 The scope of section 18C cannot be understood without consideration of section 18D. Section 18D operates to provide some 'exemptions' or defences from section 18C of the RDA. Section 18D of the RDA provides:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work;  
or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

#### *Meaning and scope of conduct caught*

1.243 The meaning and scope of section 18C of the RDA has been the subject of judicial consideration. While the need for statutory interpretation is unremarkable in itself, in this instance the interpretation given to section 18C plays a significant role because in general usage the words 'insult' and 'offend' may be employed in relation to conduct with effects that range from severe to slight.

#### *Legal meaning of 'offend, insult, humiliate or intimidate'*

1.244 The judicial interpretation of section 18C has commonly treated the terms 'offend, insult, humiliate or intimidate' in a collective manner rather than defining the words separately. Judicial interpretation has also read 18C together with the title of Part IIA ('Prohibition of offensive behaviour based on racial hatred') and in light of Australia's international obligations.<sup>26</sup> Kiefel J,<sup>27</sup> in *Creek v Cairns Post*,<sup>28</sup> held that section 18C applies only to conduct having 'profound and serious effects, not to be likened to mere slights'.<sup>29</sup> This standard has been affirmed in a series of cases.<sup>30</sup>

26 *Creek v Cairns Post* [2001] FCA 1007 [16].

27 Kiefel J is now the Chief Justice of the High Court.

28 [2001] FCA 1007.

29 [2001] FCA 1007 [16].

1.245 Therefore, the meaning that has been given to the composite phrase in section 18C by the courts is narrower than the broader meaning that the individual words may carry in general speech, such that section 18C captures only more serious forms of conduct engaged in on the basis of the subject's race.

#### *Nature of the test*

1.246 Under section 18C of the RDA the conduct complained of must be 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate'.<sup>31</sup> This has been judicially interpreted as importing an 'objective test' rather than 'subjective test' in relation to conduct.<sup>32</sup> It means that the determinative question is not whether subjectively the particular complainant was 'insulted, offended, intimidated or humiliated'. The question is whether the act was reasonably likely to have a 'profound and serious effect', in all the circumstances.

1.247 The form of the objective test that has been applied by the courts in the context of section 18C of the RDA is one in which the 'reasonable person' has the relevant racial or ethnic characteristics of the particular complainant, that is, the test requires assessing the likely effect of the conduct on a reasonable hypothetical member of a particular racial or ethnic group which is the target of the alleged conduct.<sup>33</sup>

#### *Application to public conduct*

1.248 Part IIA only applies to conduct 'otherwise than in private'. This means that there is no prohibition on expressing views that 'offend, insult, humiliate or intimidate' on the basis of race, colour or national or ethnic origin in private. Nor is there any prohibition on holding opinions on these grounds.<sup>34</sup> The right to hold opinions is therefore not engaged or limited by Part IIA of the RDA.

#### *Defences*

1.249 As set out above, section 18D of the RDA contains a number of defences or 'exemptions' to conduct that would otherwise be captured by section 18C of the RDA. These exemptions cover acts done 'reasonably and in good faith.' It includes artistic works, statements made for any genuine academic, artistic or scientific purpose or in the public interest. These 'exemptions' also extend to publishing a fair and accurate report of any event or matter of public interest or a fair comment on

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30 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 131 [70] (French J); *Jones v Scully* (2002) 120 FCR 243 [102]; *Eatock v Bolt* (2011) 197 FCR 261 at [267]-[268] (Justice Bromberg) (*Eatock*).

31 RDA section 18C.

32 See, *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FLR 56 [15].

33 *Eatock* [243], [250].

34 RDA section 18C.

any event or matter of public interest if it is a genuine belief held by the person making the comment.<sup>35</sup>

### *Civil-complaint based model*

1.250 The model adopted at a federal level in Australia under the RDA is a civil complaint-based model rather than a criminal model. This means that proceedings are initiated by individual complainants rather than the government. If a respondent is found by the court to have engaged in unlawful conduct under Part IIA they are liable only for civil remedies, rather than subject to criminal sanctions. Further, prior to a matter proceeding to court, an individual alleging unlawful discrimination under the RDA must go through the Australian Human Rights Commission (AHRC) complaint handling process with its focus on conciliated outcomes.<sup>36</sup> This AHRC process must be terminated prior to a claim for unlawful discrimination being able to be lodged in the Federal Court or Federal Circuit Court and assessed on its merits.<sup>37</sup> Courts will not grant remedies for unlawful discrimination unless the plaintiff/complainant has first made a complaint to the AHRC and that complaint with the AHRC has been terminated.<sup>38</sup>

### ***Compatibility of Part IIA of the RDA with human rights***

1.251 Assessment of the proposed measure raises the preliminary issue of whether Part IIA as enacted constitutes a permissible limit on the right to freedom of expression. Applying the committee's usual analytical framework, in order for a limitation to be permissible, limitations must be prescribed by law; pursue a legitimate objective; be rationally connected to the achievement of that objective; and be a proportionate means of achieving that objective.<sup>39</sup>

1.252 In the particular context of the regulation of serious forms of racially discriminatory speech, as set out above, article 20(2) of the ICCPR and article 4(a) of the CERD constitute compulsory limits on the right to freedom of expression that are not only permissible but required of State parties. However, the form of Part IIA of the RDA does not directly reflect the wording in these articles. Nor does it reflect the criminal sanctions that are contemplated by these articles; Australia having adopted a civil rather than criminal regime at the federal level.<sup>40</sup>

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35 RDA section 18D.

36 See, *Australian Human Rights Commission Act 1986* (AHRC Act) Part IIB and section 46PO(1)

37 See, AHRC Act section 46PO(1).

38 See *Re East; Ex parte Nguyen* (1998) 196 CLR 354.

39 These general limitation criteria reflect international human rights law. For the limitation of freedom of expression specifically, see Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

40 See UNCERD, *General recommendation 35: Combating racist hate speech* (26 September 2013) 3.

1.253 Also relevant to the permissible limits on freedom of expression, and additional to the obligations on State parties to prohibit racial hate speech, are the general obligations under the CERD and ICCPR regarding equality and non-discrimination. For example, parties to the ICCPR are required, under article 26 of the ICCPR, to prohibit, and provide effective protection against, discrimination on grounds including race, colour and national origin. This may include discriminatory expression.

1.254 In these circumstances, the existing formulation of the law is likely to be compatible with Australia's international human rights obligations. It is clear that Part IIA is aimed at pursuing the legitimate objective of protecting the rights of people in respect of racial discrimination, which is contemplated in the terms of the ICCPR itself as the basis for permissible limitation. The following factors each support the conclusion that Part IIA constitutes a proportionate limit on the right to freedom of expression in pursuit of this objective:

- (a) the limited application of section 18C to conduct 'otherwise than in private';
- (b) the protection given to the freedom of expression in section 18D of the RDA;<sup>41</sup>
- (c) the interpretation of section 18C as only applying to conduct that has 'profound and serious effects' on the basis of race; and
- (d) the civil model of regulation, including conciliation, and the absence of any criminal proceedings or penalties under the regime.

1.255 For completeness, it is noted that there is nothing in Part IIA of the RDA that prevents persons from holding opinions and therefore the right to freedom of opinion is not engaged and limited.

***Compatibility of proposed amendment to conduct prohibited under section 18C of the RDA with human rights***

1.256 The statement of compatibility states that the bill 'promotes the right to freedom of expression' by:

...removing the words 'offend', 'insult' and 'humiliate' from section 18C, ensuring that the law does not unjustifiably prevent a person from expressing opinions and genuine beliefs, even where controversial, because they may merely offend, insult or humiliate another person or groups of people.<sup>42</sup>

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41 It is noted, however, that this is not a stand-alone protection for freedom of speech but operates as an exception to conduct which would otherwise be unlawful under section 18C.

42 Explanatory memorandum (EM) 13.

1.257 The statement of compatibility further states that the amendments continue to comply with Australia's obligations with respect to equality and non-discrimination:

The amendments proposed by this Bill promote the rights of equality and non-discrimination. Section 18C as amended prohibits acts that a reasonable member of the Australian community would consider harasses or intimidates a person based on their race, colour or national or ethnic origin. The Bill maintains and provides civil protections against racial discrimination to ensure that all are able to enjoy the equal realisation and exercise of their rights under the ICCPR and CERD. The amendments in the Bill are directed towards the elimination of racial discrimination as required by the ICCPR and CERD.

By redefining the conduct which is prohibited, the Bill will not reduce protections against racial vilification. Rather, the Bill will ensure that conduct which does not constitute vilification, but merely offends the feelings of particular individuals or groups, is not made unlawful. The new standard of 'harass or intimidate' will more directly target the core concept of racial vilification, protecting the rights of all persons to live free from fear of violence and racial discrimination.<sup>43</sup>

1.258 The likely effect of the proposed amendments would be to reduce the scope of unlawful speech or expression under the RDA.

1.259 Part IIA of the RDA implements important aspects of Australia's obligations under the ICCPR and CERD with respect to the right to protection from serious forms of discriminatory expression. However, under international human rights law, there exists some latitude between the conduct which is required to be prohibited under article 4(a) of the CERD and article 20(2) the ICCPR and the level of protection or emphasis provided to the right to freedom of expression under article 19(2) of the ICCPR. In other words, there is scope for Australia to determine exactly how to formulate the appropriate balance between the obligation to provide protections against serious forms of discriminatory expression and the right to freedom of expression.

1.260 The committee canvassed major questions of policy including questions of priorities and balance in its final report to its inquiry, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*.<sup>44</sup>

1.261 In relation to the current bill, the bill was amended prior to passage to remove proposed amendments to Part IIA of the RDA. Therefore the changes to the RDA did not proceed.

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43 EM 14.

44 See final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

### **Committee comment**

**1.262** The preceding analysis sets out Australia's obligations under international human rights law to respect the right to freedom of expression, alongside obligations to protect and promote the right to equality and non-discrimination and prevent racial hate speech.

**1.263** The proposed amendments to Part IIA of the RDA engage the right to equality and non-discrimination and the right to freedom of expression.

**1.264** The bill was amended prior to passage to remove proposed amendments to Part IIA of the RDA.

**1.265** The committee notes that its inquiry into freedom of speech in Australia canvassed a range of policy matters in relation to Part IIA of the RDA and refers to its previous report and recommendations.<sup>45</sup>

### **Changes to the Australian Human Rights Commission complaint handling processes**

1.266 Schedule 2 of the bill contains a number of changes to the Australian Human Rights Commission's (AHRC) complaint handling processes and the ability of a complainant alleging unlawful discrimination at a federal level to apply to the Federal Court or the Federal Circuit Court. These amendments include:

- introducing principles applicable to the AHRC's complaint handling process including a requirement that the AHRC act fairly and expeditiously;
- a requirement for the AHRC to notify respondents;
- raising the threshold for lodging a complaint by requiring that it must be reasonably arguable that the alleged conduct constitutes unlawful discrimination and by requiring a complainant to set out details as fully as practicable;
- providing the President of the AHRC greater power to terminate complaints;
- a requirement that where a complaint is terminated by the President of the AHRC (subject to exceptions), the complainant will need to seek the leave of the Federal Court or Federal Circuit Court prior to making an application to that court in relation to the complaint; and
- a requirement that a complainant be provided information about costs that the court can award against a complainant.

1.267 It is noted that several of these process changes respond to the recommendations listed in the committee's inquiry report into freedom of speech in Australia.<sup>46</sup>

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45 See final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

1.268 These process changes passed both Houses of Parliament on 31 March 2017 with amendments.

***Compatibility of the measures with the right to an effective remedy and the right to equality and non-discrimination***

1.269 Australia is required under the ICCPR to ensure that those who experience racial and other forms of discrimination have access to effective remedies (see Article 2). Article 6 of the CERD further provides that parties to the treaty:

...shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

1.270 Parties to the treaty are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law.<sup>47</sup> The Australian government currently meets its obligation to have effective and meaningful mechanisms for those who have experienced racial discrimination and other forms of discrimination to seek redress through the operation of the AHRC, its complaints handling mechanism, and the ability to apply to the Federal Court and the Federal Circuit Court following the AHRC processes.<sup>48</sup>

1.271 The UN Human Rights Committee, the treaty monitoring body for the ICCPR, has explained that national human rights institutions such as the AHRC can also have an important role in ensuring the right to an effective remedy:

Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.<sup>49</sup>

1.272 It is noted that the process reforms apply across all areas of discrimination at a federal level and not only to complaints of racial discrimination. If the reforms were likely to create barriers to bringing a complaint or limit access to court processes, this would have implications for Australia's compliance with the right to an effective

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46 See final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

47 United Nations, International Covenant on Civil and Political Rights (ICCPR) article 2. See also UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [15],[18].

48 ICCPR article 2(3); and CERD article 6.

49 See also UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [15].

remedy.<sup>50</sup> Such measures could also have implications for the right to equality and non-discrimination more broadly to the extent that they operate to have a disproportionate negative effect on people based on particular attributes, such as sex, age or disability.

1.273 Previously the complaint handling process with the AHRC needed to be exhausted and terminated prior to a person being able to lodge a claim for unlawful discrimination under the RDA and or other federal anti-discrimination law in the Federal Court or Federal Circuit Court. However, the ground upon which the AHRC terminated the complaint did not affect whether or not a complainant could seek to apply to the Federal Court to have the merits of their claim assessed.<sup>51</sup>

1.274 The bill, at the time of first reading, proposed to introduce a requirement that leave of the court be granted to make applications alleging unlawful discrimination which were the subject of complaints terminated by the President of the AHRC. The only exception to this requirement would have been where the President of the AHRC terminated the complaint because he or she was satisfied that the subject matter of the complaint involves a significant issue of public importance that should be considered by the Federal Court or Federal Circuit Court.<sup>52</sup> This went further than the committee's recommendation which was limited to a requirement for leave of the court where the complaint had been terminated on particular grounds (such as termination on the basis that the complaint was trivial, vexatious or lacking in substance).<sup>53</sup>

1.275 While, in light of the above, the measure as first introduced may have had the effect of creating additional procedural barriers in relation to meritorious complaints, amendments were subsequently moved which addressed this issue in the bill as passed.<sup>54</sup> These amendments broadened the exemptions to the requirement for an applicant to seek the leave of the Federal Court or the Federal Circuit Court to make an application alleging unlawful discrimination. Specifically, the bill as passed provided that applicants whose complaints have been terminated on the basis that there is no reasonable prospect of the matter being settled by conciliation will not be required to seek the leave of the Federal Court or the Federal Circuit Court.<sup>55</sup> The Supplementary Explanatory Memorandum notes that these amendments 'reflect that termination on the basis of no reasonable prospect of

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50 ICCPR article 14.

51 AHRC Act section 46PO(1).

52 EM 8.

53 See final report, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

54 See, Supplementary Explanatory Memorandum relating to sheet HZ118 (Supplementary EM) 5; Revised Explanatory Memorandum 6.

55 Supplementary EM 5; Revised Explanatory Memorandum 6; *Human Rights Legislation Amendment Act 2017* Schedule 2 item 53 (new subsection 46PO(3A)).



conciliation does not reflect the merit of the complaint. As such, these amendments will ensure that there are not additional barriers for meritorious complaints to access the Federal Court or the Federal Circuit Court'.<sup>56</sup>

1.276 The amendments to the AHRC complaints handling processes as passed appear, in broad terms, to continue to conform with the right to an effective remedy. The legislation continues to provide a process through which complainants may seek redress in respect of claims of unlawful discrimination, and the changes on their face do not appear to place significant barriers on the access to a remedy in relation to a meritorious complaint. While it is still uncertain as to how these changes will operate in practice, the process changes appear likely to be compatible with the right to an effective remedy on the face of the legislation.

### **Committee comment**

**1.277 The committee notes that the process changes to the Australian Human Rights Commission as passed by both Houses of Parliament are likely to be compatible with the right to an effective remedy.**

## People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017

<b>Purpose</b>	Seeks to establish a Commission of Inquiry to inquire into unethical, unlawful and improper conduct in the banking, financial services and related sectors
<b>Sponsor</b>	Mr Bob Katter MP
<b>Introduced</b>	House of Representatives, 27 March 2017
<b>Rights</b>	Fair hearing; not to incriminate oneself; privacy; freedom of expression; freedom of assembly (see <b>Appendix 2</b> )
<b>Status</b>	Advice only

### Requirement to provide evidence that may incriminate an individual

1.278 The People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017 (the bill) seeks to establish a Commission of Inquiry (Commission) into the banking, financial services, and related sectors. The bill would invest the commission with the full powers of a royal commission, as set out in the *Royal Commissions Act 1902* (RC Act).<sup>1</sup>

1.279 Section 6A of the RC Act provides that a person appearing as a witness for a commission is not excused from answering a question on the ground that the answer might tend to incriminate that person. Section 6P of the RC Act permits a royal commission to disclose evidence relating to a contravention of a law to certain persons and bodies including the police and the Director of Public Prosecutions.

### Compatibility of the measure with the right not to incriminate oneself

1.280 Specific guarantees of the right to a fair trial in the determination of a criminal charge, guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR) include the right not to incriminate oneself (article 14(3)(g)).

1.281 Article 14 and the right to a fair trial, and more particularly the right not to incriminate oneself, are directly relevant where a person is required to give information to a commission of inquiry which may incriminate themselves and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges. Adopting the powers of a royal commission, which include a power to require a witness to answer questions even if it may incriminate themselves, engages and limits the right not to incriminate oneself.

<sup>1</sup> See proposed section 11.

1.282 The right not to incriminate oneself may be subject to permissible limitations where the measure pursues a legitimate objective, and is rationally connected to, and proportionate to achieving, that objective. The statement of compatibility does not address the limitation on the right not to incriminate oneself, save for reference to Part 4 of the bill, which allows some protections for disclosure by whistleblowers.

1.283 The committee has previously raised serious human rights concerns in relation to the powers of royal commissions on a number of occasions.<sup>2</sup> The statement of compatibility does not acknowledge the committee's previous concerns with the respect to the powers of royal commissions and the right not to incriminate oneself.

1.284 Additionally, while section 6A of the RC Act provides a use immunity for witnesses compelled to answer questions, and section 14 of the bill would provide use immunity for disclosure by whistleblowers, the bill does not appear to provide a derivative use immunity in relation to self-incriminating evidence. Use and derivative use immunities prevent compulsorily disclosed information, (or anything obtained as an indirect consequence of making a compulsory disclosure) from being used in evidence against a witness.<sup>3</sup> The inclusion of both use and derivative use immunities is relevant to an assessment of the proportionality of any measure that limits the right not to incriminate oneself.

### ***Compatibility of the measure with the right to privacy***

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

1.286 By applying the offence in the RC Act for failure to appear as a witness and answer questions, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure engages and limits the right to privacy.

1.287 While the right to privacy may be subject to permissible limitations in a range of circumstances, this particular limitation on the right to privacy was not addressed in the statement of compatibility.

1.288 The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and

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2 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) 14-18; and *Thirty-Eight Report of the 44th Parliament* (3 May 2016) 21-26.

3 A derivative use immunity prevents the use of material that has been compulsorily disclosed to 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.' See *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 380 per Lord Wilberforce at 443.

evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

### **Contempt of Commission**

1.289 As set out above, the bill would invest the commission with the full powers of a royal commission, as set out in the RC Act.<sup>4</sup>

1.290 Section 6O of the RC Act provides that a person commits an offence if they:

- intentionally insult or disturb a royal commission;
- interrupt the proceedings of a royal commission;
- use any insulting language towards a royal commission;
- by writing or speech use words false and defamatory of a royal commission;
- or
- are in any manner guilty of any intentional contempt of a royal commission.

1.291 The penalty for the offence is two hundred dollars or imprisonment for three months.

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

1.292 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. It protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression. The right to peaceful assembly is the right of people to gather as a group for a specific purpose.

1.293 As applied by the bill, the prohibition of any wilful disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of expression and the right to freedom of assembly. These rights may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to, and proportionate to achieving, that objective. However, the statement of compatibility does not provide any analysis or justification for the limitation on the freedom of expression and the right to freedom of assembly.

1.294 It is not clear whether the restriction imposed may have the effect of criminalising legitimate expression and assembly, for example, a demonstration organised by persons to protest against what they consider as the excessive or inappropriate use of the powers of the Commission or other matters relating to the work of the Commission. As currently drafted, there may be a danger that the provisions may limit legitimate criticism of or objection to the Commission and its activities.

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4 See proposed section 11.

## **Issue of arrest warrants by the Commission**

1.295 As set out above, the bill would invest the commission with the full powers of a royal commission, as set out in the RC Act.<sup>5</sup>

1.296 Section 6B of the RC Act provides that if a person served with a summons to attend before a royal commission as a witness fails to attend in accordance with the summons, a President, Chair or Commissioner may issue a warrant to arrest the person. This warrant authorises the arrest of the witness, the bringing of the witness before the Commission and the detention of the witness in custody for that purpose until the witness is released by order of the member.

### ***Compatibility of the measure with the right to liberty***

1.297 The right to liberty, which prohibits arbitrary detention, requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.298 Empowering the Commission to issue arrest warrants and to authorise the detention of a witness, rather than requiring application to a court, engages and limits the right to liberty. The statement of compatibility does not provide an assessment of how this measure engages and may limit human rights. In this respect it is noted that the committee has previously raised serious human rights concerns in relation to the powers of royal commissions on a number of occasions.<sup>6</sup> The statement of compatibility does not acknowledge the committee's previous concerns with respect to related measures.

### **Committee comment**

**1.299 Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the legislation proponent and the Parliament.**

**1.300 If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.**

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5 See proposed section 11.

6 This committee has previously sought further information as to whether the arrest powers in the *Royal Commissions Act 1902* are compatible with the prohibition against arbitrary detention; see Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013) 48; and *Seventh Report of 2013* (5 June 2013) 91-92. See also the Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework (ALRC Report 111)* (10 February 2010) para 11.48 and Recommendation 11-3.

## Extradition (People's Republic of China) Regulations 2017 [F2017L00185]

<b>Purpose</b>	Sought to extend the definition of an 'extradition country' in the <i>Extradition Act 1988</i> to include the People's Republic of China, thereby giving effect to the Treaty on Extradition between Australia and the People's Republic of China. This regulation was subsequently repealed by the Extradition (People's Republic of China) Repeal Regulations 2017 [F2017L00325]
<b>Portfolio</b>	Attorney-General
<b>Authorising legislation</b>	<i>Extradition Act 1988</i>
<b>Disallowance</b>	This regulation was repealed by the Extradition (People's Republic of China) Repeal Regulations 2017 [F2017L00325] on 29 March 2017 <sup>1</sup>
<b>Rights</b>	Prohibition against torture, cruel, inhuman and degrading treatment; life; fair hearing and fair trial; liberty; equality and non-discrimination (see <b>Appendix 2</b> )
<b>Status</b>	Advice only

### Background

1.301 The issues raised by this regulation have previously received sustained consideration by the committee.

- In its *First report of 2013*, the committee considered a similar regulation and asked the then Attorney-General how that regulation was compatible with a number of human rights.<sup>2</sup>
- In its *Sixth report of 2013* the committee gave detailed consideration to the issue and further requested the then Attorney-General's advice on the

1 The Extradition (People's Republic of China) Regulations 2017 [F2017L00185] was subject to 15 days disallowance and tabled in the House of Representatives on 2 March 2017 and in the Senate on 20 March 2017. The Extradition (People's Republic of China) Repeal Regulations 2017 [F2017L00325] is subject to 15 days disallowance and tabled in the House of Representatives and the Senate on 29 March 2017.

2 See the committee's comments on the human rights compatibility of Extradition (Convention for Suppression of Acts of Nuclear Terrorism) Regulation 2012 [F2012L02434] in Parliamentary Joint Committee on Human Rights, *First report of 2013* (6 February 2013) 107-108. See also Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013) 128 where the committee published the then Attorney-General's response but deferred its consideration to include consideration of the response together with a number of new instruments dealing with extradition.

compatibility of the *Extradition Act 1988* (the Extradition Act) with a number of specific rights.<sup>3</sup>

- In its *Tenth report of 2013*, having received the then Attorney-General's response,<sup>4</sup> the committee concluded that the Extradition Act raised serious human rights concerns and considered that this was an issue that may benefit from a full review of the human rights compatibility of the legislation.
- In its *Twenty-second report of the 44th Parliament* the committee considered another similar regulation and indicated that it was not in a position to undertake a full review of the Extradition Act to assess it for compatibility with human rights. However, the committee restated its position that the Extradition Act could benefit from a comprehensive review to assess its provisions against Australia's human rights obligations.<sup>5</sup> The committee concluded that until a comprehensive review is undertaken of the Extradition Act to assess its compatibility with Australia's international human rights obligations, the committee is unable to conclude that regulations that extend its operation are compatible with Australia's human rights obligations.

### **Extending the definition of 'extradition country' to include the People's Republic of China**

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

1.303 The Extradition (People's Republic of China) Regulations 2017 [F2017L00185] (the regulation) sought to extend the definition of 'extradition country' in the Extradition Act to include the People's Republic of China, thereby giving effect to the Treaty on Extradition between Australia and the Peoples Republic of China.<sup>6</sup>

1.304 However, the Extradition (People's Republic of China) Repeal Regulations 2017 [F2017L00325] (the repeal regulation) repealed the regulation on 29 March 2017.

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3 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 149.

4 Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (26 June 2013) 56.

5 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament* (13 May 2015) 108-110.

6 Not yet in force.

### ***Compatibility of the measure with multiple rights***

1.305 The committee previously noted that it had concerns with the compatibility of the Extradition Act with a number of human rights, including:

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

1.306 The regulation effectively sought to extend the operation of the Extradition Act by including a newly declared country as one to which a person may be subject to extradition. Accordingly, the regulation engages the rights set out above.

1.307 As the Extradition Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment by the minister in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full human rights assessment of a regulation which extends the application of powers under the Extradition Act, by listing a new 'extradition country', requires an assessment of whether the powers themselves are compatible with human rights. The committee is therefore faced with the difficult task of assessing the human rights compatibility of declaring a new country to be an 'extradition country' without the benefit of a foundational human rights assessment of the Extradition Act from the minister.

1.308 As set out above, the committee has previously considered that the Extradition Act would benefit from a comprehensive review by the minister to assess its provisions against Australia's obligations under international human rights law.<sup>7</sup>

1.309 However, in this case, the regulation was repealed by the repeal regulation on 29 March 2017 and is no longer in force.

### **Committee comment**

**1.310 The committee refers to its previous consideration of the *Extradition Act 1988*, and in particular, its recommendation that the *Extradition Act 1988* would benefit from a comprehensive review to assess its provisions against Australia's human rights obligations.**

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7 See the committee's comments on the human rights compatibility of the Extradition (Convention for the Suppression of Acts of Nuclear Terrorism) Regulation 2012 [F2012L02434]; Extradition (Cybercrime) Regulation 2013 [F2013L00214]; Extradition (Piracy against Ships in Asia) Regulation 2013 [F2013L00397]; and Mutual Assistance in Criminal Matters (Cybercrime) Regulation 2013 [F2013L00205] in Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (26 June 2013) 58.



**1.311** The committee draws the human rights implications of the *Extradition Act 1988*, and any extension of its operation by a regulation, to the attention of the minister and the Parliament.

**1.312** The committee notes that the Extradition (People's Republic of China) Regulations 2017 was repealed by the Extradition (People's Republic of China) Repeal Regulations 2017 on 29 March 2017 and is no longer in force.

**1.313** If a new regulation is made to extend the definition of an 'extradition country' in the *Extradition Act 1988*, the committee may request further information from the minister with respect to its compatibility with Australia's obligations under international human rights law.

## **Bills not raising human rights concerns**

1.314 Of the bills introduced into the Parliament between 27 and 30 March 2017, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- ASIC Supervisory Cost Recovery Levy Bill 2017;
- ASIC Supervisory Cost Recovery Levy (Collection) Bill 2017;
- ASIC Supervisory Cost Recovery Levy (Consequential Amendments) Bill 2017;
- Banking Amendment (Establishing an Effective Code of Conduct) Bill 2017;
- Communications Legislation Amendment (Deregulation and Other Measures) Bill 2017;
- Criminal Code Amendment (Protecting Minors Online) Bill 2017;
- Fair Work Amendment (Pay Protection) Bill 2017;
- National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Bill 2017;
- National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017;
- Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017;
- Parliamentary Business Resources Bill 2017;
- Parliamentary Business Resources (Consequential and Transitional Provisions) Bill 2017;
- Primary Industries Research and Development Amendment Bill 2017;
- Petroleum and Other Fuels Reporting Bill 2017;
- Petroleum and Other Fuels Reporting (Consequential Amendments and Transitional Provisions) Bill 2017;
- Renew Australia Bill 2017;
- Treasury Laws Amendment (2017 Enterprise Incentives No. 1) Bill 2017; and
- Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017.