Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationally connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

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1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the Parliament between 13 and 15 June 2017 (consideration of 3 bills from this period has been deferred);[1]
- legislative instruments received between 12 and 25 May 2017 (consideration of 6 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

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

Instruments not raising human rights concerns

1.3 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[3] Instruments raising human rights concerns are identified in this chapter.

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

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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.

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

Response required

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

Competition and Consumer Amendment (Competition Policy Review) Bill 2017

Purpose	Seeks to amend various provisions of the *Competition and Consumer Act 2010* including to increase the maximum penalty applying to breaches of the secondary boycott provisions; extend section 83 of the Act relating to admissions of fact and findings of fact made in certain proceedings; extend the Commission's power to obtain information, documents and evidence in section 155 of the Act; introduce a 'reasonable search' defence to the offence of refusing or failing to comply; and increase the penalties under section 155 of the Act
Portfolio	Treasury
Introduced	House of Representatives, 30 March 2017
Rights	Privacy; freedom of association; strike; fair trial; right to be presumed innocent (see **Appendix 2**)
Status	Seeking additional information

Coercive information gathering powers – increased penalty for failure to furnish or produce information and expansion of matters subject to notice

1.6 Currently, section 155 of the *Competition and Consumer Act 2010* (Competition Act) makes it an offence for a person to refuse or fail to comply with a notice to furnish or produce information or to appear before the Australian Competition and Consumer Commission (ACCC).

1.7 Schedule 11 of the bill proposes to increase the penalty for a contravention of section 155 to imprisonment of two years (currently 12 months) or 100 penalty units (currently 20 penalty units).[1]

1.8 Further, Schedule 11 proposes to expand the range of matters which may be subject to a notice.

1 See, Schedule 11, item 4. Currently, 1 penalty unit is $180 but is due to increase to $210 as of 1 July 2017.

1.9 Section 155(7) provides that a person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document may tend to incriminate the person.

Compatibility of the measure with the right not to incriminate oneself

1.10 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)).

1.11 The ACCC has powers to investigate a range of civil and criminal matters. The right to a fair trial, and more particularly the right not to incriminate oneself, is engaged where a person is required to give information to the ACCC which may incriminate them and that incriminating information can be used indirectly to investigate criminal charges. In relation to the right not to incriminate oneself, the statement of compatibility acknowledges that:

> [Section] 155(7) already engages and places a limitation on that right. [Section 155] provides that a person is not excused from producing information, documents or evidence on the basis that such material would tend to incriminate that person or expose that person to a penalty. The amendments to Schedule 11 do not further limit the right against self-incrimination, except to the extent that section 155 notices may now be issued in relation to additional matters.[2]

1.12 While the statement of compatibility acknowledges the increase in the range of matters which may be subject to a notice, it does not acknowledge that the measure increases the penalty for non-compliance with a notice. Increasing the penalty for non-compliance, as well as expanding the ACCC's powers, further limits the right not to incriminate oneself beyond the limitation already imposed in the existing legislation.

1.13 The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate way of achieving that objective. However, as the statement of compatibility does not acknowledge that the measure limits the right not to incriminate oneself, it does not provide an analysis against these criteria.

1.14 The statement of compatibility only notes that these amendments are a result of recommendations of the Harper Review. However, the Harper Review noted that '[i]n relation to public enforcement by the ACCC, there appears to be general approval of the severity of the sanctions for contravention of the competition law',

2 Statement of compatibility (SOC) 160.

however, 'the current sanction for a *corporation* failing to comply with section 155 of the [Competition Act] is inadequate'.[3]

1.15 The statement of compatibility does point to a range of immunities and exceptions which could be relevant to whether the measure is a proportionate limit on the right not to incriminate oneself. In particular, the statement of compatibility notes that a 'use' immunity would be available in respect of information provided. This means that where a person has been required to give incriminating evidence, that evidence cannot be used against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person.

1.16 However, no 'derivative use' immunity is provided in this case, which raises the question as to whether the measure is the least rights restrictive way of achieving its objective.[4] In order to be a proportionate limit on human rights, a measure must be the least rights restrictive way of achieving its stated objective. This issue was not addressed in the statement of compatibility.

Committee comment

1.17 The committee therefore requests the advice of the Treasurer 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;**
- **whether the increased penalty is necessary to achieve that objective;**
- **whether there are less rights restrictive ways of achieving that objective; and**
- **whether a derivative use immunity would be reasonably available.**

Compatibility of the measure with the right to privacy

1.18 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.

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3 Harper, Anderson, McCluskey and O'Bryan, *Competition Policy Review*, Final Report, March 2015, 71 (emphasis added).

4 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.

1.19 By increasing the penalty for refusal or failure to comply with a notice to furnish or produce information or to appear before the ACCC and by increasing the matters which may be subject to a notice, the measure engages and limits the right to privacy.

1.20 The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and a proportionate means of achieving that objective.

1.21 The statement of compatibility acknowledges that the coercive information gathering powers may engage the right to privacy and identifies some matters which could go towards the proportionality of the measure.[5] However, no information is provided in the statement of compatibility as to whether the measure pursues a legitimate objective (that is, addresses a pressing and substantial concern) and is rationally connected to that objective. It is difficult to assess whether a measure is a proportionate limitation on a particular right in circumstances where the objective of the measure has not been clearly identified in the statement of compatibility.

Committee comment

1.22 The committee therefore requests the advice of the Treasurer 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;**
- **whether the increased penalty is necessary to achieve that objective;**
- **whether there are less rights restrictive ways of achieving that objective; and**
- **whether there are adequate and effective safeguards in relation to the measure.**

Increased penalties for secondary boycotts

1.23 Schedule 6 to the bill proposes to increase the maximum penalty applying to breaches of the secondary boycott provisions (sections 45D and 45DB of the Competition Act) from $750,000 to $10,000,000.

1.24 Currently, section 76(2) of the Competition Act provides that individuals cannot be fined for contravention of the boycott provisions. However, this is subject to section 45DC(5) which provides that where an organisation is not a body

5 SOC 160-161.

corporate, proceedings for damages can be taken against an officer of the union as a representative of union members. These damages can be enforced against the property of the union, or against any property that members of the union hold in their capacity as members.

Compatibility of the measure with the right to freedom of association

1.25 The right to strike is protected as an aspect of the right to freedom of association and the right to form and join trade unions under article 22 of the ICCPR and article 8 of the International Covenant on Economic Social and Cultural Rights (ICESCR). The right to strike, however, is not absolute and may be limited in certain circumstances.

1.26 The statement of compatibility acknowledges that the measure may engage work-related rights:

> However, section 45DD makes it clear that boycotts are permitted under the competition law if the dominant purpose of the conduct relates substantially to employment matters, i.e. remuneration, conditions of employment, hours of work or working conditions.
>
> Consequently, the increased penalty in section 76 is only applicable to secondary boycotts with a dominant purpose that does not relate to employment matters.
>
> Where a secondary boycott has a dominant purpose not related to employment matters, but a non-dominant purpose that does relate to employment matters, the boycott may be prohibited under section 45D or 45DB.
>
> To this extent, sections 45D and 45DB may engage the rights described in Article 8 of the ICESCR.[6]

1.27 The statement of compatibility contends that the measure engages but does not further limit work-related rights. However, where a measure increases the penalties imposed in relation to offences which limit human rights, this has consistently been considered to constitute a further limitation on the relevant right. The statement of compatibility does not explain the objective of the measures, nor engage in an assessment of proportionality against the limitation criteria.

1.28 The scope of the right to strike under international human rights law is generally understood as also permitting 'sympathy strikes' or primary as well as secondary boycott activities.[7] The statement of compatibility does not explain what

6 SOC 151-152.

7 See ILO, *Committee of Experts on the Application of Conventions and Recommendations (CEACR)* - adopted 2013, published 103rd ILC session (2014); Observation (CEACR) - adopted 2011, published 101st ILC session (2012), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

kinds of matters are not considered to have a 'dominant purpose' relating to employment, such that secondary boycott activities are prohibited and the increased penalty is to apply. Further information will assist the committee's assessment of the measure.

Committee comment

1.29 The committee therefore requests the advice of the Treasurer 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 (including any relevant safeguards); and**
- **what matters do or do not have a 'dominant purpose' related to employment.**

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

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

1.31 As the increased penalty may have the effect of discouraging certain kinds of protest activities it may engage and limit the right to freedom of assembly and expression. These rights were not addressed in the statement of compatibility.

Committee comment

1.32 The committee therefore requests the advice of the Treasurer as to:

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

Further response required

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

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Purpose	Amends the *Fair Work Act 2009* to: increase maximum civil penalties for certain serious contraventions of the Act; 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; clarify the prohibition on employers unreasonably requiring their employees to make payments in relation to the performance of work; 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
Portfolio	Employment
Introduced	House of Representatives, 1 March 2017
Rights	Fair trial; right to be presumed innocent; not to be tried and punished twice; not to incriminate oneself; privacy (see **Appendix 2**)
Previous report	4 of 2017
Status	Seeking further additional information

Background

1.34 The committee first reported on the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the bill) in its Report 4 of 2017, and requested a response from the Minster for Employment by 26 May 2017.[1]

1.35 The minister's response to the committee's inquiries was received on 1 June 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 17-27.

Civil penalty provisions

1.36 Schedule 1, Part 1 of 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.[2] The maximum penalty for a 'serious contravention' would be 600 penalty units ($108,000).[3]

1.37 Proposed section 557A provides that a contravention is a 'serious contravention' if the conduct was deliberate and part of a systematic pattern of 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.[4] 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.[5]

1.38 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.[6]

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2 See proposed section 539(2).

3 See proposed section 539(2). As of 1 July 2017, a penalty unit will increase to $210 so that 600 penalty units would be $126,000.

4 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).

5 See Fair Work Act section 539.

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

Compatibility of the measure with criminal process rights

1.39 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).

1.40 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.[7]

1.41 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.[8]

1.42 As noted in the initial human rights analysis, 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.[9] 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.

1.43 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, since the penalty only applies to the regulatory regime of the Fair Work Act rather than to the public at large, and enforcement proceedings

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 *Guidance Note 2* – see Appendix 4.

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

may be brought not only by the FWO but an affected employee or union, the nature of the penalty should not be considered 'criminal'.[10]

1.44 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.

1.45 The initial human rights analysis stated that, 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)[11] 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.[12]

1.46 Further, according to the explanatory memorandum, the severity of the increased or new penalties proposed in the bill are aimed at addressing concerns about preventing the exploitation of vulnerable workers.[13] 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.[14]

1.47 This provides one argument as to why the penalties may be considered civil in nature, rather than criminal, 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

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10 EM, SOC 3-4.

11 As of 1 July 2017, a penalty unit will increase to $210 so that 600 penalty units would be $126,000.

12 EM, SOC 5.

13 See EM i; EM, SOC 5.

14 EM i.

penalties will apply. While most of the provisions apply to employers, some of the provisions may apply to individuals, including *employees*.

1.48 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.[15] The previous analysis noted that the potential application of such a large penalty to an individual in this context raises significant questions about whether this particular measure ought to be considered 'criminal' for the purposes of international human rights law. The analysis stated that it was 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.

1.49 The committee therefore sought 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 (ICCPR, article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

Minister's response

1.50 In relation to whether the penalty provisions in the bill may be considered to be 'criminal' in nature for the purposes of international human rights law, the minister states:

> The objective of the proposed new penalties is to implement a proportionate response to address persistent and deliberate exploitation of vulnerable workers (including migrant workers). This new penalty is justified because the new provisions specifically target deliberate and

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

> systematic misconduct, and the penalty needs to be high enough to ensure that the consequences of such egregious law-breaking aren't simply written off as an acceptable 'cost of doing business'.
>
> I acknowledge the Committee's observation that 'the Fair Work Act governs the 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'. The relevant provisions do however specifically target employer-employee relationships, not work relationships more broadly.
>
> On balance, and taking all of the relevant features into account, I am satisfied the penalties are not 'criminal' in nature.
>
> Application of proposed penalties for 'serious contraventions' to individuals
>
> I have also considered the application of the proposed maximum civil penalties to individuals including employees. The provisions have been crafted to specifically target contraventions relating to underpayment of employees, so the new penalties will apply to employers or others who are involved in such contraventions, whether individuals or otherwise.
>
> I am not satisfied that employers who are individuals, including sole traders, should be excluded from the proposed 'serious contraventions' regime given the purpose of these provisions is to deter deliberate and systematic underpayment of workers.
>
> The appropriate penalty to be applied in any particular case will be determined by the courts, which are in the best position to ensure the penalties imposed are appropriate to the case at hand and achieve effective deterrence.

1.51 As the initial human rights analysis acknowledged, the civil penalty provisions are aimed at addressing human rights concerns over the exploitation of vulnerable workers. This response provides a range of reasons as to why the proposed civil penalty provisions should not be considered 'criminal' for the purpose of international human rights law with respect to *employers* (including individual employers).

1.52 However, this response fails to address the specific issue raised in the initial human rights analysis about the application of some civil penalty provisions to individual *employees*. For example, as set out above, 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. Accordingly, the potential application of such a large penalty to an individual employee in this context continues to raise significant questions about whether this particular measure ought to be considered 'criminal' for the purposes of international human rights law. Contrary to the minister's response that the civil penalty provisions have been specifically crafted to address exploitation, the

application of this substantial increase in the civil penalty to any contravention of a term of a workplace determination by an individual employee does not appear directed towards combatting the exploitation of vulnerable workers.

1.53 In relation to whether the civil penalty provisions nevertheless comply with criminal process rights, the minister's response states:

> The provisions do however comply with the requirements of articles 14 and 15.
>
> The proposed legislation draws on the existing civil penalty regime, which means:
>
> • the standard of proof for allegations involving 'serious contraventions' is the civil standard of proof (Article 14(2))
>
> • the privilege against self-incrimination is abrogated but replaced with immunities (Article 14(3)(g))
>
> • protection against 'civil double jeopardy' is included under the Fair Work Act (s 556), so criminal proceedings may follow civil proceedings in relation to conduct which is the same or substantially the same (see the Fair Work Act, s 554), and
>
> • the proposed provisions would not apply retrospectively (Article 15(1)).
>
> Importantly there is no risk of 'double punishment' because the proposed new provisions are regulatory in nature and there are no apparent corresponding criminal offences. This means there would be no real need for supplementary protections against 'double jeopardy', for the purposes of international human rights law.

1.54 Some of these mechanisms provide relevant safeguards in relation to criminal process rights, particularly the protection against being tried and punished twice and that the provisions do not apply retrospectively. However, other aspects of the scheme do not comply with criminal process rights. The application of a civil rather than a criminal standard of proof raises concerns in relation to the right to be presumed innocent. The right to be presumed innocent generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. The abrogation of the privilege against self-incrimination will also impact upon the proportionality of any limitation on this right. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be serious questions about whether they are compatible with criminal process rights.

Committee response

1.55 The committee thanks the minister for her response. Noting that questions remain 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, and such penalty provisions can be legitimate as long as they have appropriate safeguards in place, the committee requests the further advice of the minister as to whether:

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

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

1.56 The bill also 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.[16] Failure to comply with the FWO notice may result in a civil penalty of 600 penalty units ($108,000).[17]

1.57 Under proposed section 713(1) a person is not excused from giving information, producing a record or document or answering a question under the FWO notice on the basis that to do so might tend to incriminate the person.[18] 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 to the obstruction of Commonwealth officials.[19]

Compatibility of the measure with the right to privacy

1.58 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.

1.59 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.[20]

16 See proposed section 712B.

17 See proposed section 712B; EM 17.

18 See proposed section 713.

19 See proposed section 713.

20 See proposed section 713(1).

1.60 As stated in the initial human rights analysis, 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.

1.61 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 propertly [sic] investigated and help ensure the lawful payment of wages.[21]

1.62 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.

1.63 However, the statement of compatibility provides very limited information as to whether the measure will be rationally connected to, or a proportionate way of, achieving this objective. The initial analysis stated that there is no reasoning or evidence provided as to how it is anticipated that the powers will be effective in achieving their objective.

1.64 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. The initial human rights analysis noted that, the fact that 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.[22] The committee's consideration of similar measures and its previous concerns about human rights compatibility were not addressed in the statement of compatibility.

1.65 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, as stated in the previous analysis,

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21 EM, SOC 6.

22 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.

there are serious questions about whether such powers constitute a proportionate limit on the right to privacy in this case.

1.66 First, the proposed powers appear to be insufficiently circumscribed with reference to 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.

1.67 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] have failed or are inappropriate.'[23] 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, again raising the question of whether the measure as drafted is sufficiently circumscribed.

1.68 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 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.[24] 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.

1.69 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.[25] Australia has also been criticised for similar coercive information gathering powers by

23 EM, SOC 6.

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

25 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66 and *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.

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.[26]

1.70 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 was noted in this respect that section 713(1) also abrogates the privilege against self-incrimination.

1.71 The committee therefore sought 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 [1.64] to [1.70].

Minister's response

1.72 In relation to how the measure is effective to achieve (that is, rationally connected to) its stated objective, the minister provided the following advice:

> The proposed FWO powers are effective to achieve the stated objectives of:
>
> • more 'effectively deterring unlawful practices, including those that involve the deliberate and systematic exploitation of workers', and
>
> • ensuring 'the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations'.
>
> Inadequacies in the Fair Work Ombudsman's powers have been highlighted by some recent cases. In FWO investigations into 7-Eleven for example, the Fair Work Ombudsman resorted to CCTV footage and registers of fuel levels to reconstruct hours of work for underpaid workers due to a lack of cooperation by the company. Investigations into the Baiada group in New South Wales stalled altogether due to lack of cooperation. These are not discrete examples but form part of a broader picture of deliberate non-compliance by certain unscrupulous operators.

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26 See International Labour Organization, *Committee on Freedom of Association*, Case No 2326 (Australia), in which the committee requests to be kept informed of development - Report No 338, November 2005, [454]-[456]; Case No 2326 (Australia), Effect given to the recommendations of the committee and the Governing Body - Report No 353, March 2009, [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)).

> These cases show how serious instances of underpayment may not be able to be investigated where any employer refuses to provide documents or cooperate with a FWO investigation. The limitation on the powers also means that vulnerable workers may not have sufficient confidence that they can come forward without facing retribution from their employer or others.

1.73 The minister's response further explains that the current law is ineffective in addressing such issues:

> While FWO Inspectors may interview people under the Fair Work Act, para 709(e), there is currently no penalty for a person who refuses or fails to answer questions. In these kinds of cases, investigations stall and the Act becomes very difficult if not impossible to enforce.

1.74 It is acknowledged that the coercive information gathering powers may be of assistance in tackling and addressing systematic worker exploitation. Accordingly, they are likely to be rationally connected to the stated objective of the measure.

1.75 In relation to whether the limitation is proportionate to achieving its stated objective, the minister's response states:

> The proposed FWO powers have been drafted to pursue the legitimate objective of ensuring 'the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations'. The breadth of the powers goes no further than necessary to achieve this stated objective.
>
> The proposed measure is carefully drafted to include appropriate safeguards, so the proposed new FWO powers are proportionate to the outcomes being sought. The safeguards have been modelled on provisions conferring similar powers on ASIC and the ACCC and are described in more detail in the Explanatory Memorandum.
>
> The Fair Work Act is the primary workplace legislation in Australia and it is critical that it is, and is seen to be, enforceable and enforced.

1.76 It is acknowledged that the measure pursues a legitimate objective. The minister's response states that the measure goes 'no further than necessary' to achieve this objective. However, as noted above, the coercive information gathering powers would apply across an extremely broad range of conduct under the Fair Work Act including conduct by individual employees and in circumstances where there are no allegations or evidence of worker exploitation. The measure accordingly appears to be insufficiently circumscribed. This concern is reinforced by the committee's

previous conclusions,[27] and the criticism by international supervisory bodies, regarding similar coercive information gathering powers set out above at [1.69].[28]

1.77 The minister's response states that there are sufficient safeguards to ensure that the measure is a proportionate limit on the right to privacy. However, no information is provided about these safeguards or response made to the concerns raised in the initial human rights analysis. The response 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. Finally, the minister's response does not address why the 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 or why it is necessary to abrogate the privilege against self-incrimination.

Committee response

1.78 The committee thanks the minister for her response.

1.79 The preceding analysis indicates that questions remain as to whether the coercive evidence gathering powers are compatible with the right to privacy.

1.80 Accordingly, the committee requests the further advice of the minister as to the proportionality of the measure including:

- **what safeguards exist in relation to the measure;**
- **whether additional safeguards could be included in relation to the measure (such as external safeguards);**
- **whether the power could be further circumscribed so as to only apply to cases where there is suspected exploitation of employees; and**
- **why the extent of the limitation is proportionate to the investigation of industrial matters noting that the powers go beyond those usually available to the police.**

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27 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66 and *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.

28 See International Labour Organization, *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, [454]-[456]; Case No 2326 (Australia), Effect given to the recommendations of the committee and the Governing Body - Report No 353, March 2009, [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, 537 (in the context of the Labour Inspection Convention, 1947 (No 81).

Compatibility of the measure with the right not to incriminate oneself

1.81 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)).

1.82 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.

1.83 While the right not to incriminate oneself may be permissibly limited, this right was not addressed in the statement of compatibility. 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*,[29] and the Attorney-General's Department's guidance on the preparation of statements of compatibility.[30]

1.84 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-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.[31]

1.85 As noted in the previous analysis, 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, this explanation does not

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

30 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.

31 EM 19.

sufficiently identify a legitimate objective, that is, one which addresses a pressing and substantial concern, for the purposes of international human rights law.[32]

1.86 The initial analysis noted that 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.[33] 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 raised questions about whether the measure is the least rights restrictive way of achieving its objective.

1.87 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.[34]

1.88 The previous analysis 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.

1.89 The committee therefore sought 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;

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

33 See proposed section 713(3).

34 EM 21.

- 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.

Minister's response

1.90 In relation to whether the measure pursues a legitimate objective and is rationally connected to that objective, the minister's response provides:

> The provisions are directed at the legitimate objective of ensuring the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations.
>
> Abrogating the privilege against incrimination is critical to achieving the stated objective. The proposed laws are concerned with addressing deliberate and systematic non-compliance with workplace laws, and ensuring they are enforceable in cases involving serious misconduct, poor, falsified or no records, and orchestrated cover-ups. 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, such individuals would be unlikely to provide information to the FWO. The proposed arrangements will enhance the FWO's evidence-gathering powers to ensure these kinds of serious cases can be effectively investigated under the Fair Work Act.

1.91 It is acknowledged that this may be considered a legitimate objective for the purposes of international human rights law.

1.92 In relation to whether the measure is proportionate, the minister's response states:

> The limitation on the protection against self-incrimination is justified because it is subject to a full use immunity, which extends in relation to all future proceedings, except several criminal proceedings relating to perjury-type offences.
>
> I do not believe a derivative use immunity is necessary for the limitation to be proportionate. The information gathering powers are based on those available to corporate regulators such as ASIC and the ACCC, which do not include a derivative use immunity. The burden placed on investigating authorities in conducting a prosecution before the courts is the main reason why the powers of the Australian Securities Commission (now ASIC) were amended to remove derivative use immunity. Similarly, the Government considers that the absence of derivative use immunity is

> reasonable and necessary for effective proceedings to be brought in this context.
>
> ASIC in its submission to the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms: Interim Report 127, noted the full scope of derivative use immunity cannot be accurately predicted in advance and risks making a person conviction-proof for an unforeseeable range of contraventions. Furthermore, while specific provision may not be made for derivative use immunity there remains 'wide and flexible' judicial discretion to exclude derivative evidence in order to prevent or remedy potential unfairness. These observations are equally relevant in the present context and should be taken into account.

1.93 It is noted that the availability of a 'use' immunity is an important safeguard. However, the addition of a 'derivative use' immunity would appear to be a less rights restrictive approach and provide a stronger level of protection.[35] The minister's response argues that a derivative use immunity would place too great a burden on investigative agencies, risks prejudicing conviction for an unforeseeable range of contraventions, and that the judicial discretion to exclude derivative evidence provides a relevant safeguard. The minister can be understood to argue therefore that a 'derivative use' immunity is not a reasonably available alternative in light of the objective of effective prosecution of criminal offences.

1.94 On the other hand, under the measure, the abrogation of the privilege against self-incrimination will apply more broadly than to the investigation of serious contraventions of workplace laws by employers. It will extend to the conduct of individual workers, including conduct that may not, in relative terms, be serious. The powers may apply to persons who are less sophisticated than, and lack the legal resources that may be available to, persons in the corporate context of ASIC or ACCC information gathering. The context and breadth of the powers of compulsion under the bill make it unlikely that, in the absence of a comprehensive immunity, the bill is a proportionate limitation on the right not to incriminate oneself. This assessment is

35 A 'use' immunity provides that where a person has been required to give incriminating evidence, that evidence cannot be used directly against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person. 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.

further supported by the conclusions reached by the ILO treaty supervisory bodies, in relation to similar powers applied in the building and construction industry.[36]

Committee response

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

1.96 The preceding analysis indicates that the coercive evidence gathering powers are likely to be incompatible with the right not to incriminate oneself.

36 See, for example, International Labour Organization, *Committee on Freedom of Association Report*, in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) [453]-[457]; Committee of Experts on the Application of Conventions and Recommendations, CEACR Observation - adopted 2011, published 101st ILC session (2012); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

Bills not raising human rights concerns

1.97 Of the bills introduced into the Parliament between 13 and 15 June 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):

- Commercial Broadcasting (Tax) Bill 2017;
- Corporations Amendment (Modernisation of Members Registration) Bill 2017;
- Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017;
- Great Barrier Reef Marine Park Amendment Bill 2017;
- Liquid Fuel Emergency Amendment Bill 2017;
- Productivity Commission Amendment (Addressing Inequality) Bill 2017;
- Regional Investment Corporation Bill 2017; and
- Treasury Laws Amendment (2017 Measures No. 3) Bill 2017.

Chapter 2

Concluded matters

1.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

1.2 Correspondence relating to these matters is included at **Appendix 3**.

Fair Work Amendment (Corrupting Benefits) Bill 2017

Purpose	This bill seeks to amend the *Fair Work Act 2009* to: • make it a criminal offence to give a registered organisation, or a person associated with a registered organisation, a corrupting benefit; • make it a criminal offence to receive or solicit a corrupting benefit; • 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; • make it a criminal offence to solicit, receive, obtain or agree to obtain any such prohibited payment; and • require full disclosure by employers and unions of financial benefits they stand to gain under an enterprise agreement before employees vote on the agreement
Portfolio	Employment
Introduced	House of Representatives, 22 March 2017
Rights	Fair trial; not to be tried and punished twice (double jeopardy) (see **Appendix 2**)
Previous report	4 of 2017
Status	Concluded examination

Background

1.3 The committee first reported on the bill in its *Report 4 of 2017*, and requested a response from the Minister for Employment by 26 May 2017.[1]

1.4 The minister's response to the committee's inquiries was received on 1 June 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

New offences and concurrent operation of state laws

1.5 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

1.6 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)).

1.7 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.

1.8 The initial human rights analysis noted that 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.

1.9 The initial human rights analysis 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 territory. While this is an important safeguard, it does not address the reverse situation of possible prosecution under a state or territory law after being prosecuted under Commonwealth law.

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 12-16.

1.10 This matter is not discussed 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.

1.11 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.[2]

1.12 Accordingly, the committee sought 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.

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2 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).

Minister's response

1.13 In relation to whether the measure is compatible with the right to a fair trial and the right not to be tried and punished twice for the same offence, the minister's response states:

> As the Committee has noted (at [1.45]), section 4C of the *Crimes Act 1914* (Cth) protects a person from being punished for a Commonwealth offence after having been punished for the same offence under the law of a State or Territory.
>
> Where a person is first punished for a Commonwealth offence, the applicability to the person of any overlapping State or Territory offence is a matter to be determined by the applicable law in that State or Territory, including the common law.
>
> In this regard, I note that a number of States and Territories have express statutory provisions dealing with anterior punishments for Commonwealth offences: see for example *Crimes (Sentencing Procedure) Act 1999* (NSW), s 20; *Sentencing Act 1995* (WA), s 11(2); *Legislation Act [2001]* (ACT), s 191(2).

1.14 This response confirms that section 4C of the *Crimes Act 1914* protects a person from being tried and punished for a Commonwealth offence after having been punished for the same offence under the law of a state or territory. This is an important safeguard for the protection of the right not to be tried and punished twice for the same offence.

1.15 As regards protection against being tried for a Commonwealth offence and then being tried for a state or territory offence in respect of the same conduct, the minister's response helpfully identifies protections in New South Wales, Western Australia and the Australian Capital Territory. However, information is not provided in relation to the other states and territories. If such laws preventing double punishment do not exist in particular states or territories a person may face double punishment and the measure risks being incompatible with the right not to be tried and punished twice for the same offence. As a matter of international human rights law the Commonwealth has the relevant powers and responsibilities to ensure that the right not to be tried or punished twice for the same offence is complied with at all levels of government – including in the law of the states and territories – in respect of the measure.[3]

Committee response

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

3 See, Vienna Convention on the Law of Treaties 1969 article 27; Australian Constitution section 51(xxix).

1.17 Section 4C of the *Crimes Act 1914* is an important safeguard which prevents a person being tried and punished for a Commonwealth offence after having been punished for the same offence under the law of a state or territory.

1.18 However, the preceding analysis indicates that double jeopardy could still arise unless each state and territory also has laws preventing a person being tried and punished twice for the same offence. On the basis of the minister's response, it cannot be concluded that the measure is compatible with the right not to be tried and punished twice for the same offence.

Strict liability offences

1.19 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.

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

1.21 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

1.22 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.

1.23 As stated in the initial human rights analysis, 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.[4]

1.24 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 the attachment of strict liability is necessary to pursue the legitimate objective of eliminating illegitimate cash or in kind payments.[5] 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.[6] The initial analysis stated that further information from the minister in this regard would assist the committee to conclude whether the measure permissibly limits the right to be presumed innocent.

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

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

1.27 The committee requested 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.

Minister's response

1.28 In relation to these questions, the minister provided the following information:

> It is appropriate for strict liability to attach to paragraphs 536F(1)(a), (c) and (d) of the relevant criminal offence. Section 536F is intended to address the problem which the Royal Commission into Trade Union and Governance found to be 'insidious' and 'immensely damaging': the provision of corrupt payments and other benefits by employers to unions

4 *Guidance Note 2* — See Appendix 4.

5 Statement of compatibility (SOC) viii.

6 See, SOC viii.

and their officials (Final Report, Volume 5, Chapter 4 at [58]). The Commissioner stated (at [60]):

Seeking simply to prohibit payments made or received with a particular intention has consequent difficulties of investigation and proof. Instead it is recommended that, subject to certain exceptions, all payments by employers to a relevant union or officials of that union be outlawed.

Paragraph 536F(1)(a) limits the offence to the defendant being a national system employer who is not an employee organisation. As explained in the Explanatory Memorandum to the Bill, this element is jurisdictional in nature, in that it attaches the offence to the relevant Commonwealth head of power to legislate. Strict liability attaching to this element can be justified by virtue of the fact that it is jurisdictional in nature.

One of the principal purposes of the offence provision is to ensure that a defendant national system employer has sufficiently robust internal governance and accounting mechanisms in place so as to ensure that they are aware of whether the recipient of a payment is a person to whom the circumstances in paragraphs 536F(1)(c) and (d) apply. If the provision were to have fault elements for paragraphs 536F(1)(c) and (d), the imperative for employers to have appropriate mechanisms in place to prevent illegitimate payments to employee organisations and their associates would be diminished. The absence of fault elements is thus a necessary and proportionate means to achieve the provision's objectives. Proportionality is further served by the availability of the defence of reasonable mistake of fact.

Similarly, strict liability attaches to paragraph 536G(1)(c) because an employee organisation and its officers should be aware of the circumstances in which the payment of money by an employer would be an offence against section 536F. The provision is intended to ensure that employee organisations take sufficient care not to solicit payments from national system employers that would contravene section 536F. Proportionality is further served by the availability of the defence of reasonable mistake of fact.

1.29 The response justifies the application of a strict liability element to the requirement that 'the defendant is a national system employer other than an employee' on the basis that it is a jurisdictional element of the offence. A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but instead links the offence to the relevant legislative power of the Commonwealth. Accordingly, this particular element appears to be justifiable as a matter of international human rights law.

1.30 However, it is less clear that the other three strict liability elements are a proportionate means of achieving the objective of the measure. It is a serious matter for an individual to be found guilty of a criminal offence in circumstances where they are not at fault in respect of particular elements of the offence. The minister's response argues that it would not be appropriate to apply a fault element to the

offence because there should be sufficiently robust internal governance and accounting mechanisms in place, or the defendant should be properly aware of the relevant circumstances, and applying a fault element would weaken the deterrent effect of the provision. Acknowledging this justification, no specific evidence is provided to support the argument that inclusion of a fault element would necessarily weaken the deterrent effect, noting that the fault element may be designed to include knowledge as well as recklessness as to relevant facts.

1.31 As noted in the minister's response, the defence of reasonable mistake of fact is available such that there is still some scope provided for a defence on the strict liability elements of the offence. However, it is not clear from the response that the strict liability elements are the least rights restrictive way of achieving the objective of the measure.

1.32 Further, in relation to the proportionality of the measure, it is noted that the penalty is significant and that a person found guilty of an offence under these provisions may be subject to a maximum period of two years imprisonment and/or 500 penalty units. This accordingly is a significant limitation on the right to be presumed innocent.

1.33 On the basis of the information provided by the minister, it is not possible to conclude that each strict liability element is compatible with the right to be presumed innocent beyond reasonable doubt.

Committee response

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

1.35 The preceding analysis indicates that, based on the information provided, it is not possible to conclude that the strict liability elements of the offence are the least rights restrictive approach, and thereby compatible with the right to be presumed innocent beyond reasonable doubt.

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

Purpose	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; 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
Portfolio	Indigenous Affairs
Introduced	House of Representatives, 30 March 2017
Right[s]	Privacy; reputation; fair trial; not to incriminate oneself (see **Appendix 2**)
Previous report	4 of 2017
Status	Concluded Examination

Background

1.36 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).

1.37 The committee first reported on the bill in its *Report 4 of 2017*, and requested a response from the Minister of Indigenous Affairs by 26 May 2017.[1]

1.38 The assistant minister's response to the committee's inquiries was received on 26 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

1.39 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.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 28-34.

2 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.

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

1.40 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.

1.41 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

1.42 The initial human rights analysis noted the 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) including the right not to incriminate oneself (article 14(3)(g)).

1.43 The RC Act is designed to enable the establishment of royal commissions with significant information gathering, 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. As a royal commission is not determining a criminal charge but undertaking a broader examination of an issue, the investigative functions of a royal commission sit, in part, outside the protections of the right to a fair trial.

1.44 However, the right to a fair trial, and more particularly the right not to incriminate oneself, is engaged where a person is required to give information to a royal commission which may incriminate them 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.

1.45 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.

1.46 The statement of compatibility briefly discusses the abrogation of the right not to incriminate oneself (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.[3]

1.47 The availability of immunities is relevant to whether a measure is a proportionate limitation on the right not to incriminate oneself. However, the initial analysis noted that no 'derivative use' immunity is provided in this case and this may be relevant to the question of whether the limitation is proportionate.[4] This issue was not addressed in the statement of compatibility.

1.48 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.[5]

1.49 Accordingly, the committee sought 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

1.50 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.

1.51 The initial human rights analysis stated that 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.

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

4 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.

5 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.

1.52 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.

1.53 Accordingly, the committee sought 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.

Assistant minister's response

1.54 The Assistant Minister to the Prime Minister on behalf of the Minister for Indigenous Affairs provided a range of information in response to the committee's requests.

1.55 In relation to the proposal to increase the penalty for failing to attend a Royal Commission, the assistant minister's response notes that:

> The Bill implements recommendation 78 of the final report of the Royal Commission into Trade Union Governance and Corruption. The Hon John Dyson Heydon AC QC recommended that the *Royal Commissions Act 1902* be amended '*to increase the penalties for a failure to comply with a summons to attend, a failure to comply with a notice to produce, a failure to be sworn or answer questions, and a failure or refusal to provide documents to at least a maximum penalty of 2 years' imprisonment or a fine of 120 penalty units or both*'…
>
> In making that recommendation, Commissioner Heydon observed that the existing penalty for those offences is 'inadequate' and that a penalty of up to 2 years' imprisonment is consistent with the penalty applicable to a failure to comply with notices issued by the Australian Security and Investments Commission and by the Australian Competition and Consumer Commissioner (pages 626; 630 Final Report).

1.56 Despite the apparent basis for the Heydon Royal Commission recommendation, such high penalties do not currently apply consistently in respect of the coercive information gathering powers of the Australian Securities and Investment Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC).[6]

6 See Royal Commission into Trade Union Governance and Corruption, *Reform of the Royal Commissions Act 1902*, (2015), paragraph 27 of Chapter 10, Volume 5 of the Final Report.

1.57 A failure to furnish information or produce documents to the ACCC or appear before the ACCC is currently subject to imprisonment up to 12 months or a fine not exceeding 20 penalty units.[7]

1.58 While some offences relating to ASIC's investigation powers subject a person to up to two years imprisonment or 100 penalty units (or both) for a failure to appear for examination, answer a question or produce documents,[8] this is not the case across all such offences.[9]

1.59 In any event, the fact that other agencies have such powers or such penalties does not mean that such measures are, for that reason, compatible with the right not to incriminate oneself or the right to privacy.

Compatibility of the measure with the right not to incriminate oneself

1.60 In response to whether the measure is compatible with the right not to incriminate oneself, the assistant minister's response states that:

> As noted in the Bill's statement of compatibility (para 13), the Bill does not engage Article 14 because a Royal Commission does not exercise judicial power and cannot determine criminal charges…

1.61 However, as noted above, this right is engaged and limited because a person may be required to give self-incriminating information to a royal commission which may be used by law enforcement agencies to investigate criminal charges.

1.62 The assistant minister's response nevertheless provides information addressing whether the measure constitutes a permissible limitation on this right. As regards the objective of the measure, the response explains:

> The proposal to increase penalties for failure to comply with summonses is aimed at achieving the legitimate objective of ensuring a Royal Commission can fully inquire into, and report on, matters of public importance. The proposal is 'rationally connected' to that objective because higher penalties will enhance compliance with the summonses and therefore the Commission's ability to obtain information and evidence so that it can conduct its inquiry.

1.63 The initial human rights analysis of the bill stated that, 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. It can be accepted that the measure is rationally connected to this objective.

1.64 The assistant minister's response provides the following information in relation to the proportionality of the measure:

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7 See section 155 of the *Competition and Consumer Act 2010*.

8 See section 63(1) of the *Australian Securities and Investments Commission Act 2001*.

9 See section 63 of the *Australian Securities and Investments Commission Act* 2001.

> [The proposal to *increase* the penalty for failure to comply with summonses] is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits or safeguards on the abrogation of the privilege against self-incrimination. The privilege still applies where the production of information or answer to a question might tend to incriminate the person in relation to an offence, and the person has been charged with the offence, and the charge has not been finally dealt with by a court. Furthermore, if incriminating evidence is obtained by a Royal Commission, the Royal Commissions Act provides a 'use' immunity so that any statement or disclosure made by the person is not admissible in evidence against that person in any civil or criminal proceedings (section 6DD).
>
> A Commissioner may communicate information or evidence that relates to a contravention of the law to certain office holders such [as] the police or the Director of Public Prosecutions where the Commissioner considers it appropriate to do so (section 6P). Introducing a 'derivative use' immunity would unreasonably hinder the ability of these law enforcement agencies to investigate and prosecute matters reported on by a Royal Commission. However, because of the 'use' immunity in section 6DD, the law enforcement agencies could not directly use that information against the person, and could only use it to obtain further evidence against that person.

1.65 The availability of a 'use' immunity is an important safeguard. The provision for a 'derivative use' immunity would be a less rights restrictive approach and provide a stronger level of protection against self-incrimination.[10] The minister's response indicates the view that a 'derivative use' immunity may not be a reasonably available alternative. It is acknowledged that such an immunity would make it more difficult to investigate individuals on the basis of self-incriminating information.

1.66 Whether a 'derivative use' immunity is a reasonably available, less rights-restrictive alternative is an issue that arises in relation to the RC Act as it currently exists, as well as the bill seeking to increase penalties under the RC Act. Beyond the general statement in the assistant minister's response, no further information is provided which addresses why such a 'derivative use' immunity is not reasonably available or would be unworkable in achieving the stated objective of the measure to enable royal commissions to 'fully inquire into, and report on, matters of public

10 A 'use' immunity provides that where a person has been required to give incriminating evidence, that evidence cannot be used directly against the person in any civil or criminal proceeding but may be used to obtain further evidence against the person. 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.

importance'. This is especially so as witnesses would still be required to provide the information requested to the royal commission.

1.67 Accordingly, it appears that increasing the penalty for non-compliance, in circumstances where the person is not afforded the privilege against self-incrimination or given the protection of both a use and derivative use immunity may not be the least rights restrictive approach. In order to be a proportionate limit on human rights, a measure must be the least rights restrictive way of achieving its stated objective.

1.68 Further, increasing the penalty for non-compliance, in context, affects the proportionality of the coercive evidence gathering powers more generally. Based on the information provided and this analysis, it is not possible to conclude that the measure is compatible with the right not to incriminate oneself.

1.69 The committee has previously raised concerns in relation to the powers of royal commissions, including concerns regarding the right not to incriminate oneself, on a number of occasions. These concerns relate to the underlying statutory regime governing royal commissions as well as amendments which have expanded that regime.[11] For the reasons set out below at [2.104]-[2.110], the RC Act would benefit from a full review of its compatibility with the right to a fair trial, including whether the provision of immunities under the legislation is sufficient to protect the privilege against self-incrimination.

Compatibility of the measure with the right to privacy

1.70 In relation to the compatibility of the measure with the right to privacy, the assistant minister acknowledges that the measure engages and limits this right. The minister's response explains that the limitation pursues a legitimate objective and is rationally connected to that objective, as set out above at [2.62].

1.71 In relation to the proportionality of the limitation on the right to privacy, the assistant minister's response states:

> The proposal is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits and safeguards on the use and sharing of personal information obtained by a Commission. For example, a Commission has power to make a non-publication direction over any evidence given before a Commission, over the contents of any documents or written statement given to a Commission, and over any information that might enable a person who [has] given evidence before the Commission to be identified (section 6D(3)).

11 See, for example, Parliamentary Joint Committee on Human Rights, Report 4 of 2017 (9 May 2017) 66-69; *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.

Further, a witness can request that their evidence be taken in private where the evidence relates to the profits or financial position of any person and taking of the evidence in public would be unfairly prejudicial to the interests of that person (section 6D(2)). If there is any incriminating evidence about an individual, the 'use' immunity in section 6DD of the Royal Commissions Act applies so that any information or statement given by the person is not admissible in evidence against that person in any civil or criminal proceedings.

1.72 Under international human rights law the right to privacy encompasses 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.

1.73 That is, while the right encompasses respect for personal information, the right will also be engaged and limited in relation to some other forms of information collected, used and shared by royal commissions.

1.74 While the assistant minister's response has identified some relevant safeguards, as set out above, there remain questions about whether the measure is, in this context, the least rights restrictive way of achieving its stated objective. As the committee has pointed out on a number of occasions, discretionary safeguards may not be sufficient for ensuring that a limitation on the right to privacy is proportionate in each individual case.

Committee response

1.75 The committee thanks the Assistant Minister for his response.

1.76 The preceding analysis indicates, based on the information provided, that questions remain as to the compatibility of the measure with the right to privacy and the right not to incriminate oneself, including whether less rights restrictive measures are reasonably available, and the sufficiency of relevant safeguards provided by the RC Act.

1.77 The committee considers that the *Royal Commission Act 1902* would benefit from a full review of its compatibility with the right to a fair trial and the right to privacy, including whether the provision of immunities and safeguards under the legislation are sufficient to protect human rights.

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

1.78 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.

1.79 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.

1.80 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

1.81 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.

1.82 The initial analysis noted that 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.[12]

1.83 Information provided under such powers may be disclosed to the police or DPP under section 6P of the RC Act. The initial analysis noted that 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.

1.84 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.

1.85 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.[13]

1.86 As set out above, 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.

1.87 The compulsory provision of information is also likely to be rationally connected to this objective as the collection of further information may assist the

12 RC Act section 6A(1).

13 EM 5.

royal commission's inquiry function. However, the initial human rights analysis noted that the statement of compatibility does not demonstrate that the measure imposes a proportionate limitation on the right to privacy in pursuit of that legitimate objective. In particular, the statement of compatibility provides no information about why the measure is necessary to achieve the legitimate objective and does not addresses whether there are adequate safeguards in place with respect to the exercise of this power.

1.88 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.[14]

Compatibility of the measure with the right not to incriminate oneself

1.89 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.

1.90 The initial analysis noted that, in this respect, such information may be disclosed to the police or DPP under existing powers.[15] 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.

1.91 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.

1.92 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'.[16] The measure also appears to be rationally connected to this legitimate objective.

1.93 However, the initial human rights analysis stated that the statement of compatibility did not demonstrate that the measure imposes a proportionate limitation on the right not to incriminate oneself in pursuit of that legitimate objective.

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14 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.

15 RC Act section 6P.

16 EM 5.

Assistant minister's response

1.94 In relation to the proposal to give royal commissions the power to require a person to give information or a statement in writing, the assistant minister advises the following in relation to the importance of the measure:

> This proposal implements a recommendation by Mr Ian Hanger AM QC in his report of the Royal Commission into the Home Insulation Program 'to empower a Royal Commission to compel the provision of statement by a potential witness' (page 12 of the report). Commissioner Hanger supported the rationale for a similar recommendation made by the Australian Law Reform Commission in its 2009 *Making Inquiries Report*. The ALRC considered that the power to require written statements ' ... may reduce the need for hearings and examinations and enable more flexible, less formal and more cost-effective inquiry procedures' (page 271 of the report).

1.95 In response to the committee's question about the compatibility of this measure with the right not to incriminate oneself, the assistant minister stated:

> As noted in the Bill's statement of compatibility (para 13), the Bill does not engage Article 14 [of the ICCPR] because a Royal Commission does not exercise judicial power and cannot determine criminal charges…

1.96 However, the scope of the right not to incriminate oneself is broader than described by the assistant minister. As set out above, 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. It is noted in this respect that disclosure may be made to criminal investigatory authorities and self-incriminating information could be used to pursue evidence against the person for the purpose of prosecution.

1.97 The assistant minister's response does however provide the following information in support of the proportionality of this limitation:

> It is acknowledged that the Bill would amend existing section 6A of the Royal Commissions Act so that a person is not, in all cases, excused from giving information or a written statement on the ground that the information or statement might tend to incriminate the person. That power is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits or safeguards on the abrogation of the privilege against self-incrimination. The privilege would still apply where the giving of information or a statement might tend to incriminate the person in relation to an offence, and the person has been charged with the offence, and the charge has not been finally dealt with by a court. Furthermore, if incriminating evidence is obtained by a Royal Commission, it is proposed in the Bill that the 'use' immunity in section 6DD of the Royal Commissions Act apply so that any information or statement given by the person is not

> admissible in evidence against that person in any civil or criminal proceedings.
>
> It is also acknowledged that a Commissioner may communicate information or evidence that relates to a contravention of the law to certain office holders such [as] the police or the Director of Public Prosecutions where the Commissioner considers it appropriate to do so (section 6P). Introducing a 'derivative use' immunity would unreasonably hinder the ability of these law enforcement agencies to investigate and prosecute matters reported on by a Royal Commission. However, because of the 'use' immunity in section 6DD, the law enforcement agencies could not directly use that information against the person, and could only use it to obtain further evidence against that person.

1.98 For the reasons stated above at [2.66]-[2.68], while the availability of a 'use' immunity is an important safeguard, other less rights-restrictive approaches may be available to achieve the objective of the measure.

1.99 In relation to right to privacy, the assistant minister's response acknowledges that the measure engages and limits the right to privacy. Regarding the proportionality of the limitation on this right, the assistant minister's response states:

> The proposal is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits and safeguards on the use and sharing of personal information obtained by a Commission. For example, the Bill would extend existing section 6D(3) of the Royal Commissions Act so that a Commission has power to make a non-publication direction over the contents of any written statement given to a Commission (item 26 of Schedule 5 of the Bill). Existing section 6D(3)(c) gives a Commission the power to make a non-publication order over any information that might enable a person who has given evidence before the Commission to be identified. If there is any incriminating evidence about an individual, it is proposed that the 'use' immunity in section 6DD of the Royal Commissions Act apply so that any information or statement given by the person is not admissible in evidence against that person in any civil or criminal proceedings (item 28 of Schedule 5 of the Bill).
>
> While a Royal Commission can now invite individuals to give information or a statement in writing, under that approach the Commission would need to rely on other existing powers to require an individual to attend to give evidence if that person refuses voluntarily give the information. As noted above, the ALRC considered that the power '*may reduce the need for hearings and examinations and enable more flexible, less formal and more cost-effective inquiry procedures* '.

1.100 It is acknowledged that the measure appears to be aimed at pursuing the effective operation of royal commissions. However, the coercive nature of the measure imposes a serious limitation on the right to privacy. While the assistant minister's response identifies some relevant safeguards, it is unclear that these will

be sufficient to ensure the limitation on the right is proportionate in all circumstances. As noted above, discretionary safeguards may not be sufficient for ensuring that a limitation on the right to privacy is proportionate.

Committee response

1.101 The committee thanks the Assistant Minister for his response.

1.102 The preceding analysis indicates, based on the information provided, that questions remain as to the compatibility of the measure with the right to privacy and the right not to incriminate oneself, including whether less rights restrictive measures are reasonably available, and the sufficiency of relevant safeguards provided by the *Royal Commission Act 1902*.

1.103 The committee considers that the *Royal Commission Act 1902* would benefit from a full review of its compatibility with the right to a fair trial and the right to privacy, including whether the provision of immunities and safeguards under the legislation are sufficient to protect human rights.

Compatibility of the coercive powers of royal commissions with multiple rights

1.104 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 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.[17] The statement of compatibility does not acknowledge or address the committee's previous concerns with respect to related powers.

1.105 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*.[18]

1.106 The initial analysis noted that 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

17 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.

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

compatibility of amendments without the benefit of a foundational human rights assessment of the RC Act from the Minister for Indigenous Affairs.

1.107 Accordingly, the committee sought the advice of the Minister for Indigenous Affairs as to whether a foundational assessment of the RC Act could be undertaken to determine its compatibility with human rights (including in respect of matters previously raised by the committee).

Assistant minister's response

1.108 In relation to the committee's request, the assistant minister's response states:

> I note the *Human Rights (Parliamentary Scrutiny) Act 2011* does not require an assessment of this kind. In accordance with the requirements in sections 8 and 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011,* the Government will continue to prepare statements of compatibility in relation to Bills that amend the Royal Commissions Act and certain legislative instruments made under the Royal Commissions Act.
>
> I note the Committee refers to particular examples of other legislation relating to the Royal Commissions Act that has been the subject of requests for information by the Committee. I understand that the Committee would have received responses to those requests.

1.109 While the assistant minister is correct in noting that the committee did receive a response in relation to matters raised previously, the human rights concerns raised are continuing.

1.110 Further, it is understood that the RC Act was legislated prior to the establishment of the committee, and for that reason, was never required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. However, in light of the existing human rights concerns with the RC Act, any extension of its provisions requires an assessment of how these interact with existing provisions. It would therefore be of considerable assistance if the RC Act were subject to a foundational human rights assessment.

Committee response

1.111 The committee thanks the Assistant Minister for his response and has concluded its examination of this issue.

1.112 The preceding analysis indicates that the *Royal Commission Act 1902* has a range of human rights implications.

1.113 The committee considers that the *Royal Commission Act 1902* would benefit from a full review of the human rights compatibility of the legislation.

1.114 The committee draws these matters to the attention of the Parliament.

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

Purpose	Amends the *Income Tax Assessment Act 1997* to ensure that investors who invest through an interposed trust are able to access specified capital gain concessions; and the *Australian Securities and Investments Commission Act 2001* to permit the sharing of confidential information by the Australian Securities and Investments Commission with the Commissioner of Taxation
Portfolio	Treasury
Introduced	House of Representatives, 16 February 2017 (passed both Houses of Parliament on 27 March 2017)
Right	Privacy (see **Appendix 2**)
Previous report	Report 4 of 2017
Status	Concluded examination

Background

1.115 The committee first reported on the Treasury Laws Amendment (2017 Measures No. 1) Bill 2017 (the bill) in its *Report 4 of 2017*, and requested a response from the Treasurer in relation to the human rights issues identified in that report by 26 May 2017.[25]

1.116 The bill passed both Houses of Parliament on 27 March 2017 and received royal assent on 4 April 2017.

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

Sharing of confidential information with the Commissioner of Taxation

1.118 Schedule 2 of 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.

25 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 39-41.

Compatibility of the measure with the right to privacy

1.119 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.

1.120 Schedule 2 of the bill engages and limits the right to privacy by allowing ASIC to share confidential information with the commissioner.

1.121 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.[26]

1.122 Under the existing law, ASIC may share confidential information with the commissioner if ASIC is satisfied that the information will enable or assist the commissioner to perform or exercise their functions or powers. The initial analysis noted that this approach would already allow for the sharing of confidential information in fairly broad terms.

1.123 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'.[27] The initial human rights analysis stated that, 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

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

27 EM, SOC 18.

ineffective in meeting this goal. The initial analysis noted 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.

1.124 As noted in the previous analysis, the removal of the requirement for an assessment by ASIC that sharing confidential information would enable or assist the commissioner to fulfil relevant functions raises the concern that the measure is not sufficiently circumscribed. The statement of compatibility does not explain why such an assessment is no longer required, or has become inappropriate.

1.125 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, the previous analysis noted that 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. For example, the statement of compatibility does not identify whether sufficient safeguards are in place to ensure that any unnecessary sharing of personal or confidential information will not have an adverse effect on individuals whose information has been shared.

1.126 Accordingly, the committee sought 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.

Minister's response

1.127 The Minister for Finance provided some information in response to the committee's requests, including explaining the scope of previous information sharing provisions and how the new powers are intended to be used:

> Prior to the amendment made by the Bill, the Australian Securities and Investments Commission (ASIC) was able to share confidential information with the Commissioner of Taxation (ATO) on an ad hoc basis. Subsection 127(4) of the *Australian Securities and Investments Commission Act 2001* required the ASIC Chairperson, or their delegate, to be satisfied that sharing particular information would enable or assist the ATO to perform or exercise its functions or powers.
>
> The amendment in the Bill supports improved machine-to-machine data matching and sharing as it removes the need for the ASIC Chairperson, or their delegate, to be personally involved in the process. The approach is

> appropriate to achieve the objective of streamlining the process for ASIC to share confidential information with the ATO as it mirrors the existing arrangements already in place for ASIC to share information with the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the responsible Minister.

1.128 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 only to that private and confidential information which is strictly necessary to achieve the stated objective of the measure. However, the minister's response appears to confirm that the measure will be used for machine-to-machine data matching without any assessment of whether that information needs to be shared.

1.129 Further, the response does not address the committee's question as to whether the measure is the least rights restrictive means of achieving its stated objective. Indeed, the broad scope of the powers and their intended use in machine-to-machine data matching indicate that the measure may not be the least rights restrictive way of achieving its previously stated objective of 'conduct[ing] timely compliance activity and better protect the integrity of Australia's tax system'. As set out above, the ASIC chairperson or their delegate already had fairly broad information sharing powers that appeared capable of addressing this objective. The minister's response does not explain why requiring the ASIC chairperson or their delegate to be satisfied that sharing particular information would enable or assist the ATO to perform or exercise its functions or powers is no longer reasonably available. Accordingly, the measure does not appear to be the least rights restrictive way of achieving its stated objective as is required for it to be a proportionate limit on human rights.

1.130 It is noted in this respect that the minister's response now puts forward the objective of the measure as 'streamlining' processes. A legitimate objective—that is, one that is capable of justifying a proposed limitation of human rights—must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Streamlining data sharing processes across agencies is unlikely to satisfy this standard.

1.131 The minister's response also provides some information about relevant safeguards in relation to confidential and personal information:

> As outlined in the explanatory memorandum to the Bill, where ASIC has shared information with the ATO, the information remains protected from unauthorised disclosure as Division 355 of Schedule 1 to the *Taxation Administration Act 1953* makes the unauthorised disclosure of confidential information an offence. The legislation ensures that the confidential information ASIC shares with the ATO is subject to the same high level of protection from unauthorised disclosure as all other confidential information held by the ATO.

> Furthermore, the application of the Australian Privacy Principles and Australian Public Service Code of Conduct to the ATO and ASIC provides for additional protection of confidential information, particularly in relation to personal information.

1.132 The availability of safeguards is an important factor in ensuring that a measure is a proportionate limit on human rights. It is noted that the minister considers that the Australian Privacy Principles and Australian Public Service Code of Conduct will apply, although the minister does not explain which specific principles will apply to protect against the sharing of personal information by ASIC unless necessary.

Committee comment

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

1.134 Based on the information provided, the preceding analysis raises some concerns in relation to the right to privacy, insofar as it allows for the sharing of personal and confidential information without requiring any assessment that such sharing is necessary.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

1.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017;
- Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017;
- Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539];
- Federal Financial Relations (National Partnership payments) Determination No. 118 (April 2017) [F2017L00540];
- Long Service Leave (Commonwealth Employees) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00568];
- Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017 [F2017L00549];
- Norfolk Island Continued Laws Amendment (2017 Measures No. 1) Ordinance 2017 [F2017L00581];
- Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017;
- Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533].

1.2 The committee continues to defer its consideration of the following legislation:

- Aviation Transport Security Amendment (Persons in Custody) Regulations 2017 [F2017L00440];
- Federal Financial Relations (National Partnership payments) Determination No. 116 (February 2017);
- Federal Financial Relations (National Partnership payments) Determination No. 117 (March 2017) [F2017L00413];
- Imported Food Control Amendment Bill 2017;
- Law Enforcement Integrity Commissioner Regulations 2017 [F2017L00304];
- National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017;

- Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450];
- Telecommunications Integrated Public Number Database Scheme 2017 [F2017L00298].

Appendix 2

Short guide to human rights

1.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

1.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

1.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [3.5]).

1.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

1.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

1.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

1.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [3.9] to [3.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

1.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [3.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

1.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

1.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

1.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

1.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

1.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

1.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

1.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

1.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

1.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

1.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [3.6] to [3.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

1.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

1.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

1.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

1.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

1.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [3.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [3.6] to [3.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

1.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

1.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

1.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

1.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

1.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

1.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

1.30 <u>The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.</u>

1.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

1.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

1.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

1.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

1.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

1.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

1.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

1.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

1.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

1.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

1.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

1.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

1.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

1.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

1.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

1.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

3 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

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

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

1.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [3.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

1.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

1.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

1.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

1.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

1.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

1.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

1.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

1.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

1.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

1.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

1.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

1.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

1.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

1.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

1.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

1.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

1.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MB17-003370

Mr Ian Goodenough
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Fair Work Amendment (Corrupting Benefits) Bill 2017 and the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

This letter is in response to your letter of 10 May 2017 concerning issues raised in the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Report No.4 of 2017* in relation to the Fair Work Amendment (Corrupting Benefits) Bill 2017 (Corrupting Benefits Bill) and the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Vulnerable Workers Bill).

The Australian Government made an election commitment to implement the majority of the recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption. The Corrupting Benefits Bill responds to Recommendations 40, 41 and 48 of the Royal Commission. The Australian Government also made an election commitment to protect vulnerable workers and the Vulnerable Workers Bill delivers on this commitment.

My detailed response to each of the issues raised in your correspondence is at Attachment A. I trust the Committee will find the information useful.

Yours sincerely

Senator the Hon Michaelia Cash
29 / 5 / 2017

Encl.

Attachment A

Detailed response to issues raised in *Human Rights Scrutiny Report No.4 of 2017*

FAIR WORK AMENDMENT (CORRUPTING BENEFITS) BILL 2017

Compatibility of the measure with the right to a fair trial

The committee asks 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.

As the Committee has noted (at [1.45]), section 4C of the *Crimes Act 1914* (Cth) protects a person from being punished for a Commonwealth offence after having been punished for the same offence under the law of a State or Territory.

Where a person is first punished for a Commonwealth offence, the applicability to the person of any overlapping State or Territory offence is a matter to be determined by the applicable law in that State or Territory, including the common law.

In this regard, I note that a number of States and Territories have express statutory provisions dealing with anterior punishments for Commonwealth offences: see for example *Crimes (Sentencing Procedure) Act 1999* (NSW), s 20; *Sentencing Act 1995* (WA), s 11(2); *Legislation Act 2003* (ACT), s 191(2).

Compatibility of the measures with the right to be presumed innocent

The Committee asks:

- **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.**

It is appropriate for strict liability to attach to paragraphs 536F(1)(a), (c) and (d) of the relevant criminal offence. Section 536F is intended to address the problem which the Royal Commission into Trade Union and Governance found to be 'insidious' and 'immensely damaging': the provision of corrupt payments and other benefits by employers to unions and their officials (Final Report, Volume 5, Chapter 4 at [58]). The Commissioner stated (at [60]):

> *Seeking simply to prohibit payments made or received with a particular intention has consequent difficulties of investigation and proof. Instead it is recommended that, subject to certain exceptions, all payments by employers to a relevant union or officials of that union be outlawed.*

Paragraph 536F(1)(a) limits the offence to the defendant being a national system employer who is not an employee organisation. As explained in the Explanatory Memorandum to the Bill, this element is jurisdictional in nature, in that it attaches the offence to the relevant Commonwealth head of power to legislate. Strict liability attaching to this element can be justified by virtue of the fact that it is jurisdictional in nature.

One of the principal purposes of the offence provision is to ensure that a defendant national system employer has sufficiently robust internal governance and accounting mechanisms in place so as to ensure that they are aware of whether the recipient of a payment is a person to whom the

circumstances in paragraphs 536F(1)(c) and (d) apply. If the provision were to have fault elements for paragraphs 536F(1)(c) and (d), the imperative for employers to have appropriate mechanisms in place to prevent illegitimate payments to employee organisations and their associates would be diminished. The absence of fault elements is thus a necessary and proportionate means to achieve the provision's objectives. Proportionality is further served by the availability of the defence of reasonable mistake of fact.

Similarly, strict liability attaches to paragraph 536G(1)(c) because an employee organisation and its officers should be aware of the circumstances in which the payment of money by an employer would be an offence against section 536F. The provision is intended to ensure that employee organisations take sufficient care not to solicit payments from national system employers that would contravene section 536F. Proportionality is further served by the availability of the defence of reasonable mistake of fact.

FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) BILL 2017

Compatibility of the measure with criminal process rights

The Committee asks:

- **whether 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.**

Response

I am satisfied the proposed penalties for 'serious contraventions' in the Bill may be reasonably characterised as civil, based on the criteria in Guidance Note 2: Offence provisions, civil penalties and human rights, December 2014.

The objective of the proposed new penalties is to implement a proportionate response to address persistent and deliberate exploitation of vulnerable workers (including migrant workers). This new penalty is justified because the new provisions specifically target deliberate and systematic misconduct, and the penalty needs to be high enough to ensure that the consequences of such egregious law-breaking aren't simply written off as an acceptable 'cost of doing business'.

I acknowledge the Committee's observation that 'the Fair Work Act governs the 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'. The relevant provisions do however specifically target employer-employee relationships, not work relationships more broadly.

On balance, and taking all of the relevant features into account, I am satisfied the penalties are not 'criminal' in nature.

Application of proposed penalties for 'serious contraventions' to individuals

I have also considered the application of the proposed maximum civil penalties to individuals including employees.

The provisions have been crafted to specifically target contraventions relating to underpayment of employees, so the new penalties will apply to employers or others who are involved in such contraventions, whether individuals or otherwise.

I am not satisfied that employers who are individuals, including sole traders, should be excluded from the proposed 'serious contraventions' regime given the purpose of these provisions is to deter deliberate and systematic underpayment of workers.

The appropriate penalty to be applied in any particular case will be determined by the courts, which are in the best position to ensure the penalties imposed are appropriate to the case at hand and achieve effective deterrence.

Criminal process rights

As the civil penalty for 'serious contraventions' may reasonably be characterised as not being 'criminal', the specific criminal process guarantees in Articles 14 and 15 will not apply. The provisions do however comply with the requirements of articles 14 and 15.

The proposed legislation draws on the existing civil penalty regime, which means:

- the standard of proof for allegations involving 'serious contraventions' is the civil standard of proof (Article 14(2))
- the privilege against self-incrimination is abrogated but replaced with immunities (Article 14(3)(g))
- protection against 'civil double jeopardy' is included under the Fair Work Act (s 556), so criminal proceedings may follow civil proceedings in relation to conduct which is the same or substantially the same (see the Fair Work Act, s 554), and
- the proposed provisions would not apply retrospectively (Article 15(1)).

Importantly there is no risk of 'double punishment' because the proposed new provisions are regulatory in nature and there are no apparent corresponding criminal offences. This means there would be no real need for supplementary protections against 'double jeopardy', for the purposes of international human rights law.

Information-gathering powers – Compatibility of the measure with the right to privacy

The Committee asks:

- **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**

Response

The proposed FWO powers are effective to achieve the stated objectives of:

- more 'effectively deterring unlawful practices, including those that involve the deliberate and systematic exploitation of workers', and
- ensuring 'the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations'.

Inadequacies in the Fair Work Ombudsman's powers have been highlighted by some recent cases. In FWO investigations into 7-Eleven for example, the Fair Work Ombudsman resorted to CCTV footage

and registers of fuel levels to reconstruct hours of work for underpaid workers due to a lack of cooperation by the company. Investigations into the Baiada group in New South Wales stalled altogether due to lack of cooperation. These are not discrete examples but form part of a broader picture of deliberate non-compliance by certain unscrupulous operators.

These cases show how serious instances of underpayment may not be able to be investigated where any employer refuses to provide documents or cooperate with a FWO investigation. The limitation on the powers also means that vulnerable workers may not have sufficient confidence that they can come forward without facing retribution from their employer or others.

While FWO Inspectors may interview people under the Fair Work Act, para 709(e), there is currently no penalty for a person who refuses or fails to answer questions. In these kinds of cases, investigations stall and the Act becomes very difficult if not impossible to enforce.

Is the limitation reasonable and proportionate
The proposed FWO powers have been drafted to pursue the legitimate objective of ensuring 'the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations'. The breadth of the powers goes no further than necessary to achieve this stated objective.

The proposed measure is carefully drafted to include appropriate safeguards, so the proposed new FWO powers are proportionate to the outcomes being sought. The safeguards have been modelled on provisions conferring similar powers on ASIC and the ACCC and are described in more detail in the Explanatory Memorandum.

The Fair Work Act is the primary workplace legislation in Australia and it is critical that it is, and is seen to be, enforceable and enforced.

Information-gathering powers – Compatibility with the right to not to incriminate oneself

The Committee asks:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve that objective;**
- **whether the limitation is reasonable and proportionate; and**
- **whether a derivative use immunity could be included in proposed section 713(3).**

Response

As explained above, I am satisfied that the penalties in the Bill should not be considered criminal for the purposes of human rights law. On this basis, the Bill does not engage the right to a fair trial in the determination of a criminal charge guaranteed by Article 14 of the ICCPR.

In response to the Committee's questions, proposed section 713 in the Bill is based on existing section 713 of the Fair Work Act, except supplementary provisions are proposed to deal with arrangements for the proposed FWO powers. The proposed supplementary provisions support the proposed FWO powers.

The provisions are directed at the legitimate objective of ensuring the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations.

Abrogating the privilege against incrimination is critical to achieving the stated objective. The proposed laws are concerned with addressing deliberate and systematic non-compliance with workplace laws, and ensuring they are enforceable in cases involving serious misconduct, poor, falsified or no records, and orchestrated cover-ups. 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, such individuals would be unlikely to provide information to the FWO. The proposed arrangements will enhance the FWO's evidence-gathering powers to ensure these kinds of serious cases can be effectively investigated under the Fair Work Act.

Is the limitation reasonable and proportionate

The limitation on the protection against self-incrimination is justified because it is subject to a full use immunity, which extends in relation to all future proceedings, except several criminal proceedings relating to perjury-type offences.

I do not believe a derivative use immunity is necessary for the limitation to be proportionate. The information gathering powers are based on those available to corporate regulators such as ASIC and the ACCC, which do not include a derivative use immunity. The burden placed on investigating authorities in conducting a prosecution before the courts is the main reason why the powers of the Australian Securities Commission (now ASIC) were amended to remove derivative use immunity. Similarly, the Government considers that the absence of derivative use immunity is reasonable and necessary for effective proceedings to be brought in this context.

ASIC in its submission to the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms: Interim Report 127, noted the full scope of derivative use immunity cannot be accurately predicted in advance and risks making a person conviction-proof for an unforeseeable range of contraventions.[1] Furthermore, while specific provision may not be made for derivative use immunity there remains 'wide and flexible' judicial discretion to exclude derivative evidence in order to prevent or remedy potential unfairness.[2] These observations are equally relevant in the present context and should be taken into account.

[1] *Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms: Interim Report 127, Submission by the Australian Securities and Investment Commission*, September 2015, p. 7
[2] Ibid, p. 14

UNCLASSIFIED

SENATOR THE HON JAMES MCGRATH
ASSISTANT MINISTER TO THE PRIME MINISTER

Reference: MC17-045289

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear Mr Goodenough Ian,

I refer to your letter dated 10 May 2017 to the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, regarding the Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017 (the Bill). I have been asked to respond.

Coercive powers of Royal Commissions – proposal to increase penalty for failing to attend a Royal Commission as a witness

The Bill implements recommendation 78 of the final report of the Royal Commission into Trade Union Governance and Corruption. The Hon John Dyson Heydon AC QC recommended that the *Royal Commissions Act 1902* be amended '*to increase the penalties for a failure to comply with a summons to attend, a failure to comply with a notice to produce, a failure to be sworn or answer questions, and a failure or refusal to provide documents to at least a maximum penalty of 2 years' imprisonment or a fine of 120 penalty units or both*'.

Right to fair trial and hearing

The Committee notes that the Bill's statement of compatibility 'does not acknowledge that the [measure to increase the penalty for failure to comply with summonses issued by the Royal Commission] 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 advice on whether:

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

In making that recommendation, Commissioner Hedyon observed that the existing penalty for those offences is 'inadequate' and that a penalty of up to 2 years' imprisonment is consistent with the penalty applicable to a failure to comply with notices issued by the

Australian Security and investments Commission and by the Australian Competition and Consumer Commissioner (pages 626; 630 Final Report).

The right not to incriminate oneself derives from Article 14(3)(g) of the International Convention on Civil and Political Rights (ICCPR) which states that *in determining a criminal charge*, everyone shall be entitled to the minimum guarantee not to be compelled to testify against themselves or to confess guilt.

As noted in the Bill's statement of compatibility (para 13), the Bill does not engage Article 14 because a Royal Commission does not exercise judicial power and cannot *determine criminal charges*. However, I make the following observations.

The proposal to increase penalties for failure to comply with summonses is aimed at achieving the legitimate objective of ensuring a Royal Commission can fully inquire into, and report on, matters of public importance. The proposal is 'rationally connected' to that objective because higher penalties will enhance compliance with the summonses and therefore the Commission's ability to obtain information and evidence so that it can conduct its inquiry.

The Committee comments that the proposal to *increase* the penalty for failure to comply with summonses engages the right not to incriminate oneself because, through another existing provision in the Royal Commissions Act, a person is not excused from answering a question on the ground that the answer might tend to incriminate the person (section 6A). That provision is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits or safeguards on the abrogation of the privilege against self-incrimination. The privilege still applies where the production of information or answer to a question might tend to incriminate the person in relation to an offence, and the person has been charged with the offence, and the charge has not been finally dealt with by a court. Furthermore, if incriminating evidence is obtained by a Royal Commission, the Royal Commissions Act provides a 'use' immunity so that any statement or disclosure made by the person is not admissible in evidence against that person in any civil or criminal proceedings (section 6DD).

A Commissioner may communicate information or evidence that relates to a contravention of the law to certain office holders such the police or the Director of Public Prosecutions where the Commissioner considers it appropriate to do so (section 6P). Introducing a 'derivative use' immunity would unreasonably hinder the ability of these law enforcement agencies to investigate and prosecute matters reported on by a Royal Commission. However, because of the 'use' immunity in section 6DD, the law enforcement agencies could not directly use that information against the person, and could only use it to obtain further evidence against that person.

Right to privacy

The Committee notes that the Bill's statement of compatibility 'has not identified or addressed the limitation on the right to privacy imposed [by the measure to increase the penalty for failure to comply with summonses issued by the Royal Commission]'. The Committee therefore seeks advice on whether:

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

The proposal to increase penalties for failure to appear as a witness and answer questions engages and limits the right to privacy, to the extent that a witness is required to provide personal information to the Commission.

The proposal to increase penalties for failure to comply with summonses is aimed at achieving the legitimate objective of ensuring a Royal Commission can fully inquire into, and report on, matters of public importance. The proposal is 'rationally connected' to that objective because higher penalties will enhance compliance with the summonses and therefore the Commission's ability to obtain information and evidence so that it can conduct is inquiry.

The proposal is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits and safeguards on the use and sharing of personal information obtained by a Commission. For example, a Commission has power to make a non-publication direction over any evidence given before a Commission, over the contents of any documents or written statement given to a Commission, and over any information that might enable a person who have given evidence before the Commission to be identified (section 6D(3)).

Further, a witness can request that their evidence be taken in private where the evidence relates to the profits or financial position of any person and taking of the evidence in public would be unfairly prejudicial to the interests of that person (section 6D(2)). If there is any incriminating evidence about an individual, the 'use' immunity in section 6DD of the Royal Commissions Act applies so that any information or statement given by the person is not admissible in evidence against that person in any civil or criminal proceedings.

Coercive powers of Royal Commissions – proposal to give the Commission a new power to require a person to give information or statement in writing

Item 2 of Schedule 5 of the bill would insert new subsection 2(3C) into the Royal Commissions Act to give a member of a Royal Commission the power to issue a written notice requiring a person to give information or a statement in writing to the Commission.

This proposal implements a recommendation by Mr Ian Hanger AM QC in his report of the Royal Commission into the Home Insulation Program 'to empower a Royal Commission to compel the provision of statement by a potential witness' (page 12 of the report). Commissioner Hanger supported the rationale for a similar recommendation made by the Australian Law Reform Commission in its 2009 *Making Inquiries Report.* The ALRC considered that the power to require written statements '… may reduce the need for hearings and examinations and enable more flexible, less formal and more cost-effective inquiry procedures' (page 271 of the report).

Right to fair trial and hearing

The Committee notes that the Bill's statement of compatibility 'does not acknowledge that the measure [to give a Commission a new power to require a person to give information or a statement in writing] 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 advice 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.*

The right not to incriminate oneself derives from Article 14(3)(g) of the International Convention on Civil and Political Rights (ICCPR) which states that *in determining a criminal charge*, everyone shall be entitled to the minimum guarantee not to be compelled to testify against themselves or to confess guilt.

The Committee comments that the proposal to give a Commission the power to require a person to give information or a statement in writing engages and limits the right not to incriminate oneself as that requirement applies regardless of whether such information might incriminate the person.

As noted in the Bill's statement of compatibility (para 13), the Bill does not engage Article 14 because a Royal Commission does not exercise judicial power and cannot *determine criminal charges*. However, I make the following observations.

It is acknowledged that the Bill would amend existing section 6A of the Royal Commissions Act so that a person is not, in all cases, excused from giving information or a written statement on the ground that the information or statement might tend to incriminate the person. That power is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits or safeguards on the abrogation of the privilege against self-incrimination. The privilege would still apply where the giving of information or a statement might tend to incriminate the person in relation to an offence, and the person has been charged with the offence, and the charge has not been finally dealt with by a court. Furthermore, if incriminating evidence is obtained by a Royal Commission, it is proposed in the Bill that the 'use' immunity in section 6DD of the Royal Commissions Act apply so that any information or statement given by the person is not admissible in evidence against that person in any civil or criminal proceedings.

It is also acknowledged that a Commissioner may communicate information or evidence that relates to a contravention of the law to certain office holders such the police or the Director of Public Prosecutions where the Commissioner considers it appropriate to do so (section 6P). Introducing a 'derivative use' immunity would unreasonably hinder the ability of these law enforcement agencies to investigate and prosecute matters reported on by a Royal Commission. However, because of the 'use' immunity in section 6DD, the law enforcement agencies could not directly use that information against the person, and could only use it to obtain further evidence against that person.

Right to privacy

The Committee notes that the Bill's statement of compatibility 'has provided no information about why the measure [to give a Commission a new power to require a person to give information or a statement in writing] is necessary to achieve the legitimate objective nor addressed there are adequate safeguards in place with respect to the exercise of this power'. The Committee therefore seeks advice as to whether:

- *the limitation is a reasonable and proportionate measures to achieve the stated objective (including the availability of less rights restrictive measures and the existence of relevant safeguards).*

The proposal to give a Commission a power to require a person to give information or a statement engages and limits the right to privacy only to the extent that a person is required to give personal information to the Commission in a written statement.

The proposal is reasonable and proportionate because while it reinforces an objective of equipping Royal Commissions with appropriate investigative powers, there are limits and

safeguards on the use and sharing of personal information obtained by a Commission. For example, the Bill would extend existing section 6D(3) of the Royal Commissions Act so that a Commission has power to make a non-publication direction over the contents of any written statement given to a Commission (item 26 of Schedule 5 of the Bill). Existing section 6D(3)(c) gives a Commission the power to make a non-publication order over any information that might enable a person who has given evidence before the Commission to be identified. If there is any incriminating evidence about an individual, it is proposed that the 'use' immunity in section 6DD of the Royal Commissions Act apply so that any information or statement given by the person is not admissible in evidence against that person in any civil or criminal proceedings (item 28 of Schedule 5 of the Bill).

While a Royal Commission can now invite individuals to give information or a statement in writing, under that approach the Commission would need to rely on other existing powers to require an individual to attend to give evidence if that person refuses voluntarily give the information. As noted above, the ALRC considered that the power '*may reduce the need for hearings and examinations and enable more flexible, less formal and more cost-effective inquiry procedures'*.

Compatibility of the coercive powers of Royal Commissions with multiple rights

The Committee also seeks advice 'as to whether a foundational assessment of the Royal Commissions Act could be undertaken to determine its compatibility with human rights (including in respect of matters previously raised by the Committee)'.

I note the *Human Rights (Parliamentary Scrutiny) Act 2011*does not require an assessment of this kind. In accordance with the requirements in sections 8 and 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Government will continue to prepare statements of compatibility in relation to Bills that amend the Royal Commissions Act and certain legislative instruments made under the Royal Commissions Act.

I note the Committee refers to particular examples of other legislation relating to the Royal Commissions Act that has been the subject of requests for information by the Committee. I understand that the Committee would have received responses to those requests.

I trust this information will be of assistance.

Yours sincerely

JAMES MCGRATH

25 / 5 / 2017

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate
Acting Minister for Revenue and Financial Services

Ref: MC17-004534

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

human.rights@aph.gov.au

Dear Mr Goodenough

I refer to the letter of the Parliamentary Joint Committee on Human Rights originally directed to the Treasurer, concerning the Treasury Laws Amendment (2017 Measures No. 1) Bill 2017. The letter has been referred to me as I have responsibility for this matter. I apologise for the delay in responding to you.

Prior to the amendment made by the Bill, the Australian Securities and Investments Commission (ASIC) was able to share confidential information with the Commissioner of Taxation (ATO) on an ad hoc basis. Subsection 127(4) of the *Australian Securities and Investments Commission Act 2001* required the ASIC Chairperson, or their delegate, to be satisfied that sharing particular information would enable or assist the ATO to perform or exercise its functions or powers.

The amendment in the Bill supports improved machine-to-machine data matching and sharing as it removes the need for the ASIC Chairperson, or their delegate, to be personally involved in the process. The approach is appropriate to achieve the objective of streamlining the process for ASIC to share confidential information with the ATO as it mirrors the existing arrangements already in place for ASIC to share information with the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the responsible Minister. I note that the Office of the Australian Information Commissioner was consulted on the measure and raised no objections.

As outlined in the explanatory memorandum to the Bill, where ASIC has shared information with the ATO, the information remains protected from unauthorised disclosure as Division 355 of Schedule 1 to the *Taxation Administration Act 1953* makes the unauthorised disclosure of confidential information an offence. The legislation ensures that the confidential information ASIC shares with the ATO is subject to the same high level of protection from unauthorised disclosure as all other confidential information held by the ATO.

Furthermore, the application of the Australian Privacy Principles and Australian Public Service Code of Conduct to the ATO and ASIC provides for additional protection of confidential information, particularly in relation to personal information.

I note that the Bill passed both Houses of Parliament on 27 March 2017 and commenced on 5 April 2017.

Kind regards

Mathias Cormann

8 June 2017

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia’s jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

2 For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 edition, available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that 'civil; penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); Sayadi and *Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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