Chapter 2

Concluded matters

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

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

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

Purpose	Seeks to make a range of amendments to the *Australian Federal Police Act 1979*, *Crimes Act 1914*, and the *Criminal Code Act 1995* including clarifying the functions of the Australian Federal Police to enable cooperation with international organisations, and non-government organisations; clarifying the custody notification obligations of investigating officials when they intend to question an Aboriginal person or Torres Strait Islander; creating separate offence regimes for 'insiders' and 'outsiders' for the disclosure of information relating to controlled operations in the *Crimes Act 1914*
Portfolio	Justice
Introduced	House of Representatives, 30 March 2017
Rights	Privacy; life; freedom from torture, cruel, inhuman or degrading treatment or punishment (see **Appendix 2**)
Previous reports	4 of 2017 and 5 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the bill) in its *Report 4 of 2017*, and requested a response from the Minister for Justice by 26 May 2017.[1]

2.4 The minister's response to the committee's inquiries was received on 29 May 2017 and discussed in *Report 5 of 2017*.[2] The committee requested further

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 3-6.

2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 34-41.

information from the minister by 30 June 2017 in relation to the human rights issues identified in that report.

2.5 The Minister's response to the committee's inquiries was received on 30 June 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Functions of the Australian Federal Police – assistance and sharing information

2.6 Schedule 1 of the bill seeks to make amendments to the *Australian Federal Police Act 1979* (AFP Act) to enable the Australian Federal Police (AFP) to provide assistance and cooperation to international organisations and non-government organisations in relation to the provision of police services or police support services.

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

Compatibility of the measure with human rights

2.8 As noted in the initial human rights analysis, the statement of compatibility states that this measure allows for information sharing with a range of bodies such as Interpol, United Nations organisations and non-government organisations (NGOs) and accordingly:

> …may engage the right to protection against arbitrary and unlawful interferences with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), as the amendments to the AFP Act provide for information sharing with international organisations, including international judicial bodies.[3]

3 Explanatory memorandum (EM) 8.

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

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

> …the AFP can engage fully with international organisations, including judicial bodies, and NGOs, in relation to the provision of police services and police support services.[4]

2.11 The initial analysis stated that this was likely to be, in broad terms, a legitimate objective for the purposes of international human rights law. However, the analysis raised questions about the adequacy of safeguards in place with respect to AFP assistance and cooperation with such bodies, including the sharing of information. The concern in relation to the right to privacy was addressed by the Minister's initial response, however, the committee requested further information in relation to the right to life and the prohibition on torture (discussed further below).[5]

2.12 In particular, the initial analysis noted that the sharing of information overseas in the context of law enforcement raises concerns in respect of the right to life, which were not addressed in the statement of compatibility. In addition, the initial analysis noted the possibility that the sharing of information, or cooperation in investigation, may result in torture, or cruel, inhuman and degrading treatment or punishment. This issue was also not addressed in the statement of compatibility.

2.13 In relation to both the right to life, and the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the committee sought the advice of the minister about the compatibility of the measure with the relevant rights (including any relevant safeguards).

Minister's initial response

2.14 The minister's initial response explained that much of the assistance and information provided will not relate to individual investigative cases so, as a practical matter, the proposed new function may not impact upon human rights in these instances. The committee's previous report stated that, nonetheless, the proposed new function still engages a range of human rights by permitting the sharing of information overseas.

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4 EM 8.

5 The first of these related to the right to privacy and the application of the Australian Privacy Principles to the measure, which was clarified by the Minister. The committee therefore concluded in its *Report 5 of 2017* the measure was likely to be compatible with the right to privacy.

2.15 The committee's previous report welcomed the AFP's commitment, as outlined in the minister's response, to review both the National Guideline on Death Penalty and the National Guideline on torture, or cruel, inhuman and degrading treatment or punishment (the guidelines) in light of the measure.

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

2.16 In relation to whether the measure is compatible with the right to life and the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the minister provided the following information:

> Information and intelligence sharing with international organisations and non-government organisations for the purposes of the proposed new function will often not relate to any particular individual under investigation, and therefore will not raise death penalty, or torture, cruel, inhuman or degrading treatment or punishment (TCIDTP), implications.
>
> Where information provided to an international organisation or a non-government organisation has potential death penalty or TCIDTP implications, the AFP will apply the National Guideline on Death Penalty or the National Guideline on TCIDTP. For example, this might arise when providing information via Interpol to a law enforcement agency in a country that has not abolished the death penalty or where TCIDTP concerns exist.
>
> As noted above, the National Guideline on Death Penalty and the National Guideline on TCIDTP do not specifically refer to the proposed new function of cooperating with international organisations. Should the amendment pass Parliament, the AFP will review both National Guidelines to ensure they reflect legislative and operational requirements.
>
> The AFP already applies the National Guideline on Death Penalty and the National Guideline on TCIDTP to relevant information disclosures it makes to international organisations under its existing functions. The AFP will continue to treat any disclosures of information that may involve the death penalty or TCIDTP implications with the same process as it would for the exchange of information between law enforcement agencies.
>
> *National Guideline on Death Penalty*
>
> All AFP appointees are required to comply with the National Guideline on Death Penalty. Inappropriate departures from the National Guideline may constitute a breach of AFP professional standards and be dealt with under Part V of the AFP Act.
>
> Under the National Guideline on Death Penalty, the AFP is required to consider relevant factors before providing information to foreign law enforcement agencies if it is aware the provision of information is likely to result in the prosecution of an identified person for an offence carrying the death penalty. Ministerial approval is required for any case in which a

person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty.

The Government has committed to make improvements to the National Guideline on Death Penalty. On 1 March 2017, the Government tabled its response to the Joint Standing Committee on Foreign Affairs, Defence and Trade's report: *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*. In its response, the Government agreed to implement a number of recommendations, including:

- the National Guideline be amended by 'explicitly applying the Guideline to all persons, not just Australian citizens';

- the National Guideline be amended by 'including a provision that, in cases where the AFP deems that there is a 'high risk' of exposure to the death penalty, such cases be directed to the Minister for decision' (the Government accepts this recommendation in principle, however re-affirms that the decision-making in the pre-arrest phase is best made within the AFP)

- The National Guideline be amended by 'articulating the criteria used by the AFP to determine whether requests are ranked 'high', 'medium' or 'low' risk'. These amendments will enhance the existing safeguards against the provision of information in death penalty cases.

National Guideline on TCIDTP

The National Guideline on TCIDTP outlines the obligations for AFP appointees where a person is in danger of being subjected to TCIDTP. All AFP appointees are required to comply with the National Guideline on TCIDTP. Inappropriate departures may constitute a breach of AFP professional standards and be dealt with under Part V of the AFP Act.

The National Guideline on TCIDTP provides a list of mandatory considerations before information can be disclosed to foreign authorities in situations where there are substantial grounds for believing a person that is detained would be in danger of being subjected to TCIDTP. It also sets out a formal approval process for the release of such information. The information, if provided, must include a caveat to protect against unintended use of the information, and on-disclosure to third parties.

2.17 The minister's initial response did not provide a copy of the guidelines referred to. Accordingly, in order to complete the human rights assessment of the measure against the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment, the committee advised the minister that it would be assisted by a current copy of the following guidelines:

- AFP National Guideline on international police-to-police assistance in death penalty situations; and
- AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment.

Minister's further response

2.18 In response to the committee's request, the minister provided copies of both sets of guidelines.

Right to life

2.19 The AFP National Guideline on international police-to-police assistance in death penalty situations (death penalty guideline) relevantly provides:

> **Assistance before detention, arrest, charge or conviction**
>
> The AFP is required to consider relevant factors before providing information to foreign law enforcement agencies if it is aware the provision of information is likely to result in the prosecution of an identified person for an offence carrying the death penalty.
>
> Senior AFP management (Manager /SES-level 1 and above) must consider prescribed factors before approving provision of assistance in matters with possible death penalty implications, including:
>
> - the purpose of providing the information and the reliability of that information
> - the seriousness of the suspected criminal activity
> - the nationality, age and personal circumstances of the person involved
> - the potential risks to the person, and other persons, in providing or not providing the information
> - Australia's interest in promoting and securing cooperation from overseas agencies in combatting crime
> - the degree of risk to the person in providing the information, including the likelihood the death penalty will be imposed.

2.20 The death penalty guideline further provides that 'Ministerial approval is required in any case in which a person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty'.

2.21 However, the safeguards outlined in the current death penalty guideline do not require that the AFP not share information that could contribute to the application of the death penalty overseas. The death penalty guideline does not prohibit cooperation when the information could be used or is likely to be used in a death penalty case. Rather the death penalty guideline only requires the relevant AFP officer to consider exposure to the death penalty as a possible factor within the list of prescribed factors. The death penalty guideline does not set out how these different factors are to be weighed or how potential conflicts may be resolved. Further, the Senior Executive Service level consideration of a request only applies if the AFP 'is aware' that the information is likely to result in the prosecution of the identified person with a death penalty charge. Accordingly, the guideline may not capture cases where the AFP may not be aware of a possible prosecution on a death

penalty charge, without itself making inquiries to ascertain whether such a risk is present.

2.22 As noted in the minister's previous response, the government has agreed to amend the death penalty guideline by setting out:

- that the guideline specifically applies to all persons not just Australian citizens;
- that in cases where the AFP deems that there is a 'high risk' of exposure to the death penalty, such cases will be directed to the minister for decision; and
- the criteria used by the AFP to determine whether requests are ranked 'high', 'medium' or 'low' risk.

2.23 While this appears likely to strengthen the level of safeguards in the death penalty guideline, it is unclear from the information provided from the minister why these amendments to the death penalty guideline have not yet occurred. They also do not address many of the concerns set out above.

2.24 Further, it is noted that discretionary or administrative safeguards alone, such as those contained in the death penalty guideline, are likely to be insufficient for the purpose of permissible limitations on the right to life.[6] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time. It is noted that there is currently no direct prohibition under Australian law of sharing information in circumstances where a person may be exposed to the death penalty. This raises concerns about the adequacy of protections in relation to the right to life.

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

6 See, for example, Human Rights Committee, *General Comment 27, Freedom of movement* (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.[7]

Torture, cruel, inhuman or degrading treatment or punishment

2.26 In relation to the disclosure of information to foreign authorities, the TCIDTP guideline relevantly provides:

> Where the disclosure of information relates to a person who is detained, or is likely to be detained, by a foreign authority, AFP appointees must consider the:
>
> - purpose for which the information is being sought by the foreign authority
> - laws, practices and human rights record of the foreign authority involved (if known)
> - evidence of past significant harm or past activity which may give rise to such harm
> - pattern of conduct shown by the receiving country in similar cases
> - consequences of lawfully disclosing information, including the likelihood that the person could be detained by a foreign authority (if the person is not already in detention)
> - operational requirements
> - consequences of withholding the information, including the potential impact on AFP relationships with foreign partner agencies.
>
> Where the AFP appointee considers that there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP, formal approval for the release of the information must be obtained from Manager International Engagement…
>
> Manager International Engagement must:
>
> - determine whether such assistance should be provided, and any limitations or restrictions that may apply
> - record the decision and reasons in PROMIS as a critical decision.

2.27 Under international human rights law, states have an obligation not to expose anyone to the real risk of torture.[8] The prohibition on torture, cruel, inhuman and degrading treatment is absolute and may never be subject to any limitations. In

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

8 See, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3-5. See, also, Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: a commentary* (2008) 116-7, 308-21.

this respect, it is noted that the TCIDTP guideline does not prohibit information being provided where there is a real risk that it will cause or contribute to the risk of torture. The TCIDTP guideline only requires referral to the Manager of the International Engagement Office where the AFP appointee considers there are 'substantial grounds for believing the person would be in danger of being subjected to TCIDTP.'[9] The Manager of International Engagement has the discretion to decide whether or not to disclose information regardless of the risk of TCIDTP.

2.28 Further, for the reasons set out above, discretionary or administrative safeguards alone, such as those contained in the TCIDTP guideline, are likely to be insufficient for the purpose of ensuring compliance with the prohibition on torture. It is noted that there is currently no requirement under Australian law to decline to disclose information where it may result in a person being tortured.

Committee response

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

2.30 In relation to the right to life, neither Australian law or the AFP's current guidelines and policies prohibit sharing information that may expose people to the death penalty in foreign jurisdictions. Accordingly, currently there is a risk that information sharing may occur in circumstances where it is incompatible with the right to life, that is, where the death penalty may be applied.

2.31 In relation to the prohibition on torture, cruel, inhuman or degrading treatment or punishment, the AFP's current guidelines do not prohibit sharing information that may lead to or contribute to torture. There is also currently no requirement under Australian law to decline to disclose information where it may result in a person being tortured. Accordingly, currently there is a risk that information sharing may occur in circumstances where it is incompatible with the prohibition on torture.

2.32 The AFP has committed to review both the guidelines in light of the measure. In order to ensure the compatibility of the measure with human rights, the committee recommends that such a review give consideration to the matters outlined above, including instituting statutory safeguards.

9 'Substantial grounds for believing a person would be in danger of being subjected to TCIDTP' are defined in the TCIDTP guideline as 'established in circumstances where there is a foreseeable, real and personal risk to the particular individual'.

Electoral and Other Legislation Amendment Bill 2017

Purpose	Seeks to amend various Acts in relation to electoral, broadcasting and criminal matters to: amend authorisation requirements in relation to political, electoral and referendum communications; replace the current criminal non-compliance regime with a civil penalty regime to be administered by the Australian Electoral Commission; amend the *Criminal Code Act 1995* to criminalise conduct amounting to persons falsely representing themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth body; and create a new aggravated offence where a person engages in false representation
Portfolio	Special Minister of State
Introduced	House of Representatives, 30 March 2017
Rights	Freedom of expression; fair trial; criminal process; presumption of innocence (see **Appendix 2**)
Previous report	5 of 2017
Status	Concluded examination

Background

2.33 The committee first reported on the Electoral and Other Legislation Amendment Bill 2017 (the bill) in its *Report 5 of 2017*, and requested a response from the Special Minister of State by 30 June 2017.[1]

2.34 The minister's response to the committee's inquiries was received on 30 June 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Requirement to authorise and notify particulars in respect of electoral matters and referendum matters

2.35 Proposed section 321D of the bill would amend the *Commonwealth Electoral Act 1918* (Electoral Act) to provide that communications about 'electoral matters' on behalf of particular entities (disclosure entities) are required to be authorised and would impose a requirement to notify particulars such as the entity's name, address and the person who has authorised the communication.[2] Under proposed section 321D, subject to exceptions, all types of communication fall within the authorisation

1 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 14-21.

2 Proposed section 321D includes a table specifying what authorisations are required for different forms of communications about an 'electoral matter'.

and notification requirements including, for example, printed material, leaflets, text messages, voice messages, telephone calls and conversations in the course of door-knocking.[3]

2.36 'Electoral matter' is currently defined in sections 4(1) and 4(9) of the Electoral Act. Section 4(1) currently provides that 'electoral matter' means a 'matter which is intended or likely to affect voting in an election'. The proposed legislation would amend section 4(9) to provide that a matter is taken to be intended or likely to affect voting in an election if it contains an express or implicit comment on: the election; or a political party, candidate or group of candidates in the election; an issue submitted to, or otherwise before, the electors in connection with the election.

2.37 A 'disclosure entity' is defined under proposed section 321B as:

- a registered political party;
- current members of parliament and current and former candidates (for the previous 4 years for candidates for election to the House of Representatives or 7 years for candidates for election to the Senate);
- an associated entity (defined under Part XX of the Electoral Act to include unions that pay affiliation fees to political parties and organisations that are set up as fundraising vehicles by political parties);
- individuals or organisations who are required, or have been required in previous financial years, to submit returns to the Australian Electoral Commission because they have donated to a party or a candidate.

2.38 Proposed sections 321D(3)-(4) provide for exceptions to the authorisation requirements for certain types of communications (including, for example, clothing or anything that is designed to be worn; reporting of the news; communication for satire; academic or artistic purposes; and personal or internal communications).

2.39 A failure to comply with the new authorisation requirements is a civil penalty provision of 120 penalty units (currently $21,600) for an individual.

2.40 Proposed Part IX, section 110C applies similar provisions in relation to referendum matters (defined as a matter intended or calculated to affect the result of a referendum).[4]

Compatibility of the measure with the right to freedom of expression

2.41 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of expression extends to the communication of information or ideas through any

3 See proposed section 321D(b)-(c).

4 See proposed section 110A.

medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[5]

2.42 The initial human rights analysis stated that, by expanding authorisation and notification requirements in relation to communication about electoral and referendum matters, the measure imposes a practical limitation on freedom of expression. By requiring the statement of certain particulars including, for example, the address of the entity, the relevant town or city of the entity and the name of the natural person responsible for giving effect to the authorisation, the measure imposes a restriction or burden on the form of communication.[6]

2.43 As noted in the initial analysis, the statement of compatibility acknowledges that the measure engages and limits the right to freedom of expression but argues that this limitation is permissible.[7] In relation to the objectives of the measure, the statement of compatibility notes:

> There is a strong public interest in ensuring that voters are aware of who is communicating to them without adversely impacting public debate. These authorisation requirements facilitate transparency and public confidence in Australia's electoral processes. They allow voters to assess the credibility of the information they rely on when forming their political judgment and selecting their representatives in the Parliament.
>
> Ultimately, this Bill facilitates free and informed voting at elections, an object which is essential to Australia's system of representative democracy…the Bill's restrictions on anonymous electoral communications supports the right of participants in public debate to protection against unlawful attacks on reputation by providing key information necessary to commence appropriate civil action under Australia's defamation laws.[8]

2.44 The previous analysis stated that these objectives are likely to constitute legitimate objectives for the purposes of international human rights law and that the measure appears to be rationally connected to these objectives.

2.45 In relation to the proportionality of the measure, the statement of compatibility notes:

> The Bill limits the restriction on anonymous speech to circumstances strictly necessary to protect the public interest by providing explicit exemptions for:
>
> - the reporting of news, current affairs and editorial content in news media
> - communication solely for genuine satirical, academic or artistic purposes

5 ICCPR, article 19(2).

6 Schedule 1, proposed section 321D(5).

7 Explanatory Memorandum (EM) 7.

8 EM 7.

- personal or internal communications of disclosure entities
- opinion polls and research relating to voting intentions.

2.46 These exceptions provide important scope to freedom of expression in a range of circumstances.

2.47 However, the initial analysis identified concerns in relation to the proportionality of the measure given the breadth of communications covered by the authorisation requirements and the burden that the notification requirement may impose depending on the type of communication being made. The measure applies not only to political parties but potentially to a range of advocacy groups, interest groups, unions and civil society organisations including those who may have a large number of volunteers. These volunteers may be actively involved in a range of campaign activities such as, for example, phone calls or door-knocking. It was stated in the previous analysis that, where communication activities occur in the context of telephone calls or door-knocking, it may be impractical to convey the required notification to each individual recipient while still attempting to communicate about electoral matters. In the voluntary context, it may also be potentially challenging for organisations to ensure that volunteers notify the required particulars. As noted above, failure to comply with section 321D(5) is a civil penalty provision of 120 penalty units. The explanatory memorandum notes in relation to the potential effect on individuals that:

> Where a notifying entity that is not a legal entity, for example, a citizens' group, contravenes subsection (5), subsection 321D(6) provides that for the purposes of the Electoral Act and the Regulatory Powers Act, each member, agent or officer (however described) of the entity who contributed to the contravention through action or inaction in their role would be individually responsible for not meeting the authorisation obligation of the notifying entity as required by subsection 321D(5).[9]

2.48 As stated in the initial analysis, this could act as a potential disincentive for some civil society or citizens organisations to use volunteers or convey information about electoral or referendum matters in light of the penalties to be applied. In other words, the measure could have a particular 'chilling effect' on freedom of expression for certain groups, individuals and volunteers.

2.49 Accordingly, the committee requested the advice of the minister as to whether the limitation is a reasonable and proportionate measure to achieve its stated objective, including the existence of relevant safeguards, and whether the measure is the least rights restrictive way of achieving its objective, noting the potential impact on some groups and individuals including volunteers.

9 EM 25.

Minister's response

2.50 The minister provided a range of information in response to the committee's inquiries. In relation to whether the measure is a proportionate limit on the right to freedom of expression, the minister states that:

> When considering whether the measure is proportionate, it is important to ensure first and foremost that its contribution to the promotion of civil and political rights is not disregarded. As noted in the Committee's analysis and the explanatory memorandum, the measure engages the right to freedom of expression, as the authorisation requirements amount to restrictions on anonymous political speech in limited circumstances. However, it does so to preserve and enhance Australia's system of representative government, including several of the rights in the International Covenant on Civil and Political Rights.
>
> With respect to the Committee's specific request for advice as to whether the measure is the least rights-restrictive way of achieving its objectives, I would highlight that the measure requires a person to communicate something additional to that political matter, and that additional communication is unlikely to detract substantially from the political communication itself. For example, the measure requires candidates to identify themselves, their party affiliation and the location of their principal office in robocalls made on their behalf. It does not otherwise impact the messages in the recording.

2.51 In relation to the specific concern raised in the committee's initial report about breadth of the communications that will be covered by the authorisation requirement, the minister states:

> While it is true that Schedule 1 covers a broad range of communications, this is both necessary and appropriate to achieve the purpose of the measure and capture all possible forms of communication that are relevant in achieving the object of promoting free and informed voting. To limit the requirements to specific forms of communication would severely undermine its intent. Such authorisation requirements are largely an extension of existing requirements that cover all forms of political communication, and will minimise the scope for existing transparency measures from being circumvented.

2.52 In relation to the relevant safeguards, including for volunteer based organisations, the minister's response provides that:

> With respect to the Committee's enquiry about relevant safeguards, the obligations in Schedule 1 are targeted at persons or entities with a particular interest in the outcome of an election, that have incurred significant expenditure in making gifts to candidates or political parties, or in the public expression of views relating to an election or election issue. This appropriately targets those who might seek to exert the most influence on voters, with the key test being engagement in political

> finance and/or paid political advertising. This is an important safeguard which ensures volunteer-based organisations are only subject to the requirements, to the extent that they engage in political finance or expression, where this incurs significant expenditure.
>
> The Government considers that there is a legitimate purpose for this burden on the implied freedom, as it facilitates free and informed voting at elections and referenda. On balance, the strong public interest in promoting free and informed voting at elections outweighs the slight burden placed on certain individuals and entities under Schedule 1. I therefore consider the restriction of the right to freedom of expression is reasonable and proportionate.

2.53 On the basis of the information provided in the minister's response, on balance, the measure appears likely to be a proportionate limit on the right to freedom of expression. Despite the practical burden on communication identified in the initial analysis, the extent of the limitation is not such as to prevent expression but rather a requirement to provide additional information with such expression; there is an understandable rationale for the application of authorisation requirements in a consistent way across different forms of communication, and volunteer-based organisations will only be subject to authorisation requirements where they engage in political financing.

Committee response

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

2.55 The committee notes that the measure is likely to be compatible with the right to freedom of expression.

Compatibility of the measure with criminal process rights

2.56 As outlined in the initial human rights analysis, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if the new civil penalty provision is effectively 'criminal' for the purposes of international human rights law, it will engage the criminal process rights under articles 14 and 15 of the ICCPR.

2.57 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.[10] Where a penalty is 'criminal' for the purposes of

10 *Guidance Note 2* – see Appendix 4.

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) apply.[11]

2.58 In relation to whether the civil penalty provision may be regarded as criminal, the statement of compatibility states only that:

> The Bill's civil penalty provisions do not constitute a criminal penalty for the purposes of human rights law as they are not classified as criminal under Australian law and are restricted to people in a specific regulatory context.[12]

2.59 As set out in the committee's *Guidance Note 2*, as the civil penalty provisions are not classified as 'criminal' under domestic law they will not automatically be considered 'criminal' for the purposes of international human rights law.

2.60 The next step in assessing whether the civil penalties are 'criminal' under international human rights law is to look at the nature and purpose of the 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 respect it was noted that while the proposed regime applies to regulate electoral and referendum matters, the regime could apply quite broadly including to volunteers, such that it is unclear whether the regime can categorically be said not to apply to the public in general. Enforcement is to be undertaken by a public authority under the *Regulatory Powers (Standard Provisions) Act 2014*.

2.61 As noted in the initial analysis, the final step in assessing whether the penalties are 'criminal' under international human rights law is to look at their severity. In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the maximum amount of the pecuniary penalty that may be imposed under the civil provision in context is relevant. In this respect, a penalty of 120 penalty units (currently $21,600) is substantial. It would apply for each breach including for each individual who contributed to the breach where the organisation is unincorporated. These issues were not addressed in the statement of compatibility.

2.62 Accordingly, the committee sought the advice of the minister as to whether the civil penalty provisions in the bill may be considered to be 'criminal' in nature for

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11 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) of the ICCPR are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

12 EM 7.

the purposes of international human rights law (having regard to the committee's *Guidance Note 2*), addressing in particular:

- whether the nature and purpose of the penalties is such that the penalties may be considered 'criminal';
- whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be considered 'criminal';
- whether the application of the civil penalties could be limited so as to not apply as broadly to individuals; and
- if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measure accords with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

Minister's response

2.63 In response 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, the minister's response states:

> For the reasons outlined below, I am advised that the civil penalty provisions proposed in the Bill would not be considered 'criminal' for the purposes of international human rights law.
>
> *2a) Nature and purpose of the penalty*
>
> A penalty is likely to be considered criminal for the purposes of human rights law if the purpose of the penalty is to punish or deter, and if the penalty applies to the public in general. While the penalty is designed to deter persons or entities from hiding their identity in order to make false or misleading communication with voters, it is unlikely to apply to the public in general. The civil penalties introduced in the Bill are designed to regulate electoral and referendum matters. The new measures and penalties will only apply to a restricted number of people in a specific regulatory or disciplinary context, that is, those engaging in political finance or paid political advertising. Historic application to specified printed items has also been retained.
>
> The measures are unlikely to capture the general public, and will not impact the content of political communications. The measures will increase the transparency of the source of political communication to voters, promoting free and informed voting at elections.
>
> *2b) Severity of the penalty*

> Civil penalties may be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction. The civil penalty provision in Schedule 1 of the Bill would replace several current criminal offences associated with failure to authorise electoral communications in Part XXI of the *Commonwealth Electoral Act 1918.* The civil penalties do not have corresponding criminal provisions, and therefore do not carry a term of imprisonment.
>
> When setting the civil pecuniary penalty amount, I considered first and foremost, that the amount must be sufficient to act as a deterrent to deliberate non-compliance. This primary objective is different to the purposes of criminal penalties, which include punishment or retribution. For example, civil pecuniary penalties should contemplate the cost of court proceedings, and should be sufficiently high as to justify the need to go to court. With this in mind, I have been advised that the civil penalty provisions should be subject to a minimum of 60 penalty units.
>
> Secondly, I considered what amount would be fair, considering the object of the measure. In order for civil penalties to be fair, there should be a degree of proportionality between the seriousness of the contravention and the quantum of the penalty. I considered the potential gains that may be made or losses that may be caused by a person or body corporate through contravention of a civil penalty provision. Ultimately, contravening the civil penalty provision could influence the results of an election, and the effectiveness and legitimacy of Australia's system of representative government. I therefore considered that the civil penalty amount associated with the Bill needed to be substantial because of the potential harm that could be caused by non-compliance, as well as the strong incentives and significant financial resources of those who would do most harm through deliberate non-compliance.
>
> A complicating factor in this consideration was the fact that a key target of the Bill, political parties, are not legal entities. It is therefore necessary to identify responsible individuals within political parties. The Bill does this in a fair manner by identifying those actually responsible for the failure to authorise in a particular incident, and holding them accountable for it. This is the fairest, least rights restrictive way to implement the measure.
>
> *2c) Application to individuals*
>
> The Committee has also asked whether the application of the civil penalties could be limited so as to not apply as broadly to individuals. I consider that any such limitation is not possible, as this could undermine the purpose of the proposed provisions. In order for voters to be able to weigh the arguments in political debate, it is necessary to establish a level playing field in terms of transparency amongst those with a particular interest in the outcome of an election.

2.64 Accordingly, the minister's response addresses each element of the test for whether the civil penalty may be considered criminal for the purpose of international

human rights law. Based on the detailed information provided, including in relation to the regulatory context and the severity of the penalty and its application, the measure appears unlikely to be criminal for the purposes of international human rights law.

2.65 It follows that the criminal process rights under articles 14 and 15 of the ICCPR are unlikely to apply.

Committee response

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

2.67 In light of the additional information provided the committee notes that the measure appears unlikely to be 'criminal' for the purpose of international human rights law. The committee notes that this information would have been useful in the statement of compatibility.

Reverse evidential burden of proof

2.68 Proposed section 150.1 of the Criminal Code would make it an offence for a person to falsely represent that the person is, or is acting on behalf of, or with the authority of, a commonwealth body (and makes it a higher level offence to do so with the intention of obtaining a gain, causing a loss, or influencing the exercise of a public duty or function).[13]

2.69 Subsection 150.1(4) provides that if the commonwealth body is fictitious, these offence provisions do not apply unless a person would reasonably believe that the commonwealth body exists. This would appear to provide an exception to the relevant offences.

2.70 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

Compatibility of the measure with the right to be presumed innocent

2.71 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. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, engage and limit this right.

2.72 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the

13 Schedule 2, item 2, proposed section 150.1(4).

defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

2.73 The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences in order to assist legislation proponents (including reverse burden offences).

2.74 In this case, the previous analysis stated that it appears that the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter). However, the reversal of the evidential burden of proof in proposed section 150.1(4) has not been addressed in the statement of compatibility. In this instance, the proposed offence appears to require the defendant to raise evidence that suggests a reasonable possibility that 'a person would reasonably believe that the Commonwealth body exists'. This seems to be an objective fact and not one that is peculiarly within the knowledge of the defendant. Accordingly, it appears that the limitation may not be proportionate.

2.75 The committee therefore drew to the attention of the minister its *Guidance Note 2* which sets out information specific to reverse burden offences.

2.76 The committee also requested the advice of the minister as to:

- whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the reverse burden offence 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.

Minister's response

2.77 In relation to whether the reverse burden offence in proposed section 150.1 is reasonable and proportionate to achieving the stated objective, the minister's response states:

> Proposed section 150.1 of the Criminal Code introduces new offences to criminalise a person falsely representing themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth body. Proposed subsection 150.1(3) clarifies that, for the purposes of the new offences, it is immaterial whether the Commonwealth body exists or it is fictitious. Proposed subsection 150.1(4) provides that, if the Commonwealth body is fictitious, these offences do not apply unless a person would reasonably believe that the Commonwealth body exists.
>
> The Government considers that proposed subsection 150.1(4) does not create an offence-specific defence. Rather, the condition of 'unless a person would reasonably believe that the Commonwealth body exists' forms an element of the offence and the burden of proof for proving that

element will sit with the prosecution. That is, there is no reversal of the onus of proof with respect to this subsection. This conclusion is based on the wording of the provision. The provision provides that, if the Commonwealth body is fictitious, the offences do not apply unless the condition is fulfilled.

The condition is therefore a condition precedent to the offence being applicable, and forms an element of the offence to be proven by the prosecution. For example, if a person falsely represents they are the Ministry for Hot Dog Appreciation - a fictitious Commonwealth body - no offence is committed unless the prosecution can prove that a member of the public would reasonably believe that the Ministry for Hot Dog Appreciation in fact exists.

2.78 In light of the minister's helpful advice that the condition of 'unless a person would reasonably believe that the Commonwealth body exists' in section 150.1(4) forms an element of the offence such that the burden of proving that element lies with the prosecution, the measure appears to be compatible with the presumption of innocence.

Committee response

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

2.80 The committee notes that, based on the information provided by the minister, the measure appears to be compatible with the presumption of innocence. The committee notes that this information would have been useful in the statement of compatibility.

2.81 The committee recommends that the explanatory materials be amended to include this information.

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 reports	4 of 2017 & 6 of 2017
Status	Concluded examination

Background

2.82 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]

2.83 The minister's response to the committee's inquiries was received on 1 June 2017 and discussed in *Report 6 of 2017*.[2] The committee requested a further response from the minister by 14 July 2017.

2.84 A further response from the minister was received on 24 July 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.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2017* (20 June 2017) 8-25.

Civil penalty provisions

2.85 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.[3] The maximum penalty for a 'serious contravention' would be 600 penalty units ($126,000).[4]

2.86 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.[5] 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.[6]

2.87 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.[7]

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3 See proposed section 539(2).

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

5 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).

6 See Fair Work Act section 539.

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

Compatibility of the measure with criminal process rights

2.88 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).

2.89 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.[8]

2.90 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.[9]

2.91 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.[10] 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.

2.92 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

8 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)).

9 *Guidance Note 2* – see Appendix 4.

10 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'.[11]

2.93 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.

2.94 As the initial human rights analysis stated, 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 ($126,000)[12] 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.[13]

2.95 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.[14] 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.[15]

2.96 The initial analysis noted that 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

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11 EM, SOC 3-4.

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

13 EM, SOC 5.

14 See EM i; EM, SOC 5.

15 EM i.

which the increased or new civil penalties will apply. While most of the provisions apply to employers, some of the provisions may apply to individuals, including *employees*.

2.97 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 ($126,000), a 10-fold increase from the current maximum penalty of 60 penalty units.[16] 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.

2.98 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 initial response – civil penalty provisions

2.99 The minister's response, discussed in the committee's *Report 6 of 2017*,[17] provided 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).

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

17 Parliamentary Joint Committee on Human Rights, *Report 6 of 2017* (20 June 2017) 8-25.

2.100 However, the response failed to address the specific issue raised in the initial analysis about the application of some civil penalty provisions to individual *employees*, in relation to matters that do not appear related to combatting the exploitation of vulnerable workers (for example, the matter set out at [2.97] above).

2.101 In relation to whether the civil penalty provisions nevertheless comply with criminal process rights, the minister's response set out a range of information, including that the proposed provisions would not apply retrospectively; that the privilege against self-incrimination, while abrogated, would be replaced with immunities; and that there was no risk of being tried and punished twice because the proposed provisions 'are regulatory in nature and there are no apparent corresponding criminal offences'.

2.102 The previous analysis noted that 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, namely the right to be presumed innocent which generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be serious questions about whether they are compatible with criminal process rights.

2.103 Accordingly, the committee requested 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.

Minister's further response – civil penalty provisions

2.104 The minister's response provides a range of information in relation to the committee's further request. In relation to the severity of the penalty that may be imposed, the minister argues the penalty should not be considered criminal because:

- there is no criminal sanction if there was a failure to pay the penalty
- the proportionate size of the maximum penalty, given the nature of the relevant contraventions and in particular the value of typical employee underpayments where contraventions have been both deliberate and systematic.

2.105 In this respect, the minister's response further points to the particular aims of the penalty as a basis for arguing that the penalty should not be considered criminal:

> The Explanatory Memorandum to the Bill explains that the exploitation of workers can result in significant losses to underpaid workers. These laws

> would also ensure that there is an even playing field for all employers regarding employment costs. Contraventions of these important entitlements undermine the workplace relations regime as a whole and deliberate contraventions demonstrate a flagrant disregard for the rule of law.

2.106 In relation to the potential scope of the application of the civil penalties, the minister's response states:

> The serious contraventions regime is limited to deliberate and systematic wrongdoing, and only applies in relation to the provisions identified in section 539 (as amended by the Bill) and listed in the Explanatory Memorandum. These provisions have been chosen because they predominantly prescribe employer obligations like minimum employee entitlements, requirements for employment records or related matters like sham contracting. This is the area of concern where deliberate and systematic contraventions have emerged, and the Bill seeks to address this behaviour. Situations where an employee inadvertently or mistakenly fails to engage in a dispute resolution clause will not be captured.
>
> Because the serious contraventions regime only applies in relation to deliberate and systematic wrongdoing, my assessment remains that the proposed regime does not engage any of the applicable human rights or freedoms and is appropriate.

2.107 It is accepted that the serious contraventions regime predominantly applies to employer obligations. However, as identified in the committee's previous *Report 4 of 2017* and again in *Report 6 of 2017*, some of these provisions relate to employee obligations and the severity of the penalty applied in this context raises concerns. The minister's response states generally in relation to the application of the penalty to individuals:

> …The Government also considers that a maximum penalty of 600 penalty units for individuals like sole traders is appropriate given the scale of potential loss that may result from a serious contravention and in light of evidence that the current penalties are simply too low to effectively deter the most serious wrongdoing in this area.

2.108 The minister's response still does not address concerns in relation to the application of the penalty to individual employees. The minister's response also does not address the committee's question as to whether the increases in the maximum civil penalties could be limited so as to not apply, or to be reduced, in respect of individual employees. Noting the severity of the penalty in the context of individual employees, and that the minister's response did not address this concern, it appears that the measure may be 'criminal' for the purposes of international human rights law. This means that the criminal process rights under articles 14 and 15 are likely to apply. However, as set out above at [2.102], the civil penalty regime, in its current form does not appear to comply with these rights.

Committee response

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

2.110 The preceding analysis indicates that the civil penalty may be 'criminal' for the purpose of human rights law noting the severity of the penalty and its application to individual employees and that the minister's response did not adequately address this issue.

2.111 This means that the criminal process rights contained in articles 14 and 15 of the ICCPR may apply. However, the civil penalty regime does not appear to be compatible with these rights.

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

2.112 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.[18] Failure to comply with the FWO notice may result in a civil penalty of 600 penalty units ($126,000).[19]

2.113 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.[20] 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.[21]

Compatibility of the measure with the right not to incriminate oneself

2.114 The initial human rights analysis noted that proposed section 713(1) engages and limits the right not to incriminate oneself 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. Following correspondence with the minister, the committee concluded

18 See proposed section 712B.

19 See proposed section 712B; EM 17.

20 See proposed section 713.

21 See proposed section 713.

in *Report 6 of 2017* that these coercive evidence gathering powers were likely to be incompatible with the right not to incriminate oneself (noting in particular the breadth of the powers and the absence of a derivative use immunity).[22]

Compatibility of the measure with the right to privacy

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

2.116 As stated in the initial human rights analysis, 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.[23]

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

2.118 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.[24]

2.119 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.

2.120 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.

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22 See, Parliamentary Joint Committee on Human Rights, *Report 6 of 2017* (20 June 2017) 8-25 for a full analysis.

23 See proposed section 713(1).

24 EM, SOC 6.

2.121 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. As the initial analysis noted, 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.[25] The committee's consideration of similar measures and its previous concerns about human rights compatibility were not addressed in the statement of compatibility.

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

2.123 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.

2.124 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.'[26] 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.

2.125 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, as the initial analysis noted, the absence of external review of an FWO notice at the time it is made may substantially

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25 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.

26 EM, SOC 6.

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.[27] 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.

2.126 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.[28] Australia has also been criticised for similar coercive information gathering powers by international treaty monitoring bodies on the basis of the breadth of the powers conferred and the absence of adequate safeguards on a number of occasions.[29]

2.127 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.

2.128 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 [2.121] to [2.127].

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

28 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.

29 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)).

Minister's initial response – coercive information-gathering powers and the right to privacy

2.129 In relation to how the measure is effective to achieve (that is, rationally connected to) its stated objective, the minister initially 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.
>
> 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.

2.130 The minister's response further explained 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.

2.131 The committee's previous report 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.

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

> 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.

2.133 Accordingly, the committee's previous report acknowledged that the measure pursues a legitimate objective. The minister's response stated 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,[30] and the criticism by international supervisory bodies, regarding similar coercive information gathering powers set out above at [2.126].[31]

2.134 The minister's response stated that there are sufficient safeguards to ensure that the measure is a proportionate limit on the right to privacy. However, no information was provided about these safeguards or response made to the concerns raised in the initial human rights analysis. The response did 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 did 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.

2.135 Accordingly, the committee requested the further advice of the minister as to the proportionality of the measure including:

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30 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.

31 See, International Labour Organization (ILO), Committee on Freedom of Association (CFA), Case No 2326 (Australia) [454]-[456]; Case No 2326 (Australia), Report No 353, March 2009, [21]-[24]; ILO Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), 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).

- 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.

Minister's further response – coercive information-gathering powers and the right to privacy

2.136 The minister provides a range of information in response to the committee's inquiries as to the proportionality of the measure. In relation to what safeguards exist in relation to the regime, the minister's response states:

> The Bill includes extensive safeguards, which have been modelled on comparable provisions that apply to the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission.
>
> The Bill's Explanatory Memorandum notes at paragraph 105 that the proposed safeguards have also been framed consistently with *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 and the Administrative Review Council Report 48, *The Coercive Information-gathering Powers of Government Agencies*. The safeguards include:
>
> - the Fair Work Ombudsman (FWO) may only exercise the proposed new information-gathering powers if it has reasonable grounds to believe a person can help with an investigation—this imposes an objective standard, so a suspicion is not enough
> - the proposed new power to issue a FWO notice may only be exercised by the Fair Work Ombudsman personally, or a delegate who is a Senior Executive (SES) or acting SES member of staff
> - an interview conducted under the new powers may only be conducted by the FWO personally or by an SES or acting SES member of staff
> - a FWO notice must be in writing and in the form prescribed by the regulation (if any)
> - a recipient of a FWO notice has a guaranteed minimum of 14 days to comply with the notice
> - a person attending a place to answer questions may be legally represented, and is entitled to be reimbursed for certain reasonable expenses, up to a prescribed amount

- there is protection from liability relating to FWO notices
- self-incriminating information, documents or answers given in response to a FWO notice cannot be used against the person who gave the evidence in any proceedings.

> The overarching legal framework includes robust oversight arrangements. Central to the oversight regime are judicial review, the Commonwealth Ombudsman and the *Privacy Act 1988* (Privacy Act).
>
> …in light of the safeguards described above, I am satisfied the proposed limitation on the right to privacy is proportionate. The proposed amendments will ensure alleged contraventions of workplace laws may be properly investigated, and more effectively deter deliberate and serious non-compliance with the law. There are no less intrusive measures that could be implemented that would achieve the same outcome.

2.137 While these safeguards are relevant, as set out above at [2.123] – [2.125], the previous human rights analysis raised serious concerns in relation to their adequacy and effectiveness. In relation to whether additional safeguards could be included, the minister's response states:

> This issue was also given consideration in the Senate Education and Employment Legislation Committee's report on the Bill, dated May 2017. The Report acknowledged concern raised regarding the expansion of the Fair Work Ombudsman's evidence-gathering powers, but found the proposed new information-gathering powers would only be used as a last resort and only for the most difficult and complex cases.
>
> I am satisfied the proposed safeguards provide significant practical protection to examinees. The Government will however carefully consider any proposals to provide additional safeguards during the Parliamentary debate process.

2.138 While the conclusions of other committees may assist this committee in its work, it is the function of this committee to examine legislation against Australia's obligations under international human rights law. In particular, legislation will be incompatible with human rights if it grants powers which may be used to limit the enjoyment of rights, without being sufficiently circumscribed and containing sufficient safeguards to only limit rights in a necessary and proportionate manner. Identifying whether legislation is sufficiently circumscribed is a core aspect of this committee's function, which is distinct from other parliamentary committees.

2.139 While it may be the current policy intention of the government and the FWO to use coercive evidence gathering powers only as a last resort, the proposed powers are not restricted in this manner in the bill. As set out above at [2.123], this means that the powers could be used in a much broader range of circumstances and indicates that the power as drafted is insufficiently circumscribed. An argument that, as a matter of policy, these laws will not be used in particular ways does not adequately address human rights concerns. However, for example, introducing a

mechanism such as a requirement that an application be made to the AAT for the grant of a notice could assist to ensure a FWO notice is necessary in an individual case.[32]

2.140 In relation to whether the power could be further circumscribed, the minister states:

> I do not accept the proposed information-gathering powers should be further circumscribed so as to only apply to cases where there is suspected exploitation of employees.

2.141 However, one of the reasons the committee's previous report had asked about whether the power could be further circumscribed in this way was that the statement of compatibility identified the legitimate objective of the power as preventing the exploitation of employees. As noted in the previous analysis, in order to be a proportionate limitation on the right to privacy, a power should be no more extensive than strictly necessary to achieve its legitimate objective. By not restricting the power to cases where there is exploitation of workers the power is much more extensive than is necessary to achieve the previously stated objective of the measure.

2.142 The minister's further response appears to acknowledge that the proposed power is broader than addressing the objective of preventing the exploitation of workers, and argues that:

> The *Fair Work Act 2009* (the Fair Work Act) codifies a set of rules and conduct 'to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians ...' (section 3). It is the primary mechanism through which a variety of internationally recognised human rights are guaranteed. Each objective described in section 3 of the Fair Work Act is legitimate, and has a role to play in striking the right balance. The rationale for enhanced information-gathering powers applies equally across the Fair Work Act.
>
> The Explanatory Memorandum explains enforcing workplace laws has become increasingly difficult, and sometimes almost impossible, without access to more effective procedures than the traditional methods such as workplace inspections and notices to produce documents. This is particularly so where there are no relevant records, or records may have been falsified.

2.143 These objectives were not identified in the statement of compatibility, or the minister's initial response, and apart from the above statement, evidence has not been provided as to why such extensive information gathering-powers are required in respect of *all* matters under the Fair Work Act. It is further noted that some

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

aspects of the Fair Work Act, including the restrictions on industrial action, have been criticised by international supervisory mechanisms as going beyond what is permissible under international law.[33] In these circumstances, providing further powers to enforce such laws may exacerbate underlying human rights concerns in relation to the Fair Work Act.

2.144 Even if it were accepted that the new objectives identified constituted legitimate objectives for the purposes of international human rights law, there remain serious concerns in relation to the proportionality of the measure, namely the breadth of the powers and insufficiency of safeguards explained above. In relation to 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, the minister's response states:

> I do not accept that the Committee's comparison of the proposed new information-gathering powers with police powers is apt, given the Fair Work Act predominately provides for civil, not criminal sanctions under Australian law. The consequences of wrongdoing under the Fair Work Act are very different from those under the general criminal law, and this important difference should be recognised.

2.145 It is true that in key respects the workplace relations context is different to the investigation of criminal offences. In terms of the proportionality of rights limiting measures, matters that are more serious may, by their nature, justify more rights intrusive measures. The limitation imposed on the right to privacy by this measure in the workplace relations context is extensive, more so than the powers usually available in the criminal investigation context, and may apply to conduct that may be less serious in relative terms. Accordingly, the extent of the power would not appear to be proportionate in a non-criminal context.

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

2.146 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.[34] Jurisprudence from international treaty monitoring bodies and supervisory mechanisms also supports a finding that the power is not a proportionate limitation on the right to privacy in the workplace relations context.[35] Accordingly, the measure appears to be incompatible with this right.

Committee response

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

2.148 The preceding analysis indicates that the measure is likely to be incompatible with the right to privacy.

34 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.

35 See, ILO CFA Case No 2326 (Australia) [454]-[456]; Case No 2326 (Australia), Report No 353, March 2009, [21]-[24]; ILO CEACR 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).

Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210]

Purpose	Amends the Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Determination 2015 and Social Security (Administration) (Trial Area - East Kimberley) Determination 2016 to extend trials of cashless welfare arrangements
Portfolio	Social Services
Authorising legislation	*Social Security (Administration) Act 1999*
Last day to disallow	19 June 2017
Rights	Social security; private life; equality and non-discrimination (see **Appendix 2**)
Previous report	5 of 2017
Status	Concluded examination

Background

2.149 The committee first reported on the Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210] (the determination) in its *Report 5 of 2017*, and requested a response from the Minister for Social Services by 30 June 2017.[58]

2.150 No response was received at the time of finalising this report. Accordingly, the committee's concluding remarks on the determination are made in the absence of further information from the minister.[59]

Extending a trial of cashless welfare arrangements

2.151 The determination extends trials of cashless welfare arrangements in Ceduna and its surrounding region, and East Kimberley for six months. This extension brings the total period of the trials to 18 months in each location.[60]

58 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 31-33.

59 See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

Compatibility of the measure with human rights

2.152 The committee has considered these measures in previous reports in relation to the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card bill),[61] and the Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248] (declinable transactions determination).[62] The Debit Card bill amended the *Social Security (Administration) Act 1999* to provide for a trial of cashless welfare arrangements in prescribed locations. Persons on working age welfare payments in the prescribed locations would have 80 percent of their income support restricted, so that the restricted portion could not be used to purchase alcoholic beverages or to conduct gambling. The trial arrangements are currently operating in two trial locations of Ceduna and East Kimberley. Explanatory material for the Debit Card bill and declinable transactions determination noted that the policy intention was for the trial to take place for only 12 months in each location.[63]

2.153 As noted in the initial human rights analysis, the explanatory statement to the determination does not provide detail as to why the extension is required, but states:

> While the early indications of the Trial's impact are positive, the Trial's extension will allow the Government to make fully informed decisions about the future of welfare conditionality in Australia.

2.154 The previous human rights assessments of the cashless welfare trial measures raised concerns in relation to the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets. These concerns related to the right to social security, the right to a private life and the right to equality and non-discrimination.[64]

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60 The trials were initially extended to a period of twelve months in two instruments: Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424] and Social Security (Administration) (Trial Area – East Kimberley) Amendment Determination 2016 [F2016L01599]. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 53.

61 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36.

62 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 58-61.

63 See Social Security Legislation Amendment (Debit Card Trial) Bill 2015, Explanatory Memorandum 4; Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248], Explanatory Statement 6.

64 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; and *Report 7 of 2016* (11 October 2016) 58-61.

2.155 By extending the trials in each location for a further six months, this instrument engages and limits the abovementioned human rights. As outlined in the committee's *Guidance Note 1*, where a limitation on a right is proposed, the committee expects the statement of compatibility to provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate. While the committee previously accepted that the cashless welfare trial measures may pursue a legitimate objective,[65] it has raised concerns as to whether the measures are rationally connected to and proportionate to their objective.[66] In this instance, the statement of compatibility has not provided enough information to establish why extending the trials is necessary and will be effective to achieve the objectives of the trials, and is a proportionate limitation on the above human rights.

2.156 Noting the human rights concerns raised by the previous human rights assessments of the trials, and related concerns regarding income management identified in the committee's *2016 Review of Stronger Futures measures*, the committee therefore sought the advice of the Minister for Social Services as to:

- why it is necessary to extend the trials for a further six months;
- how the extension is effective to achieve (that is, rationally connected to) the stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the objective of the trials.

Committee comment

2.157 The effect of the determination is to extend the trials of cashless welfare arrangements in Ceduna and its surrounding region and East Kimberley for six months, bringing the total period of the trials to 18 months. The initial analysis noted that previous human rights assessments of the trials identified concerns in relation to the right to social security, the right to a private life and the right to equality and non-discrimination, and that the statement of compatibility does not provide information as to why it is considered necessary to extend the trials beyond 12 months, as originally envisaged in the Debit Card Bill.

2.158 As noted above, no response from the minister was received at the time of finalising this report. In the absence of further information, it is not possible to conclude that the determination is necessary and effective to achieve the

65 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 27.

66 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; and *Report 7 of 2016* (11 October 2016) 42.

objectives of the trials or is a proportionate limitation on the human rights set out above.

Mr Ian Goodenough MP

Chair