Appendix 3

Correspondence

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MC17-005670

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

Dear Chair Ian

I am writing in relation to Report 5 of 2017 by the Parliamentary Joint Committee on Human Rights (the Committee), in which the Committee sought further information in relation to the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017*.

The Committee has requested copies of the AFP National Guidelines referenced in my earlier response of 29 May 2017. In response to this request, I enclose the following documents for the Committee's consideration:

- the AFP National Guideline on international police-to-police assistance in death penalty situations (**Attachment A**), and
- the AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment (**Attachment B**).

Should your office require any further information, the responsible adviser for this matter in my office is Talitha Try, who can be contacted on 02 6277 7290.

Yours sincerely

Michael Keenan

AFP National Guideline on international police-to-police assistance in death penalty situations

1. Disclosure and compliance

This document is marked **For Official Use Only** and is intended for internal AFP use.

Disclosing any content must comply with Commonwealth law and the AFP National Guideline on information management.

Compliance

This instrument is part of the AFP's professional standards framework. The AFP Commissioner's Order on Professional Standards (CO2) outlines the expectations for appointees to adhere to the requirements of the framework. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards and be dealt with under Part V of the *Australian Federal Police Act 1979* (Cth).

2. Acronyms

AFP	Australian Federal Police
MIE	Manager International Engagement
NMIO	National Manager International Operations
PNG	Papua New Guinea
PROMIS	Police Real-time Online Management Information System

3. Definitions

Commissioner – means the Commissioner of Police of the AFP, as defined in s. 4 of the AFP Act.

Minister – means the Commonwealth minister responsible for the AFP.

4. Guideline authority

This guideline was issued by the National Manager International Operations using power under s. 37(1) of the *Australian Federal Police Act 1979* (Cth) as delegated by the Commissioner under s. 69C.

5. Introduction

This guideline governs police-to-police assistance in possible death penalty cases, and has been developed in consultation with the Attorney-General's Department.

6. Authority to provide information to foreign law enforcement agencies

The AFP is authorised to provide assistance and cooperate with foreign law enforcement agencies in accordance with the *Australian Federal Police Act 1979* (Cth) and Ministerial Direction. Additionally, a number of United Nations Conventions, to which Australia is a signatory, further support the processes of conducting international police cooperation.

This guideline applies only to the provision of assistance, including the sharing of information, which can be provided on a police-to-police basis. This guideline does not apply to the provision of assistance that requires a mutual assistance request. In such cases, s. 8(1A) and s. 8(1B) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) apply. That Act is administered by the Attorney-General's Department.

7. Policy for cooperation with foreign law enforcement agencies

On 29 January 2009, the Attorney-General approved a range of measures to strengthen current policy governing international crime cooperation in death penalty cases.

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.

Assistance after detention, arrest, charge or conviction

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.

Assistance by AFP appointees in Papua New Guinea (PNG)

The Australian Government PNG Death Penalty Framework endorsed by the Attorney-General on 2 June 2014 sets out the whole-of-government approach to managing death penalty issues. Attachment A to that framework applies specifically to AFP appointees in PNG.

8. Approval process

Procedures before detention, arrest, charge or conviction

Where no person has been arrested or detained for, charged with, or convicted of an offence, and the AFP is aware the provision of information is likely to result in the prosecution of an identified person for an offence carrying the death penalty:

Step 1	The case officer or business area seeking assistance approval must complete the 'Assistance in Potential Death Penalty Situations – Approval Request' form (AFP Investigator's Toolkit) and have it endorsed by their functional coordinator. Should assistance be required members should consult the International Network Engagement team and/or Post.
Step 2	The case officer sends the endorsed form via a PROMIS task to International Operations (IO-INET) for approval by MIE/NMIO.

Procedures after detention, arrest charge or conviction

Where a person has been arrested or detained for, charged with, or convicted of an offence carrying the death penalty:

Step 1	The case officer or business area seeking assistance approval prepares a ministerial brief with a covering executive brief to MIE/NMIO for the attention of the Deputy Commissioner Operations. The ministerial brief should cover the same prescribed factors (listed above) that an AFP delegate must consider.
Step 2	If approved, requests will be progressed to the Attorney-General or the Minister via the AFP Ministerial team.

Procedures for AFP appointees in Papua New Guinea (PNG)

All AFP appointees in PNG must comply with the procedures and approval processes in the Papua New Guinea – Australia Policing Partnership Mission

Commander's Orders regarding assistance provided to PNG counterparts in matters involving offences for which the death penalty may be imposed.

9. Reporting

The Commissioner will report to the Minister annually on the nature and number of cases where assistance is provided to foreign law enforcement agencies in death penalty cases.

10. Further advice

Queries about the content of this guideline should be referred to NMIO.

11. References

- *Australian Federal Police Act 1979* (Cth)
- *Mutual Assistance in Criminal Matters Act 1987* (Cth)
- Ministerial Direction (AFP Hub)
- Australian Government PNG Death Penalty Framework.

FOR INTERNAL AFP USE ONLY

AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment

1. Disclosure and compliance

This document is marked **For Official Use Only** and is intended for internal AFP use.

Disclosing any content must comply with Commonwealth law and the AFP National Guideline on information management.

Compliance

This instrument is part of the AFP's professional standards framework. The AFP Commissioner's Order on Professional Standards (CO2) outlines the expectations for appointees to adhere to the requirements of the framework. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards and be dealt with under Part V of the *Australian Federal Police Act 1979* (Cth).

2. Acronyms

AFP	Australian Federal Police
PROMIS	Police Real-time Online Management Information System
TCIDTP	Torture or cruel, inhuman or degrading treatment or punishment

3. Definitions

AFP appointee – means a Deputy Commissioner, an AFP employee, special member or special protective service officer and includes a person:

- engaged overseas under s. 69A of the *Australian Federal Police Act 1979* (Cth) (the Act) to perform duties as an AFP employee
- seconded to the AFP under s. 69D of the Act
- engaged under s. 35 of the Act as a consultant or contractor to perform services for the AFP and determined under s. 35(2) of the Act to be an AFP appointee.

(See s. 4 of the Act.)

Australian – means a person who is an Australian citizen.

Cruel, inhuman or degrading treatment or punishment – see Attachment 1.

Foreign authorities – means law enforcement, foreign security agencies, foreign intelligence agencies and/or any agent of a foreign government.

Torture – is defined in Division 274 of the Criminal Code (see the *Criminal Code Act 1995* (Cth)) and involves conduct that inflicts severe physical or mental pain or suffering on a person.

4. Guideline authority

This guideline was issued by National Manager International Operations using power under s. 37(1) of the *Australian Federal Police Act 1979* (Cth) as delegated by the Commissioner under s. 69C of the Act.

5. Introduction

The AFP does not tolerate, participate in, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment (TCIDTP) of any individual for any purpose.

This guideline outlines the obligations for AFP appointees and the framework for dealing with foreign authorities:

- where an AFP appointee becomes aware an Australian detained offshore has been, or is likely to be, subject to TCIDTP
- where an appointee is involved in interviews of a detained person offshore in situations where there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP
- in respect of disclosure of information about a person to foreign authorities where there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP.

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

This guideline exists within broader national and international legal and policy frameworks which impose general prohibitions on TCIDTP, including in relation to accessorial forms of individual and state responsibility (e.g. aiding and abetting). This guideline is only intended to provide specific operational guidance to AFP appointees.

6. Reporting TCIDTP of Australians detained offshore

AFP appointees who in the course of carrying out AFP functions become aware

of credible information that an Australian detained by a foreign authority offshore has been, or is likely to be, subject to TCIDTP, must advise the relevant AFP post and Manager International Engagement as soon as practicable. The senior liaison officer at post, or the mission commander in countries with AFP missions, are the AFP point of contact in country. The AFP appointee should include where known:

- the full name of the detained Australian
- the location of the detained Australian
- the reason for their detention
- the name of the detaining foreign authority
- the allegations made and date of any alleged mistreatment
- the details of any other reporting of the TCIDTP (including media reporting)
- what action has been taken by the AFP or other Australian agencies
- how and by whom the TCIDTP was reported.

The AFP senior liaison officer must, as soon as practicable, report the likelihood of an Australian detained offshore being subject to TCIDTP to the Department of Foreign Affairs and Trade Head of Mission in country.

Details of the alleged TCIDTP and related AFP actions and determinations must be recorded in PROMIS as a critical decision.

7. Involvement in interviews

This guideline applies to any AFP appointee who conducts or participates in an interview offshore, whether or not Part IC of the *Crimes Act 1914* (Cth) applies.

AFP appointees considering conducting an interview where there is a substantial, real and not remote risk that a person has been, or is likely to be, subject to TCIDTP must:

- report considerations for such participation in the interview to Manager International Engagement
- record details of the request and management determinations on PROMIS as a critical decision.

AFP appointees considering attendance at, and/or involvement in, an interview conducted by another agency of a person detained offshore where there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP must:

- report considerations for such attendance or involvement in the interview to Manager International Engagement, e.g.:
  - whether it is possible to mitigate the risk of TCIDTP occurring through requesting and evaluating assurances on detainee treatment
  - attaching conditions to any information to be passed governing the use to which it may be put
  - whether AFP appointee involvement in the interview would increase or

decrease the likelihood of TCIDTP occurring
- record details of the request and management determinations on PROMIS as a critical decision
- suspend any involvement in the interview until a decision is made by Manager International Engagement.

Should Manager International Engagement permit AFP appointee attendance and/or involvement in the interview, the AFP appointee should monitor the situation closely and consider withdrawing from the interview should the risk of TCIDTP arise.

Manager International Engagement must determine the level of any involvement of the AFP appointee in the interview in consultation with the senior liaison officer at post, or mission commander in countries with AFP missions, and the Department of Foreign Affairs and Trade, through the head of mission at post; and with regard to any applicable whole-of-government guidance.

8. Disclosure of information to foreign authorities

The AFP National Guideline on information management sets out the framework for all disclosures of information by the AFP. The AFP National Guideline on international police-to-police assistance in death penalty situations sets out additional considerations in situations where the death penalty may apply.

This guideline sets out the:

- additional considerations where the disclosure of information relates to a person who is detained, or is likely to be detained, by a foreign authority and there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP
- formal approval process that applies to the release of that information, including the sending of questions or information to support the conduct of a custodial interview, as well as circumstances where an AFP appointee is physically present at an interview.

8.1 Information disclosure considerations

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.

8.2 Approval process

AFP appointees must report details of the request for information to Manager International Engagement and document, where known, information relevant to the considerations listed above.

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.

8.3 Caveats

Following approval to disclose information to a foreign authority, subject to any limitations or restrictions that may apply under s. 8.2, and the provisions of the AFP Practical Guide on applying protective markings, the AFP appointee must include a caveat on all information disclosed. The caveat must include instructions on the use of information and its releasability, as follows:

'The information contained in this document originates from the Australian Federal Police (AFP) and may be subject to disclosure restrictions under Australian law. This information may only be used for the purposes for which it was requested and provided. This information must not be disclosed to another agency or third party without the prior written consent of the AFP'.

9. Further advice

Queries about the content of this guideline should be referred to National Manager International Operations.

10. References

Legislation

- *Australian Federal Police Act 1979* (Cth)
- *Crimes Act 1914* (Cth)
- *Criminal Code Act 1995* (Cth) (including the Criminal Code).

AFP governance instruments

- AFP National Guideline on information management
- AFP National Guideline on international police-to-police assistance in death penalty situations
- AFP Practical Guide on applying protective markings.

SENATOR THE HON SCOTT RYAN
Special Minister of State
Minister Assisting the Prime Minister for Cabinet
Senator for Victoria

REF: MC17-0002147

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

I refer to your letter from of 15 June 2017 to my Senior Advisor regarding the Electoral and Other Legislation Amendment Bill (the Bill). The letter refers to the *Human rights scrutiny report 5 of 2017* by the Parliamentary Joint Committee on Human Rights and seeks my advice on the matters raised.

The Committee has requested advice as to whether:

- the restriction of the right to freedom of expression is reasonable and proportionate;
- the civil penalty provisions in the Bill may be considered 'criminal' in nature for the purposes of human rights law; and
- the reverse burden offence is legitimate, effective, and reasonable and proportionate.

I have responded to each of your requests in detail below.

1) Implied freedom of expression

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.

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.

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) 'Criminal' nature of the civil penalty provisions under international human rights law

I understand the Committee is seeking advice on whether the civil penalty provisions introduced by the Bill may be considered to be 'criminal' for the purposes of international human rights law and, if so, whether the measures accord with criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights.

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.

2d) Criminal process rights

As I have previously stated, I consider it unlikely that the penalties could be considered 'criminal' in nature for the purposes of international human rights law. However, the Committee has asked me to specifically address whether the measure accords with criminal process rights for the following specific guarantees:

- 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
- the guarantee against retrospective criminal laws (article 15(1)).

First and foremost, the rights outlined in articles 14 and 15 would be largely preserved under the proposed measures. In relation to article 14(2), I have separately addressed the reverse burden offence below. The rights contained in article 14(7) and 15(1) would not be affected by the application of the measure.

The Electoral Commissioner is given powers under the proposed section 321F to obtain information and documents. This is an acceptable limit on the right against self-incrimination in article 14(3)(g), noting the safeguards in place under the *Privacy Act 1988* in terms of the use and disclosure of personal information. The provisions are also necessary, as it assists the Electoral Commissioner in the performance of functions and powers that protect the free, fair and informed voting at elections.

3) Reverse burden offence

Finally, the Committee has requested my advice as to why it is proposed to use what appears to the Committee to be an offence-specific defence (which reverses the evidential burden of proof), and what the justification is for doing so.

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.

I thank the Committee for raising these issues and providing me with the opportunity to respond.

Yours sincerely

SCOTT RYAN

30 June 2017

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

Reference: MC17-047832

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

Dear Chair

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

This letter is in response to your letter of 21 June 2017 concerning the human rights compatibility of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, as set out in the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Report No. 6 of 2017.*

The Committee requested additional information, further to my initial response dated 29 May 2017. My supplementary response to each of the issues raised is at Attachment A. I thank the Committee for the consideration of the Bill and I trust this addresses the outstanding issues raised by the Committee.

I note that the inquiry of the Senate Education and Employment Legislation Committee into the Bill has concluded and the Australian Government is considering recommendations made in its report, dated May 2017.

Yours sincerely

Senator the Hon Michaelia Cash
/ / 2017

Encl.

Attachment A

Detailed response to issues raised in *Human Rights Scrutiny Report No.6 of 2017*

FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) BILL 2017

Compatibility of the measure with criminal process rights

The Committee requests further advice 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**
- **the increases in the maximum penalties could be limited so as to not apply, or be reduced, in respect of individual employees.**

Response

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

In relation to the Committee's concerns, and taking into account the Committee's Guidance Note 2, the following factors support the view that the proposed penalty regime is not criminal in nature:

- the 600 penalty unit penalty is not a criminal penalty under Australian law
- 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.

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.

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.

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.

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

The Committee requests further advice of the minister as to the proportionality of the measure including:

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

Response

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).

The Committee asks whether additional safeguards could be included in relation to the measure (such as external safeguards). 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.

The Committee also asked whether the power could be further circumscribed, and whether the extent of the limitation is proportionate to investigate industrial matters.

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.

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.

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.

For these reasons, and 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.