Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 4 and 7 December (consideration of 3 bills from this period has been deferred);[1]
- legislative instruments received between 3 November and 14 December (consideration of 14 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

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

Instruments not raising human rights concerns

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

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

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

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

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

Response required

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

Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017

Purpose	Amends the *Broadcasting Services Act 1992* to: establish a Register of Foreign Ownership of Media Assets to be administered by the Australian Communications and Media Authority (ACMA); provide for new assessment criteria for the applications for, and renewals of, community radio broadcasting licences relating to material of local significance; amends the *Australian Communications and Media Authority Act 2005* to enable the ACMA to delegate certain powers
Portfolio	Communications and the Arts
Introduced	Senate, 6 December 2017
Right	Privacy, criminal process rights (see **Appendix 2**)
Status	Seeking additional information

Establishment of the Register of Foreign Owned Media Assets

1.6 The Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017 (the bill) would establish a Register of Foreign Ownership of Media Assets (the register). The register will be overseen and maintained by the Australian Communications and Media Authority (ACMA), will be available publicly on the ACMA's website, and would provide information about each 'foreign stakeholder'[1] in an Australian media company, including the name of the foreign

1 A 'foreign stakeholder' is a foreign person who has a company interest in an Australian media company of 2.5% or more: proposed section 74C. 'Foreign person' has the same meaning as under the *Foreign Acquisitions and Takeovers Act 1975* and includes, relevantly, an individual not ordinarily resident in Australia.

stakeholder, the foreign stakeholder's company interests[2] in the Australian media company and the country in which the foreign stakeholder is ordinarily resident.[3]

1.7 Where a person is a foreign stakeholder in an Australian media company at the end of a financial year, or becomes a foreign stakeholder, the person must within 30 days notify the ACMA in writing of certain information, including the person's name, the circumstances that resulted in the person being or becoming a foreign stakeholder in the company, the person's company interests in the company, 'designated information' relating to the person,[4] and 'such other information (if any) relating to the person as is specified' by legislative instrument.[5] The ACMA may also, by written notice to a foreign stakeholder, require the foreign stakeholder to notify the ACMA of the foreign stakeholder's company interest's in the company, the method used to determine such interests and 'such other information' relating to the foreign stakeholder as specified by legislative instrument.[6]

Compatibility of the measure with the right to privacy

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

1.9 As noted in the statement of compatibility, the bill engages the right to privacy because it requires the provision of information by, and authorises the use and disclosure of certain information about, individuals (including personal information) for inclusion on the register.[7] However, the statement of compatibility further states that to the extent that the right to privacy is limited by the bill, the limitations are reasonable, necessary and proportionate.

1.10 The objective of the bill is described in the statement of compatibility as 'to promote increased scrutiny of foreign investment in Australian media companies, and increase transparency of the levels and sources of foreign ownership in these

2 'Company interest' is defined in the bill using the definition in section 6 of the *Broadcasting Services Act 1992* and means, in relation to a person who has a shareholding interest, a voting interest, a dividend interest or a winding-up interest in a company, the percentage of that interest or, if the person has two or more of those interests, whichever of those interests has the greater percentage.

3 Proposed section 74E of the bill. If the ACMA is satisfied that the disclosure of the information could reasonably be expected to prejudice materially the commercial interests of a person, the Register must not set out that particular information: section 74E(2).

4 'Designated information' means, relevantly, the person's date of birth and the country in which the person is ordinarily resident: proposed section 74B.

5 Proposed section 74F and 74H. See also proposed section 74J, which introduces a transitional provision for disclosure for foreign stakeholders who are required to register at the commencement of this Division of the bill.

6 Proposed section 74K(1) and (2).

7 Statement of Compatibility (SOC), p. 20.

companies'.[8] This is likely to be a legitimate objective for the purpose of international human rights law. Similarly, requiring certain information about foreign stakeholders to be available on a publicly-accessible register appears to be rationally connected to this objective.

1.11 However, in order to be a proportionate limitation on the right to privacy, regimes that permit the collection and disclosure of personal information need to be sufficiently circumscribed. In this respect, the power in proposed sections 74F(2),74H(2),74J(2), and74K(2) to specify by legislative instrument additional information that foreign stakeholders must provide to the ACMA is broadly worded. It is not clear whether such an instrument would require the collection of further personal information and, if so, what safeguards would be in place to protect the right to privacy. International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[9] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights.

1.12 It is also not clear from the statement of compatibility what safeguards are in place relating to the access, storage and disclosure of any personal or confidential information that is notified to the ACMA but not disclosed on the register (such as a person's date of birth, or information considered to prejudice materially the commercial interests of a person pursuant to section 74E(2)). For example, no information is provided in the statement of compatibility as to whether there are any penalties for unlawfully disclosing personal information, and who within the ACMA is entitled to access such information.

Committee comment

1.13 The preceding analysis raises questions as to whether the notification and disclosure requirements for the register of foreign owners of media assets are a proportionate limitation on the right to privacy.

1.14 The committee therefore seeks the advice of the minister as to whether the limitation on the right to privacy is proportionate to the stated objective of the measure (including whether the power to determine by legislative instrument the information that must be notified is sufficiently circumscribed, and what safeguards apply relating to the collection, storage and disclosure of personal and confidential information).

8 SOC, p. 18.

9 *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84]

Civil penalties for failing to comply with notification requirements

1.15 Proposed sections 74F(3), 74H(3), 74J(3) and 74K(4) provide that a foreign person who fails to properly notify the ACMA of being a foreign stakeholder is liable to a civil penalty. Similarly, a person who fails to notify the ACMA when they cease to be a foreign stakeholder is liable to a civil penalty.[10] The amount of penalty unit for a non-body corporate is 60 penalty units (currently $12,600). Further, if a person fails to comply with the section, it would be a separate contravention for each day that the person has failed to comply with the notification obligation.[11]

Compatibility of the measure with criminal process rights

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

1.17 The committee's *Guidance Note 2* sets out detailed guidance in relation to civil penalty provisions and provides that where a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of international human rights law.

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

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

1.20 The second step in assessing whether the civil penalties are 'criminal' under international human rights law is to look at the nature and purpose of the penalties. Civil penalty provisions are more likely to be considered 'criminal' in nature if they are intended to punish or deter, irrespective of their severity, and if they apply to the public in general. Here, there is no indication that the civil penalties are intended to be punitive and the penalties only apply to 'foreign stakeholders' rather than the public in general. However, no information is otherwise provided in the statement of

10 Proposed section 74G(2) of the bill.

11 Proposed sections 74F(4), 74G(3), 74H(4), 74J(4) and 74K(5) of the bill.

compatibility as to the nature and purpose of the penalties save for describing the penalties as an 'administrative' penalty.[12]

1.21 The third step in assessing whether the penalties are 'criminal' under international human rights law is to look at their severity. In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the maximum amount of the pecuniary penalty that may be imposed under the civil provision in context is relevant. Here, it is not clear whether the maximum civil penalty (60 penalty units) is, of itself, severe in the particular regulatory context. However, as each day that a person fails to properly notify the ACMA is a separate contravention, there is a potential that the overall penalty imposed could be substantial. These issues were not addressed in the statement of compatibility.

Committee comment

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

- **whether the nature and purpose of the penalties is such that the penalties may be considered 'criminal';**
- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be considered 'criminal', having regard to the regulatory context; and**
- **if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measure accords with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge, such as the presumption of innocence (article 14(2)).**

12 SOC, p. 20.

Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) (Documents) Amendment Instrument 2017 (No. 1) [F2017L01456]

Purpose	Amends the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 to list documents specified by the Minister for Foreign Affairs that list goods prohibited for export to, or importation from, the Democratic People's Republic of Korea under the Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008
Portfolio	Foreign Affairs and Trade
Authorising legislation	Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Regulations 2008
Last day to disallow	15 sitting days after tabling (tabled in the Senate 13 June 2017)
Rights	Fair trial; quality of law; liberty (see **Appendix 2**)
Status	Seeking additional information

Background

1.23 The committee has examined offence provisions arising out of sanctions regulations on a number of previous occasions.[1] The human rights assessment of these regulations noted that proposed criminal offences arising from the breach of such regulations on the supply of 'export sanctioned goods' and the importation of 'import sanctioned goods' raised concerns in relation to the right to a fair trial and the right to liberty. Specifically, the offences did not appear to meet the quality of law test, which provides that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified. The Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) (Documents) Amendment Instrument 2017 (No. 1) [F2017L01456] (the instrument) raises similar human rights concerns.

1 See, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 11; *Thirty-Seventh Report of the 44th Parliament* (19 April 2016); *Report 9 of 2016* (22 November 2016) p. 56; *Report 7 of 2017* (8 August 2017) p. 21 (which examined the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 that is amended by the current instrument); *Report 11 of 2017* (17 October 2017) pp. 46-48.

Offences of dealing with export and import sanctioned goods

1.24 The instrument lists documents that are specified by the Minister for Foreign Affairs as documents mentioning goods to be prohibited for export to, or importation from, the Democratic People's Republic of Korea (DPRK).[2] Goods mentioned in the listed documents are incorporated into the definition of 'export sanctioned goods' and 'import sanctioned goods' for the purposes of the Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008 [F2016C01044] (2008 DPRK sanctions regulations).[3] The instrument re-lists a number of documents as well as adding some additional documents to the list.[4]

1.25 The 2008 DPRK sanctions regulations define 'export sanctioned goods' as including goods that are mentioned in a document specified by the minister by legislative instrument.[5] The documents that are specified by the minister through the instrument take various forms, including letters and information circulars.

1.26 Sections 9 and 10 of the DPRK sanctions regulations, respectively, prohibit supply of export sanctioned goods to the DPRK, and importation of import sanctioned goods from the DPRK. The Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2017C00214] (the declaration) provides that contravention of sections 9 and 10 of the DPRK sanctions regulations are contraventions of a 'UN sanction enforcement law'. The effect of this is to make a breach of those provisions a criminal offence under the *Charter of the United Nations Act 1945* (the United Nations Act). Therefore, a person commits an offence under the United Nations Act by engaging in conduct (including doing an act or omitting to do an act) that contravenes the provisions in the 2008 DPRK sanctions regulations. This is then punishable by up to 10 years' imprisonment and/or a fine of up to 2,500 penalty units (or $525,000).

Compatibility of the measure with human rights

1.27 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings. Article 9 of the ICCPR protects the right to liberty including the right not to be arbitrarily detrained. The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

2 2008 DPRK regulations section 5.

3 See 2008 DPRK sanctions regulations section 5.

4 Compare, Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539].

5 See 2008 DPRK sanctions regulations section 5(1)(c).

1.28 Human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

1.29 The instrument, by amending the list of documents setting out goods to be 'export sanctioned goods' and ultimately making supply of these goods a criminal offence under the United Nations Act subject to a penalty of imprisonment, engages and may limit the right to liberty.

1.30 In particular, as the definition of 'export sanctioned goods' may lack sufficient certainty, the measure engages the right not to be arbitrarily detained and the right to a fair trial. The definition of 'export sanctioned goods', which is an important element of whether a person has engaged in prohibited conduct such as export, import or supply under the 2008 DPRK regulations, may be determined, as occurred here, through reference to goods contained in documents listed in a legislative instrument.[6] In this case the list of documents contained in the instrument incorporates documents, including letters and information circulars, into the definition of 'export and import sanctioned goods' for the purposes of prohibited conduct in the 2008 DPRK regulations. Accordingly, as noted in previous human rights analysis for similar related regulations, as the definition of an important element of offences is determined by reference to goods 'mentioned' in the listed documents the offence appears to lack a clear legal basis as the definition is vaguely drafted and imprecise.[7] In particular there appears to be a lack of clarity about what is and what is not prohibited for export and import. This raises specific concerns that, by making a breach of such regulations a criminal offence, the application of such an offence provision may not be a permissible limitation on the right to liberty as it may result in arbitrary detention.

1.31 In this respect it is noted that measures limiting the right to liberty must be precise enough that persons potentially subject to the offence provisions are aware of the consequences of their actions.[8] The United Nations Human Rights Committee has also noted that any substantive grounds for detention 'must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.[9] It is unclear whether the documents listed in the instrument contain sufficiently precise descriptions of goods, such as would meet appropriate drafting standards for the framing of an offence. For example, the sixth

6 2008 DPRK regulations section 5.

7 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) p. 21.

8 See, Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) p. 12.

9 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, (16 December 2014) [22].

and seventh documents, INFCIRC/254/Rev.12/Part 1 and INFCIRC/254/Rev.9/Part 2, which have been re-listed, appear to be circulars that provide guidelines for nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software and related technology, as opposed to specific descriptions of particular goods that are prohibited. Two of the new documents listed, S/2017/760 and S/2017/728, are letters from the chair of the United Nations Security Council and contain a long list of materials, technology and equipment. However, some of the goods are defined quite broadly by reference to, for example, 'technology' for the 'development' or 'production' of other goods. Further, given the potential difficulty in determining whether an item is prohibited from export or import, it is unclear whether there are any applicable safeguards or mechanisms that may assist persons to understand or seek advice on their export and import obligations including the content of the documents.

1.32 Despite the related human rights concerns raised in the committee's previous reports, the statement of compatibility merely states that the instrument 'is compatible with the human rights'.[10] It provides no assessment of the engagement of particular rights and only provides a general description of what the instrument does. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*.

Committee comment

1.33 The statement of compatibility for the instrument provides no assessment of the compatibility of the instrument with the right to a fair trial, the right to liberty, and quality of law test.

1.34 The preceding analysis raises questions as to the human rights compatibility of the instrument with the right not to be arbitrarily detained, the right to a fair trial and the quality of law test.

1.35 Accordingly, the committee requests the advice of the minister as to:

- **whether the instrument is compatible with the right to a fair trial, the right to liberty and the quality of law test (including whether there are mechanisms in place for individuals to seek advice on their export and import obligations); and**
- **whether a substantive assessment of the human rights compatibility of such instruments with the right to liberty and the right to a fair hearing could be included in statements of compatibility going forward noting the requirements of the *Human Rights (Parliamentary Scrutiny Act) 2011* and the concerns raised in the committee's previous reports.**

10 Statement of compatibility, p. 1.

Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

Purpose	Seeks to amend the funding and disclosure provisions of the *Commonwealth Electoral Act 1918*, including the establishment of public registers for certain non-political persons and entities, amendments to the financial disclosure scheme, and a prohibition on donations from foreign governments and state-owned enterprises
Portfolio	Finance
Introduced	Senate, 7 December 2017
Rights	Right to take part in public affairs, freedom of expression, right to privacy, freedom of association (see **Appendix 2**)
Status	Seeking additional information

Registration requirement for political campaigners, third party campaigners or associated entities

1.36 The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the bill) introduces a requirement for persons to be registered as a 'political campaigner' if their 'political expenditure' (that is, expenditure incurred for a 'political purpose'[1]) during the current, or in any of the previous three, financial years was $100,000 or more.[2] A person is required to register as a 'third party campaigner' if the amount of political expenditure incurred by or with the authority

1 Proposed section 287(1). 'Political purpose' is defined in subsection 287(1) to mean: (a) the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate; (b) the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election); (c) the communicating of any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D; (d) the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*; (e) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors; except if: (f) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media; or (g) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.

2 Section 287F of the bill. An entity must register as a political campaigner if their political campaigner in the current financial year is $50,000 or more, and their political expenditure during the previous financial year was at least 50 per cent of their allowable amount.

of the person or entity during the financial year is more than the 'disclosure threshold' ($13,200);[3] the person or entity is not required to be registered as a political campaigner; and the person or entity is not registered as a political campaigner.[4] Additionally, an entity[5] is required to register as an 'associated entity' where any of the following apply:

- the entity is controlled by one or more of the registered political parties;
- the entity operates 'wholly, or to a significant extent, for the benefit of' one or more of the registered political parties;
- the entity is a financial member of a registered political party;
- another person is a financial member of a registered political party on behalf of the entity;
- the entity has voting rights in a registered political party; or
- another person has voting rights in a registered political party on behalf of the entity.[6]

1.37 Section 287H(5) provides that an entity will operate 'wholly, or to a significant extent, for the benefit of' one or more registered political parties if:

> (a) the entity, or an officer of the entity acting in his or her actual or apparent authority, has stated (in any form and whether publicly or privately) that the entity is to operate:
>
> (i) for the benefit of one or more registered political parties; or
>
> (ii) to the detriment of one or more registered political parties in a way that benefits one or more other registered political parties; or
>
> (iii) for the benefit of a candidate in an election who is endorsed by a registered political party; or
>
> (iv) to the detriment of a candidate in an election in a way that benefits one or more registered political parties; or
>
> (b) the expenditure incurred by or with the authority of the entity during the relevant financial year is wholly or predominantly political expenditure, and that political expenditure is used wholly or predominantly:
>
> (i) to promote one or more registered political parties, or the policies of one or more registered political parties; or

3 The 'disclosure threshold' is defined in section 287(1) of the bill to be $13,200.

4 Section 287G(1).

5 Except a registered political party or a State branch of a registered political party: section 287H(1) of the bill.

6 Section 287H(1).

> (ii) to oppose one or more of the registered political parties, or the policies of one or more registered political parties, in a way that benefits one or more registered political parties; or
>
> (iii) to promote a candidate in an election who is endorsed by a registered political party; or
>
> (iv) to oppose a candidate in an election in a way that benefits one or more registered political parties.

1.38 The registers of political campaigners, third party campaigners and of associated entities are established and maintained by the electoral commissioner.[7] The registers must include the name of each person or entity registered, the name of the financial controller of the person or entity and, in the case of associated entities, the names of any registered political parties with which the entity is associated. Each of the registers may include any other information determined by the electoral commissioner by legislative instrument.[8] The registers must be maintained electronically and be publicly available.[9]

Compatibility of the measure with multiple rights

1.39 The obligation to register as a 'political campaigner', 'third party campaigner' and 'associated entity' engages the freedom of expression, the freedom of association, the right to take part in the conduct of public affairs, and the right to privacy.

1.40 The right to freedom of expression in Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) includes freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice. As acknowledged in the statement of compatibility, imposing compulsory registration obligations on certain persons interferes with those persons' freedom to disseminate ideas and information, and therefore limits the freedom of expression.[10] However, the bill also promotes the freedom of expression insofar as it allows the public to receive information about the source of political communication.[11]

1.41 The right to freedom of association in Article 22 of the ICCPR protects the right to join with others in a group to pursue common interests. The right prevents States parties from imposing unreasonable and disproportionate restrictions on the right to form associations, including imposing procedures that may effectively prevent or discourage people from forming an association. The statement of

7 Proposed section 287N of the bill.

8 Proposed section 287N(5)-(7).

9 Proposed section 287Q.

10 Statement of Compatibility (SOC) [4].

11 SOC [6].

compatibility acknowledges that Article 22 is engaged and limited by the bill by requiring entities (who may be associations of individuals who join together as a group to pursue common interests) to publicly register as 'associated entities'.[12]

1.42 The right to take part in public affairs includes the right of every citizen to take part in the conduct of public affairs by exerting influence through public debate and dialogues with representatives either individually or through bodies established to represent citizens.[13] The statement of compatibility acknowledges that placing registration obligations on persons who take part in exerting influence through debate and dialogue with representatives may limit the right to take part in public affairs.[14]

1.43 The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation, and also includes respect for information privacy, including the right to control the dissemination of information about one's private life. The statement of compatibility acknowledges that the right to privacy is limited by the requirement that persons and entities register as a 'political campaigner', 'third party campaigner' or an 'associated entity', as this would publicly disclose personal information.[15]

1.44 For each of these rights engaged and limited, the statement of compatibility states the limitations are permissible as the bill serves a legitimate objective and is proportionate.

1.45 The statement of compatibility states that the 'genuine public interest' that is served by the bill is two-fold: first, that it protects the free, fair and informed voting essential to Australia's system of representative government, and secondly, that it protects national security.[16] The statement of compatibility elaborates on these objectives as follows:

> Registration of key non-party political actors promotes the rights of citizens to participate meaningfully in elections by assisting them to understand the source of political communication… Registration will complement the [*Electoral and Other Legislation Amendment Act 2017*] transparency reforms by:
>
> a) allowing voters to distinguish between political opinions popular because of their merits, and those that are common in public debate because their promoters incurred significant political expenditure;

12 SOC [4].

13 Article 25 of the ICCPR; UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) para [1],[5]-[6].

14 SOC [4].

15 SOC [4], [8].

16 SOC [5].

b) allowing voters to form a view on the effect that political expenditure is having on the promotion of a particular political opinion, as opposed to opinions that are being debated without financial backing; and

c) discouraging corruption and activities that may pose a threat to national security.

1.46 These are likely to be legitimate objectives for the purposes of international human rights law. Requiring persons and entities who are closely associated with registered political parties or who have incurred political expenditure above a certain threshold for particular purposes to register those relationships also appears to be rationally connected to this objective.

1.47 The statement of compatibility states that the registration requirements introduced by the bill are proportionate because the provisions:

> …apply to an objectively defined group of entities who freely choose to play a prominent role in public debate, and provide financial or administrative support to those who do.[17]

1.48 In order for a limitation on human rights to be proportionate, the limitation must be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective. In this respect, concerns arise in relation to the breadth of the definition of 'political expenditure'. As noted earlier, the definition of 'political expenditure' broadly refers to expenditure for political purposes. 'Political purpose' is in turn defined broadly, including 'the public expression by any means of views on an issue that is, or is likely to be, before electors in an election', regardless of whether or not a writ has been issued for the election.[18]

1.49 This would appear to require, for example, an individual or civil society organisation to register as a 'third party campaigner' if they expended funds amounting to the disclosure threshold ($13,500) on a public awareness campaign relating to a human rights issue or other important issue of public interest (such as a public health awareness campaign) that was also an issue at an election. This would appear to be the case regardless of how insignificant or incidental the issue is at an election, as no distinction appears to be drawn between whether an issue was one common to all political parties, or an issue that is only raised by one candidate in an election. It is also not clear the basis on which it is, or could be, determined whether an issue is 'likely to be an issue' before electors at an election, and what criteria are in place to make such a determination.

1.50 It is noted that there is a limitation to the definition of 'political purpose', namely that the expression of views will not be for a 'political purpose' if the sole or predominant purpose of the expression is the reporting of news, the presenting of current affairs or any editorial content in news media, or the expression is solely for

17 SOC [5].

18 Section 287(1) of the bill.

genuine satirical, academic or artistic purposes.[19] The explanatory memorandum explains that these exemptions are intended to 'ensure that the press, media, academia, artists and entertainers are not required to register as a political actor by virtue of carrying on their core business'.[20] However, that safeguard does not appear to apply to the examples provided in [1.48] above.

1.51 There are also related concerns about the definition of 'political expenditure' as it relates to the definition of 'associated entity'. As noted earlier, the bill requires an entity to register as an 'associated entity' where the expenditure incurred by or with the authority of the entity is wholly or predominantly 'political expenditure' and that expenditure is used to promote or to oppose one of the registered political parties or endorsed candidates, or the policies of one or more of the registered political parties. The concerns in relation to the definition of 'political expenditure' discussed above therefore apply equally to the registration requirement for associated entities. Moreover, the concern is heightened in relation to associated entities because, as the explanatory memorandum explains, an association can be inferred from negative campaign techniques in some circumstances:

> Where an entity operates to the detriment of, or to oppose, a candidate or registered political party, they must do so in a way that benefits one or more political parties in order to be deemed an associated entity under subsection (5). The entity is associated with the party or parties that benefited from the entity's negative campaigning. For an entity to be associated with a registered political party because of negative campaign techniques (that is, the entity opposes a party, or operates to its detriment), intent to benefit is not required for an association to exist. For example, if an election is contested by a limited number of parties, and an entity operates predominantly to the detriment of a contesting party, the entity may be an associated entity of the other party or parties.[21]

1.52 This would appear to capture a broad variety of circumstances. For example, it appears an entity whose expenditure is wholly or predominantly directed towards a public health issue may have to register as an 'associated entity'. This could potentially occur where the public health issue features in an election because a policy of a registered political party is to de-fund services related to the issue, and the entity expends funds to campaign actively against the policy of de-funding of the service due to its impact on public health. This could benefit an opposing political party whose policy is to keep the service funded, even if that is not the intent of the entity's campaign.

1.53 Thus, the ambiguity in the definition of 'political expenditure' and potential breadth of the definition of 'associated entity' could lead to considerable uncertainty

19 Proposed section 287.

20 Explanatory Memorandum (EM), [39].

21 EM, [61].

for persons and entities who may be liable to register. As such, this raises concerns as to whether the proposed registration requirements for individuals and entities are sufficiently circumscribed. The measure could also act as a potential disincentive for some individuals and civil society organisations to run important campaigns, or could act as a disincentive for individuals to form organisations to run such campaigns. In other words, the registration requirement may have a particular 'chilling effect' on the freedom of expression, freedom of association and right to take part in public affairs for some groups and individuals.[22]

1.54 An additional issue in relation to the proportionality of the limitation on the right to privacy is that, as a consequence of registration, personal information about individuals may be publicly available. There is a risk that registration may have negative reputational consequences for individuals or entities required to register, such as criticism that the individual or entity is political, partisan or not independent. In circumstances where the definition of 'political expenditure' is very broad and may capture a wide range of individuals and groups, this raises additional concerns that the bill goes further than what is strictly necessary to serve the legitimate objective, and may insufficiently protect against attacks on reputation that may result from individuals and entities being required to register.[23] It also raises potential concerns that rather than providing greater transparency the measure may create confusion in certain circumstances about degrees of political connection.

Committee comment

1.55 The preceding analysis raises questions about the compatibility of the registration requirement for political campaigners, third party campaigners or associated entities with the right to freedom of expression, the right to freedom of association, the right to take part in public affairs and the right to privacy.

1.56 The committee therefore requests the advice of the minister as to whether the limitation on these rights is proportionate to the stated objective, in particular whether the registration requirements for political campaigners, third party campaigners and associated entities are sufficiently circumscribed, having regard to the breadth of the definitions of 'political expenditure' and 'associated entities'.

1.57 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of

22 See also, in relation to the freedom of association for human rights defenders, *Report of the Special Rapporteur on the situation of human rights defenders* (A/64/226) (2009).

23 It is also noted that proposed section 287N of the bill gives a broad power to the electoral commissioner to determine, by legislative instrument, additional information to be published on the register. This is accompanied by a safeguard, namely that the legislative instrument is subject to mandatory consultation with the Privacy Commissioner. The committee will consider the human rights compatibility of any legislative instrument enacted pursuant to section 287N, and the sufficiency of the safeguards, once it is received.

the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

Civil penalties for failure to register as a political campaigner, third party campaigner or associated entity

1.58 Subsection 287F(3) of the bill provides that a 'political campaigner' who incurs political expenditure without being registered for a financial year is subject to a maximum civil penalty of 240 penalty units ($50,400) per contravention. Subsection 287F(4) provides that each day that a person or entity is required to register as a political campaigner and has not, including the day of registration, is a separate contravention of subsection (3). The effect of this is that the maximum applicable penalty is 240 penalty units for each day the person is in breach of subsection (3).

1.59 Similarly, where a person incurs political expenditure and is required to be registered as a 'third party campaigner' and fails to register, the person is subject to a maximum civil penalty of 120 penalty units ($25,200) per day for each day the person is in breach of the subsection;[24] and incurring political expenditure where an 'associated entity' has failed to register is subject to a maximum civil penalty of 240 penalty units per day ($50,400) for each day the associated entity is in breach.[25]

Compatibility of the measure with the right to a fair trial and fair hearing rights

1.60 Under Australian law, civil penalties are dealt with in accordance with the rules and procedures that apply in relation to civil matters; that is, proof is on the balance of probabilities. However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) where the penalty is characterised as 'criminal' for the purposes of international human rights law. Such civil penalties are not necessarily illegitimate or unjustified. Rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the prohibition against double jeopardy apply. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create civil penalties.

1.61 The explanatory memorandum explains that the potential civil penalty units that may apply for failing to register may be substantial. The following example is provided in the explanatory memorandum in the context of failing to register as a 'political campaigner':

> Joseph's deadline for registration as a political campaigner was 14 December 2017. He misses this deadline, applying for registration on 25 January 2018. He is registered on 30 January 2018.

24 Section 287G(3) and (4).

25 Section 287H(3) and (4).

> Joseph contravened section 287F for 47 days, and so may be subject to a maximum civil penalty of 11,280 penalty units (47 days x 240 penalty units, approximately $2.4 million).[26]

1.62 The statement of compatibility states that the new civil penalty provisions 'do not constitute criminal penalties for the purpose of human rights law as they are not classified as criminal under Australian law and are restricted to people in a specific regulatory context'.[27]

1.63 As set out in the committee's *Guidance Note 2,* the domestic classification of the penalty is a relevant factor in determining whether a penalty is classified as 'criminal'. However, the term 'criminal' has an 'autonomous' meaning in human rights law, such that the classification of a penalty as a civil penalty in domestic law does not automatically mean the penalty will be considered as such for the purposes of international human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

1.64 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 penalties. A civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context. Relevantly, the statement of compatibility asserts that an additional reason these civil penalty provisions do not constitute criminal penalties is because they 'are restricted to people in a specific regulatory context'. However, while the proposed regime applies to regulate electoral funding and disclosure, it could apply quite broadly to include individual donors who satisfy the definition of 'political campaigner' or 'third party campaigner', or associations that fulfil the definition of 'associated entity'. It is unclear therefore whether the regime can categorically be said not to apply to the public in general.

1.65 Civil penalty provisions are also more likely to be considered 'criminal' in nature if they are intended to punish or deter, irrespective of their severity. No information has been provided in the statement of compatibility as to the purpose of the civil penalties in this regard.

1.66 The third step in assessing whether 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 penalty provision in context is relevant. This must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. The severity of the

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26 EM, p. 19.

27 SOC [16].

penalty in this particular regulatory context is unclear due to the lack of information in the statement of compatibility.

1.67 In any event, as noted above, the potential maximum amount that may be proposed for breaching the registration requirement is 240 penalty units (for political campaigners and associated entities) or 120 penalty units (for third party campaigners). However, as the provisions operate such that each day a person or entity is required to register and has not constitutes a separate contravention of the subsection, the potential maximum penalty could be substantial, as demonstrated by the example provided in the explanatory memorandum quoted at [1.61] above.

1.68 If the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, they must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. For example, as noted above, the application of a civil rather than a criminal standard of proof would raise concerns in relation to the right to be presumed innocent, which generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be questions about whether they are compatible with criminal process rights, and whether any limitations on these rights are permissible.

Committee comment

1.69 The committee draws the attention of the minister to its *Guidance Note 2* and seeks the advice of the minister as to whether the civil penalty provisions for failing to register as a political campaigner, third party campaigner or associated entity may be considered to be 'criminal' in nature for the purposes of international human rights law, in particular:

- **information regarding the regulatory context in which the civil penalty provisions operate, including the nature of the sector being regulated and the relative size of the pecuniary penalties being imposed in context; and**
- **information regarding the purpose of the penalties (including whether they are designed to deter or punish); and**
- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be 'criminal' in nature.**

1.70 If the penalties were to be considered 'criminal' for the purposes of international human rights law, the committee seeks the advice of the minister as to how, and whether, the measures could be amended to accord with criminal process rights including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

1.71 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

Restrictions on and penalties relating to foreign political donations

1.72 Section 302D makes it unlawful for a person who is an agent of a political entity (that is, registered political parties, state branches of registered political parties, candidates, and Senate groups) or a financial controller of certain political campaigners[28] to receive a gift of over $250 from a donor that is not an 'allowable donor'. An allowable donor is a person who has a connection to Australia, such as an Australian citizen or an entity incorporated in Australia.[29] A person who contravenes section 302D commits an offence punishable by 10 years imprisonment or 600 penalty units, or both, or is liable to a civil penalty of 1000 penalty units ($210,000).[30]

1.73 Section 302E makes it unlawful for third party campaigners or political campaigners who are registered charities or registered organisations to receive a gift of over $250 from a non-allowable donor if that gift is expressly made (whether wholly or partly) for one or more 'political purposes'.[31] A person who contravenes section 302E commits a criminal offence with a penalty of 10 years imprisonment or 600 penalty units, or both, or is liable to a civil penalty of 1000 penalty units.[32] A person also commits a criminal offence or is liable to a civil penalty where non-allowable donations to political campaigners that are registered charities and registered organisations are paid into the same account as that which is used for domestic political purposes.[33]

1.74 Section 302G prohibits a person soliciting gifts from non-allowable donors intending that all or part of the gift be transferred to a political entity, a political campaigner (except a registered charity or registered organisation),[34] or 'any other person for one or more political purposes'. There is an exception where the person solicited the gift in a private capacity for his or her personal use.[35] A person who

28 Section 302D excludes political campaigners who are registered charities under the *Australian Charities and Not-for-Profits Commission Act 2012* or registered organisations under the *Fair Work (Registered Organisations) Act 2009*: see section 302D(g).

29 Section 287AA of the bill.

30 Section 302D(2) and (3)

31 Section 302E(2)(b).

32 Section 302E(4) and (5).

33 Section 302F.

34 Section 302G(1)(d). The effect of this is that a fundraiser can solicit foreign gifts for registered organisations or registered charities but can only use them subject to the requirements in section 302E: see EM [175].

35 Section 302G(2).

contravenes section 302G commits a criminal offence with a penalty of 5 years imprisonment or 300 penalty units, or both, or is liable to a civil penalty of 500 penalty units. There are also provisions imposing criminal and civil penalties of the same amount as in section 302G where a person forms a body corporate for the purposes of avoiding the foreign donation restrictions,[36] and where a person receives a gift from a non-allowable donor in order to transfer the gift to a political entity, a political campaigner (except a registered charity or registered organisation), or 'any other person for one or more political purposes'.[37]

1.75 Section 302K introduces a criminal offence and civil penalty where a person who is an agent of a political entity or financial controller of a political campaigner (except registered charities or registered organisations) receives a gift from a foreign bank account or by transfer by a person while in a foreign country. The offence is punishable by 10 years imprisonment or 600 penalty units, or both, or a civil penalty of 1000 penalty units.[38]

1.76 Finally, section 302L makes it unlawful for a person who is the agent of a political entity or the financial controller of a political campaigner (except a registered charity or registered organisation) to receive a gift of over $250 in circumstances where, before the end of 6 weeks after the gift is made, appropriate donor information has not been obtained to establish the donor is an allowable donor.[39] A person who contravenes section 302L commits a criminal offence with a penalty of 10 years imprisonment or 600 penalty units, or both, or is liable to a civil penalty of 1000 penalty units.[40]

Compatibility of the measure with the right to freedom of expression, the right to freedom of association and the right to participate in public affairs

1.77 The statement of compatibility acknowledges that the right to freedom of expression, the right to freedom of association and the right to participate in public affairs are engaged and limited by the foreign donations restrictions.[41] Each of these rights is summarised at [1.40] to [1.42] above.

1.78 In relation to the restrictions on foreign political funding to registered political parties, state branches of registered political parties, candidates, and Senate

36 Section 302J.

37 Section 302H.

38 Section 302K(2) and (3).

39 A person obtains 'appropriate donor information' where a statutory declaration is obtained from the donor declaring the person is an allowable donor, unless the regulations provide otherwise: section 302P(1)(a) and (2). The regulations may also determine information that must be sought from the donor in order to establish other forms of appropriate donor information: section 302P(1)(b).

40 Section 302L(2) and(3).

41 SOC [4].

groups in section 302D, it is likely that this restriction will be a proportionate limitation on the right to freedom of expression, the right to freedom of association and the right to participate in public affairs. A number of countries place restrictions or prohibitions on foreign funding of political parties, and international human rights jurisprudence confirms that such restrictions may be necessary in a democratic society to ensure financial transparency in political life.[42]

1.79 However, concerns remain as to the proportionality of the limitation insofar as the foreign donations restrictions are placed on third party campaigners and political campaigners in section 302E. The statement of compatibility states that the foreign donations restrictions are proportionate for the following reasons:

> The right to take part in public affairs by donating to key political actors must be balanced against the need for transparency and accountability in the political system and the overarching confidence in, and the integrity of, political institutions and the democratic system. It is also worth noting that, as this measure targets those without strong links to Australia, very few people within Australia's jurisdiction will be impacted by the foreign donations restrictions.[43]

1.80 However, for the reasons discussed above at [1.48] to [1.53] in relation to the registration requirements for these persons or entities, there are questions as to whether the breadth of the obligation for persons and entities to register as 'third party campaigners' or 'political campaigners' is sufficiently circumscribed, due to the broad definitions of 'political expenditure' and in particular 'political purposes'.

1.81 Equally, the prohibition on foreign donations to third party campaigners or certain political campaigners where those donations are for 'political purposes' is equally broad. Given the breadth of matters that may be considered as a 'political purpose', there appears to be a risk that legitimate fundraising activities for third party campaigners and political campaigners concerning matters of public importance may be significantly restricted.

1.82 There also appears to be a risk that requiring persons who donate over $250 to political campaigners or political entities to provide 'appropriate donor information' in the form of a statutory declaration[44] may create a significant administrative burden for local donors, potentially reducing the likelihood of donations from persons who are not the target of the proposed laws. In this respect, it is noted that the United Nations Special Rapporteur on the Right of Freedom of Assembly and Association has stated that access to funding and resources for associations (including foreign and international funding) is an 'integral and vital part

42 See *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France,* no.71251/01, ECHR 2007-II, [45]-[47].

43 SOC [14].

44 See sections 302L and 302P.

of the right to freedom of association'.[45] The Special Rapporteur also noted that legitimate public interest objectives, such as responding to national security, should not be used in such a way as to 'undermine the credibility of the concerned association, or to unduly impede its legitimate work'.[46]

1.83 The concerns that flow from the breadth of the expression 'political purpose' also arise in relation to proposed section 302G, insofar as a person contravenes the section if they solicit a foreign donation for the purpose of transferring that donation to 'any other person for one or more political purposes'. As set out above, 'political purpose' means 'the public expression by any means of views on an issue that is, or is likely to be, before electors in an election', regardless of whether or not a writ has been issued for the election.[47] Again, given the scope of the concept of 'political purposes', it appears this could apply to persons who solicit overseas funds for a broad variety of activities and purposes that may be classified as 'political purposes' because they arise (whether significantly or incidentally) as an issue in an election.

Committee comment

1.84 The preceding analysis raises questions about the compatibility of the foreign donations restrictions in section 302E and the prohibition on soliciting foreign donations in section 302G with the right to freedom of expression, the right to freedom of association and the right to take part in public affairs. This is because the breadth of the concept of 'political purpose' as it applies to those sections may be insufficiently circumscribed so as to be a proportionate limitation on these rights.

1.85 The committee therefore seeks the advice of the minister as to the proportionality of the foreign donation restrictions as they apply to third party campaigners and political campaigners (in section 302E) and 'any other person' (in section 302G), having regard to the breadth of the concept of 'political purpose' (including whether the measures are sufficiently circumscribed).

1.86 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

Compatibility of the measure with the right to a fair trial and fair hearing rights

1.87 As noted earlier in relation to the civil penalties regime for failure to register as a political campaigner, third party campaigner or associated entity, civil penalty

45 *Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association* (A/HRC/20/27) (2012) [67]-[68].

46 *Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association* (A/HRC/20/27) (2012) [70].

47 Section 287(1) of the bill.

provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty is characterised as 'criminal' for the purposes of international human rights law. The relevant principles are summarised above at [1.60] to [1.66].

1.88 The statement of compatibility states that the 'new civil penalty provisions do not constitute criminal penalties for the purposes of human rights law as they are not classified as criminal under Australian law and are restricted to people in a specific regulatory context'.

1.89 However, as noted earlier and as set out in the committee's *Guidance Note 2,* a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law. Further, as with the civil penalties for failing to register as a political campaigner, third party campaigner or associated entity, no information available in the statement of compatibility to ascertain the nature and purpose of the civil penalty in accordance with the second step in *Guidance Note 2*, for example whether the penalties are intended to punish or deter.

1.90 As to the severity of the penalty, it is noted that the penalties applicable for breaching the foreign donations restrictions are significant, ranging from 500 penalty units to 1000 penalty units for the various offences. However, noting that the severity of the penalty must be assessed with due regard to the regulatory context, it is not possible to determine whether the pecuniary penalty is sufficiently severe to amount to a 'criminal penalty' at this stage due to the lack of information in the statement of compatibility.

1.91 As noted earlier, if the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, they must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

Committee comment

1.92 The committee draws the attention of the minister to its *Guidance Note 2* and seeks the advice of the minister as to whether the civil penalty provisions in relation to the foreign donations restrictions may be considered to be 'criminal' in nature for the purposes of international human rights law, in particular:

- **information regarding the regulatory context in which the civil penalty provisions operate, including the nature of the sector being regulated and the relative size of the pecuniary penalties being imposed in context;**
- **information regarding the purpose of the penalties (including whether they are designed to deter or punish); and**
- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be 'criminal' in nature.**

1.93 If the penalties could be considered 'criminal' for the purposes of international human rights law, the committee seeks the advice of the minister as to how, and whether, the measures could be amended to accord with criminal process rights including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

1.94 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

Reporting of non-financial particulars in returns

1.95 Proposed section 314AB introduces new requirements for political parties and political campaigners to disclose in their annual returns to the Electoral Commission the details of senior staff employed or engaged by or on behalf of the party or branch, or by or on behalf of the campaigner in its capacity as a political campaigner, and any membership of any registered political party that any of those members of staff have. Proposed section 309(4) imposes the same obligation on election or by-election candidates to disclose in their returns the name and party membership of senior staff, and proposed section 314AEB imposes the same requirement on third party campaigners. 'Senior staff' is defined in proposed section 287(1) to mean the directors of a person or entity or any person who makes or participates in making decisions that affect the whole or a substantial part of the operations of the person or entity.

1.96 Failure to provide the relevant return results in liability to civil penalties. Candidates who fail to provide returns in accordance with section 309, and third party campaigners who fail to provide returns in accordance with section 314AEB, are liable to a civil penalty of 180 penalty units per day for each day the return is not provided within the required timeframe.[48] Failure to provide an annual return in accordance with section 314AB attracts liability to a civil penalty of 360 penalty units per day for each day the annual return is not provided within the required timeframe (that is, within 16 weeks after the end of the financial year).[49]

Compatibility of the measure with the right to privacy

1.97 As noted earlier, the right to privacy includes respect for informational privacy, including the right to control the dissemination of information about one's private life. As acknowledged in the statement of compatibility, the disclosure of the

48 See the note at the end of proposed section 309(2) and (3) and section 314AEB(1).

49 See proposed section 314AB(1).

names of senior staff of candidates, third party campaigners and of political parties in returns engages and limits the right to privacy.[50]

1.98 The statement of compatibility states that these limitations on the right to privacy are 'justifiable on the basis that they promote transparency of the electoral system' and further states that:

> It is important to remember that the individuals whose privacy is impacted freely choose to play a prominent role in public debate and put themselves, or those they represent, forward for public office. It is therefore appropriate, objective, legitimate and proportional that the public has access to this information.[51]

1.99 While the objective of transparency in the electoral system is likely to be legitimate for the purpose of international human rights law, particularly in light of the breadth of the concept of 'third party campaigners' discussed above, it is unclear how disclosure of the names of senior staff and any political party affiliation they may have is rationally connected to (that is effective to achieve) that objective. No information is provided in the statement of compatibility explaining this aspect of the bill.

1.100 There are also concerns as to the proportionality of the measure. Limitations on the right to privacy must only be as extensive as is strictly necessary to achieve its legitimate objective. The definition of 'senior staff' is very broad, and is not limited to senior decision-makers but also extends to any person who 'participates in making decisions that affect the whole or a substantial part of the operations of the person or entity'. It is not clear that persons who merely participate in making, but do not make, decisions can be said to 'play a prominent role in public debate'.[52] The breadth of this definition, coupled with the breadth of the concept of 'third party campaigner', raises concerns that the measure may be broader than necessary to achieve the objective, and that other, less rights-restrictive options, may be available.

Committee comment

1.101 The preceding analysis raises concerns as to whether the requirement to disclose the name and any political party affiliation of senior staff in returns to the Electoral Commission is compatible with the right to privacy.

1.102 The committee therefore seeks the advice of the minister as to the compatibility of the measure with this right, in particular:

- **how the measure is rationally connected to (that is, effective to achieve) the legitimate objective; and**

50 SOC, [10].

51 SOC, [10]-[11].

52 SOC, [11].

- **whether the measure is a proportionate limitation on the right to privacy (including whether the measure is sufficiently circumscribed, and whether there are any less rights-restrictive measures available).**

1.103 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

Compatibility of the measure with the right to a fair trial and fair hearing rights

1.104 Similar issues arise in relation to the civil penalties associated with failing to file a return as those discussed earlier, namely, whether the civil penalties may be classified as 'criminal' for the purposes of international human rights law. The relevant principles are summarised above at [1.60] to [1.66].

1.105 The statement of compatibility provides the same justification for the civil penalties as discussed previously, namely that the provisions do not constitute criminal penalties for the purposes of human rights law as they are not classified as criminal under Australian law and are restricted to people in a specific regulatory context. As noted earlier, the classification of a civil penalty under domestic law is one relevant factor in determining whether a measure is 'criminal' for the purposes of international human rights law.

1.106 As to the second step outlined in *Guidance Note 2,* no information is provided as to the purpose or nature of the penalty, including whether the penalty is designed to deter or punish.

1.107 As to the severity of the penalty, as the provisions operate such that each day a person or entity is required to submit a return but has not constitutes a continuing contravention of the subsection, the potential maximum civil penalty could be substantial. This raises concerns that the penalties may be 'criminal' for the purposes of international human rights law in light of the severity of the penalty. However, the severity of the penalty in this particular regulatory context is unclear due to the lack of information in the statement of compatibility.

Committee comment

1.108 The committee draws the attention of the minister to its *Guidance Note 2* and seeks the advice of the minister as to whether the civil penalty provisions in reporting of non-financial particulars in returns may be considered to be 'criminal' in nature for the purposes of international human rights law, in particular:

- **information regarding the regulatory context in which the civil penalty provisions operate, including the nature of the sector being regulated and the relative size of the pecuniary penalties being imposed in context;**
- **information regarding the purpose of the penalties (including whether they are designed to deter or punish); and**

- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be 'criminal' in nature.**

1.109 If the penalties could be considered 'criminal' for the purposes of international human rights law, the committee seeks the advice of the minister as to how, and whether, the measures could be amended to accord with criminal process rights including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

1.110 Senator Reynolds deliberately did not participate in consideration of this report entry as she wished to reserve her position pending further consideration of the bill by the Joint Standing Committee on Electoral Matters, of which she is the chair.

Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017

Purpose	Amends the *Enhancing Online Safety Act 2015* to prohibit the posting of, or threatening to post, an intimate image without consent on a social media service, relevant electronic service or a designated internet service; establish a complaints and objections system to be administered by the eSafety Commissioner; provide the commissioner with powers to issue removal notices or remedial directions; establish a civil penalty regime to be administered by the commissioner; and enable the commissioner to seek a civil penalty order from a relevant court, issue an infringement notice, obtain an injunction or enforce an undertaking, or issue a formal warning for contraventions of the civil penalty provisions; and makes a consequential amendment to the *Broadcasting Services Act 1992*
Portfolio	Communications and the Arts
Introduced	Senate, 6 December 2017
Rights	Fair trial; criminal process (see **Appendix 2**)
Status	Seeking additional information

Civil penalty provision

1.111 Proposed section 44B of the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017 (the bill) would prohibit posting, or threatening to post, an intimate image without consent on a social media service, relevant electronic service or a designated internet service.[1]

1.112 Under the bill, the e-Safety Commissioner may issue a removal notice, requiring removal of the intimate image, to: a provider of a social media service or relevant electronic service,[2] an end-user who posts an intimate image on the service,[3] or a hosting service provider which hosts the intimate image.[4] If a person has contravened or is contravening proposed section 44B, then the e-Safety Commissioner may give that person a written direction ('remedial direction') to take specified action to ensure they do not contravene section 44B in future.[5]

1 See, Item 3; Statement of compatibility (SOC), p. 10.

2 See proposed section 44D of the *Enhancing Online Safety Act 2015.*

3 See proposed section 44E of the *Enhancing Online Safety Act 2015.*

4 See proposed section 44F of the *Enhancing Online Safety Act 2015*.

5 See proposed section 44K of the *Enhancing Online Safety Act 2015*.

1.113 The bill is framed so that it triggers the civil penalty provisions of the *Regulatory Powers (Standard Provisions) Act 2014* in relation to a contravention of the prohibition on the non-consensual sharing of intimate images, and in relation to failure to comply with a removal notice or remedial direction. This means that a civil penalty of up to 500 penalty units ($105,000) applies to such a contravention.[6]

Compatibility of the measure with criminal process rights

1.114 As set out in the statement of compatibility, the civil penalty provisions in the bill are 'aimed at protecting the privacy and reputation of vulnerable people'.[7]

1.115 Under Australian domestic law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, civil penalty provisions engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) where the penalty is regarded as 'criminal' for the purposes of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is described as 'civil' under Australian domestic law.

1.116 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.

1.117 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. The statement of compatibility for the bill usefully provides an assessment of whether the civil penalty provisions may be considered 'criminal' for the purposes of international human rights law.[8]

1.118 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under domestic law. In this instance, as noted in the statement of compatibility, the penalties are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law.

1.119 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be 'criminal' if the purpose of the penalty is to

6 SOC, p. 10.

7 SOC, p. 9.

8 SOC, p. 10.

punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). As the penalties under the bill may apply to a broad range of internet and social media users it appears that the penalties apply to the public in general. However, in relation to the purpose of the penalty, the statement of compatibility states that the purpose of the penalty is to encourage compliance rather than to punish. To the extent that this is the purpose of the penalty, this indicates that the penalty should not be considered 'criminal' under this step of the test.

1.120 The third step is to consider the severity of the penalty. A penalty is likely to be considered 'criminal' where it carries a penalty of a substantial pecuniary sanction. This must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. In this case an individual could be exposed to a significant penalty of up to $105,000. The statement of compatibility states that this 'reflects the extremely serious nature of the non-consensual sharing of intimate images.'[9] However, the potential application of such a large penalty to an individual in this context raises significant questions about whether this particular measure ought to be considered 'criminal' for the purposes of international human rights law. The statement of compatibility points to the court's discretion in the amount of penalty to be imposed as a reason why the penalty should not be considered criminal. Yet, it is the maximum penalty that may be imposed which is relevant to considering whether a civil penalty is 'criminal' for the purposes of international human rights law.

1.121 If the penalty is considered to be 'criminal' for the purposes of international human rights law, the 'civil penalty' provisions in the bill must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. In this case, the measure does not appear to accord with criminal process guarantees. For example, the burden of proof is on the civil standard of the balance of probabilities rather than the criminal standard of beyond reasonable doubt as required by the right to be presumed innocent.

Committee comment

1.122 The preceding analysis raises questions about whether the civil penalties may be considered 'criminal' for the purposes of international human rights law.

1.123 The committee seeks the advice of the minister as to:

- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and**

9 SOC, p. 10.

- **if the penalties are considered 'criminal' for the purposes of international human rights law:**
  - **whether they are compatible with criminal process rights including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1));**
  - **whether any limitations on these rights imposed by the measures are permissible;[10] and**
  - **whether the measures could be amended to accord with criminal process rights.**

10 Some criminal process rights may be subject to permissible limitations where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. However, other criminal process rights are absolute and cannot be subject to permissible limitations.

Foreign Influence Transparency Scheme Bill 2017; and Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017

Purpose	Seeks to establish the Foreign Influence Transparency Scheme, which introduces registration obligations for persons or entities who have arrangements with, or undertake certain activities on behalf of, foreign principals
Portfolio	Attorney-General
Introduced	House of Representatives, 7 December 2017
Rights	Freedom of expression, freedom of association, right to take part in public affairs, privacy (see **Appendix 2**)
Status	Seeking additional information

Registration and disclosure scheme for persons undertaking activities on behalf of a foreign principal

1.124 The Foreign Influence Transparency Scheme Bill 2017 (the bill) seeks to establish a scheme requiring persons to register where those persons undertake activities on behalf of a 'foreign principal'[1] that are 'registrable' in relation to the foreign principal. Section 21 of the bill provides that an activity on behalf of a foreign principal is 'registrable' if the activity is Parliamentary lobbying,[2] general political lobbying,[3] communications activity,[4] or donor activity,[5] and the activity is in Australia

1 Foreign principal is defined in section 10 of the bill to mean: (a) a foreign government; (b) a foreign public enterprise; (c) a foreign political organisation; (d) a foreign business; (e) an individual who is neither an Australian citizen nor a permanent Australian resident.

2 For Parliamentary lobbying, section 21 only applies to foreign principals who are a foreign public enterprise, foreign political organisation, foreign businesses, or individuals. Where the foreign principal is a foreign government, the activity is registrable if it is parliamentary lobbying in Australia whether or not the purpose is political or governmental influence: section 20 of the bill. 'Parliamentary lobbying' is defined in section 10 of the bill to mean lobbying a member of parliament or a person employed under section 13 or 20 of the *Members of Parliament (Staff) Act 1984*.

3 'General political lobbying' is defined in section 10 to mean lobbying any one or more of the following: (a) a Commonwealth public official; (b) a Department, agency or authority of the Commonwealth; (c) a registered political party; (d) a candidate in a federal election; other than lobbying that is Parliamentary lobbying.

4 Section 13 of the bill provides that a person undertakes 'communications activity' if the person communicates or distributes information or material.

5 For donor activity, section 21 only applies to foreign principals who are a foreign government, foreign public enterprise, or a foreign political organisation.

for the purpose of political or governmental influence.[6] Additional registration requirements and broader activities requiring registration apply to recent Cabinet Ministers, recent Ministers, members of Parliament and other senior Commonwealth position holders.[7]

1.125 Section 11 of the bill provides that a person will undertake activity 'on behalf of' a foreign principal if the person undertakes the activity:

> (a) under an arrangement with the foreign principal; or
>
> (b) in the service of the foreign principal; or
>
> (c) on the order or at the request of the foreign principal; or
>
> (d) under the control or direction of the foreign principal; or
>
> (e) with funding or supervision by the foreign principal; or
>
> (f) in collaboration with the foreign principal.

1.126 Section 12 provides that a person undertakes an activity for the purpose of political or governmental influence if:

> (1) …. a purpose of the activity (whether or not there are other purposes) is to influence, directly or indirectly, any aspect (including the outcome) of any one or more of the following:
>
> (a) a process in relation to a federal election or a designated vote;
>
> (b) a process in relation to a federal government decision;
>
> (c) proceedings of a House of the Parliament;
>
> (d) a process in relation to a registered political party;
>
> (e) a process in relation to a member of the Parliament who is not a member of a registered political party;
>
> (f) a process in relation to a candidate in a federal election who is not endorsed by a registered political party.

1.127 Section 22 of the bill imposes registration requirements on recent cabinet ministers who undertake activities on behalf of a foreign principal.[8] 'Recent cabinet minister' is defined in proposed section 10 to mean, at a particular time, a person who was a Minister and member of the Cabinet at any time in the three years before that time, but who is not at the particular time a Minister, member of the Parliament or a holder of a senior Commonwealth position. The bill does not specify the kinds of

6 Section 21 of the bill.

7 See sections 22 and 23 of the bill.

8 The requirement does not apply where the foreign principal is an individual, the activity is not registrable in relation to the foreign principal under another provision of the division, and the person is not exempt: section 22(b).

activities a recent Cabinet minister needs to undertake in order to be required to register.

1.128 Proposed section 23 imposes a registration obligation on recent ministers, members of Parliament[9] and other holders of senior Commonwealth positions[10] who undertake activity on behalf of a foreign principal where, in undertaking the activity, the person 'contributes experience, knowledge, skills or contacts gained in the person's former capacity as a Minister, member of Parliament or holder of a senior Commonwealth position'.[11] As with the registration requirement for cabinet ministers, proposed section 23 does not specify the kinds of activities that a recent minister, member of Parliament or holder of senior Commonwealth position needs to undertake, save that the person has used their experience gained in their former capacity in undertaking that activity.

1.129 There are several exemptions from registration for certain types of activity undertaken on behalf of a foreign principal, including activities undertaken for the provision of humanitarian aid or humanitarian assistance,[12] legal advice or representation,[13] diplomatic, consular or similar activities,[14] or where the person is acting in accordance with a particular religion of a foreign government,[15] where the activity is for the purpose of reporting news,[16] or where the activity is the pursuit of bona fide business or commercial interests.[17] There is also a broad power to make rules to prescribe activities as being exempt from registration.[18] The penalty for non-compliance is a criminal offence punishable by 7 years imprisonment where a person

9 'Recent Minister or member of Parliament' is defined in proposed section 10 to mean a person who was (but is no longer) a Minister or a member of the Parliament at any time in the previous 3 years: section 10.

10 'Recent holder of a senior Commonwealth position' is defined in section 10 to mean a person who held a senior Commonwealth position at any time in the 18 months before the time, and is not at the time a Minister, member of the Parliament or a holder of a senior Commonwealth position. 'Senior Commonwealth position' covers positions at the agency head and deputy agency head levels.

11 The requirement does not apply where the foreign principal is an individual, the activity is registrable in relation to the foreign principal under another provision of the division, and the person is exempt: section 23.

12 Section 24 of the bill.

13 Section 25 of the bill.

14 Section 26 of the bill.

15 Section 27 of the bill.

16 Section 28 of the bill.

17 Section 29 of the bill.

18 Section 30 of the bill.

intentionally omits to apply or renew registration when undertaking registrable activity.[19]

1.130 Section 43(1) of the bill provides that the Secretary must make available to the public, on a website, certain information in relation to persons registered in relation to a foreign principal. This includes the name of the person and the foreign principal, a description of the kind of registrable activities the person undertakes on behalf of a foreign principal, and 'any other information prescribed by the rules'.[20] Section 43(2) qualifies this obligation by clarifying that the Secretary may decide not to make particular information available to the public if the Secretary is satisfied the particular information is commercially sensitive, affects national security or is of a kind prescribed by the rules for the purposes of this scheme.

1.131 The *Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017* (the Charges Bill) imposes charges in relation to the foreign influence transparency scheme, and provides that the amount of charge payable upon applying to register under the scheme or renewing registration under the scheme is 'the amount prescribed by the regulations'.[21]

Compatibility of the measure with the freedom of expression, the freedom of association, the right to take part in the conduct of public affairs, and the right to privacy

1.132 The obligation to publicly disclose, by way of registration, information about a person's relationship with a foreign principal and activities undertaken pursuant to that relationship engages the freedom of expression, the freedom of association, the right to take part in the conduct of public affairs and the right to privacy.[22]

1.133 The right to freedom of expression in Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) includes freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of her or his choice. As acknowledged in the statement of compatibility, attaching compulsory registration and public reporting obligations on persons acting on behalf of foreign principals (as well as criminal penalties for non-compliance) interferes with that person's freedom to disseminate ideas and information, and therefore limits the freedom of expression.[23] However,

19 Section 57 of the bill.

20 Section 43(1)(c) of the bill.

21 Section 6 of the Charges Bill.

22 Statement of Compatibility (SOC) [62] and [72].

23 SOC [62].

the bill also promotes the freedom of expression insofar as it allows the public to receive information with transparency about the source of that information.[24]

1.134 The right to freedom of association in Article 22 of the ICCPR protects the right to join with others in a group to pursue common interests. The right prevents States parties from imposing unreasonable and disproportionate restrictions on the right to form associations, including imposing procedures that may effectively prevent or discourage people from forming an association. The statement of compatibility acknowledges that the bill regulates activities which may fall within the scope of Article 22, and may limit the right to freedom of association by requiring associations acting on behalf of foreign principals to register and disclose their activities.[25]

1.135 The right to take part in public affairs includes the right of every citizen to take part in the conduct of public affairs by exerting influence through public debate and dialogues with representatives either individually or through bodies established to represent citizens.[26] The statement of compatibility acknowledges that registration and disclosure obligations concerning activities that may be described as 'influencing through public debate and dialogues' may limit the right to take part in public affairs.[27]

1.136 The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy, and recognises that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy also includes respect for information privacy, including the right to control the dissemination of information about one's private life. The statement of compatibility acknowledges

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24 SOC [64]. In the United States, the registration requirements under the US *Foreign Agents Registration Act* have been found to be compatible with the First Amendment (freedom of expression) on the basis it promotes the freedom of expression: "Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment. No strained interpretation should frustrate its essential purpose": *Attorney-General of the United States of America v The Irish People Inc.,* 684 F.2d 928 (1982) (United States Court of Appeals, District of Columbia Circuit) [71]; see also *Meese v Keene,* 481 U.S. 465 (1987) (United States Supreme Court) 481-483 ("By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech").

25 SOC [71]-[73].

26 Article 25 of the ICCPR; UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [1],[5]-[6].

27 SOC [81].

that the right to privacy is limited by the requirement that persons publicly disclose information pertaining to the activities and relationships undertaken on behalf of a foreign principal.[28]

1.137 For each of the rights engaged, the statement of compatibility states that to the extent these rights are limited, the limitations are reasonable, necessary and proportionate to the legitimate objective of the bill.

1.138 The statement of compatibility describes the objective of the bill as follows:

> The objective of the Bill is to introduce a transparency scheme to enhance government and public knowledge of the level and extent to which foreign sources may, through intermediaries acting on their behalf, influence the conduct of Australia's elections, government and parliamentary decision-making, and the creation and implementation of laws and policies.[29]

1.139 This is likely to be a legitimate objective for the purposes of human rights law.[30] Requiring persons who have acted on behalf of foreign principals to register also appears to be rationally connected to the achievement of this objective.

1.140 In order for a limitation on human rights to be proportionate, the limitation must be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective. Limitations on human rights must also be accompanied by adequate and effective safeguards to protect against arbitrary application. Here, questions arise as to the breadth of the definitions of 'foreign principal', 'on behalf of' and 'for the purpose of political or governmental influence' creating an uncertain and potentially very broad range of conduct falling within the scope of the scheme. For example, concerns have been expressed as to the implications for academic freedom and reputation where an Australian university academic would be required to register upon receipt of a scholarship or grant wholly or partially from foreign sources, where that funding is conditional on the researcher undertaking and publishing research that is intended to influence Australian policy-making.[31] Such behaviour would appear to fall within the types of registrable

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28 SOC [55].

29 SOC [21], [85].

30 UN Human Rights Committee, *General Comment No. 34: Article 19, Freedom of Opinion and Expression* (2011), [3]. See also *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France,* no.71251/01, ECHR 2007-II, [43]-[44], where the European Court of Human Rights accepted that prohibiting foreign States and foreign legal entities from funding national political parties pursued the legitimate aim of protecting institutional order; *Attorney-General of the United States of America v The Irish People Inc.,* 684 F.2d 928 (1982) (United States Court of Appeals, District of Columbia Circuit); *Meese v Keene,* 481 U.S. 465 (1987) (United States Supreme Court).

31 Primrose Riordan, 'Universities alarmed new treason laws could target academics', http://www.theaustralian.com.au/higher-education/universities-alarmed-new-treason-laws-could-target-academics/news-story/af896886be03dd1c9517536e4cd70be1 (15 December 2017)

activities that a person may undertake 'on behalf of' a foreign principal, as it is an activity undertaken 'with funding or supervision by the foreign principal'[32] for the purpose of influencing 'a process in relation to a federal government decision'.[33]

1.141 Similarly, the definition of 'foreign principal' is very broad, and includes individuals who are neither an Australian citizen nor a permanent Australian resident.[34] This definition, coupled with the definition of 'on behalf of', appears to be broad enough to mean that section 21 of the bill imposes a registration requirement on domestic civil society, arts or sporting organisations which may have non-Australian members (such as individuals residing in Australia under a non-permanent resident visa, or foreign members) who may be considered as acting 'on behalf of' a foreign principal where they have undertaken activity 'in collaboration with' or 'in the service of' their membership (including foreign members) when seeking funding from government, engaging in advocacy work, or pursuing policy reform. In this respect the measures also engage the right to equality and non-discrimination, discussed further below. The uncertainty is heightened by the fact that the amount of the charge payable upon registration is not contained in the Charges Bill but instead will be prescribed by regulation,[35] as well as the significant criminal penalties imposed for non-compliance.[36]

1.142 In relation to proposed sections 22 and 23 of the bill, the application of the provisions is even broader as *any* kinds of activities falling within this provision undertaken 'on behalf of' a foreign principal gives rise to a registration requirement. In this respect, the explanatory memorandum states in relation to recent cabinet ministers that:

> Given recent Cabinet Ministers have occupied a significant position of influence, are likely to have a range of influential contacts with decision making authority in the political process and have had access to classified and sensitive information concerning current and recent Australian Government priorities, it is in the public interest to know when such persons have an arrangement with a foreign principal.[37]

1.143 Similarly in relation to recent ministers, members of parliament and persons holding senior commonwealth positions, the explanatory memorandum states that registration is justified because 'these persons bring significant influence to bear in any activities undertaken on behalf of a foreign principal' and that it is 'in the public interest to require transparency of such individuals where the person is contributing

32 See section 11(1)(e) of the bill.

33 See section 12(1)(b) of the bill.

34 Section 10 of the bill.

35 Section 6 of the Charges Bill.

36 See section 57 of the bill.

37 Explanatory Memorandum, [303].

skills, knowledge, contacts and experience gained through their previous public role'. However, for the reasons earlier stated, the definition of 'on behalf of' is very broad, and creates uncertainty as to what activities fall within the scope of the scheme.

1.144 The breadth of these definitions, their potential application, the cost of compliance and the consequence of non-compliance raise concerns that the bill may be insufficiently circumscribed, and may unduly obstruct the exercise of the freedom of expression, association and right to take part in public affairs.[38]

1.145 It is acknowledged that the bill includes several exemptions from registration requirements for certain types of activities (including exemptions for activities undertaken on behalf of foreign principals solely, or solely for the purposes of, reporting news, presenting current affairs or expressing editorial content in news media[39]), as well as a provision allowing for rules to be made specifying additional exemptions from registration. It is not clear, however, whether these safeguards in this bill are, of themselves, sufficient. It is also noted that comparable international schemes contain exemptions in the primary legislation to cover matters such as academic freedom, where agents of foreign principals who engage in activities to further *bona fide* scholastic, academic or scientific pursuits or the fine arts are not subject to registration obligations.[40]

1.146 Further, in relation to the right to privacy, it is noted that the Secretary's power in section 43(1)(c) of the bill to make available to the public 'any other information prescribed by the rules' is very broad. While the statement of compatibility notes that disclosure of information relevant to the scheme is limited and carefully regulated,[41] no information is provided in the statement of compatibility as to the safeguards in place to protect the right to privacy where the Secretary enacts rules pursuant to section 43(1)(c), and whether there would be any less rights-restrictive ways to achieve the objective. Noting that limitations on the right to privacy must be no more extensive than is strictly necessary, additional questions arise as to whether this aspect of the measure is proportionate.

Committee comment

1.147 The preceding analysis raises questions as to the compatibility of the proposed foreign influence transparency scheme with the freedom of expression,

38 See UN Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association,* A/HRC.20/27 (21 May 2012) [64]-[65].

39 See proposed section 28 of the bill. Section 28 only applies if the foreign principal is a foreign business or an individual, and does not apply in relation to activities that are registrable in relation to a foreign principal for recent cabinet ministers or recent Ministers, members of Parliament and other holders of senior Commonwealth positions: section 28(2). See also the exemptions listed in sections 24,25,26,27 and 29.

40 See the United States' Foreign Agents Registration Act, 22 USC 611-621, section 613(e).

41 SOC [58].

the freedom of association, the right to take part in the conduct of public affairs, and the right to privacy.

1.148 The committee seeks the advice of the minister as to whether the measure is proportionate to the legitimate objective of the measure, including:

- **whether the proposed obligation on persons to register where they act 'on behalf' of a 'foreign principal' is sufficiently circumscribed to ensure that the limitation on human rights is only as extensive as strictly necessary;**
- **whether the measure is accompanied by adequate safeguards (with particular reference to the exemptions from registration, including the exemption to news media in section 28 of the bill); and**
- **in relation to the right to privacy, whether the Secretary's power in section 43(1) to make available to the public 'any other information prescribed by the rules' is sufficiently circumscribed and accompanied by adequate safeguards.**

1.149 Mr Leeser deliberately did not participate in consideration of this report entry as he wished to reserve his position pending further consideration of the bills by the Parliamentary Joint Committee on Intelligence and Security, of which he is also a member.

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

1.150 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.

1.151 'Discrimination' under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination).[42] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively or disproportionately affects people with a particular personal attribute.[43]

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

43 *Althammer v Austria*, Human Rights Committee Communication no. 998/01 [10.2].

1.152 While Australia maintains a discretion under international law with respect to its treatment of non-nationals, Australia has obligations under article 26 of the ICCPR not to discriminate on grounds of nationality or national origin.[44]

1.153 The definition of 'foreign principal' is very broad, and includes individuals who are neither an Australian citizen nor a permanent Australian resident.[45] As noted earlier, this definition, coupled with the definition of 'on behalf of', appears to be broad enough to require domestic civil society, arts or sporting organisations which may have non-Australian members (such as individuals residing in Australia under a non-permanent resident visa, or foreign members) to register where they have undertaken activity 'in collaboration with' or 'in the service of' their membership (including foreign members) when seeking funding from government, engaging in advocacy work, or pursuing policy reform. This raises concerns that the registration requirement may have a disproportionate negative effect on persons or entities that have a foreign membership base. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. The statement of compatibility does not acknowledge that the right to equality and non-discrimination is raised by the registration requirement, so does not provide an assessment as to whether the limitation is justifiable under international human rights law.

1.154 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

1.155 As discussed at [1.139] above, it is likely that the objective of the bill will be a legitimate objective for the purposes of international human rights law, and that the registration requirements are rationally connected to this objective. However for the reasons earlier stated, questions remain as to whether the consequence of the broad definitions of 'foreign principal' coupled with 'on behalf of' (that is, requiring a range of civil society or other organisations acting 'in the service of' or 'in collaboration with' their foreign membership to register) are overly broad such that this does not appear to be the least rights-restrictive approach.

Committee comment

1.156 The committee notes that the breadth of the definition of 'foreign principal', coupled with the definition of 'on behalf of', raises concerns that the registration requirement may have a disproportionate negative effect on persons

44 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens* (2004).

45 Section 10 of the bill.

or entities that have a foreign membership base, and could therefore amount to indirect discrimination on the basis of nationality.

1.157 The statement of compatibility does not acknowledge that the foreign influence transparency scheme engages the right to equality and non-discrimination and therefore does not provide an assessment of whether the scheme is compatible with this right.

1.158 The committee therefore seeks the advice of the minister as to the compatibility of the foreign influence transparency scheme with the right to equality and non-discrimination.

1.159 Mr Leeser deliberately did not participate in consideration of this report entry as he wished to reserve his position pending further consideration of the bills by the Parliamentary Joint Committee on Intelligence and Security, of which he is also a member.

My Health Records (National Application) Rules 2017 [F2017L01558]

Purpose	Provides for the nationwide implementation of the My Health Record system on an opt-out basis
Portfolio	Health
Authorising legislation	*My Health Records Act 2012*
Last day to disallow	Tabled in the House of Representatives on 4 December 2017; tabled in the Senate on 5 December 2017. Last day to disallow currently 26 March 2018 (Senate)
Right	Privacy (see **Appendix 2**)
Status	Seeking additional information

Background

1.160 The My Health Record system, previously referred to as the personally controlled electronic health record (PCEHR), is an electronic summary of an individual's health records. The system currently operates on an opt-in basis, meaning that persons register to obtain a My Health Record.

1.161 The *Health Legislation Amendment (eHealth) Act 2015* enables trials to be undertaken in defined locations on an opt-out basis, with an individual's health records automatically uploaded onto the My Health Record system unless that individual takes steps to request that their information not be uploaded. The Act also allows the opt-out process to be applied nationwide following the trial. The committee previously assessed this legislation in its *Twenty-ninth Report of the 44th Parliament* and *Thirty-second report of the 44th Parliament*.[1]

Automatic inclusion of health information on the My Health Record system

1.162 The My Health Records (National Application) Rules 2017 [F2017L01558] (the instrument) provides for the implementation of the My Health Record system nationwide on an opt-out basis. Under the scheme, a My Health Record will automatically be created for all healthcare recipients,[2] unless they choose to opt-out.

1.163 Under the instrument, all people with an Individual Healthcare Identifier (IHI), which includes all people enrolled in Medicare or with a Department of

1 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (13 October 2015) pp. 9-24 and *Thirty-second report of the 44th Parliament* (1 December 2015) pp. 64-86.

2 Under the *My Health Records Act 2012*, 'healthcare recipient' is defined as 'an individual who has received, receives, or may receive, healthcare'.

Veterans' Affairs file number, will be provided the opportunity to opt-out during a three-month 'opt-out period' before their record is automatically created.[3] Healthcare recipients can also choose to cancel or suspend their registration at any time after their My Health Record is created.[4]

Compatibility of the measure with the right to privacy

1.164 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. By enabling the uploading of the personal health records of all healthcare recipients onto the My Health Record system, the instrument engages and limits the right to privacy. In this respect, as explained on the Department of Health website, My Health Records may contain very extensive health information such as records of 'medical consultations, blood tests and x-ray reports and prescriptions filled.'[5]

1.165 The statement of compatibility acknowledges that the instrument engages and limits the right to privacy but concludes that any limitation is necessary, reasonable and proportionate to achieving the objective of improving healthcare for Australians. The statement of compatibility also sets out that the measure promotes the right to health by 'improving the sharing of health information between treating healthcare providers, leading to quicker and safer treatment decisions and reducing repetition of information for patients and duplication of tests'.[6]

1.166 The broad objective of improving healthcare for all Australians is likely to be considered a legitimate objective for the purposes of international law. It may also be accepted that the sharing of health information between health practitioners

3 The three-month period will begin on a date to be specified by the minister. See, explanatory statement (ES) pp. 4-5.

4 ES, p. 5.

5 According to the Department of Health Website, the information stored on My Health Record can include: 'Clinical documents about your health – added by healthcare providers including: Shared Health Summary; Hospital discharge summaries; Pathology and diagnostic imaging reports; Prescribed and dispensed medication; Specialist and referral documents; Medicare and PBS information stored by the Department of Human Services, Medicare and RPBS information stored by the Department of Veterans' Affairs; Organ Donor decisions; Immunisations that are included in the Australian Immunisation Register. This may include childhood immunisations and other immunisations given to you by a healthcare provider; Personal health notes written by you or an authorised representative including: Contact numbers and emergency contact details; Current medications; Allergy information and any previous adverse reactions; Indigenous status; Veteran or ADF status; living will or advance care planning documents". Department of Health, My Health Record, https://myhealthrecord.gov.au/internet/mhr/publishing.nsf/Content/find-out-more?OpenDocument&cat=Managing%20your%20My%20Health%20Record

6 ES, statement of compatibility (SOC), p. 8.

through the My Health Record system may help enable more efficient and informed treatment of patients, therefore contributing to improved healthcare. The measure would therefore appear to be rationally connected to the objective.

1.167 In order to be a proportionate limitation on the right to privacy, a limitation should only be as extensive as is strictly necessary to achieve its objective. In this respect, there are concerns as to whether the measure is the least rights restrictive way to achieve the stated objective for the purposes of international human rights law. In particular, the blanket application of the system nationwide on an opt-out basis may be overly broad. It is noted that opt-in arrangements, where an individual expressly consents to having their health information uploaded to the online register, appears to constitute a less rights restrictive alternative. The statement of compatibility explains that the current arrangements are not effective to encourage broader participation, 'creating a barrier to achieving the full benefits of the system for individuals'.[7]

1.168 While increasing the number of people using the My Health Record system may potentially assist to achieve the objective of improving health outcomes, it is not clear whether a less rights restrictive approach to increasing the number of people using the system may be reasonably available. This may include, for example, measures promoting public awareness of and participation in the system in its current opt-in form or encouraging individuals with complex or serious health needs to opt-in. Further, information as to why, and the extent to which, the current opt-in system has not succeeded and is not a reasonably available alternative on an ongoing basis would assist in assessing whether the limitation on the right to privacy is proportionate. It is also possible that some people may not have opted-in to the My Heath Record system on the basis of reasonable concerns about their privacy. Further, it is unclear that automatically uploading key aspects of the medical records of all health care recipients is necessary to improve health outcomes for each individual. For example, it is unclear whether individuals who do not have ongoing or complex health needs will benefit from the proposed system.

1.169 Another relevant consideration in determining the proportionality of the measure is whether there are adequate safeguards in place to ensure that the limitation on the right to privacy is no more extensive than is strictly necessary. The statement of compatibility sets out a range of measures aimed at safeguarding informational privacy, including that individuals can restrict access to certain information, including Medicare information; effectively remove certain documents from the system; request their healthcare provider not upload certain information; monitor login activity in relation to their My Health Record; and cancel their registration at any time.[8] These points appear to provide individuals some measure of control over their electronic record. However, based on the information provided,

7 ES, SOC, p. 8.

8 ES, SOC, p. 10.

it is unclear as to the process for individuals to opt-out or control what is accessible through the My Health Record.

1.170 Other aspects of the system may not be sufficiently circumscribed, including in relation to the retention of data. The explanatory memorandum for the Health Legislation Amendment (eHealth) Bill 2015 explains that, when an individual cancels their existing My Health Record, information compiled on the individual up to that point will be retained, but cannot be accessed by any entity.[9] This apparently open-ended practice of retention raises further questions as to whether the limitation on the right to privacy is the least rights restrictive alternative to meet its objective.

1.171 The statement of compatibility also explains that healthcare recipients will have a 'reasonable period of time' to opt-out of the system, which is a three month window beginning from a future date to be specified by the minister.[10] The explanatory statement explains that:

> [i]n order to opt-out, a person must give notice to the System Operator in a particular manner. In practice, a person will be able to give this notice in a number of ways and at a time or period specified by the Minister, depending on their circumstances.

1.172 However, no specific information is set out in the explanatory materials as to how a person opts out in practice. Of particular concern is how the process would cater for people with communication difficulties or those without internet access.

1.173 A related question concerns how individuals will be made aware of the national opt-out arrangements and other relevant information about the My Health Record system. The importance of this aspect of the proposed rollout was noted in the final evaluation report of participation trials in the My Health Record system, commissioned by the Department of Health and conducted by Siggins Miller Consultants in 2016, which emphasised 'the need for any future national change and adoption strategy to include a much bigger emphasis on awareness and education'.[11] The statement of compatibility states that:

> [c]omprehensive information and communication activities are being planned to ensure all affected individuals, including parents, guardians and carers, are aware of the opt-out arrangements, what they need to do to participate, how to adjust privacy controls associated with their My Health Record, or opt-out if they choose.[12]

1.174 However, no further information is provided as to what these communication initiatives will entail and how they will be effective to ensure all

9 Health Legislation Amendment (eHealth) Bill 2015, explanatory memorandum, p. 95.

10 ES, SOC, p. 9.

11 Siggins Miller Consultants, *Evaluation of the Participation Trials for the My Health Record: Final Report* (November 2016) p. vii.

12 ES, SOC, pp. 9-10.

individuals are made aware of the My Health Record system including their ability to opt-out or control disclosure of information via the system. It is further noted that, as health recipients subject to the scheme will include a range of individuals with specific needs, including children[13] and persons with disabilities, any information and communication activities about the system would likely need to be appropriately tailored.

Committee comment

1.175 The preceding analysis raises questions as to whether the measure is a permissible limitation on the right to privacy. The committee therefore seeks the advice of the minister as to whether the measure is reasonable and proportionate to achieve the stated objective and, in particular:

- **whether the measure is the least rights restrictive way of achieving its stated objective (including why current opt-in arrangements could not be pursued on an ongoing basis, why it is necessary to automatically include the health record of all Australians and healthcare recipients on the My Health Record (rather than, for example, only those with complex or ongoing health conditions), and whether the retention of data after cancellation of a My Health Record account is adequately circumscribed); and**
- **whether there are sufficient processes and safeguards in place to ensure awareness and information in relation to the system, including the ability to opt-out or control information disclosure, will be adequately conveyed to the public, including in relation to children and persons with a disability.**

13 The explanatory statement states that individuals aged 14 years or older will be able to opt themselves out. Persons with parental or legal authority for another person may also opt out that other person. See ES, p. 5.

National Broadcasters Legislation Amendment (Enhanced Transparency Bill) 2017

Purpose	Amends the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991* to require annual reporting of employees whose combined salary and allowances are in excess of $200,000 annually
Portfolio	Communications and the Arts
Introduced	Senate, 6 December 2017
Right	Privacy (see **Appendix 2**)
Status	Seeking additional information

Disclosure of employee and on-air talent salaries in excess of $200,000

1.176 The National Broadcasters Legislation Amendment (Enhanced Transparency Bill) 2017 (the bill) seeks to amend the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991* to require the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) to disclose in their annual reports the names, position, salary and allowances for employees whose combined salary and allowances exceed $200,000 annually.[1] Similarly, for individuals who are not employees but are subject to an 'on air talent contract',[2] the bill requires that the total amount paid to the individual, the name of the individual and the nature of services performed by the individual be disclosed in the annual report.[3]

Compatibility of the measure with the right to privacy

1.177 The right to privacy encompasses respect for informational privacy, including the right to respect a person's private information and private life, particularly the storing, use and sharing of personal information.

1.178 The bill engages and limits the right to privacy by requiring the public disclosure of the names and amounts of remuneration of employees and on-air talent who are paid in excess of $200,000.

1 See proposed section 80A in Schedule 1, item 3 and proposed section 73A in Schedule 2, item 3 of the bill.

2 'On-air talent contract' refers to a contract between the ABC or SBS and an individual under which the individual performs services for the ABC or SBS including appearing on a television program or speaking or performing on a radio program: proposed section 80A(3) in Schedule 1, item 3 and proposed section 73A(3) in Schedule 2, item 3 of the bill.

3 See proposed section 80A(1)(b) in Schedule 1, item 3 and proposed section 73A(1)(b) in Schedule 2, item 3 of the bill.

1.179 The statement of compatibility acknowledges that the right to privacy is engaged and limited by the measure, but states that any limitation is reasonable, necessary and proportionate.[4]

1.180 The statement of compatibility explains the objective of the bill:

> There is a strong public interest in ensuring the Australian people can scrutinise the spending by publicly funded national broadcasters for the engagement of on-air talent contactors and employees. The amendments that would be made by the Bill will allow the public to hold the national broadcasters to account regarding the spending of public monies, and achieving appropriate value for money, in relation to remuneration for employees and on-air talent.
>
> …
>
> This reporting obligation will allow the public to have visibility of how proactive the national broadcasters are in closing any identified gender salary gaps.[5]

1.181 Promoting public transparency and scrutiny relating to the use of public revenues is likely to be a legitimate objective for the purposes of international human rights law,[6] as is the objective of reducing any gender salary gap. Insofar as the national broadcasters' expenditure on salaries of employees and on-air talent comes from public funds, disclosure of such salaries appears to be rationally connected to these objectives.

1.182 However, concerns arise as to whether the public disclosure of the names and remuneration of employees and on-air talent earning over $200,000 is proportionate to the legitimate objectives being pursued. Notwithstanding that persons employed or engaged by the ABC and SBS are remunerated for undertaking a public role, disclosure of a person's salary reveals a person's financial standing to the public at large and therefore constitutes a significant intrusion on a person's

4 Statement of Compatibility (SOC), p. 6.

5 SOC, p. 6.

6 See *Rechnungshof v Österreichischer Rundfunk and others*, Court of Justice of the European Union C-465/00, C-138/01, C-139/01, 20 May 2003, [85], where the Court of Justice of the European Union noted in a case concerning public disclosure of salaries that 'in a democratic society, taxpayers and public opinion generally have the right to be kept informed of the use of public revenues, in particular as regards the expenditure on staff. Such information….may make a contribution to the public debate on a question of general interest, and thus serves the public interest'. See also, the United Kingdom Information Commissioner's Office, *Freedom of Information Act Decision Notice* (26 September 2011), relating to disclosure of salary details of senior managers at the BBC: 'taxpayers will have a natural, and legitimate, interest in knowing how a publicly funded organisation allocates its funding' ([27]).

personal circumstances and private life.[7] For this to be proportionate, the measure should only be as extensive as is strictly necessary to achieve its legitimate objective.

1.183 In this respect, the minister explains in the statement of compatibility:

> The publication of de-identified and potentially aggregate information about these employees' and salaries and allowances, and the payments made to contractors in key on-air roles, is considered inadequate because it would not provide the transparency required to not only allow the public to see how its money is being spent, but also in identifying if there is a gender salary gap across similar roles or level of talent. This reporting obligation will allow the public to have visibility of how proactive the national broadcasters are in closing any identified gender salary gaps.
>
> …
>
> Publication of the employee or individual's name will allow the Australian public to identify the person and the role they perform, and assess whether the national broadcasters have achieved appropriate value for money in relation to the spending of public monies. Accordingly, the amendments are considered reasonable and proportionate to the objective of promoting public transparency and scrutiny and reducing the gender salary gap.[8]

1.184 While the minister explains that de-identified and aggregate information would be insufficient to determine how the ABC and SBS are spending their money and to identify any gender salary gap, it is not clear from the statement of compatibility why this should be the case. There appear to be other, less rights-restrictive, measures available that would be sufficient to allow members of the public to hold the national broadcasters accountable for how they spend public funds, without limiting the right to privacy of employees and on-air talent. For example, de-identified or anonymised information as to the number of employees and on-air talent earning over certain amounts, such as setting out the number of employees paid more than a certain amount in pay bands, would also reveal how the ABC and SBS are spending public money. Additionally, a disparity in gender pay gap could be revealed through requiring disclosure of the number or proportion of female employees and on-air talent earning over $200,000 compared to male employees and on-air talent in the same position.

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7 See *Rechnungshof v Österreichischer Rundfunk and others*, Court of Justice of the European Union C-465/00, C-138/01, C-139/01, 20 May 2003, [73]-[75]; Information Commissioner's Office, *Freedom of Information Act 2000 Decision Notice: British Broadcasting Corporation* (26 September 2011), available at: https://ico.org.uk/media/action-weve-taken/decision-notices/2011/648762/fs_50363389.pdf, [25].

8 SOC, pp. 6-7.

Committee comment

1.185 The committee notes that the right to privacy is engaged and limited by the measure and the preceding analysis raises questions as to whether it is the least rights-restrictive way of achieving the stated aim.

1.186 The committee therefore requests the advice of the minister as to whether the limitation is proportionate to achieving the stated objectives, including whether there are less rights restrictive ways to achieve the stated objectives, such as:

- **requiring the ABC and SBS in their annual reports to disclose the number or proportion of female employees and on-air talent earning over $200,000 compared to male employees and on-air talent in the same position; or**
- **requiring disclosure of de-identified or anonymised information as to the number of employees and on-air talent earning over certain amounts (as specific figures or in pay bands).**

Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures) Determination 2017 [F2017L01353]

Purpose	Amends the Parliamentary Service Determination 2013 [F2013L00448] relating to certain employment processes, measures and notification requirements
Portfolio	Prime Minister and Cabinet
Authorising legislation	*Parliamentary Service Act 1999*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 17 October 2017, tabled Senate 18 October 2017)
Rights	Privacy (see **Appendix 2**)
Status	Seeking additional information

Background

1.187 The Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures) Determination 2017 [F2017L01353] (2017 Determination), which amends the 2013 Determination,[1] raises issues similar to those recently considered by the committee in relation to the Australian Public Service Commissioner's Directions 2016 [F2016L01430] (the APS 2016 Directions).[2]

APS Directions: 2013 and 2016

1.188 The committee previously reported on issues related to the current APS 2016 Directions when its predecessor, the APS 2013 Directions, were first made as well as in relation to subsequent amendments.[3]

1.189 The APS 2013 directions provided, among other things, for notification in the Public Service Gazette (the Gazette) of certain employment decisions for Australian Public Service (APS) employees. The committee raised concerns about the human rights compatibility of these measures, particularly in relation to the publication of decisions to terminate employment and the grounds for termination. These concerns

1 Parliamentary Service Determination 2013 [F2013L00448] (2013 Determination).

2 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) pp. 12-15; *Report 10 of 2016* (30 November 2016) pp. 13-16; *Report 1 of 2017* (16 February 2017) pp. 20-23.

3 Australian Public Service Commissioner's Directions 2013 [F2013L00448] (APS 2013 Directions) reported in Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) pp. 133-134; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 65-67; and *Twenty-first Report of the 44th Parliament* (24 March 2015) pp. 25-28.

related to the right to privacy and the rights under the Convention on the Rights of Persons with Disabilities in relation to notification of termination of employment on the ground of physical or mental incapacity. Additionally, there were right to privacy concerns in relation to the requirement to notify in the Gazette of termination decisions on the basis of a breach of the Code of Conduct.

1.190 In response to these concerns, the Australian Public Service Commissioner (the Commissioner) conducted a review of the measures. As a result, the APS 2013 directions were amended in 2014 to remove most requirements to publish termination decisions in respect of APS employees. This addressed many of the concerns in relation to the right to privacy and the rights of persons with disabilities.[4]

1.191 However, the requirement to notify termination on the grounds of the breach of the Code of Conduct in the Gazette was retained. The committee considered that this retained measure remained of concern as it engaged and limited the right to privacy and appeared not to be a proportionate limitation on this right.[5]

1.192 In 2016, new APS directions (APS 2016 Directions) were made and reported on by the committee,[6] including in relation to the continuing requirement that decisions to terminate the employment of an ongoing APS employee for breach of the Code of Conduct must be published in the Gazette.[7] In response, noting that the committee had raised valid concerns, the Commissioner undertook a further review into the necessity of publicly notifying this information.[8]

1.193 On 22 June 2017, the Commissioner informed the committee that, after consultation with APS agencies, he had concluded that these publication arrangements should not continue. Instead, the Commissioner intended to establish a new secure database of employment terminations for breaches of the Code of Conduct which would not be accessible to the general public. As outlined in the Commissioner's response, this would enable agencies to access the database and maintain the integrity of their respective workforces, while appropriately respecting the privacy of affected employees. The Commissioner stated that relevant amendments to the APS 2016 Directions would also be made.[9] The committee

4 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) pp. 25-28.

5 Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) pp. 25-28.

6 Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) pp. 12-15.

7 See section 34(1)(e).

8 Parliamentary Joint Committee on Human Rights, *Report 10 of 2016* (30 November 2016) p. 16.

9 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (8 August 2017) p. 40.

welcomed this response and noted that this approach would substantially address the right to privacy concerns in relation to the measure.[10]

Parliamentary Determinations: 2013 and 2016

1.194 In respect of Parliamentary Service employees, the 2013 Determination contained measures relating to notification in the Gazette of certain employment decisions similar to those contained in the APS 2013 Directions. The committee therefore reported on the 2013 Determination raising substantially the same issues.[11]

1.195 Although the APS 2013 Directions were initially amended in 2014, the 2013 Determination remained in place until the 2016 Determination was made.[12] Consistent with the approach taken by the Commissioner in the APS 2014 Amendment Determination, the 2016 Determination removed most of the requirements to publish termination decisions in the Gazette in respect of Parliamentary Service employees, but retained the requirement to notify termination on the grounds of a breach of the Code of Conduct in the Gazette.

1.196 In *Report 1 of 2017* the committee welcomed the amendments made, but again raised concerns about compatibility of the publication requirement for breaches of the Code of Conduct with the right to privacy.[13] The committee requested advice as to whether the 2016 Determination would be reviewed in line with the review being undertaken in relation to the APS 2016 Directions.[14] The legislation proponents (the presiding officers), advised the committee that they would further examine the 2016 Determination in light of the Commissioner's review into the APS 2016 Directions.[15]

Publishing a decision to terminate for breach of the Code of Conduct

1.197 The 2017 Determination introduces a number of new measures and also remakes many requirements from the 2016 determination, including the requirement to publish in the Gazette details of a Parliamentary Service employee when their employment has been terminated on the grounds of breach of the Code of Conduct.[16]

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10 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (8 August 2017) p. 40.

11 Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) pp. 157-159.

12 Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016 [F2016L01649].

13 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) pp. 20-23.

14 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) p. 110.

15 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (16 February 2017) p. 23.

16 See section 39(1)(e).

Compatibility of the measure with the right to privacy

1.198 The statement of compatibility noted that the 2017 Determination replicates changes previously made to address the committee's concerns in respect of the 2013 Determination.[17] As outlined above, while the 2016 amendments addressed a number of matters, concerns remain about the remade requirement to publish notification of termination on the grounds of a breach of the Code of Conduct. The statement of compatibility does not address this limitation on the right to privacy.

1.199 As outlined in the committee's previous reports, this limitation is unlikely to be permissible as a matter of international human rights law. In order to be a proportionate limitation on the right to privacy the measure must be the least rights restrictive way of achieving a legitimate objective. Other methods by which an employer could determine whether a person has been dismissed from employment for breach of the Code of Conduct include maintaining a centralised, internal record of dismissed employees, or to use references to ensure that a previously dismissed employee is not rehired by the Australian Parliamentary Service. The previous report also noted that it would be possible to publish information without naming the employee, which could serve to maintain public confidence that serious misconduct is being dealt with properly.[18]

1.200 Previous correspondence from the presiding officers indicated that they would consider the outcome of the APS Commissioner's review. The APS Commissioner's review has since concluded that the current arrangements for publishing terminations of employment for breaching the Code of Conduct in the Gazette should be discontinued and replaced with a new secure database of relevant information not accessible to the general public. However, the statement of compatibility for the 2017 Determination does not indicate whether this outcome has been considered by the presiding officers.

Committee comment

1.201 Publishing the details of a Parliamentary Service employee whose employment has been terminated for breach of the Code of Conduct engages and limits the right to privacy.

1.202 The committee previously raised questions in relation to a substantively identical measure in the APS 2016 directions, which was reviewed by the Australian Public Service Commissioner who found it should be discontinued. Instead, a new secure database of employment terminations for breaches of the Code of Conduct, not accessible to the public, would be established and relevant amendments to the APS 2016 Directions would also be made.

17 Statement of compatibility, Attachment B.

18 See, Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) p. 14; *Report 1 of 2017* (16 February 2017) pp. 22-23.

1.203 Noting this outcome, the committee seeks advice from the presiding officers as to whether a similar approach will be implemented with respect to the Australian Parliamentary Service and whether the 2017 Determination will be amended to reflect this approach.

Further response required

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

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

Purpose	Amends the *Fair Work Act 2009* to: prohibit terms of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity; prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund for an industrial association; and prohibit any action with the intent to coerce an employer to pay amounts to a particular worker entitlement fund, superannuation fund, training fund, welfare fund or employee insurance scheme. Amends the *Fair Work (Registered Organisations) Act 2009* to: require registered organisations to adopt, and periodically review, financial management policies; require registered organisations to keep credit card records and report certain loans, grants and donations; require specific disclosure by registered organisations and employers of the financial benefits obtained by them and persons linked to them in connection with employee insurance products, welfare fund arrangements and training fund arrangements; and introduce a range of new penalties relating to compliance with financial management, disclosure and reporting requirements
Portfolio	Employment
Introduced	House of Representatives, 19 October 2017
Rights	Freedom of association; collectively bargain (see **Appendix 2**)
Previous report	12 of 2017
Status	Seeking further additional information

Background

1.205 The committee first reported on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the bill) in its *Report 12 of 2017*, and requested a response from the Minister for Employment by 13 December 2017.[1]

1.206 The minister's response to the committee's inquiries was received on 19 December 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Prohibiting terms of industrial agreements requiring or permitting payments to worker entitlement funds

1.207 Schedule 2 of the bill would amend the *Fair Work Act 2009* (Fair Work Act) to prohibit any term of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity.[2]

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

1.208 The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. The right to just and favourable conditions of work includes the right to safe working conditions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

1.209 The interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.[4] The principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential

1 Parliamentary Joint Committee on Human Rights, *Report 12 of 2017* (28 November 2017) pp. 16-24.

2 Statement of Compatibility (SOC), p. xi.

3 See, article 22 of the ICCPR and articles7, 8 of the ICESCR.

4 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

element' of Article 4 of ILO Convention No. 98 which envisages that parties will be free to reach their own settlement of a collective agreement without interference.[5]

1.210 Prohibiting the inclusion of particular terms in an enterprise agreement interferes with the outcomes of the bargaining process. Accordingly, the initial human rights analysis stated that the measure engages and may limit the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association.

1.211 Measures limiting the right to freedom of association including the right to collectively bargain may be permissible providing certain criteria are satisfied. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective.[6] Further, Article 22(3) of the ICCPR and article 8 of the ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.

1.212 The ILO's Committee on Freedom of Association (CFA Committee), which is a supervisory mechanism that examines complaints about violations of the right to freedom of association and the right to collectively bargain, has stated that 'measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98'.[7] The CFA Committee has noted that there are some circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, stating that 'any limitation on collective bargaining on the part of the authorities should be preceded

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5 ILO, *General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994) [248];ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897). See, also, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR),Direct Request (CEACR) - adopted 2016, published 106th International Labour Conference (ILC) session (2017) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3299912; ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

6 See ICCPR article 22.

7 See ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897, [473]).

by consultations with the workers' and employers' organizations in an effort to obtain their agreement'.[8]

1.213 Indeed, international supervisory mechanisms have previously raised specific concerns in relation to current restrictions imposed on bargaining outcomes under Australian domestic law.[9] In relation to restrictions on the scope of collective bargaining and bargaining outcomes, CFA Committee noted that:

> …the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes.[10]

1.214 In this respect the statement of compatibility acknowledges that the measure engages the right to freedom of association, the right to voluntarily reach bargaining outcomes, and the right to just and favourable conditions at work. However, the statement of compatibility asserts that the limitation on these rights is permissible. It states that the measure pursues the legitimate objectives of addressing 'the potential for misappropriation of funds and [to] avoid conflicts of interest and possible coercion.'[11] It points to the Final Report of the Royal Commission into Trade Union Governance and Corruption (Heydon Royal Commission) in support of this objective.[12] While the stated objectives may be capable of constituting a legitimate objective for the purposes of international human rights law, the initial analysis noted that it would have been useful if the statement of compatibility had more fully explained how any findings from the

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8 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 330th Report, Case No. 2194, [791]; and 335th Report, Case No. 2293, [1237]).

9 See, for example, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Australia http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3299912,102544,Australia,2016.

10 ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523.

11 SOC, p. xi.

12 SOC, p. x.

Heydon Royal Commission supported the importance of this objective as a substantial or pressing concern.

1.215 The statement of compatibility provides some information as to whether the measure is rationally connected to (that is, effective to achieve) its stated objectives. It notes that the measure does not prohibit contributions to worker entitlement funds but requires any contributions 'to be made to registered worker entitlement funds that are subject to basic governance and disclosure requirements designed to address potential conflicts of interest, breaches of fiduciary duty and the potential for coercion'.[13] As such the measure would appear to be rationally connected to its stated objective.

1.216 However, the statement of compatibility provides limited information as to whether the limitation is proportionate. In order to be a proportionate limitation on human rights a measure must be the least rights restrictive way of achieving its stated objective.

1.217 Accordingly, the committee sought the advice of the Minister for Employment as to:

- whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible); and
- whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.

Minister's response

1.218 The minister's response describes the current restrictions on bargaining outcomes imposed by the Fair Work Act and restates the scope of the new restrictions. The minister's response notes that the committee's initial report stated that the limitation imposed by the measure appeared to be rationally connected to its stated objective.

1.219 In relation to whether the limitation is reasonable and proportionate to achieve the stated objective, the minister's response states:

> Any worker entitlement fund, including those controlled by any industrial association, can be registered provided it meets basic governance and disclosure requirements. These requirements are designed to address potential conflicts of interest, breaches of fiduciary duty and coercive conduct. There is no restriction on who can be a member of a fund. The provisions enhance the right to just and favourable conditions of work by ensuring that money held by worker entitlement funds is used to benefit workers. The amendments will provide employees with a guarantee that

13 SOC, p. xi.

> any contributions they voluntarily make to a worker entitlement fund is subject to appropriate scrutiny and oversight.
>
> To the extent that the prohibition may engage any of these rights, the measure is reasonable and proportionate and enhances workers' rights by ensuring that money held on their behalf is protected. The amendments are the least rights restrictive possible in that they do not represent an unqualified prohibition on terms of industrial agreements that provide for contributions to worker entitlement funds. Rather, they require such contributions to be made to registered worker entitlement funds that are subject to basic governance and disclosure obligations.
>
> The International Labour Organization (ILO) has stated that 'Restrictions on [the] principle [of leaving the greatest possible autonomy to organizations in their functioning and administration] should have the sole objective of protecting the interests of members'.
>
> To the extent the proposed provisions may engage with these rights they do so only to protect the rights of workers by ensuring that their money is properly managed and their interests protected.
>
> The provisions support the basic governance and disclosure requirements of the Bill that are designed to address potential conflicts of interest, breaches of fiduciary duty and potential for coercive conduct that were found by the Royal Commission into Trade Union Governance and Corruption (Royal Commission) in examining the operation in Australia of worker entitlement funds. As such, the amendment protects the interests of workers.

1.220 The minister's response provides a range of information about the scope of the limitation on bargaining outcomes. In this respect, it is relevant to the proportionality of the measure that it will still be possible to negotiate clauses in enterprise agreements which require or permit payments to be made to registered workers' entitlement funds, superannuation funds or charities. However, prohibiting any term of an enterprise agreement that otherwise requires or permits contributions for the benefit of an employee may still have significant effects on voluntarily negotiated outcomes.

1.221 As discussed further below, there are a range of restrictions on registered worker entitlement funds and who can operate them. Under the proposed bill, registered organisations including unions are prohibited from operating registered workers' entitlement funds and there are restrictions on how funds can be spent. This means that, for example, even if an employer and employees agreed through an enterprise agreement to set up an occupational health and safety training fund to be administered and run by the relevant union, this would not be permissible. It is unclear from the minister's response how prohibiting this kind of voluntarily negotiated clause in general is the least rights restrictive approach to achieving the stated objective. Further, while the minister's response refers to ILO comments about when it may be legitimate to limit particular rights, it does not address the

specific concerns raised by international monitoring bodies in relation to Australia's restrictions on bargaining outcomes through prohibiting particular matters in enterprise agreements (discussed at [1.213] above). In light of the concerns raised by these international monitoring bodies as to the existing restrictions on bargaining outcomes in Australia, it is likely that any amendments which further restrict such matters would also raise concerns.

1.222 Finally, the minister's response outlined consultation which occurred with worker entitlement funds and employee and employer organisations prior to introduction. Consultation processes are relevant to an assessment of the measure, and may assist in determining whether a limitation is the least rights restrictive means of pursuing a legitimate objective on the available evidence. However, the fact of consultation alone is not sufficient to address the human rights concerns in relation to the measure.

Committee response

1.223 The committee thanks the minister for her response.

1.224 The International Labour Organization's Committee on Freedom of Association has raised concerns in relation to Australia's restrictions on bargaining outcomes through prohibiting particular matters in enterprise agreements. The provisions introduced by the bill prohibiting terms of industrial agreements that require or permit payments to worker entitlement funds is a further restriction on bargaining outcomes.

1.225 The committee considers that, in the absence of additional information addressing these concerns, prohibiting terms of industrial agreements that require or permit payments to worker entitlement funds is likely to be incompatible with the right to collectively bargain.

1.226 The committee therefore seeks further advice from the minister in relation to the compatibility of the measure with the right to collectively bargain, in particular any information in light of findings by relevant international supervisory mechanisms.

Regulation of worker entitlement funds

1.227 Schedule 2 of the bill would require 'worker entitlement funds' to meet requirements for registration and meet certain conditions relating to financial management, board composition, disclosure and how money is spent. A 'worker entitlement fund' is defined in proposed section 329HC of the *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act) as a fund whose purposes include paying worker entitlements to members, dependents or legal representatives of fund members or a fund prescribed by the minister.

1.228 Under proposed new section 329LA of the Registered Organisations Act a 'worker entitlement fund' will only be able to be operated by a corporation and cannot be operated by a registered organisation (that is, a trade union or employer

organisation.) Under proposed sections 329JA-B of the Registered Organisations Act it will be an offence to operate an unregistered fund and a civil penalty provision for employers to contribute to such a fund.

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

1.229 As described above, the interpretation of the right to freedom of association and the right to just and favourable conditions of work is informed by the ILO treaties.[14] ILO Convention 87 specifically protects the right of workers to autonomy of union processes, organising their administration and activities and formulating their own programs without interference.[15] Providing that registered organisations cannot administer 'worker entitlement funds' and limiting the purposes for which such money may be used appears to engage and limit these rights. However, the statement of compatibility does not acknowledge this limitation so does not provide an assessment of whether the limitation is permissible as a matter of international human rights law.[16]

1.230 The committee therefore requested the further advice of the minister as to:

- whether the measure is aimed at pursuing a legitimate objective for the purposes of international human rights law;
- 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 whether the measure is the least rights restrictive way of achieving its stated objective).

Minister's response

1.231 The minister's response explains the scope of current provisions and proposed amendments:

> *Current provisions*
>
> An ASIC class order currently exempts worker entitlement funds from regulation under the Corporations Act 2001.
>
> Contributions to 'approved worker entitlement funds' under the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act 1986) are exempt from fringe benefits tax. Funds can be approved if they meet certain minimum criteria,

14 See, article 22 of the ICCPR and article 8 of the ICESCR. The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

15 See ILO Convention N.87 article 3.

16 SOC, p. x.

> largely concerned with how fund money can be spent. This imposes a degree of indirect regulation on these funds.
>
> *Changes proposed through the Bill*
>
> The Bill will amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to insert new Part 3C of Chapter 11 to apply governance, financial reporting and financial disclosure requirements to worker entitlement funds. As noted by the Committee, Schedule 2 of the Bill would require worker entitlement funds to meet requirements for registration and meet certain conditions relating to financial management, board composition, disclosure and how money is spent. These conditions include that a worker entitlement fund will only be able to be operated by a corporation and cannot be operated by a registered organisation (proposed new section 329LA condition 2).

1.232 The minister also provides a range of information as to whether the limitation on human rights imposed by the measure is permissible. In relation to whether the measure is aimed at pursuing a legitimate objective for the purposes of international human rights law, the minister's response states:

> The objective of the Bill in relation to the administration of worker entitlement funds and limiting the purposes for which worker entitlement fund income and contributions can be used is to ensure that workers' entitlements are managed responsibly and transparently and in their interests. Funds will have to be run by trained professionals of good fame and character and fund money will be restricted from being re-characterised and spent for unauthorised purposes. These measures are intended to prohibit what the Royal Commission found were substantial payments flowing out of worker entitlement funds to other parties for purposes other than paying members.

1.233 This would appear to be a legitimate objective for the purposes of international human rights law.

1.234 As to how the measure is effective to achieve the stated objective, the minister's response states:

> Requiring the registration of worker entitlement funds and placing conditions on that registration are measures that are rationally connected to the objective of ensuring that workers' entitlements are managed responsibly and transparently in their interests.
>
> Requiring a fund operator to be a constitutional corporation is necessary to ensure that the provisions regulating such funds are valid. A similar requirement applies to superannuation funds under the *Superannuation Industry (Supervision) Act 1993*.

1.235 This information indicates that the regulation of worker entitlement funds is likely to be rationally connected to the stated objective of the measure.

1.236 The requirement that registered workers' entitlement funds cannot be operated by a registered organisation such as a trade union or employers' organisation raises questions in relation to the proportionality of the limitation. In this respect the minister's response explains that:

> Requiring that a fund operator cannot be an organisation is designed to prevent conflicts of interest for worker entitlement funds that also make substantial payments to those organisations for purposes other than paying members worker entitlements.
>
> In this respect, the Royal Commission stated that:
>
> > The very substantial revenue flows to unions generate significant conflicts of interest and potential breaches of fiduciary duty on the part of unions and union officials negotiating enterprise agreements … In short, the union and union officials owe a duty to act in the interests of union member employees when negotiating enterprise agreements. At the same time, there is a significant potential and incentive for the union to act in its own interests to generate revenue.
>
> The worker entitlement fund, Incolink, provides an example of the substantial revenue that flows to unions and employer groups. Between 2011 and 2015, the Construction, Forestry, Mining and Energy Union (CFMEU), the Master Builders Association of Victoria and the Plumbing Joint Training Fund together received over $85 million from Incolink. These organisations are all represented on the board of lncolink.
>
> In addition, none of the existing worker entitlement funds that are approved under the FBTA Act 1986 are operated by registered organisations; most worker entitlement funds are run by corporations with a mix of representatives from employer and employee associations on their boards. The Bill does not alter this position. Officers of registered organisations can still sit on the board of worker entitlement funds.

1.237 The minister's response articulates that there is a potential for conflicts of interest in relation to the administration of such funds as well as the potentially large sums of money involved. It is also relevant to the proportionality of the measure that none of the funds registered under the existing FBTA Act are operated by registered organisations. However, it is unclear whether there are funds that are not registered under the FBTA Act which are currently administered by registered organisations. Accordingly, based on the information provided there is some uncertainty as to the potential impact of the measure. The measure may still therefore be a significant limitation on the right for a union to organise its internal affairs and formulate its own program. For example, notwithstanding the issues raised in the minister's response, it may be the preference of some union members that money paid for their benefit is administered by their union.

1.238 The minister's response further states, in relation to whether the measure is proportionate to achieve its stated objective, that:

> The Bill also retains the existing legal limits on how contributions and income of a fund can be spent under the FBTA Act 1986.
>
> To the extent that these measures may limit human rights, any limitation is reasonable and proportionate in achieving the objectives of the Bill. Commensurate with this, the measures are the least rights restrictive as they do not prevent contributions to worker entitlement funds but provide appropriate governance and transparency to ensure that workers' entitlements are managed responsibly and transparently in their interests. They also take into account the feedback provided by funds during consultation, including to allow funds to use income to pay for training and welfare services, subject to appropriate criteria, and the provision of a separate regulatory scheme for single employer worker entitlement funds.

1.239 While noting that contributions will still be able to be made to registered workers' entitlement funds, it is unclear from the information provided that this necessarily means that the measure is the least rights restrictive approach. It is unclear from the response whether there are any other reasonably available less rights restrictive alternatives to prohibiting registered organisations from operating such funds in general. Accordingly, it is uncertain whether the measure constitutes a proportionate limitation on the right to freedom of association.

Committee response

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

1.241 Based on the information provided and the above analysis, the committee is unable to conclude that the measure is a proportionate limitation on the right to freedom of association and the right to just and favourable conditions at work.

Prohibiting terms of industrial instruments requiring payments to election funds

1.242 Schedule 3 of the bill would amend the Fair Work Act to prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund.[17]

Compatibility of the measure with the right to freedom of association and the right to just and favourable conditions at work

1.243 As set out above, the right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. Prohibiting the inclusion of particular terms in an enterprise agreement interferes with the outcomes of the bargaining process. Accordingly, the initial analysis stated that the measure engages and limits the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to

17 SOC, p. x.

freedom of association. The statement of compatibility acknowledges that the measure engages the right to negotiate terms and conditions of employment voluntarily.[18] However, the statement of compatibility appears to indicate that the limitation is permissible.

1.244 The statement of compatibility identifies one objective of the measure as being to 'remove any legal or practical compulsion on an employee to contribute to election funds'.[19] This appears to be a description of what the measure does rather than articulating the pressing or substantial concern the measure addresses as required to constitute a legitimate objective for the purposes of international human rights law. The statement of compatibility identifies a second objective as addressing 'the possibility of contributions made in accordance with a relevant instrument being used to avoid the intent of the prohibition on organisations using their resources to favour a particular candidate'. While this could be capable of constituting a legitimate objective, limited explanation or reasoning is provided as to why this objective is important. Further, in relation to whether the measure is rationally connected (that is, effective to achieve) and proportionate to the stated objectives, the statement of compatibility provides no reasoning or evidence and only asserts that the measure 'is reasonable, necessary and proportionate'.[20]

1.245 The committee therefore requested the further advice of the minister as to:

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

Minister's response

1.246 The minister's response provides the following information about the proposed amendments:

> *Current provisions*
>
> There are currently no provisions in the FW Act or RO Act that deal with terms of industrial instruments requiring or permitting employees to pay into election funds. This is despite the fact that section 190 of the RO Act prohibits an organisation from using its resources for the purposes of the

18 SOC, p. x.

19 SOC, p. x.

20 SOC, p. x.

election of a particular candidate. Because election funds are structurally separate from the organisation, they are not captured by this provision.

Changes proposed through the Bill

Schedule 3 of the Bill would amend section 194 of the FW Act to prohibit any term of an enterprise agreement or contract of employment requiring or permitting employee contributions for a regulated election purpose.

Schedule 3 would also amend Part 2-9 of the FW Act to provide that any term of a contract of employment requiring or permitting payments for a regulated election purpose will have no effect.

A 'regulated election purpose' is one that includes the purpose of funding, supporting or promoting the election of candidates for election to office in an industrial association.

1.247 The minister's response provided some further information about whether the limitation on human rights was permissible. In relation to whether the measure addresses a substantial or pressing concern, the minister's response explains:

> Election funds are established to fund election campaigns for office within registered organisations and are regularly sourced from contributions from employees of such organisations. These funds are usually managed by one or more individuals who hold elected office within the organisation. They are not established in the interests of workers who are subject to the collective agreement but rather the interests of officials of the bargaining representative. The Royal Commission found that such arrangements unfairly disadvantage candidates who are not already in office and have been misused by officials controlling the funds where there are no contested elections. The Royal Commission also found a lack of oversight of election funds, with information about revenue and expenditure sometimes hidden, or not kept at all.
>
> The amendments remove any legal or practical compulsion on employees to contribute to a particular election fund. They ensure employees have a choice about whether to contribute to the particular fund.

1.248 Based on this information provided, ensuring that non-incumbent candidates for elected union positions are not disadvantaged and that employees have a free choice about whether to contribute to a particular fund in the particular circumstances, would appear to constitute legitimate objectives for the purposes of international human rights law. The measures would also appear to be rationally connected to these objectives.

1.249 In relation to whether the measure is reasonable and proportionate, the minister's response states that registered organisation employees will still be able to make genuine contributions, voluntarily and independently of an industrial instrument. On balance, this would appear to be a proportionate limitation on bargaining outcomes.

Committee response

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

1.251 The committee notes that the measure appears to be compatible with the right to freedom of association and the right to just and favourable conditions of work.

Prohibiting any action with the intent to coerce a person or employer to pay amounts to a particular fund

1.252 Schedule 4 of the bill would introduce a civil penalty into section 355A of the Fair Work Act prohibiting a person from organising, taking or threatening to take any action, other than protected industrial action, with the intent to coerce a person to pay amounts to a particular worker entitlement fund, super fund, training fund, welfare fund or employee insurance scheme.[21]

Compatibility of the measure with the right to freedom of association

1.253 The right to strike is protected as an aspect of the right to freedom of association and the right to form and join trade unions under article 8 of ICESCR. The right to strike, however, is not absolute and may be limited in certain circumstances.

1.254 By prohibiting action (other than protected industrial action) intended to coerce a person to pay amounts into a particular fund, the initial analysis assessed that the measure further engages and limits the right to strike. This is because it may impose an additional penalty or disincentive to taking unprotected industrial action with the intent of influencing the conduct of an employer. The existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond what is permissible.[22] While the statement of compatibility acknowledges that the measure

21 See, Schedule 4, item 355, proposed section 355A of the Fair Work Act.

22 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) p. 5.

engages work-related rights it does not expressly acknowledge that the right to strike is an aspect of the right to freedom of association.

1.255 Beyond providing a description of the measure, the statement of compatibility does not identify the legitimate objective of the measure. While the statement of compatibility appears to argue that the measure in fact supports freedom of association and human rights, it provides no explanation of the reasoning for this.[23] The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that where a limitation on a right is proposed the statement of compatibility provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

1.256 The committee therefore requested the further advice of the minister as to:

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

Minister's response

1.257 The minister's response provides the following information about the proposed amendments:

> *Current provisions*
>
> Part 3-1 of the FW Act provides for general workplace protections. It contains specific prohibitions against coercive behaviour in relation to workplace rights (section 343) and industrial activities (348). However, the Part does not specifically prohibit coercive action in relation to the making [of] payments to certain funds, particularly where such action occurs outside of the enterprise bargaining process. These funds include superannuation funds, training and welfare funds, worker entitlement funds and insurance arrangements and are collectively referred to by the Royal Commission as 'worker benefit funds'.
>
> *Changes proposed through the Bill*
>
> Schedule 4 of the Bill would amend Part 3-1 of the FW Act to insert a new section 355A to prohibit a person from taking coercive action in relation to the making of payments to a particular worker benefit fund. This would fix an existing gap in the Act, which prohibits coercion in relation to a wide range of other conduct, but not in relation to contributions to funds.

23 SOC, p. xi.

1.258 In relation to the current law, the minister's response states that 'compelling contributions to a particular worker benefit fund infringes basic principles of freedom of association and, by prohibiting mandatory contributions, the amendment is in fact promoting human rights'. However, the response does not specifically explain how 'compelling' a contribution through, for example, protest or strike action would 'infringe' principles of freedom of association or promote human rights. As noted in the initial analysis, the measure, by prohibiting action (other than protected industrial action) intended to influence or 'coerce' a person to pay amounts into a particular fund, the measure further engages and limits the right to strike. This is because it may impose an additional penalty or disincentive to taking unprotected industrial action with the intent of influencing the conduct of an employer.

1.259 In relation to whether the measure imposes permissible limitations on the right to strike, the minister's response states that the measure pursues the 'legitimate objective of reducing the potential for coercive behaviour outside the enterprise bargaining process, for example in side deals'. In this respect, the minister's response discusses examples of pressure being applied to employers, potential conflicts of interest and the findings of the Heydon Royal Commission. While not articulated in this way in the minister's response, it may be that the measure pursues the objective of providing protection for employers or other people from particular forms of action. To the extent that the measure is aimed at protecting the rights and freedoms of others this is capable of constituting a legitimate objective for the purposes of international human rights law.

1.260 The minister's response further notes that 'the Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for failures to comply with Part 3-3 of the FW Act, dealing with industrial action'. However, as set out above, the existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond

what is permissible.[24] Such findings call into serious question whether any further restrictions on the right to strike, such as this one, are permissible. While the minister's response identifies that the measure addresses a gap in current restrictions, it does not explain how such restrictions are proportionate in view of the stated objective including whether they represent the least rights restrictive approach. Accordingly, based on the information available, the measure does not appear to be a proportionate limitation on the right to strike as an aspect of the right to freedom of association.

Committee response

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

1.262 Based on the information available and the above analysis, the measure is likely to be incompatible with the right to freedom of association.

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

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

1.264 The initial analysis stated that it appears that the measure may extend to prohibiting forms of expression or assembly. As such, it may engage and limit the right to freedom of expression and assembly. The prohibition on forms of protest action appears to be potentially quite broad. This issue was not addressed in the

24 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) p. 5.

statement of compatibility and as such it is unclear whether the measure is compatible with these rights.

1.265 The committee therefore sought the advice of the minister as to:

- the scope of any restriction on the right to freedom of expression and assembly;
- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed, any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).

Minister's response

1.266 In relation to the right to freedom of assembly and the right to freedom of expression, the minister's response states:

> The Committee is also concerned that the measure circumscribes the right to freedom of expression as set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and the right of peaceful assembly set out in Article 21 of the ICCPR. It is not clear how the relevant rights are engaged as the measure does not interfere with an individual's right to hold opinions without interference, the right to freedom of expression or the freedom to seek, receive and impart information and ideas of any kind or the right of peaceful assembly. In any event, the amendment pursues the legitimate objective of ensuring that a person cannot coerce another person to make payments into certain worker benefit funds and is reasonable and proportionate.

1.267 The particular concern articulated in the initial human rights analysis was that the prohibited forms of action may extend to forms of expression and assembly. For example, protest activities outside of a workplace or a boycott of goods that is aimed at influencing or 'coercing' a person to make payments into a particular fund. It is noted in this respect that the right of freedom of expression extends to the expression of ideas through a range of conduct including speech and public protest. It would have been useful if the minister's response provided an explanation of why she does not consider that these rights were engaged and limited. There is also a question about the breadth of the provision, noting it could potentially apply broadly beyond the employer-employee relationship. As such, it is unclear whether the breadth of this provision may be overly broad with respect to an objective, for example, of protecting the rights and freedoms of other. As the information provided to the committee does not include a substantive assessment as to whether any

limitation on the right to freedom of expression and assembly is permissible, it is not possible to conclude that the measure is proportionate.

Committee response

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

1.269 Based on the information provided, it is not possible to conclude that the measure is compatible with the right to freedom of assembly and the right to freedom of expression.

1.270 The committee invites any further comments from the minister in relation to the above.

Bills not raising human rights concerns

1.271 Of the bills introduced into the Parliament between 4 and 7 December, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Aboriginal Land Rights (Northern Territory) Amendment Bill 2017;
- Australian Capital Territory (Planning and Land Management) Amendment Bill 2017;
- Broadcasting Legislation Amendment (Digital Radio) Bill 2017;
- Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017;
- Communications Legislation Amendment (Regional and Small Publishers Innovation Fund) Bill 2017;
- Copyright Amendment (Service Providers) Bill 2017;
- Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017;
- Family Law Amendment (Family Violence and Other Measures) Bill 2017;
- Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017;
- Home Affairs and Integrity Agencies Legislation Amendment Bill 2017;
- Security of Critical Infrastructure Bill 2017;
- Security of Critical Infrastructure (Consequential and Transitional Provisions) Bill 2017; and
- Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017.