Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 5 and 8 February 2018 (consideration of 8 bills from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 15 December 2017 and 8 January 2018 (consideration of 6 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

Instruments not raising human rights concerns

1.2 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.

1.3 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 registered in the relevant period, as listed on the Federal Register of Legislation. See, https://www.legislation.gov.au/.

Response required

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

National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Purpose	Seeks to amend various Acts in relation to criminal law to: amend espionage offences; introduce new foreign interference offences targeting covert, deceptive or threatening actions by foreign entities; amend Commonwealth secrecy offences; introduce comprehensive new sabotage offences; amend various offences, including treason; introduce a new theft of trade secrets offence; introduce a new aggravated offence for providing false and misleading information in the context of security clearance processes; and allow law enforcement agencies to have access to telecommunications interception powers. The bill also seeks to make amendments relevant to the Foreign Influence Transparency Scheme, including seeking to amend the Foreign Influence Transparency Scheme Act 2017 (currently a bill before Parliament)
Portfolio	Attorney-General
Introduced	House of Representatives, 7 December 2017
Rights	Freedom of expression; right to an effective remedy; privacy; freedom of association; presumption of innocence; to take part in public affairs (see **Appendix 2**)
Status	Seeking additional information

Secrecy provisions

1.5 Schedule 2 of the bill would amend the *Crimes Act 1914* (Crimes Act) and the *Criminal Code Act 1995* (Criminal Code) to introduce a range of new criminal offences related to the disclosure or use of government information. These replace existing offences.[1]

1 Currently, section 70 of the Crimes Act criminalises the disclosure of information by Commonwealth officers, obtained due to their role, in circumstances where they have a duty not to disclose such information. Similarly, section 79 of the Crimes Act also currently criminalises the disclosure of 'official secrets'. The bill proposes to replace these provisions.

Offences relating to 'inherently harmful information'

1.6 Proposed subsections 122.1(1)-(2) of the Criminal Code provide that a person commits an offence if the person communicates or deals with information that is 'inherently harmful information' in circumstances where the information was made or obtained by that or any other person by reason of being, or having been, a 'Commonwealth officer'[2] or otherwise engaged to perform work for a Commonwealth entity.[3]

1.7 Proposed subsections 122.1(3)-(4) would also criminalise removing or holding 'inherently harmful information' outside a proper place of custody and failing to comply with a lawful direction regarding the retention, use or disposal of such information. These proposed offences carry a maximum term of imprisonment of between 5 to 15 years.

1.8 'Inherently harmful information' is defined to include:

- security classified information;[4]
- information the communication of which would, or could reasonably be expected to, damage the security or defence of Australia;
- information that was obtained by, or made by or on behalf of, a domestic intelligence agency or a foreign intelligence agency in connection with the agency's functions;
- information that was provided by a person to the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under a law or otherwise by compulsion of law;
- information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency.[5]

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2 'Commonwealth officer' would be defined broadly to include (a) an APS employee; (b) an individual appointed or employed by the Commonwealth otherwise than under the *Public Service Act 1999*; (c) a member of the Australian Defence Force; (d) a member or special member of the Australian Federal Police; (e) an officer or employee of a Commonwealth authority; (f) an individual who is a contracted service provider for a Commonwealth contract: Proposed section 121.1 of the Criminal Code.

3 Under proposed subsection 90.1(1) of the Criminal Code a person 'deals' with information if the person receives or obtains it; collects it; possesses it; makes a record of it; copies it alters it; conceals it; communicates it; publishes it; or makes it available.

4 Strict liability applies to the element of the offence of whether the information is inherently harmful to the extent the information is security classified information: See, proposed subsection 122.1(4) and (5) of the Criminal Code.

5 See, proposed section 121.1 of the Criminal Code.

Offences of conduct causing harm to Australia's interests

1.9 Under proposed section 122.2 of the Criminal Code it is an offence for a person to communicate, deal with or remove or hold information (outside a proper place of custody) where this conduct causes, or is likely to cause, harm to Australia's interests and the information was made or obtained by the person, or any other person, by reason of being, or having been, a 'Commonwealth officer'[6] or otherwise engaged to perform work for a Commonwealth entity. These offences carry maximum penalties of between 5 and 15 years imprisonment.

Aggravated offences

1.10 In relation to the offences under sections 122.1 and 122.2, proposed section 122.3 of the Criminal Code would introduce an aggravated offence where additional circumstances apply.[7] These aggravated offences carry a maximum penalty of between 10 and 20 years imprisonment.

Unauthorised disclosure by Commonwealth officers and former Commonwealth officers

1.11 Proposed section 122.4 of the Criminal Code provides that a person commits an offence if they communicate information which they are required under Commonwealth law not to disclose where the information was made or obtained by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.

Defences

1.12 Proposed section 122.5 of the Criminal Code provides for a number of defences to each of the offences in proposed sections 122.1-122.4 including where:

- the person was exercising a power or performing a function or duty in their capacity as a Commonwealth officer or someone otherwise engaged to perform work for a Commonwealth entity;
- the person acted in accordance with an agreement or arrangement to which the Commonwealth was a party;
- the information is already public with the authority of the Commonwealth;

6 See, proposed section 121.1 of the Criminal Code.

7 This includes where the information in relation to the offence has a security classification of 'secret' or above; the record containing the information is marked 'for Australian eyes only' or as prescribed by regulation; the offence involves 5 or more records with a security classification; the offence involves the person altering a record to remove its security classification; or at the time the person committed the offence the person held an Australian Government security clearance. Strict liability applies as to whether 5 or more documents had a security classification.

- the information is communicated to the Inspector-General of Intelligence and Security, the Commonwealth Ombudsman, the Enforcement Integrity Commissioner or their staff for the purpose of performing a function or duty;
- the information is communicated in accordance with the *Public Interest Disclosure Act 2013*;
- the information is communicated to a court or tribunal;
- the information is dealt with or held in the 'public interest'[8] in the person's capacity as a journalist for the purposes of fair and accurate reporting;
- the information has been previously published and the person has reasonable grounds for believing that the communication will not cause harm to Australia's interests or the security or defence of Australia; and
- the person has reasonable grounds for believing that making or obtaining the information was required or authorised by Australian law and it is communicated to the person to whom the information relates or with the express or implied consent of the person.

1.13 The defendant bears an evidential burden in relation to these defences.

Compatibility of the measures with the right to freedom of expression

1.14 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. By criminalising the disclosure of information as well as particular forms of use, the proposed secrecy provisions engage and limit the right to freedom of expression.

1.15 The committee has previously examined the secrecy provisions now contained in the *Australian Border Force Act 2015* (Border Force Act) and assessed that they may be incompatible with the right to freedom of expression.[9] The measures proposed in the bill raise similar concerns in relation to freedom of expression but appear to be broader in scope than those now contained in the Border Force Act. It is noted that concerns have also previously been raised by United Nations (UN) supervisory mechanisms about the chilling effect of Australian secrecy provisions on freedom of expression.[10] The type of concerns raised, including that civil society organisations, whistle-blowers, trade unionists, teachers, social

8 What is not in the 'public interest' is defined in proposed section 122.5 (7).

9 See, Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 6-12; *Report 11 of 2017* (17 October 2017) pp. 72-83.

10 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders (Visit to Australia)*, 18 October 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E; François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, Thirty-fifth session, Human Rights Council, A/HRC/35/25/Add.3 (24 April 2017) [86].

workers, health professionals and lawyers may face criminal charges 'for speaking out and denouncing the violations' of the rights of individuals appear to apply equally in respect of the measures in this bill.[11]

1.16 Measures limiting the right to freedom of expression may be permissible where the measures pursue a legitimate objective, are rationally connected to that objective, and are a proportionate way to achieve that objective.[12]

1.17 The statement of compatibility acknowledges that the measures engage and limit the right to freedom of expression but argues that such limitations are permissible.[13] In relation to the objective of the bill, the statement of compatibility states:

> The objective of the Bill is to modernise and strengthen Australia's espionage, foreign interference, secrecy and related laws to ensure the protection of Australia's security and Australian interests. Foreign actors are currently seeking to harm Australian interests on an unprecedented scale, posing a grave threat to Australia's sovereignty, prosperity and national security. This threat is a substantial concern for the Australian Government. If left unchecked, espionage and foreign interference activities may diminish public confidence in the integrity of political and government institutions, compromise Australia's military capabilities and alliance relationships, and undercut economic and business interests within Australia and overseas.

1.18 While generally these matters are capable of constituting legitimate objectives for the purposes of international human rights law, it would have been useful if the statement of compatibility had provided information as to the importance of these objectives in the context of the specific secrecy measures.

1.19 The statement of compatibility provides limited information as to whether the limitations imposed by the measures are rationally connected to (that is, effective to achieve) these stated objectives.

1.20 In relation to the proportionality of the measures, the statement of compatibility refers to UN Human Rights Committee General Comment No. 34 on the

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11 Michel Forst, End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders Visit to Australia, 18 October 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E; François Crépeau, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, Thirty-fifth session, Human Rights Council, A/HRC/35/25/Add.3 (24 April 2017) [86].

12 See, generally, Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, [21]-[36] (2011). The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.

13 Statement of compatibility (SOC) pp. 22-23.

right to freedom of expression which says that state parties must ensure that secrecy laws are crafted so as to constitute permissible limitations on human rights. The UN Human Rights Committee noted in General Comment No 34 that it is not a permissible limitation on the right to freedom of expression, for example:

> …to invoke such [secrecy] laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.[14]

1.21 However, it appears that, as drafted, the proposed measures in question may give rise to just such concerns.

Breadth and scope of information

1.22 While the statement of compatibility states that the 'offences in section 122.1 apply only to information within narrowly defined categories of inherently harmful information', it is unclear that these categories are sufficiently circumscribed in respect of the stated objectives of the measures to meet this description. Rather than being 'narrowly defined' the definition of 'inherently harmful information', to which the offences under proposed section 122.1 apply, appears to be very broad.

1.23 As set out above at [1.8], 'inherently harmful information' is defined to include security classified information; information expected to prejudice security, defence or international relations of Australia; information from a domestic intelligence agency or a foreign intelligence agency; information that was provided by a person to the Commonwealth to comply with an obligation under a law, as well as a range of other matters. The breadth of the current and possible definitions therefore raises concerns as to whether the limitation is proportionate.

1.24 For example, the category of 'security classified information' is to be defined by regulation[15] and may potentially apply to a broad range of government documents. In this respect, the Australian government *Information security management guidelines* set out when government information is or should be marked as security classified and indicate that the scope of the documents captured by security classifications is likely to be broad.[16]

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14 SOC p. 22: UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, (12 September 2011) [30].

15 Explanatory Memorandum (EM) p. 229.

16 See, Australian Government, *Information security management guidelines Australian Government security classification system* (April 2015) https://www.protectivesecurity.gov.au/informationsecurity/Documents/INFOSECGuidelinesAustralianGovernmentSecurityClassificationSystem.pdf.

1.25 Further, the explanatory memorandum acknowledges that the category of any information provided by a person to the Commonwealth to comply with another law is wide. It explains that this category would include information required to be provided to regulatory agencies, by carriage services and Commonwealth authorities. While the statement of compatibility refers generally to the 'gravity of the threat posed' by these categories, it is unclear whether each category of 'inherently harmful information' is necessary to achieve the stated objective of the measures. It appears that some of the categories could capture the communication of information that is not harmful or not significantly harmful to Australia's national interests or not intended to cause harm. This raises a concern that the measure may not be the least rights restrictive way of achieving its stated objectives and may be overly broad.

1.26 The proposed offences in section 122.2 relating to communicating, dealing with or removing or holding information where this conduct causes, or is likely to cause, harm to Australia's interests also applies to a potentially broad range of information.[17] The definition of information that 'causes harm to Australia's interests' is very broad and includes categories that appear less harmful. For example, it includes interfering with any process concerning breach of a Commonwealth law that has a civil penalty. As civil penalty provisions relate to civil processes, the imposition of a criminal sanction for an unauthorised disclosure of information appears to be serious. It would capture interfering with, for example, the investigation of relatively minor conduct such as failing to return an identity card as soon as practicable (which carries a maximum penalty of 1 penalty unit or $210)[18] or providing a community radio broadcasting service without a licence (which carries a maximum penalty of 50 penalty units or $10,500).[19] It is unclear that the level of harm is sufficiently connected to the stated objective of the measure. Accordingly, it appears proposed

17 See, proposed section 121.1 of the Criminal Code: 'cause harm to Australia's interests' includes 'interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of: (i) a criminal offence against; or (ii) a contravention of a provision, that is subject to a civil penalty, of: a law of the Commonwealth; or (b) interfere with or prejudice the performance of functions of the Australian Federal Police under: (i) paragraph 8(1)(be) of the Australian Federal Police Act 9 1979 (protective and custodial functions); or (ii) the Proceeds of Crime Act 2002; or (c) harm or prejudice Australia's international relations in relation to information that was communicated in confidence: (i) by, or on behalf of, the government of a foreign country, an authority of the government of a foreign country or an international organisation; and (ii) to the Government of the Commonwealth, to an authority of the Commonwealth, or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth; or (d) harm or prejudice Australia's international relations in any other way; or (e) harm or prejudice relations between the Commonwealth and a State or Territory; or (f) harm or prejudice the health or safety of the public or a section of the public.

18 *Privacy Act 1988* section 68A;

19 *Broadcasting Services Act 1992* section 135.

section 122.2 and the categories of harm to Australia's interests may also be overly broad with respect to the stated objective of the measures.

1.27 As set out above, proposed section 122.4 of the Criminal Code criminalises unauthorised disclosures of information by former and current Commonwealth officers where they were under a duty not to disclose. The statement of compatibility states that this provision is a modernised version of current section 70 of the Crimes Act and as such 'section 122.4 does not establish a new limitation on the ability of such persons to communicate information'.[20] However, while proposed section 122.4 is similar to current section 70 of the Crimes Act, this does not address human rights concerns with the proposed provision. The concerns about whether the section 122.4 offence is sufficiently circumscribed arise from there being no harm requirement and it potentially applying to any information a person has learnt while engaged by the Commonwealth regardless of its nature. Further, the breadth of any 'duty not to disclose' is potentially broad as it arises under any law of the Commonwealth. This accordingly raises concerns that section 122.4 may be overly broad with respect to the stated objective of the measures.

1.28 More generally, the breadth of the information subject to these offences would appear to also capture even government information that is not likely to be harmful to Australia's national interests. It is likely to also capture a range of information the disclosure of which may be considered in the public interest or may merely be inconvenient. This raises serious questions about whether the limitation on the right to freedom of expression is proportionate. As noted by the UN Special Rapporteur on the right to freedom of expression '[i]t is not legitimate to limit disclosure in order to protect against embarrassment or exposure of wrongdoing, or to conceal the functioning of an institution'.[21]

Breadth and scope of application

1.29 The classes of people to which the offences in proposed sections 122.1-122.4 applies are extremely broad and these sections could criminalise expression on a broad range of matters by a broad range of people, including Australian Public Service employees; members of the Australian Defence Force and the Australian Federal Police; people providing services to government; contractors performing services for the government such as social workers, teachers, medical professionals or lawyers.

1.30 The proposed offences in section 122.1-122.3 go further than this and do not merely cover the conduct of those who are, or have been, engaged or employed in some manner by the Commonwealth government. They would also criminalise the

20 SOC p. 22.

21 David Kaye, Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, 70th sess, UN Doc A/70/361 (8 September 2015) 5 [8]

conduct of anyone (in other words, 'outsiders') who communicates, receives, obtains or publishes the categories of government information described above at [1.22]–[1.26].

1.31 For example, it would appear that a journalist who deals with (which is defined very broadly to include 'receives') unsolicited security classified information made by a Commonwealth employee would commit a criminal offence under section 122.1.[22] It is possible that the defence that the information is dealt with or held in the 'public interest' in the person's capacity as a journalist engaged in fair and accurate reporting could potentially be available. However, if the receipt of the information was not in the 'public interest'[23] because, for example, it is likely to harm the health or safety of a section of the public then the defence would appear not to apply. Further, the defence also requires that the journalist is engaged in 'fair and accurate reporting' such that there may be a range of circumstances where it does not apply. This is notwithstanding that the receipt of the information in question may be unsolicited and the journalist may or may not be aware of the security classification.[24] It also raises a related concern that the measure, as drafted, could apply to the mere receipt of information regardless of what the journalist (for example) does with the information afterwards. This raises a particular concern that the offence provisions in section 122.1 could have a chilling effect on reporting and that the defences may act as an insufficient safeguard in relation to the right to freedom of expression.

1.32 More generally, where the 'inherently harmful information' is not already publicly available and the person is not a journalist, it appears that by dealing with information the person may be guilty of an offence under section 122.1 even where they have not solicited such information or are unaware that it is, for example, subject to a security classification. Proposed sections 122.1-122.3 would also appear to capture professional conduct by advisers such as lawyers who may be asked to

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22 Under proposed subsection 90.1(1) of the Criminal Code a person 'deals' with information if the person receives or obtains it; collects it; possesses it; makes a record of it; copies it; alters it; conceals it; communicates it; publishes it; or makes it available.

23 Proposed section 122.5(7) provides that, dealing with or holding information is not in the public interest if (a) dealing with or holding information that would be an offence under section 92 of the *Australian Security Intelligence Organisation Act 1979* (publication of identity of ASIO employee or ASIO affiliate); (b) dealing with or holding information that would be an offence under section 41 of the *Intelligence Services Act 2001* (publication of identity of staff); (c) dealing with or holding information that would be an offence under section 22, 22A or 22B of the *Witness Protection Act 1994* (offences relating to Commonwealth, Territory, State participants); (d) dealing with or holding information that will or is likely to harm or prejudice the health or safety of the public or a section of the public.

24 Strict liability applies to the element of the offence of whether the information is inherently harmful to the extent the information is security classified information: See, proposed subsection 122.1(4) and (5) of the Criminal Code.

advise whether a person would commit an offence. For example, it would appear to constitute an offence for a lawyer to make a photocopy of a security classified document which a client has received for the purposes of providing the client with legal advice about whether they can disclose or publish the document. It would also appear to be a criminal offence, if the lawyer were to merely receive or make a record of the document in this context. There does not appear to be an applicable defence in relation to such conduct.

1.33 Indeed, there are serious questions about whether the proposed statutory defences provide adequate safeguards in respect of the right to freedom of expression. For example, in addition to the matters raised above, the defences may not sufficiently protect disclosure of information that may be in the public interest or in aid of government accountability and oversight so as to be a proportionate limit on human rights. While there is a defence where information was disclosed in accordance with the *Public Interest Disclosure Act 2013* (PIO Act), it is unclear that this would provide adequate protection. The UN Special Rapporteur on human rights defenders has recently urged the government to 'substantially strengthen the Public Interest Disclosure framework to ensure effective protection to whistleblowers',[25] noting that 'many potential whistleblowers will not take the risk of disclosing because of the complexity of the laws, severity and scope of the penalty, and extremely hostile approach by the Government and media to whistleblowers'.[26] There is no general public interest defence in relation to the proposed measures. There are questions as to whether some of the defences such as those contained in sections 122.5(3) and (4) extend to preparatory acts such as printing or photocopying.

1.34 Further, the penalties for the offences in schedule 2 of the bill are serious and range from 2 to 20 years. The severity of such penalties is also relevant to whether the limitation on the right to freedom of expression is proportionate. Finally, it is unclear how the proposed provisions will interact with existing secrecy provisions such as, for example, under the Border Force Act. In this respect, as noted above, the proposed measures appear to capture a much broader range of conduct than that currently prohibited under the Border Force Act.

Committee comment

1.35 The measures engage and limit the right to freedom of expression.

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25 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders (Visit to Australia)*, 18 October 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E.

26 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders (Visit to Australia)*, 18 October 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E.

1.36 The preceding analysis raises questions about whether the measures are compatible with this right.

1.37 The committee therefore seeks the advice of the Attorney-General as to:

- **how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill;**
- **whether the limitations are reasonable and proportionate to achieve the stated objective (including in relation to the breadth of information subject to secrecy provisions, the adequacy of safeguards and the severity of criminal penalties); and**
- **how the measures will interact with existing secrecy provisions such as those under the Border Force Act which has been previously considered by the committee.**

1.38 In relation to the proportionality of the measures, in light of the information requested above, if it is intended that the proposed secrecy provisions in schedule 2 proceed, advice is also sought as to whether it would be feasible to amend them to:

- **appropriately circumscribe the range of 'inherently harmful information' to which the offence in proposed section 122.1 applies;**
- **appropriately circumscribe the definition of what information 'causes harm to Australia's interests' for the purposes of section 122.2;**
- **appropriately circumscribe the definition of 'deals' with information for the purposes of offences under proposed sections 122.1-122.4;**
- **appropriately circumscribe the scope of information subject to the prohibition on disclosure under proposed section 122.4 (by, for example, introducing a harm element);**
- **limit the offences in schedule 2 to persons who are or have been engaged by the Commonwealth as an employee or contractor;**
- **expand the scope of safeguards and defences (including, for example, a general 'public interest' defence, an unsolicited information defence, a broader journalism defence, and the provision of legal advice defence);**
- **reduce the severity of the penalties which apply; and**
- **include a sunset clause in relation to the secrecy provisions in schedule 2.**

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

Compatibility of the measure with the right to an effective remedy

1.40 The right to an effective remedy requires states parties to ensure a right to an effective remedy for violations of human rights. The prohibition on disclosing information may also affect human rights violations coming to light and being addressed as required by the right to an effective remedy. That is, the prohibition on disclosing information may adversely affect the ability of individual members of the public to know about possible violations of rights and seek redress. The engagement of this right was not addressed in the statement of compatibility and accordingly no assessment was provided about this issue.

Committee comment

1.41 The preceding analysis raises questions about whether the measure is compatible with the right to an effective remedy. This right was not addressed in the statement of compatibility.

1.42 The committee therefore seeks the advice of the Attorney-General as to whether the measure is compatible with the right to an effective remedy.

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

Compatibility of the measure with the right to be presumed innocent

1.44 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent usually requires that the prosecution prove each element of the offence (including fault elements and physical elements).

1.45 Strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need for the prosecution to prove fault. In the case of a strict liability offence, the prosecution is only required to prove the physical elements of the offence. The defence of honest and reasonable mistake of fact is, however, available to the defendant. Strict liability may be applied to whole offences or to elements of offences.

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

1.47 Reverse burden and strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

Strict liability element

1.48 As outlined above, strict liability applies to the element of the offence in proposed section 122.1 that the information dealt with or communicated is 'inherently harmful information' to the extent that the information is security classified information. The statement of compatibility acknowledges that this measure engages and may limit the right to be presumed innocent but argues that this limitation is permissible.[27] It states that this is 'appropriate' as 'information or articles are clearly marked with the security classification and any person who has access to security classified information should easily be able to identify as such'.[28]

1.49 However, it is unclear from the information provided whether there could be circumstances where a security classification marking has been removed but the substance of the document is still security classified. It may also be difficult for persons who are not Commonwealth employees to ascertain whether or not a particular marking on a government document held a 'security classification'. The statement of compatibility confirms that the strict liability element means a person cannot avoid liability if they were unaware the information was security classified, but argues that requiring knowledge would undermine the deterrence effect of the offence.[29] The statement of compatibility further notes that the general defence of mistake of fact as set out in section 9.2 of the Criminal Code would apply. While this is relevant to the proportionality of the limitation, to rely on this defence a person must hold a reasonable belief that the information is not security classified. This is a much narrower defence than would otherwise apply.

1.50 Further, there is a concern that the application of a strict liability element to whether information had a 'security classification' means that a person may be found guilty of an offence even where it was not appropriate that the information in question had a security classification. That is, there may be circumstances where information has a security classification which was not appropriately applied or alternatively is no longer appropriate. As such, it does not appear that an inappropriate security classification would be a matter that a court could consider in

27 SOC, p. 16.

28 SOC, p. 16.

29 SOC, p. 17.

determining whether a person had committed an offence under proposed section 122.1.

1.51 While the explanatory memorandum argues that the government 'has well-established practices for determining whether particular classified information has been properly security classified',[30] it is unclear whether this is a sufficient safeguard in the context of the strict liability element. In contrast, while the current secrecy provisions in the Border Force Act raise human rights concerns, there potentially exists a relevant safeguard in respect of an offence of disclosing security classified information. Section 50A of the Border Force Act provides that a prosecution must not be initiated unless the secretary has certified that it is appropriate that the information had a security classification at the time of the conduct.[31] While this does not fully address human rights concerns, to the extent that it requires the secretary to certify that the *substance* of the information was appropriately classified, it would appear to constitute a relevant safeguard. As noted above, it is also unclear how these proposed offences will interact with existing agency specific secrecy offences.

Reverse burden offences

1.52 As set out above, proposed section 122.5 provides offence-specific defences to the offences in sections 122.1-122.4. In doing so, the provisions reverse the evidential burden of proof as subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.53 The explanatory memorandum and statement of compatibility include some information about the reverse evidential burden. However, the justification for reversing the evidential burden of proof is generally that the defendant 'should be readily able to point to' the relevant evidence[32] or the defendant is 'best placed' to know of the relevant evidence.[33] However, this does not appear to be sufficient to constitute a proportionate limitation on human rights. It is unclear that reversing the evidential burden is necessary as opposed to including additional elements within the offence provisions themselves.

1.54 In this respect, proposed section 122.1 appears to be framed broadly to potentially make the work that any Commonwealth officer or engaged contractor

30 EM, p. 229.

31 Under section 42 of the Australian Border Force Act it is an offence to disclose categories of information including information which has a security clearance. Section 50A provides that if an offence against section 42 relates to information that has a security classification, a prosecution must not be initiated 'unless the Secretary has certified that it is appropriate that the information had a security classification at the time of the conduct'.

32 See EM pp. 276-283.

33 See explanatory memorandum, p. 88.

does when dealing with security classified information an offence. It is a defence to prosecution of this offence, if a person is acting in their capacity as a Commonwealth officer. However, the effect of this would appear to leave officers or contractors acting appropriately in the course of their duties open to a criminal charge and then place the evidential burden of proof on them to raise evidence to demonstrate that they were in fact acting in accordance with their employment. This raises questions as to whether the current construction of the offence, with the reverse evidential burden in the statutory defence, is a proportionate limitation on the right to be presumed innocent.

1.55 Indeed, it appears in some circumstances, it would be very difficult for Commonwealth officers to discharge the evidential burden. For example, the Inspector-General of Intelligence and Security (IGIS) explains that if a current or former IGIS officer was charged under proposed section 122 of the Criminal Code 'it would, for all practical purposes, be impossible for them to discharge the evidential burden of proving that the alleged dealing with or communication of information contrary to the proposed offences was undertaken in the course of their duties'. This is because they would 'potentially commit an offence under s 34(1) of the [*Inspector-General of Intelligence and Security Act 1986*] by disclosing that information in their defence at trial, or providing it to law enforcement officials investigating the potential commission of an offence'.[34]

Committee comment

1.56 The preceding analysis raises questions as to the compatibility of the reverse burden offences and a strict liability element of an offence with the right to be presumed innocent.

1.57 In relation to the strict liability which applies to the element of the offence in proposed section 122.1, the committee therefore requests the advice of the Attorney-General as to:

- **whether the limitation is a reasonable and proportionate measure to achieve a legitimate objective (including the scope of application to persons who may not be aware of the security classification; the ability of courts to consider whether a security classification is inappropriate; and any safeguards); and**
- **if the measure proceeds, whether it would be feasible to amend proposed section 122.1 to provide a prosecution must not be initiated or continued unless it is appropriate that the substance of the information had a security classification at the time of the conduct.**

34 See, Inspector-General of Intelligence and Security, Submission 13, Parliamentary Joint Committee on Intelligence and Security inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 pp. 5-6.

1.58 In relation to the reverse evidential burdens, the committee requests the advice of the Attorney-General as to:

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including why the reverse evidential burdens are necessary and the scope of conduct caught by the offence provisions);**
- **whether there are existing secrecy provisions that would prevent a defendant raising a defence and discharging the evidential burden, and if so, whether this is proportionate to the stated objective; and**
- **whether it would be feasible to amend the measures so that the relevant matters (currently in defences) are included as elements of the offence or alternatively, to provide that despite section 13.3 of the Criminal Code, a defendant does not bear an evidential (or legal) burden of proof in relying on the offence-specific defences.**

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

Offences relating to espionage

1.60 Schedule 1 of the bill seeks to amend a number of offences in the Criminal Code including those relating to foreign actors and persons who act on their behalf against Australia's interests.

1.61 While the Criminal Code currently contains espionage offences, schedule 1 would create a broader range of new espionage offences.[35] The new offences would criminalise a broad range of dealings with information, including both classified and unclassified information, including making it an offence:[36]

- to deal with (including to possess or receive)[37] information or an article that has a security classification[38] or concerns Australia's national security where the person intends, or is reckless as to whether, the conduct will prejudice

35 EM, p. 26.

36 EM, p. 26.

37 Under proposed subsection 90.1(1) a person deals with information or an article if the person: (a) receives or obtains it; (b) collects it; (c) possesses it; (d) makes a record of it; (e) copies it; (f) alters it; (g) conceals it; (h) communicates it; (i) publishes it; (j) makes it available.

38 'Security classification' is to have the meaning prescribed by regulation: Proposed section 90.5.

Australia's national security or advantage the national security[39] of a foreign country and the conduct results or will result in the information or article being made available to a foreign principal[40] or someone acting on behalf of a foreign principal.[41]

- to deal with information, even where it does not have a security classification or concern Australia's national security, where the person intends, or is reckless as to whether, the conduct will prejudice Australia's national security where the conduct results or will result in the information or article being made available to a foreign principal or someone acting on behalf of a foreign principal.[42]
- to deal with information or an article which has a security classification or concerns Australia's national security where the conduct results or will result in the information or article being made available to a foreign principal or someone acting on behalf of the foreign principal.[43]

1.62 In addition to these new espionage offences, it would be an offence:

- to engage in espionage[44] on behalf of a foreign principal;[45]
- to solicit or procure a person to engage in espionage;[46]

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39 Proposed section 90.4 defines '*national security'* of Australia or a foreign country as (a) the defence of the country; (b) the protection of the country or any part of it, or the people of the country or any part of it, from defined activities (espionage; sabotage; terrorism; political violence; activities intended and likely to obstruct, hinder or interfere with the performance of the defence force; foreign interference); (c) the protection of the integrity of the country' s territory and borders from serious threats; (d) the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or a defined activity; (e) the country's political, military or economic relations with another country or other countries.

40 Proposed section 90.2 of the Criminal Code defines 'foreign principal' as: (a) a foreign government principal; (b) a public international organisation (c) a terrorist organisation (d) an entity or organisation owned, directed or controlled by a foreign principal within the meaning of paragraph (b) or (c); (e) an entity or organisation owned, directed or controlled by 2 or more foreign principals.

41 Proposed section 91.1 of the Criminal Code. Strict liability applies to the element of whether information has a security classification.

42 Proposed section 91.2 of the Criminal Code.

43 Proposed section 91.3. Strict liability applies to the element of whether information has a security classification.

44 Proposed section 91.8 defines 'espionage' by reference to offences in Division A, sections 91.1, 91.2, 91.3, 91.6.

45 Proposed section 91.8.

46 Proposed section 91.11. This section defines 'espionage' by reference to offences in Division A, sections 91.1, 91.2, 91.3, 91.6 and Division B, section 91.8.

- to prepare or plan for an offence of espionage.[47]

1.63 These offences carry a maximum penalty of between 20 years and life imprisonment. The bill contains a number of limited defences to the offences.[48]

Compatibility of the measures with the right to freedom of expression

1.64 By criminalising disclosure and use of information in particular circumstances, the measures engage and limit the right to freedom of expression. The statement of compatibility does not expressly acknowledge that the proposed espionage offences engage and limit this right and accordingly does not provide a full assessment of whether the limitation is permissible.

1.65 The objective of the bill identified above, summarised as protecting Australia's security and Australian interests, is likely to be capable of being a legitimate objective for the purposes of international human rights law. However, it is unclear from the information provided whether these specific measures are rationally connected and proportionate to that objective.

1.66 For a measure to be a proportionate limitation on the right to freedom of expression it must be sufficiently circumscribed. In this respect, it appears that the offences as drafted capture a very broad range of conduct. For example, under the offence of dealing with security classified information under proposed section 91.3, it appears that a journalist, by publishing any information subject to a security classification online, will commit an offence. This is because online publication would necessarily make the information available to a foreign principal. Noting that a large number of government documents may be defined as security classified,[49] the extent of the limitation on the right to freedom of expression imposed by these offences is extensive.

1.67 Further, it would appear to still be an offence for a journalist in the above example even if the information were unclassified if it concerned 'Australia's national

47 Proposed section 91.12. This section defines 'espionage' by reference to offences in Division A, sections 91.1, 91.2, 91.3, 91.6 and Division B, section 91.8.

48 See, proposed sections 91.4, 91.9, 91.13. For example, it is a defence where the person dealt with the information or article in accordance with Commonwealth law; the person acted in accordance with an agreement or arrangement to which the Commonwealth was a party; the information is already public with the authority of the Commonwealth.

49 'Security classification' is to have the meaning prescribed by regulation: Proposed 90.5.

security'. The concept of 'national security'[50] in the bill is very broadly defined so that reporting on a range of matters of public significance may be captured including, for example, political, military or economic relations with another country. There do not appear to be any applicable defences available unless the materials were already in the public domain with the Commonwealth's authorisation.[51] Indeed, the proposed offence under section 91.3 applies without any requirement of intention to harm and without any requirement that the person has in mind a particular foreign principal or principals.

1.68 It also appears that these offences may capture the conduct of civil society organisations. For example, if a civil society organisation disclosed unclassified information it had received from a whistleblower to UN bodies, international non-government organisations or foreign governments about, for example, Australia's human rights record, this would appear to be covered by the proposed offence under section 91.3. This is because such information could affect Australia's relations with a foreign country or countries and it would accordingly fall within the definition of 'concerning Australia's national security'. Under the proposed provisions, which make it an offence to deal with information concerning Australia's 'national security' and where that information is made available to foreign principals, there does not appear to be an applicable defence for civil society organisations available unless the information has already been made public with the authorisation of the Commonwealth.

1.69 As such, this raises concerns that the offences as drafted may be overly broad with respect to their stated objective. It is also unclear from the statement of compatibility whether there are adequate and effective safeguards, including relevant defences, to ensure the limitation on the right to freedom of expression is proportionate.

Committee comment

1.70 The measures engage and limit the right to freedom of expression.

1.71 The preceding analysis raises questions about whether the measures are compatible with this right.

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50 Proposed section 90.4 defines '*national security'* of Australia or a foreign country as (a) the defence of the country; (b) the protection of the country or any part of it, or the people of the country or any part of it, from defined activities (espionage; sabotage; terrorism; political violence; activities intended and likely to obstruct, hinder or interfere with the performance of the defence force, foreign interference); (c) the protection of the integrity of the country' s territory and borders from serious threats; (d) the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or a defined activity; (e) the country's political, military or economic relations with another country or other countries.

51 See proposed section 91.4 of the Criminal Code.

1.72 The committee therefore seeks the advice of the Attorney-General as to:

- **how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill; and**
- **whether the limitations are reasonable and proportionate to achieve the stated objective (including in relation to the breadth and types of information subject to espionage provisions, the scope of the definition of 'national security' and the adequacy of safeguards).**

1.73 In light of the information requested above, if it is intended that the espionage offences proceed, advice is also sought as to whether it would be feasible to amend them to:

- **appropriately circumscribe the range of information to which the offences apply;**
- **appropriately circumscribe the definition of what information concerns 'Australia's national interests' where making such information available to a foreign national would constitute a criminal offence;**
- **appropriately circumscribe the definition of 'deals' with information for the purposes of espionage offences under proposed sections 91.1-91.13;**
- **appropriately circumscribe the scope of conduct covered by proposed section 91.3 (by, for example, introducing a harm element);**
- **expand the scope of safeguards and defences; and**
- **include a sunset clause in relation to the espionage provisions in schedule 1.**

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

Compatibility of the measure with the right to be presumed innocent

1.75 As noted above, strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need for the prosecution to prove fault. Strict liability applies to the element of the offence that the information is security classified information.

1.76 Consistently with the concerns in relation to the above strict liability offence (see [1.44] – [1.51]), it is unclear from the information provided whether there could be circumstances where a security classification marking has been removed but the substance of the document is still security classified. It may also be difficult for

persons who are not Commonwealth employees to ascertain whether or not a particular marking on a government document held a 'security classification'.

1.77 Further, there is a concern that the application of a strict liability element to whether information had a 'security classification' means that a person may be found guilty of an offence even where it was not appropriate that the information in question had a security classification. That is, there may be circumstances where information has a security classification which was not appropriately applied or is no longer appropriate.

Committee comment

1.78 The preceding analysis raises questions as to the compatibility of the strict liability element of the offences in proposed sections 91.1 and 91.3 with the right to be presumed innocent.

1.79 The committee therefore requests the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure to achieve a legitimate objective (including the scope of application to persons who may not be aware of the security classification; the ability of courts to consider whether a security classification is inappropriate; and any safeguards).

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

Compatibility of the measure with the right to an effective remedy

1.81 As noted above, the right to an effective remedy requires states parties to ensure a right to an effective remedy for violations of human rights. The breadth of the proposed offence could also affect human rights violations coming to light and being addressed as required by the right to an effective remedy. The engagement of this right was not addressed in the statement of compatibility and accordingly no assessment was provided about this issue.

Committee comment

1.82 The preceding analysis raises questions about whether the measure is compatible with the right to an effective remedy. This right was not addressed in the statement of compatibility.

1.83 The committee therefore seeks the advice of the Attorney-General as to whether the measure is compatible with the right to an effective remedy.

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

Foreign interference offences

1.85 Schedule 1 of the bill introduces new offences relating to foreign interference. The proposed offences would apply where a person's conduct is covert or deceptive, involves threats or menaces or involves a failure to disclose particular connections with a foreign principal or involves preparing for an offence.[52] For example, the offences of foreign interference involving 'targeted persons' provides:

- that a person engages in conduct on behalf of or in collaboration with a foreign principal, or a person acting on behalf of a foreign principal, where the conduct is directed, funded or supervised by a foreign principal (or person acting on their behalf) and the person intends or is reckless as to whether the conduct influences another person (the target) in relation to:
  - a political or government process of the Commonwealth or state or territory; or
  - the target's exercise of an Australian democratic or political right or duty;

  in circumstances where the person conceals from, or fails to disclose to, the target.[53]

1.86 Proposed sections 92.7 to 92.9 also criminalise the provision of support or funding to foreign intelligence agencies.

1.87 The foreign interference offences each carry a maximum term of imprisonment of between 10 and 15 years.[54] The bill contains a number of limited defences to the offences.[55]

Compatibility of the measures with the right to freedom of expression

1.88 By criminalising types of conduct which influence another person, the measures engage and limit the right to freedom of expression. The statement of compatibility does not expressly acknowledge that the proposed foreign offences engage and limit this right and accordingly does not provide a full assessment of whether the limitation is permissible.

1.89 The objective of the bill identified above, summarised as protecting Australia's security and Australian interests, is likely to be capable of being a

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52 Proposed section 90.2 of the Criminal Code defines 'foreign principal' as: (a) a foreign government principal; (b) a public international organisation (c) a terrorist organisation (d) an entity or organisation owned, directed or controlled by a foreign principal within the meaning of paragraph (b) or (c); (e) an entity or organisation owned, directed or controlled by 2 or more foreign principals.

53 Proposed sections 92.2 (2), 92.3(2).

54 Proposed sections 92.3-92.10.

55 Proposed sections 92.5, 92.11.

legitimate objective for the purposes of international human rights law. However, as with the espionage offences discussed above, it is unclear from the information provided whether the measures are rationally connected and proportionate to that objective.

1.90 In relation to the proportionality of the limitation, aspects of the offences appear to be overly broad with respect to the stated objective of the measure. The offences appear to capture a very broad range of conduct, including conduct engaged in by civil society organisations. It is common for civil society organisations to work in collaboration to form international coalitions about campaigns or work with public international organisations. It is noted that public international organisations would fall within the definition of a 'foreign principal'.[56] Accordingly, in this context, if a member of an Australian civil society organisation were to lobby an Australian parliamentarian to adopt a particular policy in the context of a campaign this may constitute a criminal offence under proposed subsection 92.2(2) if the person fails to disclose that their organisation is, for example, collaborating with public international organisations. There do not appear to be any relevant defences to such conduct.[57] This also raises a concern that there appear to be insufficient safeguards, including relevant defences, to protect freedom of expression.

1.91 Further, the offences of providing support to a foreign intelligence agency appear to be very broad. For example, if 'support' were to be given its ordinary meaning, the offence could potentially cover the publication of a news article which reported positively about the activities of a foreign intelligence organisation. There do not appear to be any relevant defences in relation to this kind of conduct.[58]

Committee comment

1.92 The measures engage and limit the right to freedom of expression.

1.93 The preceding analysis raises questions about whether the measures impose a proportionate limit on this right.

1.94 The committee therefore seeks the advice of the Attorney-General as to:

- **how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill; and**
- **whether the limitations are reasonable and proportionate to achieve the stated objective (including in relation to the breadth of the offences and the adequacy of safeguards).**

56 Proposed section 90.2 of the Criminal Code.

57 Proposed section 92.5.

58 Proposed section 92.11.

1.95 In light of the information requested above, if it is intended that the foreign interference offences proceed, advice is also sought as to whether it would be feasible to amend them to:

- **appropriately circumscribe the range of conduct to which the offences apply;**
- **expand the scope of safeguards and defences; and**
- **include a sunset clause in relation to the foreign interference provisions in schedule 1.**

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

Presumption against bail

1.97 Section 15AA of the Crimes Act provides for a presumption against bail for persons charged with, or convicted of, certain Commonwealth offences unless exceptional circumstances exist. Schedule 1 would update references to offences and apply the presumption against bail to the proposed offences in Division 80 and 91 of the Criminal Code (urging violence, advocating terrorism, genocide, offences relating to espionage).[59] It would also apply the presumption against bail to the new foreign interference offences where it is alleged that the defendant's conduct involved making a threat to cause serious harm or a demand with menaces.[60]

Compatibility of the measure with the right to release pending trial

1.98 The right to liberty includes the right to release pending trial. Article 9(3) of the ICCPR provides that the 'general rule' for people awaiting trial is that they should not be detained in custody. The UN Human Rights Committee has stated on a number of occasions that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or

59 See, EM, p. 215.

60 EM, p. 216.

flee from the jurisdiction.[61] As the measure creates a presumption against bail it engages and limits this right.[62]

1.99 In relation to the presumption against bail, the statement of compatibility states:

> The presumption against bail is appropriately reserved for serious offences recognising the need to balance the right to liberty and the protection of the community.[63]

1.100 The statement of compatibility accordingly identifies the objective of the presumption as 'the protection of the community.'[64] In a broad sense, incapacitation through imprisonment could be capable of addressing community protection, however, no specific information was provided in the statement of compatibility about whether the measure is rationally connected to (that is, effective to achieve) the stated objective. In particular, it would be relevant whether the offences to which the presumption applies create particular risks while a person is on bail.

1.101 The presumption against bail applies not only to those convicted of the defined offences, but also those who are accused and in respect of which there has been no determination of guilt. That is, while the objective identified in the statement of compatibility refers to 'community protection' it applies more broadly to those that are accused of particular offences.

1.102 In this respect, the presumption against bail goes further than requiring that bail authorities and courts consider particular criteria, risks or conditions in deciding whether to grant bail. It is not evident from the information provided that the balancing exercise that bail authorities and courts usually undertake in determining whether to grant bail would be insufficient to address the stated objective of 'community protection' or that courts would fail to consider the serious nature of an offence in determining whether to grant bail.[65] This raises a specific concern that the measure may not be the least rights restrictive alternative, reasonably available, as required for it to constitute a proportionate limit on human rights.

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61 See, UN Human Rights Committee, *Smantser v Belarus* (1178/03); *WBE v the Netherlands* (432/90); *Hill and Hill v Spain* (526/93).

62 See, *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010): the ACT Supreme Court declared that a provision of the Bail Act 1992 (ACT) was inconsistent with the right to liberty under section 18 of the ACT *Human Rights Act 2004* which required that a person awaiting trial not be detained in custody as a 'general rule'. Section 9C of the Bail Act required those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before having a normal assessment for bail undertaken.

63 SOC, p. 13.

64 SOC, p. 13.

65 See, *Crimes Act 1914* section 15AB.

1.103 In relation to the proportionality of the measure, the statement of compatibility further states that:

> For offences subject to a presumption against bail the accused will nevertheless be afforded [the] opportunity to rebut the presumption. Further, the granting or refusing of bail is not arbitrary, as it is determined by a court in accordance with the relevant rules and principles of criminal procedure.[66]

1.104 However, a presumption against bail fundamentally alters the starting point of an inquiry as to the grant of bail. That is, unless there is countervailing evidence, a person will be incarcerated pending trial. In this respect, the bill does not specify the threshold for rebutting this presumption, including what constitutes 'exceptional circumstances' to justify bail.

1.105 While bail may continue to be available in some circumstances, based on the information provided, it is unclear that the presumption against bail is a proportionate limitation on the right to release pending trial.[67] Relevantly, in the context of the *Human Rights Act 2004* (ACT) (ACT HRA), the ACT Supreme Court considered whether a presumption against bail under section 9C of the *Bail Act 1992* (ACT) (ACT Bail Act) was incompatible with section 18(5) of the ACT HRA. Section 18(5) of the ACT HRA relevantly provides that a person awaiting trial is not to be detained in custody as a general rule. However, section 9C of the ACT Bail Act contains a presumption against bail in respect of particular offences and requires those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before the usual assessment as to whether bail should be granted is undertaken. *In the matter of an application for Bail by Isa Islam* [2010] ACTSC 147, the ACT Supreme Court considered these provisions and decided that section 9C of the ACT Bail Act was not consistent with the requirement in section 18(5) of the ACT HRA that a person awaiting trial not be detained in custody as a general rule.

Committee comment

1.106 The preceding analysis indicates that there are questions as to the compatibility of the measure with the right to release pending trial.

1.107 The committee seeks the advice of the Attorney-General as to:

- **how the measure is effective to achieve (that is, rationally connected to) its stated objective (including whether offences to which the presumption applies create particular risks while a person is on bail);**

66 SOC, p. 13.

67 See, *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010);

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective including:**
  - **why the current balancing exercise undertaken by bail authorities and courts is insufficient to address the stated objective of the measure;**
  - **whether less rights restrictive alternatives are reasonably available (such as adjusting criteria to be applied in determining whether to grant bail rather than a presumption against bail);**
  - **the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances; and**
  - **advice as to the threshold for rebuttal of the presumption against bail including what is likely to constitute 'exceptional circumstances' to justify bail.**

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

Telecommunications and serious offences

1.109 Schedule 4 of the bill extends the definition of a 'serious offence' in subsection 5D(1)(e) of Part 1.2 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to include the offences provided for in the bill including sabotage, espionage, foreign interference, other threats to security, theft of trade secrets involving government principals, an aggravated offence for giving false and misleading information as well as secrecy offences under proposed section 122.[68] A 'serious offence' for the purpose of the TIA Act is one in respect of which declared agencies can apply for interception warrants to access the content of communications.[69]

Compatibility of the measure with the right to privacy

1.110 The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information and the right to control the dissemination of information about one's private life. By extending the definition of 'serious offence' and thereby permitting agencies to apply for a warrant to access private communications for investigation of such offences, the measure engages and limits the right to privacy.

68 EM, pp. 298-301.

69 See TIA Act section 46.

1.111 As the TIA Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Human Rights Act).[70] The committee is therefore faced with the difficult task of assessing the human rights compatibility of extending the potential access to private communications under the TIA Act without the benefit of a foundational human rights assessment of the Act. On a number of previous occasions the committee has recommended that the TIA Act would benefit from a foundational review of its human rights compatibility.[71]

1.112 The statement of compatibility identifies that the measure engages and limits the right to privacy and argues that it constitutes a permissible limitation on this right. Limitations on the right to privacy will be permissible where they are not arbitrary such that they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

1.113 In relation to the objective of the measures, the statement of compatibility provides that:

> The gravity of the threat posed to Australia's national security by espionage, foreign interference and related activities demonstrates the need to take reasonable steps to detect, investigate and prosecute those suspected of engaging in such conduct. The current lack of law enforcement and intelligence powers with respect to these activities has resulted in a permissive operating environment for malicious foreign actors, which Australian agencies are unable to effectively disrupt and mitigate.[72]

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70 The committee has considered proposed amendments to the TIA Act on a number of previous occasions: See, Parliamentary Joint Committee on Human Rights, Law Enforcement Integrity Legislation Amendment Bill 2012, *Fifth Report of 2012* (October 2012) pp. 21-21; Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *Fifteenth Report of the 44th Parliament* (14 November 2014) pp. 10-22; *Twentieth report of the 44th Parliament* (18 March 2015) pp. 39-74; and *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 133-139; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, *Thirty-second report of the 44th Parliament* (1 December 2015) pp. 3-37 and *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 85-136; the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2016* (22 November 2016) pp. 2-8 and *Report 1 of 2017* (16 February 2017) pp. 35-44; and the Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017* (8 August 2017) pp. 30-33.

71 See, for example, Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access – Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533], *Report 7 of 2017* (8 August 2017) p. 33; Investigation and Prosecution Measures Bill 2017, *Report 12 of 2017* (28 November 2017) p. 88.

72 SOC, p. 19.

1.114 This is likely to constitute a legitimate objective for the purposes of international human rights law. Providing law enforcement agencies access to telecommunications content to investigate serious categories of crime is likely to be rationally connected to this objective.

1.115 In relation to the proportionality of the measure, the statement of compatibility points to the threshold requirements for issuing a warrant:

> Before issuing an interception warrant, the relevant authority must be satisfied that the agency is investigating a serious offence, the gravity of the offence warrants intrusion into privacy and the interception is likely to support the investigation. This threshold acts as a safeguard against the arbitrary or capricious use of the interception regime and also ensures that any interception will be proportionate to the national security objective.[73]

1.116 This is likely to be a relevant safeguard to assist to ensure that the limitation on the right to privacy is necessary. The statement of compatibility further points to independent oversight mechanisms such as the Commonwealth Ombudsman.

1.117 Notwithstanding these important safeguards, there are still some questions in relation to whether the expansion of the definition of 'serious offence' is permissible in the context of the underlying scheme under the TIA Act. In this respect, it appears that while some of the offences are very serious, others are less so. Further information as to why allowing warranted access for the investigation of each criminal offence is necessary would be useful to determining whether the limitation is proportionate.

1.118 In order to constitute a proportionate limitation on the right to privacy, a limitation must only be as extensive as is strictly necessary. However, it is unclear from the statement of compatibility who or what devices could be subject to warranted access under the TIA Act. It is also unclear what safeguards there are in place with respect to the use, storage and retention of telecommunications content. As such it is unclear whether the expanded definitions of 'serious offences' would be permissible limitations.

Committee comment

1.119 The preceding analysis raises questions as to whether the expanded definition of 'serious crimes' is a proportionate limitation on the right to privacy.

1.120 The committee therefore requests the advice of the Attorney-General as to:

- **whether the expanded definition of 'serious offence' in the context of existing provisions of the TIA Act constitutes a proportionate limit on the right to privacy (including why allowing warranted access for the**

73 SOC, pp. 19-20.

investigation of each criminal offence is necessary; who or what devices could be subject to warranted access; and what safeguards there are with respect to the use, storage and retention of telecommunications content); and

- **whether an assessment of the TIA Act could be undertaken to determine its compatibility with the right to privacy.**

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

Amendments to the Foreign Influence Transparency Scheme legislation

1.122 Schedule 5 seeks to amend the definition of 'general political lobbying' in section 10 of the Foreign Influence Transparency Bill 2017 (the foreign influence bill) to include within the definition lobbying of 'a person or entity that is registered under the *Commonwealth Electoral Act* as a political campaigner'.[74] The effect of the amendments is that a person may be liable to register under the proposed foreign influence transparency scheme where they lobby a registered political campaigner on behalf of a foreign principal 'for the purpose of political or governmental influence'.[75]

1.123 The reference to 'political campaigner' in item 3 incorporates the proposed amendments to the *Commonwealth Electoral Act 1918* that are currently before Parliament in the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the electoral funding bill). As such, section 2 of the bill provides that if either of the foreign influence bill or electoral funding bill does not pass, part 2 of schedule 5 will not commence.

1.124 'Political campaigner' is defined in the electoral funding bill to mean a person or entity that incurs 'political expenditure' during the current, or in any of the previous three, financial years of $100,000 or more.[76] 'Political expenditure' is expenditure incurred for a 'political purpose', the latter of which is defined in the electoral funding bill to include (relevantly) 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, and the public expression by any means of views on

74 See item 3 of part 2 of schedule 5.

75 See explanatory memorandum to the bill, p. 303.

76 See proposed section 287F of the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (the electoral funding bill). Additionally, an entity must register as a political campaigner if their political expenditure 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.

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).[77]

1.125 Item 4 of the bill also seeks to amend section 12 of the foreign influence bill to expand the circumstances in which an activity is done for 'political or governmental influence'. The amendments provide that a person will undertake activity on behalf of a foreign principal for the purpose of political or governmental influence if the purpose of the activity is to influence, directly or indirectly, any aspect of 'processes in relation to a person or entity registered under the *Commonwealth Electoral Act 1918* as a political campaigner'.[78] Item 5 further adds to section 12 examples of 'processes in relation to' a registered political campaigner:

> (a) processes in relation to the campaigner's:
>
> (i) constitution; or
>
> (ii) platform; or
>
> (iii) policy on any matter of public concern; or
>
> (iv) administrative or financial affairs (in his or her capacity as a campaigner, if the campaigner is an individual); or
>
> (v) membership; or
>
> (vi) relationship with foreign principals within the meaning of paragraph (a),(b) or (c) of the definition of *foreign principal* in section 10,[79] or with bodies controlled by such foreign principals;
>
> (b) the conduct of the campaigner's campaign in relation to a federal election or designated vote;
>
> (c) the selection (however done) of officers of the campaigner's executive or delegates to its conferences;
>
> (d) the selection (however done) of the campaigner's leader and any spokespersons for the campaign.

Compatibility of the measure with multiple rights

Previous committee comment on the Foreign Influence Transparency Scheme Bill

1.126 The committee considered the foreign influence bill in its *Report 1 of 2018*.[80] In that report, the committee sought further information from the Attorney-General

77 Proposed section 287(1) of the electoral funding bill.

78 Proposed section 12(1)(g) in item 4 of schedule 5 of the bill.

79 foreign principal means: (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.

80 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 34-44.

as to the compatibility of the proposed foreign influence transparency scheme with the freedom of expression,[81] the freedom of association,[82] the right to take part in the conduct of public affairs,[83] and the right to privacy.[84]

1.127 The committee raised concerns in relation to limitations on these rights due to the breadth of the definitions of 'foreign principal', 'on behalf of' and 'for the purpose of political or governmental influence', and whether those definitions caught within the scope of the scheme an uncertain and potentially very broad range of conduct. The committee noted:

> 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. Such behaviour would appear to fall within the types of registrable 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' for the purpose of influencing 'a process in relation to a federal government decision'.[85]

1.128 The committee also noted that the definition of 'foreign principal' coupled with the definition of 'on behalf of' was very broad:

> 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

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81 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.

82 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.

83 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.

84 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 informational privacy, including the right to control the dissemination of information about one's private life.

85 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 39-40.

> 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.[86]

1.129 The committee noted that the breadth of these definitions, their potential application, the cost of compliance and the consequence of non-compliance raised concerns that the foreign influence bill may be insufficiently circumscribed.[87]

Previous committee comment on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

1.130 The committee has considered the electoral reform bill in its *Report 1 of 2018*.[88]

1.131 The committee sought advice from the minister as to the compatibility of the obligation to register as a 'political campaigner' 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. In particular, the committee noted that concerns arose in relation to the breadth of the definition of 'political expenditure' that triggers the obligation to register as a political campaigner. 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. This would appear to capture activities that arise in an election 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. The committee noted:

> Thus, the ambiguity in the definition of 'political expenditure' …could lead to considerable uncertainty 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

86 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 43.

87 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 41.

88 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 11-29.

> 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.[89]

1.132 The committee also noted that an additional issue that arose was that as a consequence of registration, personal information about individuals may be publicly available. The committee noted:

> 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.[90]

Compatibility of the amendments

1.133 The statement of compatibility to the bill does not specifically address the amendments that are introduced by schedule 5 of the bill. However, as these amendments broaden the scope of the foreign influence transparency scheme by including lobbying of 'political campaigners' on behalf of foreign principals, the existing human rights concerns with the operation of the foreign influence bill and the electoral funding bill are equally applicable here.

1.134 In particular, as noted in the initial analysis of the electoral funding bill, because the definition of 'political campaigner' may capture a broad variety of persons or entities who undertake expenditure for a 'political purpose', this may give rise to considerable uncertainty as to which persons and entities are required to register, and also raises potential concerns that rather than providing greater transparency the measure may create confusion in certain circumstances about degrees of political connection.[91] By introducing an obligation to register under the foreign influence transparency scheme for persons who lobby political campaigners on behalf of foreign principals, the uncertainty that is introduced with the concept of 'political campaigner' is incorporated into the foreign influence bill.

1.135 There are also related concerns about the expanded definition of 'political or governmental influence' to include processes relating to the internal functioning of the political campaigner, such as its constitution, administration and membership. It is not clear how introducing a registration obligation on persons or entities who lobby political campaigners in such circumstances is rationally connected to the stated objective of the foreign influence bill (namely, 'to enhance government and

89 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 16-17.

90 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 17.

91 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) p. 17.

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'[92]). Further, concerns also arise as to whether the expanded definition of 'political or governmental influence' is proportionate, having regard to the principle that limitations must be sufficiently circumscribed to ensure that they are only as is strictly necessary to achieve their objective.

Committee comment

1.136 The statement of compatibility does not address the human rights compatibility of schedule 5 of the bill, which amends the Foreign Influence Transparency Scheme Bill 2017 by incorporating the concept of 'political campaigner' from the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017. However, as noted in its *Report 1 of 2018,* the proposed foreign influence transparency scheme and the electoral funding reform bill engage and limit the freedom of expression, the freedom of association, the right to take part in the conduct of public affairs, and the right to privacy.

1.137 The committee therefore seeks the advice of the Attorney-General as to whether the amendments to the Foreign Influence Transparency Scheme Bill 2017 introduced by schedule 5 pursue a legitimate objective, are rationally connected and proportionate to that objective. In particular:

- **whether introducing a requirement for persons to register under the foreign influence transparency scheme when they lobby a 'political campaigner' on behalf of a foreign principal is sufficiently circumscribed, having regard to the definition of 'political campaigner' in the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017; and**
- **whether expanding the definition of 'political or governmental influence' to include the matters raised in item 5 of schedule 5 is rationally connected to the objective of the foreign influence transparency scheme, and whether it is sufficiently circumscribed so as to constitute a proportionate limitation on human rights.**

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

92 Statement of compatibility to the foreign influence bill, [21], [85].

Advice only

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

Social Security (Administration) (Recognised State/Territory Authority – Northern Territory Department of Health) Determination 2017 [F2017L01371]

Purpose	Determines the Northern Territory Department of Health as a recognised State/Territory authority for the purposes of Part 3B of the *Social Security (Administration) Act 1999*.
Portfolio	Social Services
Authorising legislation	*Social Security (Administration) Act 1999*
Last day to disallow	15 sitting days after tabling (tabled Senate 13 November 2017). Notice of motion to disallow currently must be given by 8 February 2018
Rights	Multiple Rights (see **Appendix 2**)
Status	Advice only

Background

1.140 The *Social Security (Administration) Act 1999* provides the legislative basis for the income management regime for certain welfare recipients in the Northern Territory and other prescribed locations.[1] Income management limits the amount of income support paid to recipients as unconditional cash transfers and imposes restrictions on how the remaining 'quarantined' funds can be spent. A person's income support can be subject to automatic deductions to meet 'priority needs', such as food, housing and healthcare. The remainder of the restricted funds can only be accessed using a 'BasicsCard', which can only be used in certain stores and cannot be used to purchase 'excluded goods' or 'excluded services'.[2]

1.141 A person on welfare benefits can voluntarily sign up for income management, or be made subject to compulsory income management.

1 See *Social Security (Administration) Act 1999*, Part 3B.

2 See, further, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 39.

1.142 The committee examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.[3] In its 2016 review, the committee noted that the income management measures engage and limit the right to equality and non-discrimination, the right to social security and the right to privacy and family.[4]

Determining the Northern Territory Department of Health as a recognised State/Territory authority for the purposes of Part 3B of the *Social Security (Administration) Act 1999*

1.143 The Social Security (Administration) (Recognised State/Territory Authority – Northern Territory Department of Health) Determination 2017 (the determination) determines the Northern Territory Department of Health as a recognised State/Territory authority for the purposes of Part 3B of the Social Security (Administration) Act. The effect of being recognised as a State/Territory authority is that an officer or employee of the Northern Territory Department of Health may give the Secretary of the relevant Commonwealth department a written notice requiring that a person be subject to income management.[5]

1.144 The determination replaces the Social Security (Administration) (Recognised State/Territory Authority – NT Alcohol Mandatory Treatment Tribunal) Determination 2013 which recognised the NT Alcohol Mandatory Treatment Tribunal (AMTT) as a State/Territory authority for the purposes of Part 3B. The AMTT previously had responsibility for issuing notices that people be subject to income management in accordance with the *Alcohol Mandatory Treatment Act 2013* (NT) (AMT Act).

1.145 However, the AMT Act and AMTT framework were repealed and replaced by the *Alcohol Harm Reduction Act 2017* (NT) (Alcohol Harm Reduction Act). The Alcohol Harm Reduction Act establishes a legal framework for making banned drinker orders (BDOs) to enable adults to be registered on the banned drinkers register (BDR). BDOs and the BDR are facilitated by the BDR Registrar, who is located within the Northern Territory Department of Health and is an employee of that department.

1.146 The Alcohol Harm Reduction Act provides that the BDR Registrar may order than an adult is required to be subject to income management if the BDR Registrar is satisfied that:

(a) either:

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3 See Parliamentary Joint Committee on Human Rights*, Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (27 June 2013) and *2016 Review of Stronger Futures measures* (16 March 2016).

4 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 61.

5 Explanatory Statement (ES), p. 1.

(i) a BDO is in force for the adult for a period of 12 months; or

(ii) a BDO will be in force for the adult for a period of 12 months when the income management order comes into force; and

(b) the adult would benefit from the making of an income management order; and

(c) the adult, or the adult's partner, is an eligible recipient of a category H welfare payment under Part 3B of the Social Security Administration Act.[6]

Compatibility of the measure with multiple rights

1.147 The 2016 Review considered that income management, including the income management referral scheme undertaken by the former AMTT,[7] engages and limits the following rights:

- the right to equality and non-discrimination;
- the right to social security; and
- the right to privacy and family.

1.148 Each of these rights is discussed in detail in the context of the income management regime in the committee's *2016 Review of Stronger Futures measures* (2016 Review).[8]

1.149 The statement of compatibility for the determination recognises that multiple rights are engaged and limited by the determination. In relation to the right to social security, the statement of compatibility explains that income management does not reduce a person's social security payment, it just changes the way the person receives it.[9] The statement of compatibility further states that to the extent income management may disproportionately affect Indigenous Australians, any such limitation is reasonable and proportionate.[10] Further, it states that the limitation on how a person accesses and spends their money is a proportionate limitation on a person's right to a private life in order to achieve the objectives of ensuring income support payments are used to meet the essential needs of vulnerable people and their dependents.[11] It concludes:

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6 Section 27 of the *Alcohol Harm Reduction Act 2017* (NT).

7 See Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 38 and p. 41.

8 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) pp. 43-63.

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

10 SOC, pp. 7-8.

11 SOC, p. 9.

> The recognition of the Northern Territory Department of Health as an income management referring authority will advance the protection of human rights by ensuring that income support payments are spent in the best interests of welfare payment recipients and their dependents. To the extent the determination may limit human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objective of income management.[12]

1.150 In the 2016 Review, the committee accepted that the income management regime pursues a legitimate objective for the purposes of international human rights law, but questioned whether the measures were rationally connected to achieving the stated objective and were proportionate.[13] The committee's report noted:

> While the income management regime may be of some benefit to those who voluntarily enter the program, it has limited effectiveness for the vast majority of people who are compelled to be part of it.[14]

1.151 The previous regime for referral to income management under the AMT Act required the AMTT to make an income management order if a person is subject to a mandatory treatment order.[15] In its 2016 review, the committee noted that the availability of any individual assessment of whether income management was appropriate for persons who received payments was relevant in assessing the proportionality of the measure:

> In assessing whether a measure is proportionate some of the relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case, whether affected groups are particularly vulnerable, and whether there are other less restrictive ways to achieve the same aim…[16]

1.152 The BDR Registrar's powers in the Alcohol Harm Reduction Act provide greater flexibility to consider individual circumstances when determining whether

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12 SOC, p. 9.

13 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 42.

14 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 52.

15 Section 34 of the *Alcohol Mandatory Treatment Act 2013.* A mandatory treatment order was able to be made when the AMTT considered that an adult is misusing alcohol, had lost the capacity to make appropriate decisions about their alcohol use or personal welfare and the misuse was a risk to their health, safety or welfare or to others: see Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 41.

16 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 52.

income management should be ordered, including considering whether 'the adult would benefit from the making of an income management order'. An adult who is subject to income management may also apply to the BDR Registrar for variation or revocation of an income management order, and upon such application the BDR Registrar may vary or revoke the order if satisfied that it is appropriate to do so having regard to the criteria for making the order.[17] The new determination, and the income management referral scheme under the Alcohol Harm Reduction Act enabled by the determination, is therefore an improvement to the continuing compulsory income management as it allows flexibility to treat different cases differently and provides for consideration of a person's individual suitability for the program.

1.153 However, notwithstanding the greater flexibility to consider individual circumstances, the income management orders made by the BDR Registrar still impose compulsory, rather than voluntary, income management. The committee previously raised concerns in its 2016 review that imposing income management compulsorily may not be the least rights restrictive means of achieving the legitimate objectives of the measure.[18] Therefore, insofar as the regime does not operate voluntarily, the concerns raised in the 2016 Review regarding compulsory income management remain.

Committee comment

1.154 The effect of the determination is that an officer or employee of the Northern Territory Department of Health may give the Secretary a written notice requiring that a person be subject to income management.

1.155 Noting the human rights concerns regarding income management identified in the committee's *2016 Review of Stronger Futures measures*, the committee draws the human rights implications of the determination to the attention of the Parliament.

17 Section 29 of the *Alcohol Harm Reduction Act 2017.*

18 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) pp. 60-61.

Bills not raising human rights concerns

1.156 Of the bills introduced into the Parliament between 5 and 8 February, 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):

- Commonwealth Inscribed Stock Amendment (Debt Ceiling) Bill 2018;
- Fair Work Amendment (Improving National Employment Standards) Bill 2018;
- Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2018;
- Road Vehicle Standards Charges (Imposition—Customs) Bill 2018;
- Road Vehicle Standards Charges (Imposition—Excise) Bill 2018;
- Road Vehicle Standards Charges (Imposition—General) Bill 2018;
- Road Vehicle Standards (Consequential and Transitional Provisions) Bill 2018;
- Treasury Laws Amendment (2018 Measures No. 1) Bill 2018; and
- Treasury Laws Amendment (2018 Measures No. 2) Bill 2018.