

## Chapter 1

### New and ongoing matters

1.1 The committee comments on the following bill and legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

### Bills

#### Counter-Terrorism and Other Legislation Amendment Bill 2023<sup>1</sup>

<b>Purpose</b>	<p>This bill seeks to extend for 12 months the following Australian Federal Police counter-terrorism powers that are scheduled to sunset on 7 December 2023:</p> <ul style="list-style-type: none"> <li>• the control order regime in Division 104 of the <i>Criminal Code Act 1995</i>;</li> <li>• the preventative detention order regime in Division 105 of the <i>Criminal Code Act 1995</i>; and</li> <li>• the stop, search and seizure powers in Division 3A of Part IAA of the <i>Crimes Act 1914</i>.</li> </ul> <p>The bill also seeks to amend provisions relating to the control order regime, and stop, search and seizure powers in Division 3A of the <i>Crimes Act 1914</i>, and make other consequential amendments</p>
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 10 August 2023
<b>Rights</b>	Children's rights; fair hearing; freedom of association; freedom of expression; freedom of movement; liberty; privacy; torture or cruel, inhuman or degrading treatment or punishment

<sup>1</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism and Other Legislation Amendment Bill 2023, *Report 9 of 2023*; [2023] AUPJCHR 86.

## Extension of counter-terrorism powers

1.2 This bill seeks to extend, by three years, the operation of several counter-terrorism related provisions which are due to sunset on 7 December 2023. In particular, the bill would extend the operation of:

- (a) the stop, search and seizure powers in Division 3A of the *Crimes Act 1914* (Crimes Act), which provides a range of powers for the Australian Federal Police (AFP) and state and territory police to exercise in a Commonwealth place (such as an airport) relating to counter-terrorism;<sup>2</sup>
- (b) the control order regime in Division 104 of the *Criminal Code Act 1995* (Criminal Code), which allows courts to impose conditions on a person restricting their ability to do certain things;<sup>3</sup> and
- (c) the preventative detention order regime in Division 105 of the Criminal Code, which allows a person to be taken into custody and detained if it is suspected on reasonable grounds that they are preparing to engage in a terrorist act.<sup>4</sup>

1.3 The bill would also extend, by 12 months, the operation of section 122.4 of the Criminal Code, which makes it an offence for a current or former Commonwealth officer to disclose information without authorisation.<sup>5</sup>

## Preliminary international human rights legal advice

### ***Multiple rights***

1.4 The powers sought to be extended by this measure are intended to protect Australia's national security interests and protect against the possibility of terrorist acts in Australia. As such, if these powers were capable of assisting to achieve these objectives, it would appear that extending these powers would promote the rights to life and security of person. The right to life includes an obligation on the state to protect people from being killed by others or identified risks. The right to security of person requires the state to take steps to protect people against interference with personal integrity by others.

1.5 However, the extended powers also engage and limit numerous human rights, including the:

- right to liberty;

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<sup>2</sup> Schedule 1, item 9, *Crimes Act 1914* (Crimes Act), section 3UK.

<sup>3</sup> Schedule 2, Part 1, item 42; *Criminal Code Act 1995* (Criminal Code), section 104.32.

<sup>4</sup> Schedule 2, Part 1, item 51; Criminal Code, section 105.53.

<sup>5</sup> Schedule 2, Part 2, item 63.

- right to freedom of movement;
- right to a fair trial and fair hearing;
- right to privacy;
- right to freedom of expression;
- right to freedom of association;
- right to equality and non-discrimination;
- right to be treated with humanity and dignity;
- right to the protection of the family;
- right to work;
- rights to social security and an adequate standard of living; and
- rights of children.

1.6 The statement of compatibility does not provide an analysis of the proposed extension of these powers with the right to equality and non-discrimination, right to be treated with humanity and dignity, right to protection of the family, right to work, right to social security, or the right to an adequate standard of living.<sup>6</sup>

1.7 These measures were first introduced in 2005, pursuant to the *Anti-Terrorism Act (No. 2) 2005*, and their operation has been extended several times since then. Consequently, the committee has considered the human rights compatibility of the provisions that are sought to be extended by this measure on numerous occasions.<sup>7</sup> The committee has previously found that while all of the measures likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate. As a result, the committee has previously found the measures were likely to be incompatible with a range of human rights.

1.8 While the bill seeks to make several amendments to these three measures (proposed amendments which are considered below), the same human rights concerns as were previously raised apply in relation to the further proposed extension of these coercive powers.

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<sup>6</sup> Statement of compatibility, pp. 14–40.

<sup>7</sup> See most recently, Parliamentary Joint Committee on Human Rights, [Report 4 of 2022](#) (28 September 2022), pp. 7-11; [Report 10 of 2018](#) (18 September 2018) pp. 25-53.

1.9 In addition, there are questions as to whether these powers remain necessary. Notably, prior to the introduction of this bill, Australia's National Terrorism Threat Level (threat level) was downgraded for the first time since 2014. From 2014 to November 2022, Australia's threat level was rated as 'probable', meaning there was 'credible intelligence assessed by Australia's security agencies indicating that individuals and groups have the intent and capability to conduct a terrorist act in Australia'.<sup>8</sup> This threat level was in place when the operation of these measures was last extended by the Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022 (2022 bill) (introduced on 8 September 2022 and received Royal Assent on 9 November 2022). It was also Australia's threat level when the Parliamentary Joint Committee on Intelligence and Security (PJCIS) last reviewed these powers in 2021 (a review which the measures in this bill are largely in response to).<sup>9</sup>

1.10 However, on 28 November 2022, 21 days after the passage of the 2022 bill, the Australian Security Intelligence Organisation (ASIO) reduced Australia's threat level to 'possible'. This threat level indicates that 'there is credible intelligence that, whilst Australia is a possible target of terrorists, there is limited intention or capability to conduct an attack'.<sup>10</sup> The explanatory memorandum states that, in announcing this change, the Director-General of ASIO had noted that lowering the threat level does not mean that the threat of terrorism is extinguished, and that terrorism 'is an enduring and evolving threat'.<sup>11</sup> However, at that time the Director-General also noted that the decision to lower this threat level took place following careful consideration and consultation, which concluded that 'while Australia remains a potential terrorist target, there are fewer extremists with the intention to conduct an attack onshore than there were when we raised the threat level in 2014'.<sup>12</sup> Similarly, the explanation relating to this change in threat level notes that '[t]he factors that led to an elevation of the terrorism threat level in 2014 no longer exist, or persist to a lesser degree'.<sup>13</sup>

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<sup>8</sup> Australia's National Terrorism Threat Level is a five-level scale advising as to the likelihood of an act of terrorism in Australia consisting of: certain; expected; probable; possible; and not expected. See, [www.nationalsecurity.gov.au](http://www.nationalsecurity.gov.au).

<sup>9</sup> See, explanatory memorandum accompanying the Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022, p. 3. See also, Parliamentary Joint Committee on Intelligence and Security, *Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime* (October 2021), para [2.56].

<sup>10</sup> Explanatory memorandum, p. 4.

<sup>11</sup> Explanatory memorandum, p. 4.

<sup>12</sup> Director-General of Security Mr Mike Burgess, [speech](#), 28 November 2022.

<sup>13</sup> Australia National Security, [Current National Terrorism Threat Level](#) (accessed 16 August 2023, page last updated 28 November 2022).

1.11 The explanatory memorandum notes Australia's current threat level, and states that the proposed amendments:

would support Australia's counter-terrorism framework, ensuring that the Government and agencies continue to have appropriate tools to protect the community from the risk of terrorism, and improve the operational effectiveness of, and safeguards that apply in relation to the use of, those tools.<sup>14</sup>

1.12 However, no specific information is provided to demonstrate the continuing need for these powers *despite* this reduction in the terrorism threat level in the intervening period. While the explanatory memorandum states that the threat of terrorism is not extinguished, it is not clear that the threat of terrorism could ever be said to be entirely extinguished. Further, it is noted that the stop, search and seizure powers in Division 3A of the Crimes Act, and the preventative detention order powers in the Criminal Code, have never been used since their introduction.<sup>15</sup>

1.13 With respect to control orders, the explanatory memorandum states that this bill is intended to implement the PJCIS's recommendation that the regime's operation be extended for three years.<sup>16</sup> In this regard, it is noted that 28 control orders have been made against 21 individuals (including one against a child) since September 2014.<sup>17</sup> In its review of these powers the PJCIS noted that submitters had highlighted the potential impact that the extended supervision order (ESO) scheme may have on the ongoing utility of the control order regime. ESOs are used to monitor a terrorist offender once they are released from prison.<sup>18</sup> The PJCIS considered it was necessary to evaluate the ESO scheme before determining that the control order scheme was no longer necessary.<sup>19</sup> The PJCIS is currently undertaking a review of the operation and effectiveness of post-sentence terrorism orders in Division 105A of the Criminal Code (including ESOs).<sup>20</sup> This raises

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<sup>14</sup> Explanatory memorandum, p. 4.

<sup>15</sup> The Hon Mark Dreyfus MP, Attorney General, the Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022, [Second Reading speech](#), *House of Representatives Hansard*, 8 September 2022, p. 3.

<sup>16</sup> Explanatory memorandum, p. 64.

<sup>17</sup> The Hon Mark Dreyfus MP, Attorney General, [Second Reading speech](#), *House of Representatives Hansard*, 10 August 2023, p. 1.

<sup>18</sup> The *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* introduced extended supervision orders.

<sup>19</sup> Parliamentary Joint Committee on Intelligence and Security (PJCIS), [Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime](#), October 2021, paras [3.64]–[3.67].

<sup>20</sup> PJCIS, [Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995](#) (referred 11 May 2023).

further questions as to why it is necessary to extend the control order regime for three years, given that a relevant review of related powers is currently underway.

1.14 In addition, with respect to the proposed further extension of the stop, search and seizure powers in Division 3A of the Crimes Act, the explanatory memorandum cites a 2017 report by the Independent National Security Legislation Monitor (INSLM), which concluded that the police stop, search and seizure powers are consistent with Australia's human rights, are proportionate to the current threats of terrorism and to national security, and are necessary.<sup>21</sup> This report includes lengthy consideration of Australia's human rights obligations.<sup>22</sup> However, it incorrectly states that the human rights impact of Division 3A of the Crimes Act had, at this time, only been considered by the Senate Legal and Constitutional Affairs Legislation Committee and the Council of Australian Government (COAG) Review Committee.<sup>23</sup> In fact, at the time of the review, this committee had tabled advice to Parliament raising concerns as to compatibility of Division 3A of the Crimes Act with Australia's international human rights law obligations on three occasions.<sup>24</sup> Given the review's failure to identify the specialist advice to Parliament as to the human rights compatibility of these measures, the value of this assessment by the INSLM in 2017, as cited in the explanatory memorandum, would appear to be extremely limited.

1.15 As such, noting the committee's previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and the absence of specific information as to the continued necessity of all these powers despite the recent reduction in Australia's terrorist threat level, further information is required to establish whether there is an ongoing necessity for the control order, preventative detention order and stop, search and seizure provisions.

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<sup>21</sup> Explanatory memorandum, p 5. See also, Independent National Security Legislation Monitor (INSLM), [Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers](#) (September 2017).

<sup>22</sup> INSLM, [Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers](#), pp. 14–21.

<sup>23</sup> INSLM, [Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers](#), p. 19 with respect to Senate Legal and Constitutional Legislation Committee, *Report on Provisions of the Anti-Terrorism Bill (No 2) 2005* (November 2005) and COAG Review Committee, *Report of the Council of Australian Governments Review of Counter-Terrorism Legislation* (1 March 2013).

<sup>24</sup> In particular, the assessment of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. Parliamentary Joint Committee on Human Rights, [14<sup>th</sup> Report of the 44<sup>th</sup> Parliament](#) (28 October 2014), pp. 3–69; [19<sup>th</sup> Report of the 44<sup>th</sup> Parliament](#) (3 March 2015), p. 112; and [30<sup>th</sup> Report of the 44<sup>th</sup> Parliament](#) (10 November 2015), pp. 82–101.

## Committee view

1.16 The committee notes it has previously concluded that while the measures sought to be extended by this bill likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate, and therefore were likely to be incompatible with a range of human rights.

1.17 The committee notes that the measures in this bill are in response to recommendations of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) arising from a review conducted in October 2021. The committee notes that some of these amendments seek to increase some oversight and accountability with respect to the exercise of these powers. While this may be desirable, the committee notes that such amendments do not assist with the human right compatibility of the measures.

1.18 The committee considers that questions arise as to the ongoing necessity for these powers, noting in particular that since the PJCIS reviewed these powers in 2021, Australia's terrorism threat level has been downgraded and the PJCIS is currently undertaking a review of related counter-terrorism powers, which it has identified as being relevant to an assessment of whether control order powers continue to be necessary.<sup>25</sup>

1.19 The committee considers that further information is required to assess the compatibility of these measures with human rights, and as such seeks the Attorney General's advice in relation to:

- (a) the ongoing necessity of these powers despite the recent downgrade in Australia's national terrorist threat level;
- (b) why it is proposed that these measures be extended for three years, and not a shorter period of time; and
- (c) why it is proposed that the control orders regime be extended despite the current PJCIS inquiry into matters it has identified as being relevant to an assessment of the ongoing necessity of control orders.

1.20 The committee further notes that the explanatory materials cite a 2017 review of the stop, search and seizure powers in Division 3A of the *Crimes Act 1914* conducted by the Independent National Security Legislation Monitor, which concluded that these measures were consistent with Australia's human rights obligations. The committee is concerned that this review failed to identify that this committee had, in 2017, provided advice to Parliament as to the compatibility of these stop, search and seizure powers with

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<sup>25</sup> PJCIS, [Review of post-sentence terrorism orders: Division 105A of the Criminal Code Act 1995](#) (referred 11 May 2023).

human rights on three occasions. As such, the committee intends to write to the INSLM to explain this committee's role in providing specialist human rights advice to Parliament.

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### **Proposed amendments to counter-terrorism powers**

1.21 In addition to seeking to extend the operation of these counter-terrorism provisions, the bill also seeks to amend provisions relating to control orders and stop, search and seizure powers.

1.22 In particular, the bill seeks to make several amendments to the control order regime in Division 104 of the Criminal Code.<sup>26</sup> These would largely extend the available conditions under control orders to include all of those conditions currently available with respect to extended supervision orders.<sup>27</sup> The bill would repeal and replace sections 104.5 and 104.5A, which specify the particular conditions and obligations that a court may impose on a person under a control order.<sup>28</sup> In particular, proposed new section 104.5A would provide that a court's ability to impose conditions on a person is not limited by the section, and would further provide that a court may impose conditions that 'relate to' a listed matter.

1.23 The proposed amendments would introduce several new conditions that may be imposed on a person subject to a control order. These would include conditions that relate to requiring a person to:

- (a) reside at specified premises and not begin to reside at any other premises without prior permission from a specified authority;
- (b) surrender travel documents (including passports) and not apply for any travel documents;
- (c) not change their name or use another name;
- (d) not apply for a heavy vehicle or a weapon, or any licence to possess a weapon;
- (e) not engage in any education or training without prior written permission from a specified authority;
- (f) provide specified information to a specified authority within a specified period or before a specified event;
- (g) attend at places, and report to persons at specified times;

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<sup>26</sup> Schedule 2, Part 1, items 3–42.

<sup>27</sup> See, Criminal Code, Division 105, subdivisions A–EA.

<sup>28</sup> Schedule 2, item 11.



- (h) provide a schedule setting out their proposed movements for a specified period and comply with that schedule for that period;
- (i) allow any police officer to enter specified premises to search them, their residence, or any premises they intend to reside in, search any other premises under their control, and seize any item found during those searches (including allowing them to be examined forensically); and/or
- (j) facilitate access to electronic equipment or technology (including by providing passwords or in any other way), or any data held within or accessible from it, which is owned or controlled by them, for the purposes of police searching and seizing or accessing any such equipment or data.

1.24 The bill would also broaden several existing conditions, to include requirements that a person:

- (a) not be present at specified place or area, classes of places or areas, or any area or place determined by a specified authority;
- (b) not leave Australia, or the state or territory in which they reside;
- (c) not communicate or associate by any means (including through third parties) with specified individuals or classes of individuals, or any individuals determined by a specified authority;
- (d) attend and participate in treatment, rehabilitation or intervention programs or counselling, and/or undertake psychological or psychiatric assessment or counselling, including as directed by a specified authority (including where they do not agree to do so);
- (e) attend and participate in interviews and assessments (including for the purposes of the matters set out at (d) immediately above) and allow the results of these, and any other specified information, to be disclosed to a specified authority;
- (f) comply with any reasonable direction by a specified authority in relation to any specified condition;
- (g) not possess or use specified articles or substances, and submit to testing in relation to them; and/or
- (h) remain at specified premises between specified times for up to 12 hours per day, and allow visits at specified premises by a specified authority at any time to ensure compliance with this.<sup>29</sup>

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<sup>29</sup> See Schedule 2, item 11, proposed section 104.5A.

1.25 The bill would permit a court to specify that certain conditions in a control order are exemption conditions, meaning conditions from which the person may apply to a specified authority in writing for a temporary exemption.<sup>30</sup> In addition, the bill would create a new mechanism by which the AFP, or the affected individual, may apply to the issuing court to vary a control order by either varying or removing existing conditions or imposing further additional conditions.<sup>31</sup> The court would be able to vary the order if satisfied that: the other party consents to the variation; the variation is 'appropriate in all the circumstances'; and, where the affected individual is a child, the variation is in their best interests, having regard to any variations they make in relation to the proposed variation and any other matters the court considers to be relevant.<sup>32</sup>

1.26 The bill would also amend the circumstances in which a court may make an interim control order. Currently, the court must be satisfied that each of the proposed obligations, prohibitions or restrictions is reasonably necessary, appropriate and adapted towards preventing a terrorist act, taking into account: the objects of Division 101 of the Criminal Code (as a paramount consideration); the best interests of the child (as a primary consideration, where applicable); and the impact of these proposed conditions on the person's financial and personal circumstances.<sup>33</sup> The bill would require the court to also be satisfied that these criteria are met having regard to the combined effect of all the proposed conditions.<sup>34</sup>

1.27 With respect to the stop, search and seizure powers in Division 3A of the Crimes Act, the bill would provide that where a police officer exercises their stop and search powers with respect to terrorism related items, they must inform the person of their right to make a complaint to the Commonwealth Ombudsman or other oversight body (unless not reasonably practicable to do because of circumstances of urgency).<sup>35</sup> It would require a minister to have regard to a range of matters before declaring a Commonwealth place to be a prescribed security zone, including the availability of existing laws to assist in responding to a threat of terrorism, and whether the impact on the rights of persons in the place would be reasonable and proportionate.<sup>36</sup> Further, it would permit such declarations to be made for a shorter period than the current default minimum of

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<sup>30</sup> Schedule 2, item 11.

<sup>31</sup> Schedule 2, Part 1, item 26, proposed s 104.22.

<sup>32</sup> A decision by the AFP to provide or refuse consent to vary a control order would not be subject to judicial review. See, Schedule 2, Part 1, items 57—58, proposed amendments to the *Administrative Decisions (Judicial Review) Act 1977*.

<sup>33</sup> Criminal Code, section 104.4.

<sup>34</sup> Schedule 2, items 5 and 7.

<sup>35</sup> Schedule 1, item 2, Crimes Act, proposed subsections 3UD(1A) and (1B).

<sup>36</sup> Schedule 1, item 3, Crimes Act, proposed subsection 3UJ(1A).

28 days.<sup>37</sup> It would also require that the Commonwealth Ombudsman, INSLM and PJICIS be notified of a declaration being made within 72 hours.<sup>38</sup>

1.28 The bill would also make minor amendments to other counter-terrorism measures. It would limit the classes of persons who may be appointed as an issuing authority for preventative detention orders to Judges of the Federal Court of Australia or the Supreme Court of a State or Territory only.<sup>39</sup> It would also amend the annual reporting requirements that apply with respect to continuing detention orders and extended supervision orders, requiring the inclusion of specified additional statistical and financial information.<sup>40</sup>

## **Preliminary international human rights legal advice**

### ***Multiple rights***

1.29 The proposed amendments to these measures engage and limit multiple human rights, as identified above at paragraph [1.5].

1.30 Some of these proposed amendments may provide for greater oversight and accountability with respect to the exercise of these powers, and may assist with their proportionality. For example, with respect to the stop, search and seizure powers in Division 3A of the Crimes Act, requiring the minister to have regard to certain matters before declaring a Commonwealth place to be a prescribed security zone may facilitate greater accountability with respect to the measure.<sup>41</sup> With respect to control orders, requiring that the court must be satisfied that the combined effect of the conditions in a control order is reasonably necessary, appropriate and adapted may assist with the proportionality of the measure. In addition, enabling a court to determine that the subject of a control order may seek an exemption from specified conditions, and to vary an order with the consent of the AFP, may provide for some flexibility in practice (albeit in the context of potentially extremely broad coercive limitations on the person's human rights).

1.31 However, many of the proposed amendments to the control order regime would substantially broaden the potential conditions that may be imposed on a person, meaning

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<sup>37</sup> Schedule 1, item 4, proposed subsection 3UJ(3).

<sup>38</sup> Schedule 1, item 5, proposed subsection 3UK(5A).

<sup>39</sup> Schedule 2, Part 1, item 44, Criminal Code, section 105.2.

<sup>40</sup> Schedule 2, Part 1, items 52–55, Criminal Code, section 105A.22. This bill would not extend the operation of powers related to post-sentence orders (which are currently due to sunset on 7 December 2026). See, section 105A.25.

<sup>41</sup> The other proposed amendment to Division 3A of the Crimes Act is that officers exercising these powers be required to advise persons being stopped or searched of their ability to make a complaint. This would appear to have very limited safeguard value, noting that a complaint would only be made once a breach of human rights had already occurred.

the potential interference with human rights would be greater. The explanatory memorandum states that the intention behind the proposed expansion of available conditions is to align them with the conditions that can be imposed under an extended supervision order (ESO), in line with recommendations of the PJCIS in 2021.<sup>42</sup> In this regard, it is noted that in 2020, the advice of this committee was that there was a significant risk that the extended supervision order provisions could impermissibly limit multiple human rights.<sup>43</sup>

1.32 In making its recommendation to align the conditions with ESOs, the PJCIS noted that 'the control order provisions were introduced 15 years ago where the technological landscape was markedly different'.<sup>44</sup> It considered that there would be 'a benefit in modernising the range of conditions...available under a control order and aligning the conditions to those available under the proposed extended supervision order scheme', and recommended that the government undertake a review of the range of conditions that could be imposed as part of a control order, and report back to the committee by July 2022.<sup>45</sup> No government response has been published in relation to that report. Broadening the range of available conditions in this manner so as to 'modernise' them is not an adequate justification under international human rights law for interferences with human rights. This is a significant concern having regard to the potentially broad limitations that control orders may place on an individual, and the length of time for which control orders may be in place (up to one year, if an interim control order is confirmed).<sup>46</sup>

1.33 No specific information is provided in relation to this bill to demonstrate either the inadequacy of the existing range of available conditions, or the need for each proposed additional potential condition. For example, a person subject to a control order may already be prohibited from communicating or associating with specified individuals but it is proposed that a person may be prohibited from communicating or associating with

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<sup>42</sup> Statement of compatibility, p. 9.

<sup>43</sup> See, Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, [Report 11 of 2020](#) (24 September 2020), pp. 2-29 and [Report 13 of 2020](#) (13 November 2020), pp. 19-62.

<sup>44</sup> PJCIS, [Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime](#), October 2021, para [3.74].

<sup>45</sup> PJCIS, [Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime](#), October 2021, pp. 51—52.

<sup>46</sup> Having received a request from a senior AFP member, a court may make an interim order *ex parte* (that is, in the absence of the affected person). The interim order must specify a date on which the affected person may attend court where that order may be revoked, declared void, or confirmed with or without variation. The date specified must be as soon as practicable, but within at least seven days. A confirmed control order may then be in force for up to 12 months. See, Criminal Code, section 104.5.

specified classes of individuals. However, no information is provided as to why the existing power is inadequate to achieve the stated objective of the control order regime, and why it is necessary that the power be expanded.

1.34 In this regard, the list of proposed available conditions is non-exhaustive and would not limit the power of the court to impose additional conditions. As with ESOs the conditions the court may impose include that an offender remain at specified premises between specified times of the day, but this must be no more than 12 hours within any 24 hours'. However, this general condition is stated to apply 'without limiting' the overall section which states that a court could impose 'any conditions' which the court is satisfied on the balance of probabilities, are reasonably necessary, and reasonably appropriate and adapted.<sup>47</sup> In relation to ESOs, advice was provided to the committee from the then Attorney-General that the 12 hour period listed as a possible condition would not constrain the court from requiring that a person remain at specified premises for longer than this. Consequently, as a matter of statutory interpretation, there is a risk a court could require that, in order to address the unacceptable risk of a person engaging in terrorist conduct, they must remain at specified premises for 24 hours a day. Such a condition would amount to a deprivation of liberty under international human rights law.<sup>48</sup>

1.35 Further, a court may impose conditions that 'relate to' the conditions specified, and so it appears that a person may be required to do (or refrain from doing) further additional things in order to comply with a condition. For example, it is proposed that an affected person be required to undertake psychological assessment, including where they do not consent to it, and it appears that complying with this condition may, for example, require that they attend specific premises, answer questions, and/or provide personal medical or other records to a clinician. Consequently, the full extent of the potential interference with human rights arising from these proposed amendments is unclear.

1.36 In addition, the court must be satisfied that each of the proposed obligations, prohibitions or restrictions is reasonably necessary, appropriate and adapted towards preventing a terrorist act. To do so they must take into account the objects of Division 101 of the Criminal Code (which criminalises terrorist acts) as a paramount consideration and the best interests of the child (as a primary consideration, where applicable).<sup>49</sup> Presumably the objects of Division 101 of the Criminal Code are to protect the community against terrorism. As such, it would appear that in making this a 'paramount consideration' this would be considered above the best interests of the child, which is

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<sup>47</sup> See Schedule 2, item 5.

<sup>48</sup> See *Fardon v. Australia*, UN Human Rights Committee, CCPR/C/98/D/1629/2007, 10 May 2010, [7.4].

<sup>49</sup> Criminal Code, section 104.4.

only a 'primary consideration'. This does not appear to be compatible with Australia's obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, meaning 'the child's best interests may not be considered on the same level as all other considerations'.<sup>50</sup>

1.37 Noting that the committee has previously found the existing control order regime to be a disproportionate limit on multiple rights, further information is required to assess whether expanding the conditions that may be imposed under a control order is a proportionate limit on multiple human rights.

### **Committee view**

1.38 The committee notes that the stated intention behind the proposed expansion of available conditions under control orders is to align them with the conditions that can be imposed under an extended supervision order, in line with a recommendation of the Parliament Joint Committee on Intelligence and Security (PJCIS) to modernise the control order provisions. The committee notes that in 2020, the advice of the committee raised a number of concerns as to the potential incompatibility of extended supervision orders with Australia's international human rights law obligations.<sup>51</sup>

1.39 The committee notes that no specific information has been provided in relation to this bill to demonstrate either the inadequacy of the existing range of available control order conditions, or the need for each proposed additional potential condition. As such, the committee seeks the Attorney General's advice in relation to:

- (a) why the current range of available conditions with respect to control orders are inadequate;
- (b) what is the necessity for each proposed additional available conditions in relation to control orders;
- (c) why is it necessary to enable the court to be empowered to impose any condition that is reasonably appropriate and adapted for the relevant purpose (noting that the listed conditions are stated to be 'without limiting' the conditions that may be imposed), rather than the current non-exhaustive list of conditions; and
- (d) how are the measures compatible with the rights of the child, noting that the protection of the community must be considered to be a paramount

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<sup>50</sup> UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

<sup>51</sup> Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, [Report 13 of 2020](#) (13 November 2020), pp. 19-62.

consideration, which appears to be a higher consideration than that of the primary consideration as to the best interests of the child.

## Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2023<sup>52</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Administrative Decisions (Judicial Review) Act 1977</i> , <i>Social Security Act 1991</i> and <i>Veterans' Entitlements Act 1986</i> with respect to Chapter 2D of the <i>Social Security Act 1991</i> , which relates to arrangements and grants relating to assisting persons to obtain and maintain paid work.
<b>Portfolio</b>	Employment and Workplace Relations
<b>Introduced</b>	House of Representatives, 3 August 2023
<b>Rights</b>	Equality and non-discrimination

### Specifying 'Indigenous persons' with respect to spending powers

1.40 This bill seeks to make amendments to Chapter 2D of the *Social Security Act 1991* (the Act), which deals with arrangements and grants relating to assisting persons to obtain and maintain paid work. Current section 1062A provides that the Employment Secretary may, on behalf of the Commonwealth, make, vary or administer an arrangement for the making of payments by the Commonwealth, or make, vary or administer a grant of financial assistance in relation to specified matters.<sup>53</sup> These matters include assisting unemployed persons to obtain and maintain paid work; assisting recipients of participation payments to meet their mutual obligation requirements; the funding of the activities of employment services providers and projects to create pathways to paid work; and matters that are incidental or ancillary to a specified matter.<sup>54</sup> Other matters or activities may be determined by way of legislative instrument.<sup>55</sup> Current section 1062B of the Act sets out the constitutional limits with respect to an arrangement or grant made pursuant to section 1062A. In particular, paragraph 1062B(k) provides that an arrangement or grant referred to in section 1062A must be with respect to 'people to whom paragraph 51(xxvi) of the Constitution applies'.<sup>56</sup> This bill seeks to amend this

<sup>52</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2023, *Report 9 of 2023*; [2023] AUPJCHR 87.

<sup>53</sup> *Social Security Act 1991*, subsection 1062A(1).

<sup>54</sup> *Social Security Act 1991*, paragraphs 1062A(1)(a), (f), (i), (j) and (m).

<sup>55</sup> *Social Security Act 1991*, paragraph 1062A(1)(l) and subsection 1062A(2).

<sup>56</sup> Paragraph 51(xxvi) of the Constitution provides the Commonwealth with the legislative power to make laws for 'the people of any race for whom it is necessary to make special laws'.



paragraph by specifying 'Indigenous persons' as the particular persons for whom an arrangement or grant may be made.<sup>57</sup>

1.41 Additionally, the bill would amend the *Administrative Decisions (Judicial Review) Act 1977* to provide that decisions made under Chapter 2D of the Act are not judicially reviewable.<sup>58</sup>

## **International human rights legal advice**

### ***Right to equality and non-discrimination***

1.42 By specifying Indigenous persons as the particular race of persons for whom an arrangement or grant may be made, the measure engages the right to equality and non-discrimination as if laws are made on this basis it would involve differential treatment of Aboriginal and Torres Strait Islander peoples based on the protected attribute of race. This is acknowledged in the statement of compatibility.<sup>59</sup> The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>60</sup> The International Convention on the Elimination of All Forms of Racial Discrimination further describes the content of these obligations and the specific elements that States parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, or national or ethnic origin.<sup>61</sup> The United Nations (UN) Committee on the Elimination of Racial Discrimination has stated that discrimination against Indigenous peoples falls within the scope of this Convention and that all appropriate means must be taken to combat and eliminate such discrimination.<sup>62</sup>

1.43 The statement of compatibility states that the measure promotes the right to equality and non-discrimination because it would ensure constitutional support for Commonwealth spending on programs aimed at removing barriers First Nations Australians might face in getting and keeping paid work.<sup>63</sup> It states that such programs

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<sup>57</sup> Item 8.

<sup>58</sup> Item 1.

<sup>59</sup> Statement of compatibility, p. 4.

<sup>60</sup> International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

<sup>61</sup> Convention on the Elimination of All Forms of Racial Discrimination, articles 1, 2, 4 and 5.

<sup>62</sup> UN Committee on the Elimination of Racial Discrimination, *General recommendation No. 23 on the rights of indigenous peoples* (1997) [1].

<sup>63</sup> Statement of compatibility, p. 4.

would involve positive action on the basis of a protected status to reflect relevant differences between different groups. It concludes that such differential treatment is based on objective and reasonable criteria and seeks to achieve substantive equality.<sup>64</sup>

1.44 To the extent that the measure facilitates the spending of money on programs that benefit Aboriginal and Torres Strait Islander peoples who are unemployed, it would appear to promote the right to equality and non-discrimination, as well as potentially other related rights, such as the right to work. Indeed, were the programs funded under Chapter 2D of the Act to be for the sole purpose of advancing the rights of Aboriginal and Torres Strait Islander peoples (on a temporary basis) and so constitute a 'special measure' under international human rights law, such differential treatment would be permissible. The International Convention on the Elimination of All Forms of Racial Discrimination places an obligation on member states, when the circumstances warrant, to take temporary special measures to ensure the adequate development and protection of certain racial groups or individuals in order to guarantee full and equal enjoyment of rights.<sup>65</sup> Special measures are ordinarily achieved through preferential treatment of disadvantaged groups and must not lead to the maintenance of separate rights for different racial groups or result in the impairment of the enjoyment of their human rights.<sup>66</sup> With respect to Indigenous peoples, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people has emphasised that while special measures are:

required to address the disadvantages faced by indigenous peoples in Australia...it would be quite extraordinary to find consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain members of it.<sup>67</sup>

1.45 The UN Committee on the Elimination of Racial Discrimination has similarly stated that special measures should be 'designed and implemented on the basis of prior

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<sup>64</sup> Statement of compatibility, p. 4.

<sup>65</sup> International Convention on the Elimination of All Forms of Racial Discrimination, articles 1(4) and 2(2).

<sup>66</sup> International Convention on the Elimination of All Forms of Racial Discrimination, article 1(4); UN Human Rights Council, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: The situation of indigenous peoples in Australia*, A/HRC/15/37/Add.4 (2010) [21].

<sup>67</sup> UN Human Rights Council, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: The situation of indigenous peoples in Australia*, A/HRC/15/37/Add.4 (2010) [21].

consultation with affected communities and the active participation of such communities'.<sup>68</sup>

1.46 Thus, the key question is whether the programs that are to be funded under Chapter 2D would involve preferential treatment of Aboriginal and Torres Strait Islander peoples for the purpose of advancing their rights or result in the impairment or limitation of their rights. Some of the programs that may be funded would appear likely to benefit Aboriginal and Torres Strait Islander peoples, such as programs to assist unemployed persons to obtain and maintain paid work and measures designed to reduce discrimination in employment practices and to encourage workforce participation.<sup>69</sup>

1.47 However, other programs that may be funded may limit human rights, such as programs relating to the enforcement of mutual obligation requirements.<sup>70</sup> The UN Committee on Economic, Social and Cultural Rights has expressed concern about conditionalities such as mutual obligations in Australia's social security system on the basis that they may have a punitive effect on disadvantaged and marginalised families, women and children (including Indigenous families).<sup>71</sup> The Parliamentary Joint Committee on Human Rights has previously raised human rights concerns with respect to social security programs involving mutual obligations. For example, the committee found that there was a considerable risk that the ParentsNext program, which required participants to meet certain mutual obligation requirements in order to continue receiving the parenting payment (such as completing training or addressing non-vocational barriers to employment), impermissibly limited the rights to social security and an adequate standard of living, as certain participants were potentially unable to meet their basic needs in practice. The committee also considered that there was a risk that compulsory participation did not constitute a proportionate limit on the right to a private life, the right to equality and non-discrimination, particularly with respect to Aboriginal and Torres Strait Islander peoples, and the rights of the child.<sup>72</sup>

1.48 While the statement of compatibility states that the measure seeks to facilitate spending on programs aimed at removing employment barriers for First Nations persons,

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<sup>68</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32 (2009)* [16]–[18].

<sup>69</sup> *Social Security Act 1991*, paragraphs 1062A(1)(a) and (g).

<sup>70</sup> *Social Security Act 1991*, paragraph 1062A(1)(f).

<sup>71</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) [20]. See also, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO/5 (11 July 2017) [31].

<sup>72</sup> Parliamentary Joint Committee on Human Rights, [Inquiry report – ParentsNext: examination of Social Security \(Parenting payment participation requirements – class of persons\) Instrument 2021](#) (4 August 2021) p. 111.

there is nothing in the legislation itself that would restrict spending on programs to only those that benefit Indigenous persons, meaning that programs that are detrimental to, or limit the rights of, Aboriginal and Torres Strait peoples may also be funded. As such, it is unlikely that the measure as a whole could accurately be characterised as a 'special measure' for the purposes of international human rights law, noting that measures that consist of differential treatment that limit the rights of the disadvantaged group, in this case Indigenous persons, are highly unlikely to be considered special measures. Further, the power appears to be inserted on an ongoing basis and would therefore not be a temporary measure under law.

1.49 It is therefore necessary to consider whether the differential treatment arising from the measure would constitute unlawful discrimination. Differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>73</sup> It is noted that the statement of compatibility does not acknowledge that the measure may *limit* the right to equality and non-discrimination and so provides no compatibility assessment in this regard.<sup>74</sup>

1.50 Regarding the objective, the statement of compatibility states that the measure seeks to achieve substantive equality.<sup>75</sup> The explanatory memorandum states that the measure seeks to ensure that Chapter 2D of the Act better engages with the Commonwealth's race power in paragraph 51(xxvi) of the Constitution by identifying 'Indigenous persons' as the people of a particular race for whom Parliament intends to make a special law.<sup>76</sup> The explanatory materials explain that this amendment is necessary because courts have held that a law enacted under the race power of the Constitution must be a special law for the people of a *particular* race.<sup>77</sup> Achieving substantive equality for Aboriginal and Torres Strait Islander peoples is likely to constitute a legitimate objective for the purposes of international human rights law. If the programs funded involved preferential treatment that benefited Indigenous persons, the measure could be said to be rationally connected to the stated objective.

1.51 In assessing whether the proposed limitation is proportionate, it is relevant to consider whether the measure is accompanied by sufficient safeguards, including the

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<sup>73</sup> UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

<sup>74</sup> The statement of compatibility only acknowledges that the measure engages and promotes the right to equality and non-discrimination.

<sup>75</sup> Statement of compatibility, p. 4.

<sup>76</sup> Explanatory memorandum, p. 10.

<sup>77</sup> Explanatory memorandum, p. 10; statement of compatibility, p. 4, referring to *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

availability of review. The bill seeks to remove the availability of judicial review for decisions made under Chapter 2D, which would include decisions relating to the spending of money on programs with respect to Indigenous persons. As such, there would be no access to review and there do not appear to be any other safeguards accompanying the measure.

1.52 Another relevant factor in assessing proportionality is whether there are any less rights restrictive alternatives that could achieve the same stated objective. If the programs funded with respect to Indigenous persons were restricted to those that *benefit* such persons, it would likely be a less rights restrictive alternative as it would mitigate the risk that programs funded under Chapter 2D would limit the rights of Indigenous persons.

### **Committee view**

1.53 The committee notes that facilitating the spending of money on social security programs in relation to Indigenous persons engages the right to equality and non-discrimination. The committee notes that some social security programs are likely to promote the rights of Indigenous persons, such as programs to assist unemployed persons to obtain and maintain paid work. However, the committee notes that other programs may limit human rights, such as those involving enforcement of mutual obligation requirements.

1.54 The committee notes that differential treatment will not constitute unlawful discrimination if it is based on reasonable and objective criteria. While the measure pursues the important objective of achieving substantive equality, the committee is concerned that it is not accompanied by sufficient safeguards and notes that there may be less rights restrictive alternatives to achieve the stated objective. As such, the committee considers that there is a risk that the differential treatment of Indigenous persons would not be based on reasonable and objective criteria such that it would constitute lawful discrimination under international human rights law.

### **Suggested action**

1.55 The committee considers the proportionality of this measure may be assisted were the bill amended to restrict the funding of programs with respect to Indigenous persons to those that benefit, and do not discriminate against, Indigenous persons.

1.56 The committee draws these human rights concerns to the attention of the minister and the Parliament.

## Telecommunications (Interception and Access) Amendment Bill 2023<sup>78</sup>

<b>Purpose</b>	This bill (now Act) amended sections 65 and 137 of the <i>Telecommunications (Interception and Access) Act 1979</i> regarding the communication, use and recording of foreign intelligence information
<b>Portfolio</b>	Attorney General
<b>Introduced</b>	House of Representatives, 7 August 2023 Finally passed both Houses, 9 August 2023
<b>Rights</b>	Privacy; effective remedy; life; torture or cruel, inhuman or degrading treatment or punishment

### Communication, use and recording of foreign intelligence information

1.57 This bill (now Act) amended sections 65 and 137 of the *Telecommunications (Interception and Access) Act 1979* (the Act) regarding the communication, use and recording of foreign intelligence information. Foreign intelligence information is defined as information obtained under certain warrants for the collection of foreign intelligence.<sup>79</sup>

1.58 Prior to the amendments passed by this bill, subsection 65(1) allowed the Director-General of Security (Director-General) or a person authorised by the Director-General to communicate to another person, in accordance with certain provisions in the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), lawfully intercepted information (other than ASIO computer access intercept information) and interception warrant information.<sup>80</sup> Subsection 65(2) provided that the person to whom this foreign intelligence information was communicated may communicate that information to such persons, and in such manner, and use that information for such purposes as approved by the Attorney-General. They could also make a record of that information. Section 137 of the Act provided that the Director-General may, in accordance with certain provisions in

<sup>78</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, *Telecommunications (Interception and Access) Amendment Bill 2023*, Report 9 of 2023; [2023] AUPJCHR 88.

<sup>79</sup> *Telecommunications (Interception and Access) Act 1979*, subsection 5(1). The relevant warrants are a telecommunications service warrant (section 11A), a named person warrant (section 11B) and a foreign communications warrant (section 11C).

<sup>80</sup> The relevant provisions in the *Australian Security Intelligence Organisation Act 1979* are subsections 18(3), 18(4A) and 19A.

the ASIO Act,<sup>81</sup> communicate lawfully accessed information, preservation notice information and stored communications warrant information to another person.<sup>82</sup> It also permitted the person to whom foreign intelligence information had been communicated to communicate, use and make record of that information to such persons and in such a manner, and for such purposes, as approved by the Attorney-General.<sup>83</sup>

1.59 This bill amended these sections to provide that the Director-General may, for the purposes (if any) approved by the Attorney-General and subject to the conditions (if any) specified by the Attorney-General, communicate foreign intelligence information to another person (the *second* person), other than those persons to whom the Director-General could already communicate information.<sup>84</sup> In the case of foreign intelligence information communicated pursuant to new subsection 65(1A), the Director-General may communicate the information either personally or by a person authorised by the Director-General.<sup>85</sup> The second person to whom the foreign intelligence information is communicated, as well as any other person to whom information is communicated, is also permitted to communicate the information to 'another person', and use and make a record of it.<sup>86</sup> A person who receives foreign intelligence information<sup>87</sup> is required to communicate, use or make a record of that information 'in the proper performance or exercise of the person's functions, duties or powers'.<sup>88</sup>

1.60 This bill, in effect, removed the requirement that the Attorney-General specify the persons, manner and purposes for which information may be communicated and permits the Director-General and other persons to whom foreign intelligence information is

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<sup>81</sup> The relevant provisions in the *Australian Security Intelligence Organisation Act 1979* are subsections 18(3), 18(4A) and 19A.

<sup>82</sup> *Telecommunications (Interception and Access) Act 1979*, subsection 137(1). The information specified is lawfully accessed information, preservation notice information and stored communications warrant information.

<sup>83</sup> *Telecommunications (Interception and Access) Act 1979*, subsection 137(3).

<sup>84</sup> Schedule 1, item 1, proposed subsection 65(1A) and item 7, proposed subsection 137(1A). The persons to whom the Director-General could already communicate information include those persons to whom information may be communicated under subsections 65(1), 64(2), 137(1) and 136(2), including an ASIO employee, ASIO affiliate or IGIS official.

<sup>85</sup> Schedule 1, item 1, proposed paragraph 65(1A)(a).

<sup>86</sup> Schedule 1, items 1, 3, 4, 7 and 9.

<sup>87</sup> That is, lawfully intercepted information, interception warrant information, lawfully accessed information, preservation notice information and stored communications warrant information, as intercepted under subsections 65(1) and 137(1) of the *Telecommunications (Interception and Access) Act 1979*.

<sup>88</sup> Schedule 1, items 2 and 9.

communicated to communicate that information to 'another person' and use and make record of the information.<sup>89</sup>

## International human rights legal advice

### ***Rights to privacy; effective remedy; life; and prohibition against torture or cruel, inhuman or degrading treatment or punishment***

1.61 The statement of compatibility states that the rights to life and security of person are promoted by the bill insofar as the measure enhances the ability of agencies to identify and respond to national security threats. It states that foreign intelligence information plays a critical role in enabling intelligence agencies to identify, mitigate and combat such threats.<sup>90</sup> If the measure facilitates the investigation, disruption and prevention of serious crimes against persons (such as terrorist attacks), it may promote the rights to life and security of the person. The right to life imposes an obligation on the state to protect people from being killed by others or identified risks.<sup>91</sup> The right imposes a duty on States to take positive measures to protect the right to life, including an obligation to take adequate preventative measures in order to protect persons from reasonably foreseen threats, such as terrorist attacks or organised crime, as well as an obligation to take appropriate measures to address the general conditions in society that may threaten the right to life, such as high levels of crime and gun violence.<sup>92</sup> Furthermore, States have an obligation to investigate and, where appropriate, prosecute perpetrators of alleged violations of the right to life.<sup>93</sup>

1.62 However, by broadening the scope of information sharing provisions in the Act with respect to foreign intelligence information, including potentially expanding the persons to whom, and the circumstances in which, foreign intelligence information may

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<sup>89</sup> Explanatory memorandum, p. 9.

<sup>90</sup> Statement of compatibility, pp. 6–7.

<sup>91</sup> International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1. UN Human Rights Committee, *General Comment No. 6: article 36 (right to life)* (2019) [3]: the right 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

<sup>92</sup> UN Human Rights Committee, *General Comment No. 6: article 36 (right to life)* (2019) [21], [26]. See also UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* (1982) [5].

<sup>93</sup> UN Human Rights Committee, *General Comment No. 6: article 36 (right to life)* (2019) [27]. At [28], the UN Human Rights Committee has stated that investigations in alleged violations of the right to life 'must always be independent, impartial, prompt, thorough, effective, credible and transparent'. Further, the right to security of the person requires the state to take steps to protect people against interference with personal integrity by others, see International Covenant on Civil and Political Rights, article 9(1).



be communicated, used and recorded, the measure engages and limits the right to privacy. The statement of compatibility acknowledges the right to privacy is limited by enabling the communication of foreign intelligence information, which could include personal information, to 'another person', who may then also use, communicate to other persons, and make a record of, the information.<sup>94</sup> The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>95</sup> It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, and be rationally connected (that is, effective to achieve) and proportionate to achieving that objective. An assessment is provided below as to this.

1.63 Further, as the amended provisions do not specify who can receive, use, share and record foreign intelligence information and there appears to be no limit on the number of persons who may onwards disclose the information, it is unclear whether other human rights may be engaged by the measure. For example, if the measure authorised the sharing of foreign intelligence information with foreign persons, such as foreign police, intelligence or security agencies, and this resulted in the investigation and prosecution of a person for an offence that is punishable by the death penalty in that foreign country, the measure may also engage and limit the right to life.<sup>96</sup> The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state.<sup>97</sup> The provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies is also prohibited.<sup>98</sup>

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<sup>94</sup> Statement of compatibility, p. 5.

<sup>95</sup> International Covenant on Civil and Political Rights, article 17.

<sup>96</sup> International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

<sup>97</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights.

<sup>98</sup> UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009) [20]. The UN Human Rights Committee further raised its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.

1.64 Additionally, if the sharing of foreign intelligence information, including personal information, with foreign persons, could expose individuals to ill treatment this may engage the prohibition against torture or other cruel, inhuman or degrading treatment or punishment. International law absolutely prohibits torture and cruel, inhuman or degrading treatment or punishment.<sup>99</sup> There are no circumstances in which it will be permissible to subject this right to any limitations. The statement of compatibility does not acknowledge that the right to life or the prohibition against torture and cruel, inhuman or degrading treatment or punishment may be engaged by the bill.

1.65 Furthermore, it is not clear that a person would have access to an effective remedy if their rights were violated as a result of the communication and use of foreign intelligence information under these sections (for example, a person's right to privacy may be violated if their personal information was inappropriately used or disclosed without authorisation). The right to an effective remedy requires access to an effective remedy for violations of human rights.<sup>100</sup> This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), States parties must comply with the fundamental obligation to provide a remedy that is effective.<sup>101</sup> The statement of compatibility does not acknowledge that the measure may have implications for the right to an effective remedy and as such, there is no human rights compatibility assessment in this regard. The right to an effective remedy is absolute in requiring there be a remedy that is effective.

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<sup>99</sup> International Covenant on Civil and Political Rights, article 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>100</sup> International Covenant on Civil and Political Rights, article 2(3).

<sup>101</sup> See, UN Human Rights Committee, General Comment 29: States of Emergency (Article 4), (2001) [14].

*Legitimate objective and rational connection*

1.66 The stated objective of the measure is national security.<sup>102</sup> The statement of compatibility states that the amendments are necessary to support information sharing practices that are critical to the protection of Australia's national security.<sup>103</sup> It states that the measure enables agencies to use and communicate foreign intelligence information to persons who are best placed to take actions, mitigate risk and protect national security interests.<sup>104</sup>

1.67 In general terms, national security has been recognised as being capable of constituting a legitimate objective for the purposes of international human rights law and, insofar as the sharing and use of foreign intelligence information assists intelligence agencies to identify and disrupt national security threats, the measure may be rationally connected to this objective.

1.68 However, in order to establish that this objective constitutes a legitimate one in the context of this specific measure, it must be demonstrated that there is a pressing and substantial concern which gives rise to the need for the measure. While the statement of compatibility provides general statements regarding the necessity of the measure for protecting Australia's national security, it neither articulates the specific national security threats which this measure seeks to address nor explains why the previous information sharing provisions were insufficient to achieve the stated objective, particularly given these provisions already provided broad authorisation to communicate, use and record foreign intelligence information. In this regard, the UN High Commissioner for Human Rights has stated, with respect to surveillance and communications interception legislation, that '[v]ague and overbroad justifications, such as unspecific references to "national security" do not qualify as adequately clear laws'.<sup>105</sup> On the basis of the information provided in the explanatory materials, it has not been demonstrated that the measure is necessary to address a pressing and substantial concern and as such, it is not possible to conclude that the measure pursues a legitimate objective for the purposes of international human rights law.

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<sup>102</sup> Statement of compatibility, p. 5.

<sup>103</sup> Statement of compatibility, p. 4.

<sup>104</sup> Statement of compatibility, p. 5.

<sup>105</sup> UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/39/29 (2018) [35]. In its concluding observations on New Zealand, the UN Human Rights Committee raised concerns about 'the absence of a clear definition of the terms "national security" and "private communication" in the Telecommunications (Interception Capability and Security) Act 2013': UN Human Rights Committee, *Concluding observations on the sixth periodic report of New Zealand*, CCPR/C/NZL/CO/6 (2016) [15].

### *Proportionality*

1.69 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed and whether it is accompanied by sufficient safeguards, including access to oversight and review. The UN Commissioner for Human Rights has emphasised the importance of subjecting intelligence sharing to the principles of 'legality, strict necessity and proportionality'. It stated that there 'must be rigorous rules for using and storing the data obtained [by secret surveillance] and the circumstances in which the data collected and stored must be erased need to be clearly defined, based on strict necessity and proportionality'.<sup>106</sup>

1.70 The breadth of the measure is relevant in considering whether it is sufficiently circumscribed. Indeed, the UN Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.<sup>107</sup> In the context of mass surveillance and other broad measures to collect and retain communications data, the European Court of Human Rights has emphasised the importance of precisely circumscribing the extent of interference with fundamental rights, notably the right to privacy, to ensure that the interference is limited to what is strictly necessary.<sup>108</sup>

1.71 The measure permits the communication of foreign intelligence information to 'another person' and the use and recording of that information. However, the persons or class of persons who fall into the category of 'another person' are not specified in the bill and there does not appear to be any limit on the number of persons who can receive and communicate the information. This raises serious concerns regarding the breadth of the measure, as it is not clear on the face of the legislation the persons who are authorised to use and share the information, and thus the circumstances in which interferences with the right to privacy are permitted. The greater the number of persons to whom personal information may be shared and used, without the consent of the individual concerned, the more likely the interference with privacy will be substantial and thus less likely to be proportionate.

1.72 There also does not appear to be any legislative limit on the purposes for which the information may be used, so long as it is for the purposes (if any) approved by the

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<sup>106</sup> UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/39/29 (2018) [37].

<sup>107</sup> *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

<sup>108</sup> *Digital Rights Ireland Ltd v Ireland*, European Court of Human Rights (Grand Chamber), Joined Cases C-293/12 and C-594/12 (2014) [65].

Attorney-General and, where it relates to certain types of information,<sup>109</sup> in the proper performance or exercise of the person's functions, duties or powers. The explanatory memorandum states that if the Attorney-General decides not to approve any purposes, foreign intelligence information may still be communicated pursuant to the relevant sections.<sup>110</sup>

1.73 The statement of compatibility identifies the following safeguards accompanying the measure:

- the Attorney-General *may* approve the purposes for which foreign intelligence information is communicated and used, such as for the purpose of the performance of ASIO's functions or powers;
- the Attorney-General *may* impose conditions on the communication and use of foreign intelligence information, such as specifying the manner in which information can be communicated and used, or matters that must be considered before information may be shared; and
- with respect to information shared and received under subsections 65(1) and 137(1), the recording, use and communication of the information must be in the proper performance or exercise of the person's functions, duties or powers.<sup>111</sup>

1.74 It is not clear that these safeguards would be sufficient to protect the right to privacy in practice.<sup>112</sup> This is because discretionary safeguards, such as the Attorney-General's ability to approve purposes or impose conditions with respect to the communication and use of information, are less stringent than the protection of statutory processes as there is no requirement to implement them. Indeed, the explanatory materials contemplate that the Attorney-General may not approve any purposes or impose any conditions, in which case information may broadly be communicated to

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<sup>109</sup> The requirement that the communication, use and recording of information be 'in the proper performance or exercise of the person's functions, duties or powers' only relates to persons who have received information under subsections 65(1) and 137(1), which relate to lawfully intercepted information, interception warrant information, lawfully accessed information, preservation notice information and stored communications warrant information.

<sup>110</sup> Explanatory memorandum, p. 9.

<sup>111</sup> Statement of compatibility, p. 6; explanatory memorandum, p. 9.

<sup>112</sup> European Court of Human Rights jurisprudence offers some useful guidance as to minimum safeguards with respect to the right to privacy in the context of secret surveillance measures, including 'the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed': *Szabó and Vissy v Hungary*, European Court of Human Rights, Application No. 37138/14 (2016) [56].

'another person'. The requirement that the recording, use and communication of information be in the 'proper performance or exercise of the person's functions, duties or powers' has limited safeguard value as it only applies to specific subsections. Further, it is not clear what the scope of a person's functions, duties or powers are, as the persons to whom information may be communicated are not specified.

1.75 Additionally, there do not appear to be any oversight mechanisms with respect to the measure. The European Court of Human Rights has highlighted the importance of external supervision and remedial measures in the context of governments 'transferring and sharing amongst themselves intelligence retrieved by virtue of secret surveillance'.<sup>113</sup> The court found 'external, preferably judicial, *a posteriori* control of secret surveillance activities, both in individual cases and as general supervision' to be of particular importance.<sup>114</sup> The UN High Commissioner for Human Rights has also stated that intelligence-sharing 'should be authorized, reviewed and supervised by independent bodies at all stages'.<sup>115</sup> The measure does not contain such a control mechanism whereby an independent, preferably judicial, authority has oversight or control over the provisions which authorise the onwards disclosure of foreign intelligence information.

1.76 Further, if the measure violated a person's right to privacy or other rights, it is not clear that they would have access to an effective remedy in practice. This is because the person whose privacy is interfered with is highly unlikely to be aware that their personal information is being used, shared and recorded by other persons as such information is obtained by covert means.<sup>116</sup>

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<sup>113</sup> *Szabó and Vissy v Hungary*, European Court of Human Rights, Application No. 37138/14 (2016) [78]. The UN Human Rights Committee has also recommended that States parties provide for 'judicial involvement in the authorization or monitoring of surveillance measures' and consider establishing 'strong and independent oversight mandates with a view to preventing abuses'. See, UN Committee on Human Rights, *Concluding observations on the fourth periodic report of the United States of America*, CCPR/C/USA/CO/4 (2014) [22]. See also UN Special Rapporteur on the right to privacy, *Draft Legal Instrument on Government-led Surveillance and Privacy*, Version 0.6 (2018), p. 16.

<sup>114</sup> *Szabó and Vissy v Hungary*, European Court of Human Rights, Application No. 37138/14 (2016) [79]. The Court stated: '[t]he significance of this control cannot be overestimated in view of the magnitude of the pool of information retrievable by the authorities applying highly efficient methods and processing masses of data, potentially about each person, should he be, one way or another, connected to suspected subjects or objects of planned terrorist attacks'.

<sup>115</sup> UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/39/29 (2018) [39], see also [21] and [40].

<sup>116</sup> In the context of information obtained by secret surveillance see *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, Application No. 47143/06 (2015) [233].

1.77 In considering what constitutes an effective remedy where personal information is being collected in the context of covert surveillance activities, United Nations (UN) bodies and the European Court of Human Rights have observed that while effective remedies can take a variety of forms, they must be known and accessible to anyone with an arguable claim that their rights have been violated.<sup>117</sup> It is not clear that a person whose privacy might be interfered with under this measure would ever be made aware of that fact (if it does not lead to a prosecution). In such circumstances, it does not appear that such a person would have access to adequate review mechanisms or to an effective remedy for any potential violation of their right to privacy.

1.78 It is also not clear whether any safeguards exist to ensure that personal information is not shared with a foreign person or agency in circumstances that could expose a person to the death penalty or lead to a person being tortured, or subjected to cruel, inhuman or degrading treatment or punishment.

1.79 In conclusion, while the general objective of national security is capable of constituting a legitimate objective, it is not clear that this specific measure is necessary and addresses a pressing and substantial concern. The breadth of the measure, including the lack of clarity as to whom foreign intelligence information may be communicated and the purposes for which information may be used, shared and recorded, raises concerns that the measure is not sufficiently circumscribed. Noting that many of the safeguards identified are discretionary, it is not clear that they are adequate in all circumstances and in relation to all rights that may be limited. As such, there is a risk that the measure constitutes an arbitrary limitation on the right to privacy and, in circumstances where the person whose privacy might have been interfered with is unaware of that fact, there does not appear to be access to an effective remedy for any potential violation of their rights. Additionally, if information is communicated with foreign persons or agencies where there are substantial grounds for believing there is a real risk that disclosure of information to that person may expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, the measure risks being incompatible with Australia's obligations with respect to these rights.

### **Committee view**

1.80 The committee considers that this bill, now Act, in broadening the scope of information sharing provisions with respect to foreign intelligence information may

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<sup>117</sup> Report of the Office of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age (A/HRC/27/37) [40]; *Szabó and Vissy v Hungary*, European Court of Human Rights, Application No. 37138/14 (2016) [86]. See also *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, Application No. 47143/06 (2015) [234], [287] and *Klass and Others v Germany*, European Court of Human Rights, Plenary Court, Application No. 5029/71 (1978) [57].

promote the rights to life and security of person insofar as it facilitates the sharing of intelligence information for the purposes of identifying and disrupting threats to Australia's national security. However, the committee also notes that by authorising the sharing, use and recording of foreign intelligence information, the measure engages and limits the right to privacy. The committee notes that it is unclear whether the measure may have implications for other human rights. For example, if the measure facilitated the sharing of foreign intelligence information with foreign persons, such as foreign police or intelligence agencies, it may have implications for the right to life and the prohibition against torture or other cruel, inhuman or degrading treatment or punishment.

1.81 The committee acknowledges that foreign intelligence information can play a critical role in enabling intelligence agencies to perform their functions and keep Australia safe. However, the committee considers it has not been demonstrated in the statement of compatibility that this specific measure is necessary and addresses a pressing and substantial concern – noting that no information has been provided in respect of its necessity. With respect to proportionality, the committee considers that it does not appear that the measure is sufficiently circumscribed, having regard to its breadth, or accompanied by sufficient safeguards, noting that discretionary safeguards are not as stringent as statutory protections. As such, the committee considers there is a risk that the measure may constitute an arbitrary limitation on the right to privacy, and affected persons may not have access to an effective remedy. Additionally, if information is communicated with foreign persons or agencies where there are substantial grounds for believing there is a real risk that disclosure of information to that person may expose a person to the death penalty or to torture or ill-treatment, the committee considers there is a risk the measure would not be compatible with Australia's obligations with respect to these rights.

1.82 The committee notes with significant concern from a scrutiny perspective that this bill passed both Houses of Parliament two sitting days after its introduction. As a result, the committee was unable to scrutinise this legislation and engage with the Attorney-General as to its compatibility with human rights while it was before Parliament.