Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two principal research officers with specialised expertise in international human rights law. LSU officers regularly work across multiple scrutiny committee secretariats.

Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee is required to examine bills, Acts and legislative instruments for compatibility with human rights, and report its findings to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[2] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationally connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

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2 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 10 and 13 September 2018 (consideration of 3 bills from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 26 July and 22 August 2018;[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.

Australian Federal Police Regulations 2018 [F2018L01121]

Purpose	Prescribes a number of matters relating to the operation of the Australian Federal Police (AFP), including relating to disposal of property
Portfolio	Home Affairs
Authorising legislation	*Australian Federal Police Act 1979*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 20 August 2018)
Rights	Freedom of expression (see **Appendix 2**)
Status	Seeking additional information

Immediate disposal of 'offensive' property

1.5 Section 76(1)(b) of the regulations provides that the AFP Commissioner (commissioner) may direct immediate disposal (except by sale or gift) of property that the commissioner is reasonably satisfied is property that is offensive in nature.

Compatibility of the measure with the right to freedom of expression

1.6 Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) requires the state not to arbitrarily interfere with freedom of expression, including restrictions on political debate.[3] The right protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression, such as images and objects of art.[4] This right embraces expression that may be regarded as deeply offensive, subject to the provisions of article 19(3) and article 20 of the ICCPR.[5]

1.7 The explanatory memorandum explains that property that is 'offensive' in nature is not defined in the regulations but may include, for example, 'racist materials, pornography in various formats, or material that depicts violent or sexual

3 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [28].

4 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [12].

5 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11].

activity'.[6] By allowing the commissioner to direct the immediate disposal of property that the commissioner is satisfied is 'offensive' in nature, the measure may engage and limit this right.

1.8 The statement of compatibility does not acknowledge that the right to freedom of expression may be engaged and limited by the regulations and so does not provide an assessment as to whether any limitation is justifiable under international human rights law.

1.9 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. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.

1.10 Based on the information provided in the explanatory memorandum as to the type of information that may be considered 'offensive', the measure would appear to pursue the objective of protecting public morals which is likely to be legitimate for the purposes of international human rights law. To that extent the measure also appears to be rationally connected to that objective.

1.11 However, the statement of compatibility has not provided sufficient information to determine whether the measure is a proportionate limitation on the right to freedom of expression. For example, it is not clear the basis on which the commissioner may be 'reasonably satisfied' that property is offensive (for example, whether this is subject to guidelines or other, legislative, safeguards), and the safeguards in place to protect a person's freedom of expression. Further information from the minister would assist in determining whether any limitation on the right to freedom of expression is proportionate.

Committee comment

1.12 The preceding analysis indicates that the commissioner's power to direct immediate disposal of property that is 'offensive' may engage and limit the right to freedom of expression.

1.13 The committee therefore seeks the advice of the minister on the compatibility of the measure with this right. In particular, the committee seeks the advice of the minister as to whether the measure is a proportionate limitation (including information as to relevant safeguards to protect freedom of expression).

6 Explanatory Memorandum (EM), p. 46.

Social Security Legislation Amendment (Community Development Program) Bill 2018

Purpose	Seeks to extend the targeted compliance framework in the *Social Security Administration Act* to Community Development Programme regions
Portfolio	Indigenous Affairs
Introduced	Senate, 23 August 2018
Rights	Social security and an adequate standard of living; work; equality and non-discrimination (see **Appendix 2**)
Status	Seeking additional information

Background

1.14 The *Social Security Legislation Amendment (Welfare Reform) Act 2018* (Welfare Reform Act) amended the *Social Security (Administration) Act 1999* (Social Security Administration Act) to create a new compliance framework, the targeted compliance framework (TCF). The TCF applies to income support recipients subject to participation requirements,[1] except for declared program participants.[2] Participants in the Community Development Programme (CDP) are not currently subject to the TCF,[3] as the CDP is a declared program.[4] CDP participants are currently subject to compliance arrangements under Division 3A of Part 3 of the Social Security Administration Act.[5]

1 Income support payments made to job seekers have 'participation' requirements or 'activity test' requirements, which require the job seeker to seek work or participate in some other labour force preparation activity as a condition of payment. Participation requirements include attending participation interviews, signing a participation plan with a compulsory work-focused activity, and undertaking the compulsory work-focused activity: see Department of Social Services, *Guide to Social Security* (2016) [1.1.P.75]. The CDP supports participants receiving a participation payment in meeting their activity test or participation requirements through Newstart Allowance, Youth Allowance (other), Parenting Payment (subject to participation requirements), Social Benefit (nominated visa holders) and the Disability Support Pension: see Explanatory Memorandum (EM) p. 3 [3].

2 Social Security Administration Act, section 42AB. 'Declared program participants' are persons who participate in employment services programs specified in a determination made under section 28C of the Social Security Act: see Division 3A of Part 3 of that Act.

3 Social Security Administration Act, section 42AB.

4 *Social Security (Declared Program Participant) Determination 2018,* section 5.

5 Social Security Administration Act, section 42B.

1.15 The CDP is the Australian Government's employment and community development service for remote Australia. The CDP seeks to support job seekers in remote Australia to build skills, address barriers and contribute to their communities through a range of activities. It is 'designed around the unique social and labour market conditions in remote Australia' with the objective of 'increasing employment and breaking the cycle of welfare dependency'.[6] Under the current CDP, job seekers with activity requirements are expected to complete up to 25 hours per week of work-like activities that benefit their community.

1.16 The committee previously considered the TCF in its human rights assessment of the bill that became the Welfare Reform Act.[7] Under the TCF, a job seeker can have their payments suspended for non-compliance with a mutual obligation, such as failing to attend a job interview or appointment (mutual obligation failure),[8] or for refusing suitable employment (work refusal failure).[9] Payments may be cancelled if a job seeker commits persistent mutual obligation failures without reasonable excuse, or commits a work refusal failure without a reasonable excuse, or voluntarily leaves a job or is terminated for misconduct (unemployment failure).[10]

Payment cancellation for work refusal failure without a reasonable excuse, and unemployment failure

1.17 The bill seeks to extend the TCF to CDP participants. Currently, a CDP participant is subject to a non-payment period of eight weeks for refusing or failing to accept suitable work without a reasonable excuse,[11] or for an unemployment failure resulting from a voluntary act or misconduct.[12] The secretary has discretion to waive this non-payment period if it would cause 'severe financial hardship'.[13] As a result of the TCF applying to CDP participants, the non-payment period is reduced to four weeks (six weeks if the person has received a relocation assistance to take up a

6 Department of Prime Minister and Cabinet, *The Community Development Programme (CDP)* (2018) https://www.pmc.gov.au/indigenous-affairs/employment/community-development-programme-cdp

7 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 46-77; *Report 11 of 2018* (17 October 2017) pp. 138-203.

8 Social Security Administration Act, sections 42AC, 42AF and 42AL.

9 Social Security Administration Act, sections 42AD, 42AG and 42AL.

10 Social Security Administration Act, sections 42AH and 42AO.

11 Social Security Administration Act, sections 42N and 42P(2).

12 Social Security Administration Act, section 42S.

13 Social Security Administration Act, section 42NC.

job).[14] However, the measure would also remove the discretion for the secretary to waive the non-payment penalty on the basis of severe financial hardship.[15]

1.18 The bill also provides that a designated program participant (being a CDP participant) does not commit a work refusal failure if the person refuses or fails to accept an offer of subsidised employment,[16] nor does a person commit an unemployment failure for voluntarily leaving or being dismissed for misconduct from subsidised employment.[17] As these exceptions only apply in relation to subsidised jobs, these safeguards do not apply to persons who refuse or fail to accept an offer for unsubsidised employment or who voluntarily leave or are dismissed from unsubsidised jobs.

Compatibility of the measure with the right to social security and an adequate standard of living

1.19 Article 9 of the International Covenant on Economic and Social Rights (ICESCR) recognises the right of everyone to social security. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.[18] The right to an adequate standard of living, enshrined in article 11, requires Australia to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.[19]

14 Social Security Administration Act, section 42AP(5).

15 See section 27, which seeks to repeal Division 3A of Part 3 of the Social Security Administration Act 1999, which includes section 42NC that allows the Secretary to not impose a non-payment period if it would cause 'severe financial hardship'.

16 The bill seeks to insert a new section 42AEA to the Social Security Administration Act 1999 to define 'subsidised employment' to mean 'employment in respect of which a subsidy of a kind determined in an instrument [made by the secretary] is payable, or has been paid, by the Commonwealth': section 26.

17 See section 25 of the bill.

18 See UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security* (2008) [28].

19 ICESCR article 11(1).

1.20 The committee has considered measures similar to the TCF on a number of occasions.[20] The committee's previous analysis in relation to the Welfare Reform Bill (now Act) stated that while the TCF reduces the non-payment penalty from eight weeks to four weeks for a work refusal failure or dismissal due to misconduct, the eight week non-payment penalty was subject to a waiver in situations of severe financial hardship. By contrast no waiver from the four week non-payment penalty would be available under the TCF. Accordingly, the committee concluded that the financial penalty is likely to be incompatible with the right to social security insofar as there may be circumstances where a person is unable to meet basic necessities during the four week non-payment period. As such, the extension of the TCF to a new class of vulnerable persons raises similar concerns.

1.21 The statement of compatibility does not provide an assessment of whether these measures are compatible with the right to social security and an adequate standard of living.

1.22 Limitations on the right to social security and an adequate standard of living are permissible where the limitation is in pursuit of a legitimate objective, and is rationally connected and proportionate to that objective. The statement of compatibility does not specifically identify the objective of imposing penalties for refusing unsubsidised work, or for leaving or being dismissed for misconduct from unsubsidised work, but states generally that:

> …the measures will… ensure compliance action applies to CDP participants who continue to be wilfully non-compliant… [t]his counters the risk of long-term unemployment and welfare dependency to the individual, communities and Australian society general.[21]

1.23 While reducing long-term unemployment and welfare dependency may be capable of constituting a legitimate objective, no evidence is provided in the statement of compatibility as to whether the existing compliance arrangements for CDP participants are ineffective to achieve this objective. It is especially unclear in circumstances where the statement of compatibility notes, 'participants [in remote areas] face higher barriers, fewer opportunities, higher level of dependence on welfare and lower levels of literacy and numeracy',[22] and the statement of

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20 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) [2.465]-[2.467]; *Report 8 of 2017* (15 August 2017) p. 71 [1.335], [1.346]. See also Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (15 July 2014) pp. 66-70; *Thirty-Second Report of the 44th Parliament*, Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 (1 December 2015) pp. 92-100; *Thirty-Third Report of the 44th Parliament*, Social Security Legislation Amendment (Community Development Program) Bill 2015 (2 February 2016) pp. 7-12.

21 SOC, p. 19.

22 SOC, p. 22.

compatibility to the Welfare Reform Bill (now Act) explained that the rationale for not applying the TCF to CDP participants was to 'reflect the unique labour market conditions that job seekers face in remote Australia'.[23]

1.24 In relation to whether the measure is rationally connected to its stated objective, it is unclear how limiting the availability of a waiver on the grounds of severe financial hardship would achieve the stated objective of the measures. The statement of compatibility does not specifically address how suspending and cancelling welfare payments without the ability of the secretary to grant a waiver for severe financial hardship is effective to reduce welfare dependency and long-term unemployment in remote Australia, noting in particular the earlier rationale for applying a different compliance framework in this context.

1.25 As to the proportionality of the measure, it is relevant 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. Removing the ability for the secretary to waive the non-payment period on the grounds of financial hardship in effect removes the ability to consider the merits of an individual case such as, for example, whether a person may be unable to afford basic necessities during the four week non-payment period.[24] This may be of particular concern in CDP regions noting the statement of compatibility states that participants in remote Australia face higher levels of dependency on welfare than in non-remote Australia.[25] As noted above, while the four week period is a reduction from the eight week non-payment penalty that can be imposed under the current compliance framework, four weeks is still a considerable period of time for a person dependent on welfare to be without welfare payments. It is unclear how a person will afford basic necessities

23 SOC, *Social Security Legislation Amendment (Welfare Reform) Bill 2017*, p. 162.

24 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 189 [2.467].

25 SOC pp. 21-23. Government statistics indicate the proportion of Indigenous people whose main source of income is welfare increases with remoteness: Australian Institute of Health and Welfare, 'Australia's Welfare – 7.5: Income and employment for Indigenous Australians' (2017) *Australian Government* https://www.aihw.gov.au/getmedia/2f327206-c315-43a7-b666-4fe24fefc12f/aihw-australias-welfare-2017-chapter7-5.pdf.aspx.

during this period.[26] In such a case, the committee has previously concluded that this type of measure would likely be incompatible with the right to social security.[27]

1.26 Also relevant to proportionality is the extent of any interference with rights in practice. The above analysis proceeds on the assumption that subsidised jobs do not represent the only jobs available to CDP participants in remote Australia. However, if the only jobs available to CDP participants in remote areas are subsidised jobs, then this measure may be less likely, in practice, to interfere with the right to social security, given the exception from penalty for failures in relation to subsidised jobs. Further information from the minister as to whether the labour market in CDP regions will be comprised mostly or entirely by subsidised jobs would be useful for the purposes of this analysis.

Committee comment

1.27 The preceding analysis raises questions as to whether the measure constitutes a permissible limitation on the rights to social security and an adequate standard of living.

1.28 The committee seeks the advice of the minister as to the compatibility of the measure with the rights to social security and an adequate standard of living, in particular:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, such as retaining the discretion of the secretary to waive a non-payment period on the grounds of severe financial hardship under section 42NC of the Social Security Administration Act; and the extent to which, in practice, subsidised jobs represent the only jobs which may be offered to CDP participants in particular areas of remote Australia).**

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26 A recent inquiry on the CDP heard evidence that the impact of payment suspension and cancellation meant CDP participants were going without food and basic necessities: Senate Standing Committee on Finance and Public Administration References Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Programme (CDP)* (December 2017) [4.12], [4.47], [4.50], [4.51], [4.53].

27 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 189 [2.467].

Penalties for persistent non-compliance with mutual obligations

1.29 The application of the TCF to CDP participants means that income support recipients, other than holders of subsidised jobs,[28] will be subject to escalating reductions in their income support payments for persistent non-compliance with mutual obligations.[29]

1.30 The *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No 1)* (persistent non-compliance determination) outlines the matters to be taken into account when determining if a person has committed persistent mutual obligation failures.[30] Relevantly, among the matters the secretary must take into account are the findings of the most recent comprehensive compliance assessment in respect of the person, and whether, during the assessment period (6 months) the person has committed three or more mutual obligation failures.[31] The secretary must not take into account failures outside the person's control, but only failures that occurred intentionally, recklessly or negligently.[32] The secretary also retains discretion to take into account other matters in determining whether a person failed to comply with his or her obligations.[33]

1.31 For the first failure constituting persistent non-compliance, the rate of participation payment for the instalment period in which the failure is committed or determined will be halved.[34] For a second failure, the job seeker will lose their entire participation payment and any add-on payments or supplements for that instalment period.[35] For a third failure, the job seeker's payment will be cancelled from the start of the instalment period and a four week non-payment period, starting from the date

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28 Holders of subsidised jobs will not be required to comply with mutual obligation requirements: section 21 of the bill.

29 See [1.2] above for an explanation of the types of requirements that constitute mutual obligations.

30 Section 42M(4) of the Social Security Administration Act provides that the minister must, by legislative instrument, determine matters that the secretary must take into account in deciding whether a person persistently failed to comply with his or her obligations in relation to a participation payment.

31 *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No 1)* section 5(1).

32 Social Security Administration Act, section 42M(1).

33 Social Security Administration Act, section 42M(2).

34 Social Security Administration Act, section 42AN(3)(a).

35 Social Security Administration Act, section 42AN(3)(b).

of cancellation, will apply if the job seeker reapplies for payment.[36] As noted above, there will be no waivers for non-payment periods.

Compatibility of the measure with the right to social security and right to an adequate standard of living

1.32 As the measure operates to cancel income support payments, it engages the right to social security and an adequate standard of living. As noted above, while the objective of 'reducing long-term unemployment and welfare dependency' may be capable of constituting a legitimate objective, the statement of compatibility does not explain how reducing and ultimately cancelling welfare payments alone, without possibility of waiver for severe financial hardship, is effective in achieving this objective. Nor does it explain why the current compliance framework, which includes the possibility of waiver in circumstances of severe financial hardship, is ineffective.

1.33 In relation to the proportionality of the measure, it is relevant that the *Social Security (Administration Act) 1999* and the persistent non-compliance determination indicate that the secretary must not take into account failures that are outside the person's control, that only failures that occurred intentionally, recklessly or negligently are to be taken into account, and that the secretary has latitude to take into account other matters when determining whether mutual obligation failures are 'persistent'. This provides some degree of safeguard for participants who were unable to comply with requirements for reasons outside their control. However, there are still questions as to whether it is proportionate to impose a non-payment penalty for 'reckless' or 'negligent' behaviour in meeting mutual obligations (such as attending an appointment or a job interview) in circumstances where compliance with mutual obligations is made more difficult by the conditions of remote Australia, such as issues regarding transportation and communication, drug and alcohol dependency, and lower levels of literacy and numeracy.[37]

1.34 In relation to the removal of the possibility of waiver of the four week non-payment penalty in cases of financial hardship this is, as noted above, likely to render the measure incompatible with the rights to social security and an adequate standard of living where it renders persons unable to afford basic necessities. Further information from the minister as to why it is not possible to retain the secretary's discretion to waive non-payment periods in cases of severe financial hardship and how it is expected persons will meet basic necessities during a non-payment period would assist with this analysis.

36 See Social Security Administration Act, section 42AP.

37 See EM, p. 22.

Committee comment

1.35 The preceding analysis raises questions as to whether the measure constitutes a permissible limitation on the rights to social security and an adequate standard of living.

1.36 The committee seeks the advice of the minister as to the compatibility of the measure with the rights to social security and an adequate standard of living, in particular:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, such as retaining the discretion of the secretary to waive a non-payment period on the grounds of severe financial hardship under section 42NC of the Social Security Administration Act).**

Payment suspension for a mutual obligation failure

1.37 Applying the TCF to CDP participants means that CDP participants who are not engaged in subsidised employment are liable to payment suspension for a mutual obligation failure unless they have a reasonable excuse.[38] The suspension period may last up to four weeks but ends when the person complies with the reconnection requirement (such as reconnecting with an employment provider) unless the secretary determines an earlier day.[39] If the job seeker fails to comply with the reconnection requirement within four weeks, their social security participation payment will be cancelled.[40]

Compatibility of the measure with the right to social security and an adequate standard of living

1.38 The suspension of social security payments for mutual obligation failures may limit the right to social security and the right to an adequate standard of living.[41]

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38 Social Security (Administration) Act, sections 42AC and 42AL. Section 12 of the bill creates an exception from the requirement to comply with mutual obligations for subsidised employment holders.

39 Social Security (Administration) Act, section 42AL(3).

40 Social Security (Administration) Act, section 42AM(3)-(4).

41 See the committee's analysis of the TCF in relation to the Welfare Reform Act 2018 in Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 46-77; *Report 11 of 2017* (17 October 2017) pp. 138-203.

As noted above, this right may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is a proportionate way of achieving that objective.

1.39 Assuming the objective of the measure is 'reducing welfare dependency and long-term unemployment' (identified above at [1.10]), the concerns discussed above as to whether this constitutes a legitimate objective and whether the measures are rationally connected to that objective, are equally relevant in relation to this measure.

1.40 As to proportionality, the existence of safeguards is relevant to the proportionality of the measure. A relevant safeguard in the TCF includes that suspension does not apply if the person has a 'reasonable excuse'. The committee has previously concluded that, apart from certain measures in the Welfare Reform Bill (now Act) which narrowed circumstances in which a person could rely on drug and alcohol dependency as a 'reasonable excuse',[42] the range of circumstances which were identified by the minister as constituting a 'reasonable excuse' meant that the measure may be compatible with the right to social security.[43]

1.41 However, at the time of the committee's previous conclusion, the TCF did not apply to participants in designated programs, such as the CDP.[44] Given the bill seeks to extend the TCF to CDP participants, the circumstances constituting 'reasonable excuse' require re-examination to determine if they function as adequate safeguards. Currently, the matters that the secretary must take into account in deciding whether a person has a reasonable excuse for committing a failure are:

(a) the person did not have access to safe, secure and adequate housing, or was using emergency accommodation or a refuge, at the time of the failure;

(b) the literacy and language skills of the person;

(c) an illness, injury, impairment or disability of the person;

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42 In relation to this aspect of the measure, the committee considered that narrowing the circumstances in which a person may rely upon their drug and alcohol misuse or dependency as a reasonable excuse may raise concerns as to compatibility with the right to social security and an adequate standard of living, given the potentially serious financial repercussions of payment suspension. See also the committee's assessment of the *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018* in Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) pp. 30-35. However, as noted earlier, this aspect of the measure did not apply to CDP participants: Explanatory Statement, Social *Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018*, p. 2.

43 Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (17 October 2017) pp. 138-203, 186 [2.450].

44 Explanatory Memorandum, Social Services Legislation Amendment (Welfare Reform) Bill 2017, pp. 88, 92.

(d) a cognitive, neurological, psychiatric or psychological impairment or mental illness of the person;

(e) a drug or alcohol dependency of the person;

(f) unforeseen family or caring responsibilities of the person;

(g) the person was subjected to criminal violence (including domestic violence and sexual assault);

(h) the person was adversely affected by the death of an immediate family member or close relative;

(i) the person was undertaking paid work at the time of the failure;

(j) the person was attending a job interview at the time of the failure.[45]

1.42 It is acknowledged that several of these requirements would operate as important safeguards to protect the rights to social security and adequate standard of living. However, it is not clear whether or not the matters required to be taken into account by the secretary provide a sufficient safeguard in relation to the unique conditions of remote Australia, for example, challenges involved in covering long distances and limited transport options.[46] While the instrument does not limit the discretion of a decision-maker to take into account any factor that may provide a reasonable excuse, discretion in and of itself may not constitute a sufficient safeguard under international law, as it falls short of statutory protection. Further information from the minister as to whether and how the reasonable excuse provisions will take into account the unique conditions of remote Australia would therefore assist in determining the proportionality of the measure.

1.43 It is noted that the statement of compatibility states that 'some... mutual obligations requirements will be different to participants in non-remote areas as these obligations have been designed to take into account the unique nature of remote labour markets'.[47] No further detail is provided in the statement of compatibility, explanatory memorandum or second reading speech as to how mutual obligation requirements for CDP areas will differ from non-remote areas. In any case, these differences appear to concern the content of the mutual obligations requirements, rather than what constitutes a 'reasonable excuse' under the legislation. Mutual obligation requirements are made by way of administrative

45 *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018,* section 5.

46 See Senate Standing Committee on Finance and Public Administration References Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP),* December 2017 [7.8]. The committee recommends that CDP participants have obligations that are no more onerous than those of other income support recipients, taking into account special circumstances such as remote locations and cultural obligations.

47 SOC, p. 19.

arrangement between the employment services provider and the job seeker, potentially subject to change at any time. It is not clear whether adapting mutual obligation requirements to the 'unique nature of remote labour markets' will function as a sufficient safeguard given it is not enshrined in legislation. Further information from the minister as to how mutual obligation requirements will differ in remote Australia would assist in determining whether the measure has adequate safeguards.

Committee comment

1.44 The preceding analysis raises questions as to whether the measure constitutes a permissible limitation on the rights to social security and an adequate standard of living.

1.45 The Committee therefore seeks the advice of the minister as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is rationally connected to (that is, effective to achieve) the stated objective of reducing welfare dependence and long-term unemployment in remote Australia; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including how mutual obligation requirements will differ in remote Australia from non-remote Australia and whether appropriate safeguards exist in relation to what constitutes a reasonable excuse in the context of remote Australia).**

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

1.46 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Under article 26 of the ICCPR, if a state adopts social security legislation, it must do so in a non-discriminatory manner.[48]

1.47 Under the ICCPR, a measure will amount to discrimination where it has either the purpose ('direct' discrimination) or effect ('indirect' discrimination) of treating individuals differently on the basis of a personal attribute (such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status).[49] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a

48 See *Sprenger v The Netherlands,* Communication No 395/1990, CCPR/C/44/D/395/1990 (1992) [7.2].

49 See UN Human Rights Committee, *General Comment 18*: *Non-discrimination* (1989).

particular personal attribute or other status.[50] 'Place of residence' within a country has been held to qualify as a prohibited ground of discrimination under 'other status'.[51]

1.48 In relation to this measure, there is a concern that it will have a disproportionate impact on Aboriginal and Torres Strait Islander people and those living in remote Australia. It therefore raises concerns from the perspective of discrimination on the basis of race or place of residence. The statement of compatibility notes that 'more than 80 per cent of CDP participants identify as Aboriginal and Torres Strait Islander people.'[52] Accordingly, by extending the TCF to CDP participants, the suspension and cancellation of welfare payments that may occur as a result is likely to have a disproportionate impact on Aboriginal and Torres Strait Islander people and job seekers living in remote Australia.

1.49 The statement of compatibility acknowledges that the right to equality and non-discrimination is potentially engaged by the bill, but its analysis is limited to justifying why exceptions from some the aspects of the TCF in relation to subsidised employment[53] constitute 'legitimate differential treatment'.[54] The statement of compatibility does not appear to consider the possible differential impact of ensuring 'all activity tested job seekers across Australia will be subject to the same compliance framework, no matter where they live'[55] on remote jobseekers and Aboriginal and Torres Strait Islander people in the CDP (other than those offered or employed in subsidised jobs).

1.50 Where a measure impacts on particular group disproportionately it establishes *prima facie* that there may be indirect discrimination. However, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective,

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50 *Althammer v Austria*, Human Rights Committee, Communication No 998/01, CCPR/C/78/D/998/2001 (2003) [10.2].

51 See *Lindgren et al v Sweden*, Communication Nos 298/1988 and 299/1988, CCPR/C/40/D/298/1988 (1991).

52 SOC, p. 21.

53 Namely, that a person does not commit a mutual obligation failure if the person is in subsidised employment (section 21); a person does not commit a work refusal failure for refusing an offer of subsidised employment (section 23); and a person does not commit an unemployment failure if a person voluntarily leaves a subsidised job or is dismissed from a subsidised job for misconduct. Otherwise, mutual obligation failures, work refusal failures and unemployment failures carry penalties from suspension to cancellation of income support payments.

54 SOC, p. 21.

55 SOC, p. 32.

is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.[56]

1.51 As noted above, no evidence is provided in the statement of compatibility as to whether the existing compliance arrangements for CDP participants are ineffective to address the stated objective of the bill of reducing welfare dependence and long-term unemployment in remote Australia. This raises questions as to whether the differential treatment, being the disproportionate impact this measure may have on Aboriginal and Torres Strait Islander people and jobseekers living in remote Australia, is based on reasonable and objective criteria. Further information from the minister to justify the rationale for the differential effect on Aboriginal and Torres Strait Islander people and job seekers living in remote Australia will assist in determining whether the measure is compatible with the right to equality and non-discrimination.

Committee comment

1.52 The preceding analysis raises questions as to whether the measure is compatible with the right to equality and non-discrimination.

1.53 The committee seeks the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- **whether the disproportionate impact the measure may have on Aboriginal and Torres Strait Islander people and jobseekers living in remote Australia constitutes differential treatment for the purposes of international human rights law;**
- **whether the differential treatment is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the differential treatment is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the differential treatment is a proportionate means of achieving the stated objective.**

Inability to access subsidised jobs for six months

1.54 Section 25 of the bill provides that a CDP participant who voluntarily leaves subsidised employment or is dismissed for misconduct will not be subject to an unemployment failure for the purposes of the TCF. However, the explanatory memorandum states in relation to section 25 that where a participant voluntarily leaves a subsidised job or is dismissed due to misconduct, the job seeker will be

56 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; *Althammer v Austria*, Human Rights Committee, Communication No 998/01, CCPR/C/78/D/998/2001 (2003) [10.2].

prevented from taking up a place in subsidised employment for six months.[57] This is not reflected in section 25 or elsewhere in the text of the bill.

Compatibility of the measure with the right to work

1.55 The right to work is enshrined in article 6 of the ICESCR and includes the right of 'everyone to the opportunity to gain his [or her] living by work which he [or she] freely chooses or accepts'. It provides that, for full realisation of that right, steps should be taken by a state including 'technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and productive employment'.[58] An aspect of the right is not to be unfairly deprived of employment.[59] The right to work may be subject to permissible limitations which are provided by law and not arbitrary. In order for a limitation not to be arbitrary, it must be prescribed by law, pursue a legitimate objective, and be rationally connected to and proportionate to achieving that objective.

1.56 The statement of compatibility states that this right is engaged and promoted by the bill, as it provides that CDP participants may choose to decline an offer of subsidised employment, without penalty.[60]

1.57 However, it is not clear which provision of the bill gives effect to the statement in the explanatory memorandum that if a participant voluntarily leaves a job or is dismissed due to misconduct, the job seeker will be prevented from taking up a place in subsidised employment for six months.

1.58 If the bill is proposed to have this effect, this could limit the right to work if the labour market in CDP regions is comprised mostly or entirely of subsidised jobs, as a CDP participant may be effectively excluded from the opportunity to gain their living through work for six months. Further information from the minister as to the proposed operation of the provision would assist in determining the extent to which this proposed effect of the measure limits the right to work.

Committee comment

1.59 The preceding analysis raises questions as to whether the proposed exclusion on participants that have left or been dismissed from subsidised employment from accessing further subsidised employment for six months constitutes a permissible limitation on the right to work.

1.60 The committee seeks the advice of the minister as to the compatibility of the measure with the right to work. In particular, the committee seeks the advice of the minister as to:

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57 EM, pp. 5, 12.

58 International Covenant on Economic and Social Rights, article 6(2).

59 UN Economic and Social Council, *General Comment 18: The right to work* (2006) [6].

60 SOC, p. 20.

- **whether the proposed exclusion on participants that have left or been dismissed from subsidised employment from accessing further subsidised employment for six months is prescribed by law;**
- **an evidence-based explanation of the legitimate objective being pursued (including how it addresses a pressing or substantial concern);**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available and the existence of any safeguards).**

Bills not raising human rights concerns

1.61 Of the bills introduced into the Parliament between 10 and 13 September, 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):

- Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018;
- Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018;
- Shipping Registration Amendment Bill 2018;
- Social Services Legislation Amendment (Ending the Poverty Trap) Bill 2018; and
- Treasury Laws Amendment (Supporting Australian Farmers) Bill 2018.

Chapter 2

Concluded matters

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

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

Counter-Terrorism Legislation Amendment Bill (No. 1) 2018

Purpose	Seeks to make a range of amendments to the *Criminal Code Act 1995*, *Crimes Act 1914*, *Australian Security Intelligence Organisation Act 1979*, *Intelligence Services Act 2001* and the *Administrative Decisions (Judicial Review) Act 1977*, including to extend the operation of the control order regime, the preventative detention order regime, declared area provisions, and the stop, search and seize powers of the Australia Federal Police by a further three years; and to extend the operation of the Australian Security Intelligence Organisation's questioning, and questioning and detention powers for a further 12 months
Portfolio	Attorney-General
Introduced	House of Representatives, 24 May 2018
Rights	Equality and non-discrimination; liberty; freedom of movement; fair trial and the presumption of innocence; privacy; freedom of expression; freedom of association; protection of the family; prohibition on torture and cruel, inhuman or degrading treatment; work; social security; adequate standard of living; children (see **Appendix 2**)
Previous report	6 of 2018
Status	Concluded examination

Background

2.3 The bill amends various Acts relating to counter-terrorism, including to extend for a further three years the following regimes which are scheduled to sunset on 7 September 2018:

- the control order regime in Division 104 of the *Criminal Code Act 1995* (Criminal Code);
- the preventative detention order regime in Division 105 of the Criminal Code;

- the declared areas provisions in sections 119.2 and 119.3 of the Criminal Code; and
- the stop, search and seize powers in Division 3A of Part IAA of the *Crimes Act 1914*.

2.4 The bill also amends the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to extend the operation of ASIO's questioning and detention powers for a further 12 months.

2.5 The committee first reported on the bill in its *Report 6 of 2018*.[1] The committee has considered the measures listed above on a number of previous occasions.[2] In its *Report 6 of 2018*, the committee set out the concerns raised in its previous human rights assessments in relation to the declared area provisions and ASIO's questioning and detention powers, respectively, and concluded its examination by drawing these concerns to the attention of the parliament.[3]

2.6 The committee also requested a response from the Attorney-General by 11 July 2018 in relation to control orders, preventative detention orders and stop, search and seize powers.

2.7 The bill passed both Houses of Parliament on 16 August 2018.

2.8 A response from the Attorney-General and the Minister for Home Affairs to the committee's inquiries was received on 13 August 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Control orders

2.9 The committee has previously considered the control orders regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016.[4]

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1 Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 2-29.

2 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 3-69; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 71-73; *Nineteenth report of the 44th Parliament* (3 March 2015) pp. 56-100; *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 82-101; and *Report 4 of 2018* (8 May 2018) pp. 88-90.

3 See, Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 2-29.

4 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 3; *Sixteenth Report of the 44th Parliament* (25 November 2014) p. 7; *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); *Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 85; *Report 7 of 2016* (11 October 2016) p. 64.

2.10 The control orders regime grants the courts power to impose a control order on a person (including children aged between 14 and 17) at the request of the Australian Federal Police (AFP), with the Attorney-General's consent. The maximum penalty for contravening a condition of a control order is five years imprisonment.[5] The current 2018 bill extends the operation of the control orders regime for a further three years noting the regime was due to sunset on 7 September 2018.[6] The 2018 bill also makes some specific amendments to the operation of the regime.[7]

Terms of a control order

2.11 The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person subject to the order. These include:

- requiring a person to stay in a certain place at certain times;
- preventing a person from going to certain places;
- preventing a person from talking to or associating with certain people;
- preventing a person from leaving Australia;
- requiring a person to wear a tracking device;
- prohibiting access or use of specified types of telecommunications, including the internet and telephones;
- preventing a person from possessing or using specified articles or substances; and
- preventing a person from carrying out specified activities, including in relation to their work or occupation.[8]

Steps for the issue of a control order

2.12 The steps for the issue of a control order are:

- a senior AFP member must obtain the Minister for Home Affairs'[9] consent to seek a control order on prescribed grounds;[10]

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5 Criminal Code, section 104.5.

6 Explanatory Memorandum (EM) p. 2; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (2018 bill), item 11.

7 These amendments include permitting an issuing court to vary an interim control order where there is agreement to a variation between the AFP and the subject of the control order; extending the minimum duration of time between the making of the interim control order and the confirmation proceeding from 72 hours to seven days; providing that the issuing court cannot make cost orders against the controlee except in limited circumstances where the controlee has acted unreasonably in conducting the control order proceedings: see EM, pp. 3-38, 40-41.

8 See Criminal Code, section 104.5.

9 See Criminal Code, section 104.2; EM p. 8.

- once consent is granted, the AFP member must seek an interim control order from an issuing court through an *ex parte* proceeding. The court must be satisfied on the balance of probabilities:
    - (i) that making the order would substantially assist in preventing a terrorist act; or
    - (ii) that the person in respect of whom the control order is sought has provided training to, received training from or participated in training with a listed terrorist organisation; or
    - (iii) that the person has engaged in a hostile activity in a foreign country; or
    - (iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or
    - (v) that the person has been convicted in a foreign country for an equivalent offence; or
    - (vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
    - (vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country; and
- the court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of:
    - (i) protecting the public from a terrorist act; or
    - (ii) preventing the provision of support for or the facilitation of a terrorist act; or
    - (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.[11]

2.13 In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account:

(a) as a paramount consideration in all cases the objects of:

(i) protecting the public from a terrorist act;

(ii) preventing the provision of support for or the facilitation of a terrorist act;

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10 See Criminal Code, sections 104.2 and 104.4.

11 See Criminal Code, section 104.4.

(iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country;

(b) as a primary consideration in the case where the person is 14 to 17 years of age—the best interests of the person; and

(c) as an additional consideration in all cases—the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).[12]

2.14 The AFP must subsequently elect whether to seek the court's confirmation of the control order, with a confirmed order able to last up to 12 months (or three months if the person is aged between 14 and 17).[13] Currently, an interim control order is subject to confirmation by the court as soon as practicable but at least 72 hours after the interim control order is made. The bill extends this minimum period of time from 72 hours to seven days.[14]

Compatibility of continuing the control orders regime with human rights

2.15 The control orders regime involves significant limitations on human rights. Notably, it allows the imposition of a control order on an individual without following the regular criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.

2.16 The initial human rights analysis stated that the extension of the control orders regime by the 2018 bill engages and may limit a number of human rights, including:

- right to equality and non-discrimination;
- right to liberty;
- 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 the protection of the family;
- right to work;
- right to social security and an adequate standard of living; and
- rights of children.

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12 See Criminal Code, section 104.4.

13 See Criminal Code, sections 104.5(f), 104.14; EM, statement of compatibility (SOC) p. 8.

14 EM, p. 4.

2.17 The statement of compatibility acknowledges that the bill engages a range of human rights.[15] These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

2.18 The committee's previous reports have raised serious concerns as to whether control orders constitute permissible limitations on human rights.[16] Noting that the control orders regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the control orders regime that set out in detail how the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand).[17] As set out below, the statement of compatibility for the 2018 bill provides some of this information.

Extending control orders - legitimate objective

2.19 In relation to whether extending the control orders regime pursues a legitimate objective, the statement of compatibility states that:

> The control order regime achieves the legitimate objective of preventing serious threats to Australia's national security interests, including in particular, preventing terrorist acts. In the current national security landscape, it is critical that law enforcement agencies have access to preventative powers such as control orders to proactively keep the Australian community safe.[18]

2.20 In this respect, the statement of compatibility also provides some information as to the importance of this objective as a pressing concern.[19] Based on this information, the initial analysis stated that the objective of preventing serious threats to Australia's national security interests, including preventing terrorist acts, is likely to constitute a legitimate objective for the purposes of international human rights law. The committee has previously considered that the objective of the measure constituted a legitimate objective.[20]

Extending control orders—rational connection to a legitimate objective

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15 EM, SOC, from p. 10.

16 See, for example, Parliamentary Joint Committee on Human Rights*, Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 94; *Report 7 of 2016* (11 October 2016) p. 69.

17 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 69.

18 EM, SOC, p. 9.

19 EM, SOC, p. 7.

20 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 16.

2.21 As set out above, a measure that limits human rights must be rationally connected to (that is, effective to achieve) its legitimate objective. In this respect, the human rights assessment in the committee's previous reports noted that there was doubt as to whether control orders are rationally connected to their stated objective. This was because it was unclear whether control orders were an effective tool to prevent terrorist acts noting the availability of regular criminal justice processes (including for preparatory acts).[21]

2.22 It was noted that since the committee's last report on control orders,[22] the current Independent National Security Legislation Monitor (INSLM), James Renwick SC, had reported that control orders may be effective in preventing terrorism, based on recent court cases.[23] This contrasted with the findings of a previous INSLM, Bret Walker SC, who found that 'control orders in their present form are not effective, not appropriate and not necessary'.[24]

2.23 On this issue, the statement of compatibility notes that since control orders were introduced in 2005 they have been used only six times. However, rather than indicating that control orders are ineffective or not necessary, the statement of compatibility argues that this indicates that the control order regime has been used judiciously to date.[25] It refers to the findings of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) that 'the limited use of the provisions reflects the AFP's position that, in circumstances where there is enough evidence to formally charge and prosecute a person, the AFP will take this approach over seeking the imposition of a control order'.[26] While this may be the case as a matter of policy and practice, there is no legal requirement that control orders be restricted in this manner.

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21 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) p. 90; *Report 7 of 2016* (11 October 2016) p. 68. See, also, Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) p. 30.

22 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

23 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54. See, Parliamentary Joint Committee on Intelligence and Security, Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime (1 March 2018) p. 54.

24 INSLM, *Declassified Annual Report* (20 December 2012) p. 4.

25 EM, SOC, p. 9.

26 Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime,* (February 2018) [3.56] p. 54.

2.24 It was acknowledged that there is some evidence that the imposition of a control order could be capable of being effective in particular individual cases.[27] However, some questions remain as to whether the control order regime as a whole is rationally connected to its objective, noting in particular the availability of the regular criminal processes.

Extending control orders—proportionality

2.25 In relation to proportionality, the human rights assessment in the committee's previous reports on the control orders regime noted that there may be questions as to whether control orders are the least rights restrictive approach to preventing terrorist-related or hostile activities, and whether control orders contain sufficient safeguards to appropriately comply with Australia's human rights obligations.[28]

2.26 The previous human rights assessment raised concerns that control orders could be sought in circumstances where there is not necessarily an imminent threat to personal safety. The previous report stated that protection from imminent threats had been a critical rationale relied on for the introduction and use of control orders rather than ordinary criminal processes. It further stated that, in the absence of an imminent threat, it is difficult to justify as proportionate the imposition of significant limitations on human rights without criminal charge or conviction.[29]

2.27 As noted above, the issuing criteria for a control order set out in section 104.4 of the Criminal Code require that each proposed condition of a control order must be reasonably necessary, and reasonably appropriate and adapted, to the purpose of protecting the public from the threat of a terrorist act, or support for terrorist or hostile activities. The issuing court must also have regard to the impact of the obligations on the person's circumstances.[30] The statement of compatibility explains that this threshold ensures that any restrictions on human rights are 'reasonable, necessary and proportionate'.[31] However, while this criterion may act as a relevant safeguard, there is no explicit requirement that the conditions be the least rights restrictive measures for the person subject to the control order to protect the public.[32] In this respect, it was noted that the impact on the individual is given the

27 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54.

28 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) p. 11.

29 See, for example, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

30 See Criminal Code, section 104.4.

31 EM, SOC, p. 11.

32 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

status of 'additional consideration', while the effect on preventing or providing support to terrorism is to be a 'paramount consideration' of the issuing court.[33]

2.28 As noted in the previous human rights assessment of control orders, a less rights restrictive approach would not mean that public protection would become a secondary consideration in the issuance of a control order. Rather, it would require a decision-maker to take into account any possible less invasive means of achieving public protection as an equally paramount consideration. In the absence of such requirements, it may be difficult to characterise the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.[34]

2.29 The statement of compatibility also outlines some additional safeguards relating to the application of the control orders regime against children (aged 14 to 17 years). This includes, subject to exceptions, the requirement that the court must appoint a lawyer to act for a young person (aged 14 to 17 years) in control order proceedings if the young person does not already have a lawyer. Additionally, when considering whether to impose a particular condition under a control order on a child, the court is required to consider the best interests of the child as a primary consideration and the safety and security of the community as a paramount consideration.[35] Overall, while these safeguards are relevant to the proportionality of the limitations imposed on human rights, the initial analysis stated that questions remain as to whether they are sufficient to ensure that the application of the control orders regime to children is a proportionate limit on human rights. This includes questions as to whether applying a coercive regime to children (noting their maturity and particular vulnerabilities as children) constitutes a least rights restrictive approach.

2.30 In order to constitute a proportionate limitation on human rights, coercive powers must also be no more extensive than is strictly necessary to achieve their legitimate objective. In this respect, the initial analysis stated that there were questions about how the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand). The committee's previous human rights assessment of control orders noted there are a range of offences in the Criminal Code that cover preparatory acts to terrorism offences, which allow police to detect and prosecute terrorist activities at early stages.[36] In the absence of further information, and as

33 See Criminal Code, section 104.4.

34 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

35 See Criminal Code, subsection 104.4(1)-(2).

36 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 17.

indicated in the committee's previous assessment, the control orders regime is likely to be incompatible with a number of human rights.[37]

2.31 In light of the proposed extension of the regime, the committee sought further advice as to:

- how the control orders regime as a whole is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

Minister and Attorney-General's response

Legitimate objective

2.32 The minister and Attorney-General's response notes that the committee has accepted that the control orders regime pursues a legitimate objective for the purposes of international human rights law.

Rational connection

2.33 As to how the measures are effective to achieve (that is, rationally connected to) the stated objective, the response provides the following context:

> Control orders are a measure of last resort, which are only relied upon when traditional law enforcement options such as arrest, charge and prosecution are not available. As noted by the PJCIS Powers Report, the limited use of the control order regime demonstrates that the preference of law enforcement agencies is to employ traditional law enforcement methods to more comprehensively address the threat posed by an individual.

2.34 Noting the serious limitation on human rights that may be imposed by control orders, it is relevant that as a matter of policy and practice their use has been restricted. However, as noted above, there may still be questions about the potential application of the regime given there is no legal requirement that the use of control orders be restricted to circumstances where traditional law enforcement options are not available. In relation to evidence of effectiveness, the response refers to the report by INSLM Renwick and notes that he found that examples from recent cases demonstrate the effectiveness of control orders in pursuing the objects of the regime. The response does not directly address the findings by previous INSLM Walker which queried the effectiveness of the regime.

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37 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 17.

2.35 The response further reiterates that while only six control orders have been made to date:

> …there will be circumstances where law enforcement agencies may have sufficient information or intelligence to establish a serious concern regarding the threat posed by an individual that falls short of the evidentiary burden to commence criminal prosecution. However, without an appropriate preventative mechanism, law enforcement agencies have limited means to manage the threat in the short to medium term. Use of a control order is considered in conjunction with, and is complementary to, criminal prosecution, and allows a balance to be achieved between mitigating the risk to community safety and allowing criminal investigations to continue.

2.36 Further, in relation to how the control order regime is rationally connected to 'preventing a terrorist act', the response from the minister and the Attorney-General points to specific legislative requirements:

> When determining which conditions to impose on an individual under a control order, the issuing court must consider whether the proposed obligation, prohibition or restriction is 'reasonably necessary, and reasonably appropriate and adapted' for the purposes of achieving one of the permitted purposes for a control order, such as protecting the public from a terrorist act (paragraph 104.4(1)(d)). This requires the issuing court to be satisfied that each condition under a control order must be effective in addressing the risk posed by the individual. Where a condition is not effective or necessary in addressing this threat, the issuing court may not impose that condition, or if it does impose the condition, may at a later time, upon application by the subject of the control order, determine that that condition is no longer necessary or effective to address the threat posed by the individual.
>
> Accordingly, the control order regime ensures that each of the limitations on a human right that may be imposed under a control order is rationally connected to minimising serious threats to Australia's national security, including in particular, the prevention of terrorist acts.

2.37 On the basis of the information provided, it appears that the control order regime may be rationally connected to its stated objective. However, much may depend on how the control orders are used in practice and how they interact with regular criminal justice processes. Noting that they have only been used six times to date, there is limited evidence in this respect.

Proportionality

2.38 The response identifies a number of safeguards which it states ensure that the control order regime 'represents the least restrictive way to achieve the legitimate purpose of preventing a serious threat to Australia's national security interests, including in particular, the prevention of terrorist acts.' The response states that these safeguards include that the control order is made by a judicial officer and

that under section 104.4(1)(d) of the *Criminal Code* the court must be satisfied on the balance of probabilities that each of the obligations, prohibitions or restrictions to be imposed on the person by the control order is reasonably necessary, and reasonably appropriate and adapted for the purpose of achieving one of the permitted purposes for a control order, such as protecting the public from a terrorist.

2.39 The response states that this requirement in subsection 104.4(1)(d) of the Criminal Code ensures that only the obligations, prohibitions and restrictions directly capable of achieving the objective of the control order are imposed by the issuing court. The response argues that this means that the control order is no more restrictive than it needs to be for the purpose of achieving the legitimate objective. That is, the response appears to suggest that while there is no explicit requirement that the conditions in the control order be the least rights restrictive approach, the requirement that each obligation, prohibition or restriction be 'reasonably necessary, and reasonably appropriate and adapted' to a permitted purpose is an equivalent test.

2.40 However, the provision as drafted would seem to permit conditions to be imposed in circumstances where this is not the least rights restrictive approach. This is because while the court is required to take into account the effect on preventing or providing support to terrorism as a 'paramount consideration',[38] it is not required to take into account any possible less invasive means of achieving public protection as an equally paramount consideration. As a result, it is difficult to characterise the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.[39] This is the case particularly in light of the fact that, under section 104.4, the impact on the subject of the control order is only given the status of 'additional consideration'.[40]

2.41 The response does, however, point to some other mechanisms to assist with the proportionality of the regime including the ability to treat individual cases differently:

> …the control order regime allows for each application to be dealt with flexibly, and based on the circumstances of each case. For instance, for control order applications in relation to young persons between the age of 14 and 17, the issuing court must consider the best interests of the young person when determining whether each of the obligations, prohibitions or restrictions to be imposed on the individual is reasonably necessary, and reasonably appropriate and adapted to the protecting the public from a terrorist act (paragraph 104.4(2)(b)). Subsection 104.4(2A) outlines specific

38 See Criminal Code, section 104.4.

39 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

40 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

> matters that the issuing court must take into account when determining what is in the best interest of the young person, including their age, maturity, background, the right of the person to receive an education, the benefit to the person of having a meaningful relationship with his or her family and friends and the physical and mental health of the individual.
>
> In addition, paragraph 104.4(2)(c) provides that the issuing court must consider the impact of each of the proposed obligations, prohibitions or restrictions on the person's circumstances (including the person's financial and personal circumstances). This enables the control order regime to provide sufficient flexibility to treat the circumstances of each control order application differently, rather than imposing a blanket restriction on human rights without regard to the specific needs of the individual, or the threat they pose.

2.42 The flexibility to take individual circumstances into account is relevant to the proportionality of the regime. The response further explains that the control order regime contains mechanisms for assessing the ongoing need for a control order, and each of its obligations:

> An individual subject to a control order may apply at any time to have a confirmed control order revoked or varied. The issuing court can revoke a control order if it is no longer satisfied on the balance of probabilities that the control order would substantially assist in the prevention of a terrorist act. Alternatively, the issuing court may remove certain obligations, prohibitions and restrictions in relation to an individual if it is no longer satisfied that the condition is reasonably necessary, and reasonably appropriate and adapted to achieving the purpose of protecting the public from a terrorist act. These review mechanisms ensure that the intrusions on human rights that may be occasioned by a control order are no greater than necessary to achieve the legitimate objective.
>
> … The restrictions on human rights occasioned by a control order are not indiscriminate or disproportionate intrusions, but rather tailored to the specific threat being mitigated, and the individual circumstances of the individual who is the subject of the restrictions.

2.43 While these mechanisms for oversight and review are important safeguards in relation to the operation of the regime, it is unclear that they will be sufficient to ensure that it imposes a proportionate limit on human rights in all circumstances. In this context, it is important to bear in mind that control orders will be used in cases where there is insufficient evidence to charge someone with an offence. It is not clear from the response that other less rights restrictive mechanisms, such as engagement or de-radicalisation, would not be sufficient to address the stated objectives of the measure, rather than imposing conditions under a control order, a

breach of which constitutes a criminal offence.[41] This is particularly the case given that, as noted above, control orders may be sought in circumstances where there is not necessarily an imminent threat to personal safety. This means that there is a risk that the potential threat could be more remote. In these circumstances, the imposition of significant limitations on human rights without criminal charge or conviction may be difficult to characterise as permissible as a matter of international human rights law. For these reasons, the control order regime does not appear to be a proportionate limitation on human rights.

Committee response

2.44 The committee thanks the minister and the Attorney-General for their response and has concluded its examination of this issue.

2.45 While the control order regime pursues a legitimate objective and may be rationally connected to that objective, the preceding analysis indicates that the regime does not impose a proportionate limit on human rights.

2.46 Consistent with the concerns raised in the previous human rights assessment relating to the control orders regime, the committee draws the human rights implications of the bill (now Act) to the attention of the Parliament.[42]

Compatibility of extending the minimum duration of time between the interim control order and the confirmation proceedings with the right to a fair hearing

2.47 As noted above, currently, an interim control order is subject to confirmation by the court as soon as practicable but at least 72 hours after the interim control order is made. The bill would extend this minimum period of time from 72 hours to seven days.[43] As interim control orders are made *ex parte* (that is, without the person subject to the control order being present), this means that the person will, generally, be subject to the conditions of the control order until the confirmation proceeding, without having an opportunity to be heard. In this context, while it was acknowledged that both parties to a confirmation proceeding may require sufficient time to prepare their case,[44] the extension of the minimum period raises other questions about the compatibility of the measure with the right to a fair hearing. This is because a delay in confirmation hearing may have significant implications for a person who remains subject to an interim control order while awaiting this hearing.

2.48 The explanatory memorandum explains the timing of confirmation hearings further in the context of the measure:

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41 Under section 104.27 of the Criminal Code it is offence with a maximum penalty of five years imprisonment for contravening a control order.

42 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 70.

43 EM, p. 2.

44 EM, SOC, p. 15.

> Confirmation proceedings have to date occurred many months after the making of an interim control order. However, under existing subsection 104.5(1A), it remains open to the issuing court to set the confirmation date only 72 hours after the making of an interim control order. This would leave both parties potentially unprepared to make detailed submissions to the court at the confirmation proceeding.[45]

2.49 While this may be the case as a matter of practice, it was unclear why it is insufficient to leave it to the court to set a confirmation date as soon as reasonably practicable. It would have been useful if the statement of compatibility had provided further information in this respect.

2.50 The committee therefore sought further advice as to the compatibility of extending the minimum duration of time between the interim control order and the confirmation proceedings with the right to a fair hearing.

Minister and Attorney-General's response

2.51 In relation to the compatibility of the measure with the right to a fair hearing, the response acknowledges that the measure has the potential to limit the subject of the control order's right to contest the interim control order as soon as practicable. However, the response argues that the measure also provides greater opportunity for the subject of the control order to prepare to present their case to the court:

> Confirmation proceedings are complex, and may take both parties a substantial amount of time to prepare for. While subsection 104.5(1B) allows the issuing court to consider a range of factors when determining the date of the confirmation hearing, subsection 104.5(1A) enables the issuing court to set the confirmation date as early as 72 hours after the making of an interim control order. This could prevent both the subject of the control order and the AFP from being adequately prepared for the confirmation hearing.
>
> To date, the issuing court, the AFP and the subject of the control order application, have been satisfied in holding confirmation proceedings several months after the making of an interim control order. In light of this reality, the proposed extension of time between the making of an interim control order and the confirmation date from 72 hours to seven days is unlikely to amount to an undue delay in an individual's right to contest the interim control order.

2.52 An important aspect of the right to a fair hearing is for there to be adequate time for an individual to prepare their case. It is further noted that, to date, the issuing court has set the date for confirmation proceedings sometimes many months after the making of the interim control order. It is acknowledged that this means that

45 EM, p. 37.

from a practical perspective the measure is unlikely to lead to delay in an individual's ability to contest the control order. However, as noted above, while this may be the case as a matter of practice, it is unclear why it cannot be left to the court to set a confirmation date as soon as 'practicable'. This issue was not addressed in the response. Noting this, there is a concern that the measure may result in a delay to the confirmation hearing in an individual case. This may have significant implications for a person who remains subject to an interim control order while awaiting this hearing.

Committee response

2.53 The committee thanks the minister and the Attorney-General for their response and has concluded its examination of this issue.

2.54 Based on the information provided, from a practical perspective the measure is unlikely to lead to delay in an individual's ability to contest the control order. However, noting the potential for delay, there may be a risk in relation to the right to a fair hearing in the individual case.

Preventative detention orders

2.55 The committee has previously considered the Preventative Detention Orders (PDO) regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016.[46]

2.56 The AFP can apply for a PDO which allows a person to be taken into custody and detained[47] if it is suspected, on reasonable grounds, that a person will engage in a terrorist act, possesses something in connection with preparing for or engaging in a terrorist act, or has done an act in preparation for planning a terrorist act.[48] The terrorist act must be one that 'is capable of being carried out, and could occur, within the next 14 days'.[49]

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46 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 3; *Sixteenth Report of the 44th Parliament* (25 November 2014) p. 7; *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); *Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 85; *Report 7 of 2016* (11 October 2016) p. 64.

47 The period of detention is up to 48 hours.

48 See subsection 105.4(4) of the Criminal Code. There is also the power for a PDO to be issued if a terrorist act has occurred within the last 28 days and it is reasonably necessary to detain the subject to preserve evidence of, or relating to, the terrorist act, and detaining the subject for the period for whi1ch the person is to be detained is reasonably necessary for preserving that evidence (subsection 105.4(6)).

49 Criminal Code, section 105.4(5).

2.57 The 2018 bill sought to extend the operation of the PDO regime for a further three years, noting the regime was due to sunset on 7 September 2018.[50]

2.58 The police must not question the person subject to a PDO while they are detained subject to limited exceptions.[51]

2.59 There are restrictions on who the subject of the PDO can contact while detained.[52] A person subject to a PDO may contact a family member or employer. However, contact can be monitored by police and can only occur for the purposes of letting the contacted person know that the subject being detained is safe but is not able to be contacted for the time being.

Compatibility of extending the operation of the PDO with multiple human rights

2.60 The PDO regime engages and may limit a number of human rights, including:

- right to liberty;
- right to security of the person;
- right to a fair hearing and fair trial;
- right to freedom of expression;
- right to freedom of movement;
- right to privacy;
- right to be treated with humanity and dignity;
- right to protection of the family; and
- right to equality and non-discrimination.

2.61 In particular, as PDOs are administrative orders made, in the first instance, by a senior AFP member, which authorise an individual to be detained without charge, the extension of the PDO regime engages and limits the right to liberty. Further, as there are restrictions on who a person can contact while detained under a PDO and what they can say to those they contact, the regime also engages and limits the right to freedom of expression. Being held in a form of detention, which is in effect incommunicado, may also have implications for a number of other human rights.

2.62 The statement of compatibility acknowledges that PDOs engage and limit a number of these rights.[53] These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

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50 EM, p. 2; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018, item 11.

51 Criminal Code, section 105.42.

52 Criminal Code, sections 105.34, 105.35, 105.45.

53 EM, SOC, p. 19.

2.63 Noting that the PDO regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the PDO regime,[54] setting out in detail how the necessarily coercive powers impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal processes (e.g. arrest and charge).[55] As set out below, the statement of compatibility for the 2018 bill provides some of this information.

Extending the operation of the PDO regime – legitimate objective

2.64 In relation to the objective of the PDO regime, the statement of compatibility explains:

> The PDO regime supports the legitimate objective of preventing serious threats to Australia's national security and, in particular, preventing terrorist acts. In recent years, there has been an increase in the threat of smaller-scale, opportunistic attacks by lone actors. Law enforcement agencies have had less time to respond to these kinds of attacks than other terrorist plots.[56]

2.65 Consistent with the committee's previous analysis, the objective of preventing serious terrorist attacks is likely to constitute a legitimate objective for the purposes of international human rights law.

Extending the operation of the PDO regime – rational connection

2.66 Since the committee's last report on PDOs,[57] current INSLM Renwick reported that PDOs 'have the capacity to be effective'.[58] This contrasts with the findings of previous INSLM Walker who found that '[t]here is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism'.[59] The PJCIS has

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54 In accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

55 See, for example, Parliamentary Joint Committee on Human Rights: *Fourteenth Report of the 44th Parliament* (28 October 2014); *Sixteenth Report of the 44th Parliament* (25 November 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); and *Thirty-Sixth Report of the 44th Parliament* (16 March 2016).

56 EM, SOC, p.18.

57 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

58 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54. See, Parliamentary Joint Committee on Intelligence and Security, Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime (1 March 2018) p. xii.

59 INSLM, *Declassified Annual Report* (20 December 2012) p. 67.

also recommended that the PDO regime continue.[60] There is therefore conflicting evidence as to whether the PDO regime is effective to achieve its stated objective.

2.67 The statement of compatibility notes that to date no PDOs have been issued since the commencement of the regime in 2005.[61] However, it argues that this:

> …reflects the policy intent that these orders should be invoked only in limited circumstances where traditional investigative powers available to law enforcement agencies are inadequate to respond to a terrorist threat.[62]

2.68 However, as stated in the initial analysis, while this may be the policy intention of the measure, the fact that no PDOs have been issued also raised questions as to whether the PDO regime is effective to achieve its stated objective. Further, noting in particular the availability of the regular criminal processes, additional questions remained as to whether the PDO regime as a whole is rationally connected to its objective. It would have been useful if the statement of compatibility had provided further information about this issue.

Extending the operation of the regime – proportionality

2.69 In relation to proportionality, the previous human rights assessment of the PDO regime stated that the PDO regime involves very significant limitations on human rights. Notably, it allows the imposition of a PDO on an individual without following the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.

2.70 The previous assessment noted that it was unclear that the PDOs were necessary to achieve their stated objective, noting the availability of ordinary criminal justice processes including the criminalisation of preparatory terrorism offences.[63] In this respect, the UN Human Rights Committee has indicated that, in order to justify preventative detention, the state must show that the threat posed by the individual cannot be addressed by alternative (less rights restrictive) means.[64] This issue was not fully addressed in the statement of compatibility.

2.71 In terms of proportionality, the statement of compatibility for the 2018 bill argues that the 'high threshold' for making a PDO ensures that it is 'inextricably linked to preventing an imminent terrorist incident' and is a proportionate limit on

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60 Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime,* (February 2018) [4.80] p. 103.

61 EM, SOC, p. 18.

62 EM, SOC, p. 18.

63 Section 101.6 of the Criminal Code makes it an offence to do 'any act in preparation for, or planning a terrorist act'.

64 *Miller & Carroll v New Zealand* (2502/2014) UN Human Rights Committee (2017) [8.5].

human rights.[65] However, the previous human rights assessment noted that given a PDO could be sought even where there is not an imminent threat to life, it was unclear that the regime imposes a proportionate limitation on the right to liberty in the pursuit of national security.[66] In this respect, it was noted that the regime would potentially allow for detention of a person, who may not themselves pose a risk to society, for the purpose of preserving evidence. This kind of power is an extraordinary one in the context of the right to liberty and appears not to be a least rights restrictive approach.

2.72 In light of the proposed extension of the regime, the committee sought further advice as to:

- how the PDO regime is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

Minister and Attorney-General's response

Legitimate objective

2.73 The minister and Attorney-General's response notes that the committee has accepted that the PDO regime pursues a legitimate objective for the purposes of international human rights law.

Rational connection

2.74 In relation to whether the PDO regime is effective to achieve its stated objective, the response explains the scope of the PDO regime in the context of the type of risks that may occur:

> Under a Commonwealth PDO, a person can be detained for up to 48 hours to:
>
> - prevent a terrorist act that is capable of being carried out, and could occur, within the next 14 days from occurring, or
> - preserve evidence of, or relating to, a recent terrorist act.
>
> In the current threat environment, there is a heighted risk of smaller-scale opportunistic attacks, undertaken principally by lone actors or small

65 EM, SOC, p. 19.

66 See, for example, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64. Schedule 5 of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (now Act) changed the current definition of a 'terrorist act' as being one that is imminent and expected to occur in the next 14 days, to one that 'is capable of being carried out, and could occur, within the next 14 days'.

> groups. While there is still the need to prepare for more complex attack plots, simple attack methodologies that enable individuals to act independently and with a high degree of agility remain the more likely form of terrorism in Australia. The simple nature of these attacks means preparation may not involve activity that is concerning enough to come to the attention of authorities immediately. In such circumstances, law enforcement agencies need to act quickly and decisively to disrupt terrorist acts and prevent catastrophic consequences to the community.

2.75 This information indicates that there may be challenges in preventing and responding to simple attack methodologies using traditional investigative methods. In this respect, the response reiterates that the PDO is a measure of last resort, which is only sought in exceptional circumstances before a terrorist act occurs, or after an act of terrorism occurs to preserve evidence. The response further states the lack of use of the PDO regime reflects the understanding by the AFP that the PDO regime is only anticipated to be used 'in times of an unfolding emergency (or in its immediate aftermath) and when the traditional investigative powers available to law enforcement are inadequate to contain the threat'. The response explains that while the PDO regime is yet to be used, there are scenarios when its use will be effective to achieve its stated objectives. The response cites the following hypothetical situation of when use of the PDO regime may be necessary and appropriate:

> In its supplementary submission to the PJCIS, the Attorney-General's Department (AGD) and the AFP provided the following example of when a PDO is an effective means of responding to a terrorist act:
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> > Consider there has been an explosion in a crowded place in the Melbourne central business district. There are significant casualties. Police arrest a person suspected of causing the explosion and establish that the terrorist suspect had called an unknown associate around the time of the attacks. The associate is previously unknown to police, and at this stage, there is insufficient information to reach the threshold for arrest, and further investigation is required. A Commonwealth PDO is issued by a senior AFP member to the associate.
>
> In this scenario, the detention of the associate is rationally connected to the prevention of a further terrorist act. The rational connection to the prevention of a terrorist act is outlined in the legislation itself which requires an analysis by the AFP member and the issuing authority of whether the PDO would 'substantially assist' in preventing a terrorist act occurring (paragraph 105.4(4)(c)). This ensures that a PDO can only be made if it is likely to be effective in achieving its objective of addressing a serious terrorist threat.

2.76 This hypothetical scenario shows how the PDO could be capable of being used in a way that is rationally connected to its stated objective. However, the hypothetical also raises questions as to the effectiveness of the PDO regime. This is because there is a question about whether the threshold for arrest and the issue of a

PDO will be different in the type of circumstances canvassed in the scenario. In this respect, the threshold for affecting the arrest of the 'associate' for a terrorism offence is set out in section 3WA of the *Crimes Act 1914* and provides that a person may be arrested if a constable suspects on reasonable grounds the person has committed or is committing an offence.[67] To make a PDO in relation to the 'associate' the AFP member would be still be required to suspect, on reasonable grounds, that the person will engage or has engaged in a terrorist act, the planning of such an act, or possesses a thing that is connected with such an act.[68] This means that, at least in relation to activity that has already been engaged in by the 'associate', the threshold for arrest and issue of a PDO would appear to be quite similar. It is difficult to reach conclusions in relation to questions of effectiveness in circumstances where PDOs have not been used and the hypotheticals provided do not appear to completely address the issue.

2.77 The response further argues that each of the restrictions on human rights occasioned by the making of a PDO (including restrictions on communications) are rationally connected with preventing a terrorist act, or preserving evidence in the immediate aftermath of a terrorist act. It would have been useful if the response had explained how these restrictions would be effective in preventing a terrorist act or preserving evidence. On this basis, it appears that there are some outstanding questions as to whether PDOs are effective to achieve their stated objective.

Proportionality

2.78 In relation to whether the limitation is proportionate, the response points to safeguards in relation to the operation of the PDO regime. This includes the threshold requirements under subsection 105.4(4) that to obtain a PDO the AFP member must suspect on reasonable grounds that the subject of the PDO:

- will engage in a terrorist act, or
- possesses a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or
- has done an act in preparation for, or planning, a terrorist act.

2.79 In addition, the AFP member must:

- be satisfied that making the PDO would substantially assist in preventing a terrorist act occurring, and

67 In circumstances where a summons against the person would not be effective.

68 Criminal Code, subsection 105.4(4)(a). Alternatively, a PDO can be issued in relation to the 'associate' where it is reasonably necessary to preserve evidence after a terrorist attack has occurred: Criminal Code, subsection 105.4(6).

- be satisfied that detaining the individual for the period for which the individual is to be detained under the PDO is reasonably necessary for the purpose of preventing a terrorist act.

2.80 These thresholds are relevant to the proportionality of the PDO regime. Further, the response states that the test for seeking and making a PDO also requires both the AFP member and the issuing authority to undertake a proportionality analysis:

> The PDO can only be sought and made where it would 'substantially assist' in preventing a terrorist act occurring. The AFP member and issuing authority must also consider whether detention of the individual under a PDO is 'reasonably necessary' for the underlying purpose of making a PDO. These criteria require the AFP member and issuing authority to weigh the effectiveness of the PDO against other measures that are available to prevent or respond to a terrorist threat.
>
> Accordingly, the test for seeking and making a PDO is targeted and narrowly framed, to ensure it is only used where it is likely to be effective, and in circumstances where it can prevent terrorist acts which are likely to occur within a short period of time.

2.81 These requirements are relevant safeguards in relation to making a PDO. However, the particular assessment required in 105.4(4) is not necessarily equivalent to the test of proportionality for the purposes of international human rights law. In order to be a proportionate limitation on human rights, a measure must be the least rights restrictive approach, reasonably available, to achieve the stated objective. Concerns remain because it is possible that an AFP member may be satisfied that the PDO may 'substantially assist' preventing a terrorist act occurring and that the PDO is 'reasonably necessary', even though less rights restrictive approaches may be available. On this issue of proportionality, it is important to note that the threshold would appear to allow a PDO to be sought even where there is not an imminent threat to life.[69]

2.82 The response further argues that a similar proportionality analysis is undertaken where a PDO is sought and made for the purposes of preserving evidence in the immediate aftermath of a terrorist act:

> In such circumstances, the AFP member and issuing authority must be satisfied that a terrorist act has occurred within the last 28 days, that it is necessary to detain the person to preserve evidence of, or relating to the

69 See, for example, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64. Schedule 5 of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (now Act) changed the current definition of a 'terrorist act' as being one that is imminent and expected to occur in the next 14 days, to one that 'is capable of being carried out, and could occur, within the next 14 days'.

terrorist act, and that detention is reasonably necessary to achieve this objective (subsect 105.4(6)).

2.83 However, again, this assessment in subsection 105.4(6) is not equivalent to the test of proportionality for the purposes of human rights law. As noted above, the test under international human rights law requires consideration of whether the measure is proportionate to achieve the stated objective of 'preventing serious threats to Australia's national security and, in particular, preventing terrorist acts.' The specific concern is that the regime would allow for detention of a person, who may not themselves pose a risk to society, for the purpose of preserving evidence. As noted in the initial analysis, this kind of power is an extraordinary one in the context of the right to liberty and appears not to be a least rights restrictive approach.

2.84 The response explains that once a person is detained under a PDO they are subject to a number of safeguards:

- after 24 hours the AFP must apply to an issuing authority, such as a judge, to have the detention continued for a further 24 hours;
- there are additional protections for those under 18 or incapable of managing their own affairs to contact their parent or guardian;
- while a person subject to a PDO is prevented from communicating, they may still inform specified individuals they are safe or make a complaint to the Commonwealth;
- an individual detained under a PDO has the right to be treated with humanity and respect for human rights, and not to be subject to cruel, inhuman or degrading treatment;
- after the PDO has expired, the person subject to the PDO may apply to the Security Division of the Administrative Appeals Tribunal to seek merits review of the decision to make or extend a PDO. The person may also bring proceedings in a court for a remedy in relation to the PDO, or for their treatment under the PDO.

2.85 These are important and relevant safeguards in relation to the proportionality of the measure. However, despite these safeguards and the considerations to be made by the issuing authority, serious questions remain as to the proportionality of the PDO regime. As noted above, in its current form, the breadth of the PDO regime extends to detaining people who may have committed no crime and pose no threat, for the purpose of securing evidence. As noted in the initial analysis, the UN Human Rights Committee has indicated that, in order to justify preventative detention, the state must show that the threat posed by the individual cannot be addressed by alternative (less rights restrictive) means.[70] The information

70 *Miller & Carroll v New Zealand* (2502/2014) UN Human Rights Committee (2017) [8.5].

provided in the response does not completely address this issue. Accordingly, the PDO regime does not appear to impose a proportionate limit on human rights.

Committee response

2.86 The committee thanks the minister and the Attorney-General for their response and has concluded its examination of this issue.

2.87 While the PDO regime pursues a legitimate objective for the purposes of human rights law, the preceding analysis indicates that the regime as drafted is likely to be incompatible with human rights.

2.88 Consistent with the concerns raised in the previous human rights assessment relating to the PDO regime, the committee draws the human rights implications of the bill (now Act) to the attention of the Parliament.[71]

Australian Federal Police – stop, search and seize powers

2.89 The committee has previously considered stop, search and seize powers as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.[72]

2.90 Part IAA Division 3A of the *Crimes Act 1914* was first introduced in 2005 to provide 'a new regime of stop, question, search and seize powers…exercisable at airports and other Commonwealth places to prevent or respond to terrorism'.[73]

2.91 Division 3A provides a range of powers for the AFP and state and territory police officers that can be exercised if a person is in a 'Commonwealth place' (such as an airport)[74] and:

- the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act; or
- the Commonwealth place is a 'prescribed security zone'.[75]

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71 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 77.

72 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Thirtieth Report of the 44th Parliament* (10 November 2015).

73 EM, Anti-Terrorism Bill (No 2) 2005, p. 1.

74 'Commonwealth place' means a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth: *Commonwealth Places (Application of Laws) Act 1970*, section 3.

75 The minister may, upon application from a police officer, declare, in writing, a Commonwealth place to be a 'prescribed security zone' if the minister considers that a declaration would assist in preventing a terrorist act occurring, or in responding to a terrorist act that has occurred: *Crimes Act 1914*, section 3UJ.

2.92 In these circumstances, the powers that the officers may exercise include:

- requiring a person to provide their name, residential address and reason for being there;
- stopping and searching persons, their items and vehicles for a terrorist related item; and
- seizing terrorism related items.[76]

2.93 Division 3A, section 3UEA also allows a police officer to enter and search premises without a search warrant and to seize property without the occupier's consent in certain circumstances.[77] These powers are not limited in their application to Commonwealth places.[78]

2.94 The 2018 bill sought to extend the operation of stop, search and seize powers for a further three years noting the regime was due to sunset on 7 September 2018.[79]

Compatibility of extending the stop, search and seize powers with multiple human rights

2.95 The stop, search and seize powers engage and may limit a number of human rights, including:

- the right to privacy;
- the right to freedom of movement;
- the right to security of the person and the right to be free from arbitrary detention;
- the right to a fair trial and fair hearing.[80]

2.96 These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

2.97 The committee's previous reports have raised concerns as to whether the stop, search and seize powers constitute permissible limitations on human rights.[81]

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76 *Crimes Act 1914*, sections 3UC-3UE.

77 *Crimes Act 1914*, section 3UEA.

78 EM, SOC, p. 26; *Crimes Act 1914*, section 3UEA.

79 EM, SOC, p. 26; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (2018 bill), item 11.

80 As noted in the committee's *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 28: These powers may also engage and limit the right to freedom of expression; the right to be treated with humanity and dignity; and the right to equality and non-discrimination.

81 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

Noting that the stop, search and seize powers were not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility[82] be prepared.[83] As set out below, the statement of compatibility for the 2018 bill provides some of this foundational assessment.

Extending stop, search and seize powers – legitimate objective

2.98 The statement of compatibility states that the powers 'achieve the legitimate purpose of protecting Australia's national security, including in particular, preventing and responding to terrorist acts'. This is likely to constitute a legitimate objective for the purposes of international human rights law.

Extending stop, search and seize powers – rational connection

2.99 The statement of compatibility acknowledges that the powers have not been used to date.[84] However, it points to recent reviews of the powers by INSLM Renwick and the PJCIS which recommended that the powers be continued as evidence of their importance.[85] Other than pointing to these other reviews, the statement of compatibility does not further explain how the powers are effective. Accordingly, it was unclear from the information provided how the powers are rationally connected to their stated objective.

Extending stop, search and seize powers – proportionality

2.100 The human rights assessment of the powers in the committee's previous report raised concerns about the proportionality of the limitation. The assessment noted that these powers are coercive and highly invasive in nature. For example, once a 'prescribed security zone' is declared, everyone in that zone is subject to stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. In deciding whether to declare a prescribed security zone, the minister need only 'consider' that such a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred.[86]

2.101 There were further questions about whether the powers are more extensive than is strictly necessary to achieve their stated objective. The previous assessment noted that the powers are in addition to existing police powers under

82 In accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

83 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

84 EM, SOC, p. 26.

85 EM, SOC, pp. 26-27.

86 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 25-28.

Commonwealth criminal law, including a range of powers to assist in the collection of evidence of a crime.[87] For example, Division 2 of Part IAA of the *Crimes Act 1914* sets out a range of search and seizure powers, including the primary Commonwealth search warrant provisions that apply to all offences against Commonwealth law. Under these provisions, an issuing officer can issue a warrant to search premises and persons if satisfied by information on oath that there are reasonable grounds for suspecting that there is, or will be in the next 72 hours, evidential material on the premises or in the possession of the person. An application for such a search warrant can be made by telephone in urgent situations.[88] A warrant authorises a police officer to seize anything found in the course of the search that he or she believes on reasonable grounds to be evidential material of an offence to which the warrant relates (or another indictable offence) and seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.[89] The statement of compatibility does not explain how these ordinary powers are insufficient to protect national security.

2.102 The statement of compatibility argues that the powers are proportionate, pointing to restrictions on their use and noting they are subject to oversight by the ombudsman. The 2018 bill also proposes to introduce additional requirements for the AFP to report to the PJCIS after the AFP exercises such powers. These matters assist with the proportionality of the limitation. However, as noted above, questions remain as to whether the powers are more extensive than is strictly necessary and so may not represent the least rights restrictive approach.

2.103 The committee therefore sought advice as to the compatibility with international human rights of each of the stop, question, search and seizure powers, and their proposed extension, including:

- whether each of the stop, question, search and seizure powers, and their proposed extension, is effective to achieve (that is, rationally connected to) its stated objective; and
- whether each of the stop, question, search and seizure powers, and their proposed extension, is a reasonable and proportionate measure for the achievement of that objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

87 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 25-28.

88 Section 3R of the *Crimes Act 1914*.

89 Division 2 of Part IAA of the *Crimes Act 1914.*

Minister and Attorney-General's response

Legitimate objective

2.104 The minister and Attorney-General's response notes that the committee has accepted that the stop, search and seizure powers in Division 3A of Part IAA of the *Crimes Act* pursue a legitimate objective for the purposes of international human rights law.

Rational connection

2.105 The response explains that the scope of the powers in Division 3A is mostly confined to Commonwealth places. It states that 'Commonwealth places' 'are generally places of national significance, or areas of mass gathering (or both), where a terrorist act could have potentially catastrophic consequences.' The response notes that only section 3UEA, which provides that a police officer may enter premises without a warrant in certain circumstances, may be exercised by law enforcement agencies outside of a Commonwealth place.

2.106 In relation to how the powers are rationally connected to (that is, effective to achieve) the stated objective, the response explains:

> As noted in the PJCIS Powers Report, the stop, search and seize provisions are emergency powers which are only likely to be used 'in rare and exceptional circumstances' to enable police to 'respond rapidly to terrorism incidents'. While these powers have not yet been used by law enforcement agencies, they 'fill a critical, albeit narrow, gap in state and territory emergency counter-terrorism powers, by enabling law enforcement agencies to act immediately in the event of a terrorist threat to, or terrorism incident within, a Commonwealth place'. In the joint submission from AGO and the Australian Federal Police (AFP) to the PJCIS, a hypothetical scenario was outlined in which the stop, search and seize powers would be an effective measure and markedly improve the capability of law enforcement agencies to respond to the threat of a terrorist act:
>
> > AFP provides a Uniformed Protection Function at Garden Island Defence Precinct (NSW). The AFP's function in that regard is to provide for the safety and security of the Precinct and its population along with providing a first response capability in the event of a critical incident.
> >
> > In this hypothetical example, intelligence indicates that an unidentified person is planning to commit an edged weapon terrorist attack at the Precinct. A suspect is identified loitering in the public area for a prolonged period of time, constantly keeping his hands in his pocket and trying to secret himself from view of CCTV cameras with a black and white flag visible in his rear pocket.
> >
> > In this scenario reasonable grounds to suspect the person might be about to commit a terrorist act exist to exercise powers under

> Division 3A. The suspect is approached and required to provide their name and reason for being at the Precinct under section 3UC. The person provides their name and shows a NSW driver's licence. Intelligence checks identify that they are an associate of a known terrorism suspect. Meanwhile, police search the person under section 3UD, and seize a knife and Islamic State flag found in their possession. The person is arrested on suspicion of planning a terrorist act.
>
> In the current terrorism threat environment, an attack on a Commonwealth place is not unlikely. It is therefore vital that law enforcement agencies have appropriate and targeted powers to prevent or respond to terrorist acts in Commonwealth places. The stop, search and seize powers are rationally connected to the legitimate purpose of preventing serious threats to Australia's national security and, in particular, preventing terrorist acts.

2.107 Although the powers have not been used to date, the information provided indicates that there may be circumstances where these powers would be effective to achieve the legitimate objective of protecting Australia's national security, including in particular, preventing and responding to terrorist acts.

Proportionality

2.108 In relation to whether each of the stop, question, search and seizure powers, and their proposed extension, is a proportionate measure for the achievement of the stated objective, the response states:

> The stop, search and seize powers contain a number of safeguards to ensure that they represent the least restrictive way to achieve the legitimate purpose of preventing serious threat of Australia's national security interests, including in particular, preventing terrorist acts.
>
> Firstly, as noted in the PJCIS Powers Report, the stop, search and seize powers are only likely to be exercised in emergency scenarios. Under such circumstances, it is anticipated that traditional law enforcement powers are unlikely to be as effective in responding to the terrorist threat. In a rapidly evolving threat scenario, the stop, search and seize powers are likely to represent the most effective means of responding to a terrorist threat, and therefore may represent the least restrictive way to achieve the legitimate objective of safeguarding the community from a terrorist act.
>
> Secondly, the stop, search and seize powers are, with the exception of the emergency entry into premises power in section 3UEA, narrowly confined in their application to Commonwealth places. Accordingly, these powers are not broadly applicable and are limited in their exercise to locations which are generally of national significance or places of mass gathering (or both). Similarly, while section 3UEA is not limited in its application to a Commonwealth place, the circumstances in which it may be applied are narrowly confined to emergency scenarios, where rapid law enforcement

action is necessary because there is a serious and imminent threat to a person's life, health or safety.

Thirdly, in exercising the stop and search power in section 3UD, a police officer must not use more force, or subject the person to greater indignity, than is reasonable and necessary in order to conduct the search (subsection 3UD(2)). Furthermore, a person must not be detained longer than is reasonably necessary for a search to be conducted (subsection 3UD(3)). Similarly, in searching a thing (including a vehicle), a police officer may use such force as is reasonable and necessary in the circumstances, but must not damage the thing by forcing it, unless the person has been given a reasonable opportunity to open the thing, or it is not possible to give that opportunity (subsection 3UD(4)). These safeguards ensure that the stop, search and seize powers are exercised in a proportionate manner and cause the least amount of interference with an individual's rights.

Fourthly, a police officer who is responsible for an item seized under section 3UE or section 3UEA must, within seven days, serve a seizure notice on the owner of the thing (or, if the owner cannot be found, the person from whom the thing was seized), to enable the owner to request for the return of the item (section 3UF).

Fifthly, where the Minister makes a declaration for a prescribed security zone in respect of a Commonwealth place, the Minister is subject to an ongoing requirement to revoke the declaration as soon as there is no longer a terrorism threat that justifies the declaration being continued, or if it is no longer required to respond to a terrorist act that has already occurred (subsection 3UJ(4)). This ensures that the inference with human rights that may be occasioned through the making of a prescribed security zone declaration does not last any longer than necessary to achieve the legitimate objective of the preventing or responding to a terrorist act.

Finally, the stop, search and seize powers are subject to important oversight mechanisms. For instance, complaints on the use of these powers by the AFP could be investigated by the Commonwealth Ombudsman or the Australian Commission for Law Enforcement Integrity. Similarly, the use of these powers by state and territory police can be reviewed by the appropriate jurisdictional oversight bodies, such as state and territory Ombudsman. In addition, the INSLM has the power to review the operation of counter-terrorism legislation, which includes the power to request information or produce documents for the purposes of performing the INSLM's function. This enables the INSLM to seek information and review documents associated with the exercise of stop, search and seize powers by the AFP.

The Bill strengthens these oversight arrangements by also requiring that as soon as possible after the exercise of the stop, search and seize powers by an AFP police officer, the Commissioner of the AFP must provide a report about the use of the powers to the Minister, the INSLM and the PJCIS.

> Furthermore, the Bill also introduces a new annual reporting requirement for the exercise by the AFP of the stop, search and seize powers.
>
> These safeguards ensure that the stop, search and seize powers are targeted in their application and do not cause greater interference with human rights than is necessary to achieve the legitimate objective of preventing serious threat of Australia's national security interests, including in particular, preventing terrorist acts.

2.109 These safeguards are highly relevant to the proportionality of the stop, search and seizure powers. Noting that the powers have not been used to date, it is acknowledged that use of these powers has been approached cautiously. In this respect, in light of the safeguards identified, in circumstances where a police officer believes on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act, the stop, search and seizure power may be a proportionate limitation on human rights. However, concerns remain as to the proportionality of other aspects of the powers.

2.110 The response states that the powers are 'only likely to be exercised in emergency scenarios.' While this may be the case as a matter of policy and practice, the provisions themselves appear to be able to apply more broadly. As noted above, once a Commonwealth place is declared by the minister to be a 'prescribed security zone', everyone in that zone is subject to stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. As Commonwealth places may be areas of public significance such powers could have considerable human rights implications. In deciding whether to declare a prescribed security zone, the minister need only 'consider' that such a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred. While the law has not operated so broadly to date, there is a concern that in future such declarations may be made on a more regular basis. This issue is not fully addressed in the response and it appears that the breadth of the powers' potential application may not be the least rights restrictive approach.

2.111 Additionally, in relation to the power to search premises without a warrant, it is unclear from the information provided why these provisions are necessary in light of the ordinary powers of the police. As noted above, under Division 2 of Part IAA of the *Crimes Act 1914*, an issuing officer can issue a warrant to search premises and persons if satisfied by information on oath that there are reasonable grounds for suspecting that there is, or will be in the next 72 hours, evidential material on the premises or in the possession of the person. An application for such a search warrant can be made by telephone in urgent situations.[90] A warrant authorises a police officer to seize anything found in the course of the search that he or she believes on

90 Section 3R of the *Crimes Act 1914*.

reasonable grounds to be evidential material of an offence to which the warrant relates (or another indictable offence) and seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.[91] The response does not explain how these ordinary powers are insufficient to protect national security. As such, it is unclear that the powers Division 3A, section 3UEA represent the least rights restrictive approach as required to be a proportionate limitation on human rights.

Committee response

2.112 The committee thanks the minister and the Attorney-General for their response and has concluded its examination of this issue.

2.113 The committee notes that the stop, search and seizure powers have not been used to date.

2.114 Based on the information provided, in circumstances where a police officer believes on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act the stop, search and seizure powers may be a proportionate limitation on human rights.

2.115 However, the preceding analysis indicates that the scope of other aspects of the stop, search and seizure powers is likely to be incompatible with human rights.

2.116 Consistent with the concerns raised in the previous human rights assessment relating to the stop, search and seizure powers, the committee draws the human rights implications of the bill (now Act) to the attention of the parliament.[92]

91 Division 2 of Part IAA of the *Crimes Act 1914.*

92 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

Office of National Intelligence Bill 2018

Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018

Purpose	Seeks to establish the Office of National Intelligence as an independent statutory agency within the prime minister's portfolio, subsuming the role, functions and staff of the Office of National Assessments Seeks to repeal the *Office of National Assessments Act 1977*, make consequential amendments to a range of Acts and provide for transitional arrangements
Portfolio	Prime Minister
Introduced	House of Representatives, 28 June 2018
Rights	Freedom of expression; presumption of innocence; privacy; equality and non-discrimination; life; torture, cruel, inhuman and degrading treatment or punishment (see **Appendix 2**)
Previous report	7 of 2018
Status	Concluded examination

Background

2.117 The committee first reported on the bills in its *Report 7 of 2018*, and requested a response from the Prime Minister and the Attorney-General by 29 August 2018.[93]

2.118 A response from the Attorney-General to the committee's inquiries was received on 31 August 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Offences for unauthorised use or disclosure of information

2.119 The Office of National Intelligence Bill 2018 (the bill) seeks to create a number of offences related to the unauthorised communication, use or recording of information or matters acquired or prepared by or on behalf of the Office of National Intelligence (ONI) in connection with its functions or that relates to the performance by ONI of its functions (ONI information).

93 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) pp. 48-64.

2.120 Proposed section 42 would create an offence for persons to communicate ONI information or matters in circumstances where the person is or was a staff member of ONI, is otherwise engaged by ONI, or is an employee or agent of a person engaged by ONI (in other words, an ONI 'insider').[94] The offence carries a maximum penalty of 10 years' imprisonment.

2.121 Proposed section 43 would create an offence for the subsequent disclosure of ONI information or matters which come to the knowledge or into the possession of a person other than due to their employment or association with ONI[95] (in other words, an ONI 'outsider'), in circumstances where the person intends that the communication cause harm to national security or endanger the health or safety of another person, or where the person knows that the communication will or is likely to cause harm to national security or endanger the health or safety of another person. The offence carries a maximum penalty of 5 years' imprisonment.

2.122 Proposed section 44 would create offences for the unauthorised 'dealing with'[96] or making records of ONI information where the person is an ONI 'insider'. The offences carry a maximum penalty of 3 years' imprisonment.

Defences and exceptions

2.123 There are specific exemptions to the offences in proposed sections 42 and 44 where the communication is made:

- to the Director-General[97] or a staff member by the person in the course of their duties as a staff member or in accordance with a contract, agreement or arrangement; or
- within the limits of authority conferred on the person by the Director-General or with the approval of the Director-General or a staff member having the authority of the Director-General to give such an approval.

2.124 The bill also provides for a number of defences to each of the offences in proposed sections 42, 43, and 44, including where:

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94 See subsection 42(1)(b).

95 Under proposed subsection 43(1)(a) these associations include 'that the person is or was a staff member of ONI, that the person has entered into any contract, agreement or arrangement with ONI or that the person has been an employee or agent of a person who has entered into a contract, agreement or arrangement with ONI'. See explanatory memorandum (EM), p. 38.

96 Under proposed subsection 44(1)(a) 'dealing with' information includes copying a record, transcribing a record, retaining a record, removing a record, or dealing with a record in any other manner.

97 Under the bill, Director-General means the Director-General of National Intelligence, whose functions include overseeing and managing ONI. See division 1 of part 3 of the bill.

- the information or matter is already publicly available with the authority of the Commonwealth;[98]
- the information is communicated to an Inspector-General of Intelligence and Security (IGIS) official for the purpose of the official exercising a power or performing a function or duty as an IGIS official;[99]
- the person deals with, or makes, a record for the purpose of an IGIS official exercising a power or performing a function or duty as an IGIS official;[100] and
- the subsequent communication is in accordance with any requirement imposed by law or for the purposes of relevant legal proceedings or any report of such proceedings.[101]

2.125 The defendant bears an evidential burden in relation to these matters.

Compatibility of the measures with the right to freedom of expression

2.126 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 certain information, as well as particular forms of use of such information, the proposed secrecy provisions engage and limit the right to freedom of expression.

2.127 The committee has previously raised concerns in relation to limitations on the right to freedom of expression relating to secrecy offences introduced or amended by the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018; the Australian Border Force Amendment (Protected Information) Bill 2017; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016; and the National Security Legislation Amendment Bill (No. 1) 2014 (all now Acts).[102] The secrecy offences examined in this report raise similar concerns.

98 See proposed subsections 42(2), 43(2) and 44(3).

99 See proposed subsections 42(3) and 43(3).

100 See proposed subsection 44(4).

101 See proposed subsection 43(3).

102 See, respectively, Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 213-279; *Report 11 of 2017* (17 October 2017) pp. 72-83; *Report 7 of 2016* (11 October 2016) pp. 64-83; and *Sixteenth Report of the 44th Parliament* (25 November 2014) pp. 33-60.

2.128 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.[103]

2.129 The statement of compatibility for the bill acknowledges that the secrecy offences engage and limit the right to freedom of expression but argues that the measures are reasonable, necessary and proportionate to achieve the objectives of protecting national security; protecting the right to privacy of individuals whose personal information may be provided to ONI; and enabling ONI to perform its functions, including promoting a well-integrated intelligence community.[104] While generally these matters are likely to constitute legitimate objectives for the purposes of international human rights law, the initial analysis stated that it would have been useful if the statement of compatibility provided further information as to the importance of these objectives in the specific context of the secrecy measures.

2.130 As to whether the measures are rationally connected to the stated objective, the statement of compatibility explains that:

> By providing a deterrent against the disclosure or handling of information without authorisation, the risk of national security being prejudiced through that disclosure or inappropriate handling is minimised, the risk of a person's privacy being breached is lowered, and agencies will be more willing to provide information to ONI in the knowledge that there are strict penalties for unauthorised disclosure of that information.[105]

2.131 It was acknowledged that, to the extent that the type of information or matters prohibited from unauthorised use or disclosure under the bill may prejudice national security or contain an individual's personal information, the measures may be capable of being rationally connected to the objectives stated above. However, the breadth of information or matters that the proposed offences may apply to raises questions as to whether the measures would in all circumstances be rationally connected to the stated objectives.

2.132 Similar questions arose in relation to the proportionality of the measures as drafted.

Breadth of information

2.133 As set out at [1.3], the proposed offences apply to information or matters acquired or prepared by or on behalf of ONI in connection with its functions or that

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103 See, generally, UN Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34 (2011) [21]-[36]. 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.

104 EM, Statement of compatibility (SOC), p. 13.

105 EM, SOC, p. 13.

relate to the performance by ONI of its functions. ONI's functions are extensive and include leading and evaluating the activities of the 'national intelligence community' (NIC);[106] collecting information and preparing assessments on matters of political, strategic or economic significance to Australia, including of a domestic or international nature; and providing advice to the Prime Minister on national intelligence priorities, requirements and capabilities and other matters relating to the NIC. Under the bill, ONI may receive information on matters of political, strategic or economic significance to Australia from a Commonwealth authority, an intelligence agency or agency with an intelligence role, and may request such information subject to certain restrictions.[107]

2.134 In relation to the type of information prohibited from unauthorised use or disclosure under the bill, the statement of compatibility explains that:

> Such information is likely to be sensitive, and unauthorised disclosure or handling could threaten Australia's national security. The provisions also provide for NIC agencies to give ONI documents or things that relate to ONI's functions. This information is likely to relate to highly sensitive information that could prejudice national security if disclosed – for example, information relating to intelligence workforce information, intelligence capabilities or national intelligence priorities.[108]

2.135 While it was acknowledged that the disclosure of some types of ONI information may potentially harm national security, as noted above, proposed section 42 of the bill prohibits the unauthorised disclosure of ONI information or matters generally, regardless of the material's security classification or whether it concerns national security or is otherwise deemed to be potentially harmful. It therefore appears that the 'insider' offence set out in proposed section 42 would criminalise the unauthorised communication of information that is not necessarily harmful to national security, to Australia's interests or to a particular individual, and is not intended to cause harm. This raises concerns that the measures may not be the least rights restrictive way of achieving the stated objectives and may be overly broad.

Breadth of application and definition of 'national security'

106 This includes the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), Defence Intelligence Organisation (DIO), Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO), the Australian Criminal Intelligence Commission (ACIC); and the intelligence functions of the Department of Home Affairs, the Australian Federal Police (AFP), the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Department of Defence.

107 See division 1 of part 4 of the bill.

108 EM, SOC, p. 13.

2.136 In this context, the breadth of the proposed 'insider' offence in section 44, which prohibits the unauthorised 'dealing with'[109] or recording of ONI information or matters, was also a concern. The initial analysis stated that it appears that a person does not have to publicly communicate the information or matter, or intend to do so, in order to commit an offence. It was unclear whether criminalising unauthorised 'dealing with' all information or matters classified as ONI information, including where the information is not otherwise harmful or sensitive and is not communicated publicly, is rationally connected or proportionate to achieve the legitimate objectives.

2.137 The proposed 'outsider' offence in section 43 relating to the subsequent communication of information or matters by persons other than, for example, ONI employees or contractors, applies to the same broad range of information. However, the offence only applies where the person intends that the communication cause harm to national security or endanger the health or safety of another person, or knows that it will or is likely to. While this may potentially assist with the proportionality of the limitation on the right to freedom of expression, concerns remained that the offence is overly broad with respect to the stated objectives.

2.138 In particular, the scope of information or matters that may be considered as causing harm to Australia's national security if publicly disclosed is potentially broad. Under the bill, national security has the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), which provides that 'national security means Australia's defence, security, international relations or law enforcement interests'.[110] 'International relations' is in turn defined in the NSI Act as the 'political, military and economic relations with foreign governments and international organisations'.[111] In light of these definitions, it appears that the proposed offence in section 43 would apply to a journalist who publishes an article containing ONI information that they know will likely cause harm to Australia's political relations with an international organisation, notwithstanding that the communication may be in the course of reporting on an issue considered to be in the public interest. It would also appear possible that the public disclosure of certain information may endanger the health or safety of another person — for example, a person held in immigration detention — and therefore constitute an offence despite the information being in the public interest, including in circumstances where the affected person consents to the information being made public. It was therefore not

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109 As stated above, under proposed subsection 44(1)(a) 'dealing with' information includes copying a record, transcribing a record, retaining a record, removing a record, or dealing with a record in any other manner.

110 See section 8 of division 2 of part 2 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

111 See section 10 of division 2 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

clear whether the measure, as drafted, is sufficiently circumscribed in order to be a proportionate limitation on the right to freedom of expression.

2.139 Further, it may not be clear to a person as to whether information or matters that they come to know or possess constitutes ONI information and is therefore protected from subsequent disclosure subject to the exceptions set out above. As noted at [1.17], ONI information may potentially include a very broad range of documents or other matters that may initially have been produced by a range of Commonwealth agencies, including non-intelligence agencies. It is possible that a person may receive information that was originally produced by, for example, the Department of Home Affairs, but may be unaware that the information has also become ONI information by reason of it having been acquired by ONI. Under proposed section 43, the prosecution is only required to prove that the defendant was reckless as to whether information or a matter is ONI information.[112]

Safeguards and penalties

2.140 There were also questions about whether the defences (set out at [1.8]) act as adequate safeguards in respect of the right to freedom of expression. For example, the defences may not sufficiently protect the disclosure of information that is in the public interest or in aid of government accountability and oversight. There is no general defence related to public reporting in the public interest or general protections for whistle-blowers, other than for the communication of information to the IGIS. This raised further questions about the proportionality of the limitation on the right to freedom of expression.

2.141 Further, the severity of the penalties is also relevant to whether the limitation on the right to freedom of expression is proportionate. In this case, it was noted that the proposed penalties are serious and range from three to 10 years' imprisonment.

2.142 The committee therefore sought advice 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 objectives (including in relation to the breadth of information subject to secrecy provisions; the range of information or matters that may be considered as causing harm to Australia's national security or the health and safety of another person; the adequacy of safeguards; and the severity of the criminal penalties).

112 See EM, SOC, p. 38.

2.143 In relation to the proportionality of the measures, in light of the information requested above, advice was also sought as to whether it would be feasible to amend the secrecy offences to:

- appropriately circumscribe the scope of information subject to the prohibition on unauthorised disclosure or use under proposed sections 42 and 44 (by, for example, introducing a harm element or otherwise restricting the offences to defined categories of information);
- appropriately circumscribe the definition of what causes harm to national security for the purposes of proposed section 43;
- expand the scope of safeguards and defences (including, for example, a general 'public interest' defence); and
- reduce the severity of the penalties which apply.

Attorney-General's response

2.144 In response to the committee's concerns regarding proposed section 43, the Attorney-General states:

> The development of the ONI Bill overlapped with the consideration by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (EFI Bill). Noting the PJCIS' recommendations on the EFI Bill, and the form in which that Bill passed Parliament, the ONI Bill including its Explanatory Memorandum will be amended to remove section 43 (the offence of subsequent communications of certain information) in its entirety. On that basis, this response only deals with clauses 42 and 44 of the Bill.

2.145 In light of the committee's concerns, the committee welcomes the removal of section 43 from the bill.

2.146 In relation to whether the measures in sections 42 and 44 are effective to achieve the stated objectives of the bill, the Attorney-General's response explains:

> In order to effectively perform its functions, ONI will need to have access to [a] wider range of information (frequently of a sensitive and classified nature) from a broader range of agencies than is currently required for ONA's functions. The offences in clauses 42 and 44 are part of a range of safeguards contained in the Bill to ensure that this information, as well as information generated by ONI, is appropriately protected from unauthorised disclosure, particularly given the potentially devastating consequences that unauthorised disclosures and compromises of intelligence-related information can have.

2.147 Based on this information, it appears that the measures are capable of being effective to achieve the stated objectives of the bill to protect national security, protect the right to privacy of individuals whose information may be provided to ONI, and enable ONI to perform its functions.

2.148 The Attorney-General's response also provides additional information as to whether the measures constitute a proportionate limitation on the right to freedom of expression. For example, regarding the scope of the offences, the response explains:

> The offences in clauses 42 and 44 will only apply where the information or matter came into the person's knowledge or possession by reason of one the following circumstances: that the person is or was a staff member of ONI, that the person has entered into any contract, agreement or arrangement with ONI, or that the person has been an employee or agent of a person who has entered into a contract, agreement or arrangement with ONI.
>
> This is in recognition of the special duties and responsibilities that apply to ONI staff and people with whom the agency has an agreement or arrangement, and the strong and legitimate expectation that those persons will handle all information obtained in that capacity in strict accordance with their authority at all times.

2.149 It is acknowledged that restricting the offence to staff assists with the proportionality of the limitation. However, concerns remain regarding the scope of the information which is subject to the prohibition on disclosure.

2.150 More specifically, in response to the committee's inquiry about the feasibility of circumscribing the scope of information subject to the prohibition on unauthorised disclosure or use under proposed sections 42 and 44, the Attorney-General's response states:

> Limiting the scope of the offences to ONI information of a particular security classification would be insufficient to provide adequate protection against harm to national security. It is well-recognised that the information handled by intelligence agencies is so sensitive that even isolated disclosures of seemingly innocuous information could cause harm; as these may be analysed collectively to reveal significant matters. Limiting the scope of the offences to the communication of information would be also insufficient to provide sufficient protection as it would not capture the full continuum of behaviour that may result in the unauthorised disclosure of information, limiting the ability of authorities to take steps to prevent significant harm to national security.

2.151 In light of the potentially significant impact of the proposed measures on the right to freedom of expression, concerns remain as to the proportionality of a measure which makes it a criminal offence to disclose all information to be held by ONI. While it is acknowledged that seemingly innocuous information could be capable of being harmful in particular circumstances, the concern in relation to the proportionality of the measure is that this could also capture the disclosure of information which is not harmful. It is noted in this respect that the offence does not require that the unauthorised disclosure of information 'may cause harm' by itself or

when used in combination with other material. In these circumstances, it appears that the offence as drafted may be overly broad.

2.152 In relation to whether the scope of the safeguards and defences could be expanded, for example, by including a general public interest defence, the Attorney-General's response explains:

> The offences do not constitute an absolute bar on the disclosure of ONI information and contain appropriate safeguards to facilitate the communication of ONI information in appropriate circumstances including:
>
> - with the approval of the Director-General of National Intelligence (Director-General) or a staff member with authority to give such approval; and
>
> - to an Inspector-General of intelligence and Security (IGIS) official for the purpose of that official exercising a power, or performing a function or duty as such an official. This will include disclosures to the Office of the IGIS under the *Public Interest Disclosure Act 2013* that relate to an intelligence agency.
>
> Given the existing exceptions and the limited application of the offences, the inclusion of a general public interest defence is not considered necessary.

2.153 Despite these exceptions, the disclosure of information for public interest purposes appears to be barred in circumstances where the disclosure lacks the approval of the Director-General, or is made to a party other than an IGIS official, due to the operation of the proposed offences in combination with the broad definition of 'intelligence information' in the *Public Interest Disclosure Act 2013*.[113] Consequently, concerns remain about the apparently limited availability of safeguards and defences.

2.154 Finally, regarding the severity of the penalties, the Attorney-General's response explains:

> The maximum penalties are consistent with the penalties that apply to the existing secrecy provisions in the IS Act [*Intelligence Services Act* 2001] and reflect the higher level of culpability on the part of persons who obtain ONI information in their capacity as an ONI staff member, or through a contract, arrangement or agreement with ONI.

2.155 Whilst similarly severe penalties may exist in other legislation, evidence of consistency with other penalty frameworks does not, of itself, provide an answer to the question of whether the proposed penalties can be reduced to address concerns

113 Section 41 of the *Public Interest Disclosure Act 2013* defines 'intelligence information' to include 'information that has originated with, or has been received from, an intelligence agency'.

about whether a measure constitutes a reasonable and proportionate limitation on human rights in pursuit of a legitimate objective.

2.156 The preceding analysis indicates that many of the concerns raised in the initial analysis regarding the proportionality of the limitation imposed on the right to freedom of expression by the offences in sections 42 and 44 remain; particularly with regard to the breadth and scope of information to which the offences apply, and the limited availability of relevant safeguards.

Committee response

2.157 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.158 The committee welcomes the removal of proposed section 43 in its entirety.

2.159 However, noting, in particular, the breadth and scope of information to which the measures in sections 42 and 44 relate, the preceding analysis indicates that the remaining measures may be incompatible with the right to freedom of expression.

Compatibility of the measures with the right to be presumed innocent

2.160 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 an offence beyond reasonable doubt.

2.161 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.

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

2.163 As set out at [1.8] above, proposed sections 42, 43 and 44 include offence-specific defences to the various secrecy offences in the bill. In doing so, the provisions reverse the evidential burden of proof as subsection 13.3(3) of the *Criminal Code Act 1995* (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.

2.164 While the objectives of the secrecy provisions are stated generally as being to protect national security and individual privacy, the statement of compatibility does not expressly explain how reversing the evidential burden in the offences pursues a legitimate objective or is rationally connected to this objective.

2.165 The statement of compatibility acknowledges that the offence-specific defences engage and limit the presumption of innocence but argues that the measures are reasonable, necessary and proportionate.[114] The justification provided in the explanatory memorandum and statement of compatibility is, generally, that the relevant evidence 'should be readily available to the accused'[115] or that it is 'far more reasonable' to require a defendant to point to the relevant evidence than to require the prosecution to demonstrate that such evidence does not exist.[116] However, the initial analysis stated that this does not appear to be a sufficient basis to constitute a proportionate limitation on human rights.

2.166 It was unclear that reversing the evidential burden, as opposed to including additional elements within the offence provisions themselves, is necessary. For example, it is a defence for a person to provide ONI information to an IGIS official for the purpose of the official exercising a power or performing a function or duty as an IGIS official. This would appear to leave individuals who provide information to the IGIS 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 appropriately. In this context, the approach of including the fact that the information was not provided to an IGIS official as described above as an element of the offence provisions themselves, would seem to be a less rights restrictive alternative. This raised questions as to whether the current construction of the offences is a proportionate limitation on the right to be presumed innocent.

2.167 The committee therefore requested advice as to:

- whether the reverse burden offences are aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the reverse burden offences are rationally connected to (that is, effective to achieve) this objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and

114 EM, SOC, p. 12.

115 EM, SOC, p. 12.

116 EM, p. 37.

- whether it would be feasible to amend the measures so that the relevant matters (currently in defences) are included as elements of the offences 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.

Attorney-General's response

2.168 The Attorney-General's response explains that the reverse burden offences aim to achieve 'the legitimate objectives of protecting national security, the privacy of individuals and enabling ONI to perform its functions'.

2.169 The response does not, however, provide any specific information about the nature of these objectives in the context of the offences for unauthorised use and disclosure of information, or how the reverse burden offences specifically are effective to achieve these objectives.

2.170 In noting that the offences only apply to ONI staff and related parties, the Attorney-General's response explains:

> These individuals will be well aware of the sensitivity of the information being communicated or dealt with and the importance of ensuring appropriate authorisation when communicating and dealing with that information.

2.171 Given that staff may have unique access to sensitive information relevant to national security and the privacy of individuals, the imposition of a reverse evidentiary burden may encourage staff to be more mindful of their authorisation and responsibilities in communicating and dealing with information that is likely to affect the privacy of individuals and national security.

2.172 Accordingly, despite the lack of specific information provided by the legislative proponent, it appears that that the objectives identified in the Attorney-General's response are capable of constituting legitimate objectives for the purposes of international human right law, and that the measures are rationally connected to (that is, effective to achieve) the stated objectives.

2.173 In relation to the proportionality of the reverse burden offences, the Attorney-General's response states:

> The reversal of proof provisions are proportionate, as the prosecution will still be required to prove each element of the offence beyond a reasonable doubt before a defence can be raised by the defendant. In circumstances where evidence in relation to an offence-specific defence is raised by the defendant, the prosecution will also need to disprove that evidence beyond a reasonable doubt.

2.174 It is acknowledged that the offence-specific defences impose an evidential rather than legal burden of proof on the defendant and that the prosecution will still be required to prove other elements of the offence beyond a reasonable doubt. This

is relevant to the proportionality of the limitation. However, while the Attorney-General's response argues that one basis on which the reverse burden of proof is permissible is that the offence-specific defences are peculiarly within the knowledge of the defendant, it does not explain how the matters in each of these defences are actually peculiarly within the knowledge of the defendant. For example, it is unclear that the defence in sections 42(3) and 44(3), that the information has already been communicated or made available to the public, is peculiarly within the knowledge of the defendant.

2.175 Regarding the feasibility of amending the measures to include the relevant matters as elements of the offence, the minister's response states:

> Including the matters in the exceptions to the offences as elements of the offences would impact on the effectiveness of the offences in achieving these legitimate objectives. This is because it would be significantly more difficult and costly for the prosecution to prove, beyond a reasonable doubt (and in every case), that the circumstances in the exceptions did not exist.

2.176 While it may be 'significantly more difficult and costly' for the prosecution to establish that a person did not, for example, have lawful authority to engage in the conduct set out in the offences, it is unclear from the information provided whether this sufficiently affects the achievement of the legitimate objectives such as to constitute a sufficient justification for reversing the burden of proof for the purposes of international human rights law.

2.177 Finally, as discussed at [1.54], the Attorney-General's response notes that the offences 'only apply to ONI staff and people with whom the agency has an agreement or arrangement'. This is relevant to the proportionality of the measures insofar as the limitation on the right to the presumption of innocence is limited to a particular class of people. However, this does not address concerns about the nature and extent of the limitation on the right to the presumption of innocence imposed by the reverse burden offences as they apply to ONI staff and associated people.

2.178 In light of this analysis, concerns remain that reversing the evidential burden, as opposed to including additional elements within the offence provisions themselves, is not the least rights-restrictive approach, as ONI staff and associated people remain open to a criminal charge and bear the evidential burden of proof in circumstances in which they may be acting in accordance with their employment. As such, the reverse evidential burden in the statutory defences does not appear to be a proportionate limitation on the right to be presumed innocence.

Committee response

2.179 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.180 The committee welcomes the removal of the reverse burden offence in section 43.

2.181 However, the preceding analysis indicates that the reverse evidential burdens may not be compatible with the presumption of innocence.

Information gathering powers

2.182 The bill would provide ONI with a number of information gathering powers. Under proposed section 7 ONI will have broad statutory functions, including to:

- assemble, correlate and analyse information related to international and other matters that are of political, strategic or economic significance to Australia and prepare assessments and reports (section 7(1)(c)-(d)); and
- collect, interpret and disseminate information relating to matters of political, strategic or economic significance to Australia that is accessible to any section of the public (section 7(1)(g)).

2.183 Under proposed section 37, for the purpose of ONI performing its function under section 7(1)(c), the Director-General of ONI may make a written request that a Commonwealth authority provide information, documents or things in its possession that relate to international matters of political, strategic or economic significance to Australia; or domestic aspects relating to such international matters.

2.184 Proposed section 38 provides that a Commonwealth authority may provide to ONI information, documents or things that the head of the authority considers relate to matters of political, strategic or economic significance to Australia.

2.185 Proposed section 39 provides that an intelligence agency or agency with an intelligence role or function may provide to ONI information, documents or things that relate to any of ONI's functions.

Compatibility of the measures with the right to privacy

2.186 The right to privacy includes respect for private and confidential information, particularly the collection, storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.[117] The statement of compatibility acknowledges that the above measures, by enabling ONI to obtain, and in some cases compel, information, including personal information, engage and limit the right to privacy.[118]

2.187 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, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective. In this respect, the statement of compatibility states that the measures constitute a permissible limitation on the right to privacy and are aimed at two legitimate objectives:

117 Article 17 of the International Covenant on Civil and Political Rights.

118 SOC, p. 8.

> …firstly, to ensure national security, by collecting, interpreting and disseminating open source intelligence on matters of significance to Australia, and by promoting the collective performance of the NIC agencies through its leadership and enterprise management functions; and secondly, to promote well-informed and rigorous policy making by the Australian government through preparing and communicating assessments on matters of significance.[119]

2.188 These are likely to constitute a legitimate objective for the purposes of international human rights law. Collecting relevant information is likely to be rationally connected to (that is, effective to achieve) these stated objectives.

2.189 In order to be a proportionate limitation on the right to privacy, a measure must be no more extensive than is strictly necessary to achieve its stated objective and must be accompanied by adequate and effective safeguards. In this respect, in relation to the proportionality of the limitation, the statement of compatibility provides relevant information. It acknowledges that proposed sections 37 and 38 provide a requirement or authorisation under Australian law for the purposes of the *Privacy Act 1988* (Privacy Act). As such, this requirement or authorisation operates as an exception to the prohibition on the disclosure of personal information by a Commonwealth entity for a secondary purpose and allows information to be disclosed to ONI. This means the Privacy Act will not act as a safeguard in the context of the measures. However, the statement of compatibility argues that the measures are nevertheless sufficiently circumscribed. In relation to the compulsory evidence gathering power in proposed section 37, it states:

> …section 37 is broad, but it is not unconstrained. It can only be exercised for the purposes of ONI's international assessments function under paragraph 7(1)(c). The Director-General is also obliged to consider any privacy concerns raised by the relevant Commonwealth authority before making the request to compel information. This ensures that requests will not be made unless the Director-General considers that the importance of obtaining the information outweighs the importance of preserving the right to privacy.[120]

2.190 The statement of compatibility further explains that section 37 does not override any existing secrecy provisions and ONI will have express obligations in relation to the use and protection of such information.[121] While these matters are relevant to the proportionality of the limitation, the initial analysis noted that the breadth of the power remains broad.

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119 SOC, p. 8.

120 SOC, p. 8.

121 SOC, p. 9.

2.191 In relation to proposed section 38, the statement of compatibility acknowledges that the provision provides a permissive authority for Commonwealth authorities to disclose information to ONI even if doing so would not otherwise fall within the scope of the authority's statutory functions. However, the statement of compatibility explains that these disclosure powers are also limited to material related to ONI's assessment functions.[122] While this may be the case, it was noted that the assessment functions are broad and so may permit disclosure of a very extensive range of information to ONI.

2.192 In relation to proposed section 39, the statement of compatibility explains that while this provides a broad power of voluntary disclosure from NIC agencies, the broader power is reasonable as NIC agencies will hold far greater information that is relevant to ONI's functions than Commonwealth agencies more generally. The statement of compatibility further outlines some relevant safeguards in relation to the handling of disclosed information.[123] While these are relevant safeguards, it was unclear from the information provided that the scope of the power is sufficiently circumscribed. This is because while NIC agencies may hold information relevant to ONI's functions, it was unclear whether the disclosure of information from NIC agencies would be proportionate in each case.

2.193 In relation to ONI's proposed power to collect 'identifiable information'[124] under ONI's open source function, the statement of compatibility explains that the Prime Minister will be required to make privacy rules governing ONI's collection, communication, handling and retention of such information.[125] Such rules may operate as a safeguard in relation to the right to privacy. However, the likely content of these rules is not described in the statement of compatibility and it was therefore difficult to assess whether the rules will be sufficient to ensure that the limitation on the right to privacy is proportionate.

2.194 Further, in relation to the scope of the rules as a potential safeguard, it was noted that the requirement to make rules regarding 'identifiable information' will only apply in respect of Australian citizens and permanent residents rather than all persons in Australia or subject to Australian jurisdiction. This is of concern as Australia owes human rights obligations to all persons within Australia.

2.195 In explaining the scope of the requirement to make privacy rules, the statement of compatibility nevertheless states that:

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122 SOC, p. 9.

123 SOC, p. 9.

124 'Identifiable information' means information about an Australian citizen or permanent resident, who is identified or reasonably identifiable: section 4.

125 SOC, p. 9. See section 53 of the bill.

> …the provision does not limit the matters in relation to which the Prime Minister may make rules. It remains open to the Prime Minister to extend these rules, or to make additional rules, to protect the personal information of others, including foreign nationals.[126]

2.196 The initial analysis stated that, while it is possible that the Prime Minister may decide to make rules to protect the privacy of people who are not Australian citizens or permanent residents, there is no requirement to make such rules. Accordingly, it was unclear what other safeguards are in place to protect the right to privacy of non-nationals or whether the measure is the least rights restrictive approach. In this respect, there may also be concerns about the compatibility of the measure with the right to equality and non-discrimination.

2.197 The committee therefore sought advice as to whether the measures are reasonable and proportionate to achieve the stated objectives, including:

- whether each of the information gathering powers are sufficiently circumscribed and accompanied by adequate and effective safeguards;
- how the measures constitute the least rights restrictive approach;
- in relation to the power to collect open source information, whether a copy of the proposed rules could be provided; and
- what safeguards will be in place in relation to the power to collect open source information from people who are not Australian citizens or permanent residents.

Attorney-General's response

2.198 In response to the committee's inquiries, the Attorney-General states that in order to effectively perform its functions, ONI will need to have access to a wider range of information (frequently of a sensitive and classified nature) from a broader range of agencies than is currently required for ONA's functions. However, the Attorney-General's response states that the bill contains a number of safeguards to ensure that the measures are a reasonable and proportionate limitation on the right to privacy. The minister's response explains that these safeguards were canvassed in the independent Privacy Impact Assessment (PIA) undertaken by the Australian Government Solicitor. A copy of the PIA was usefully provided to the committee at **Attachment A** to the Attorney-General's response. The Attorney-General explains that the PIA concluded:

> - Key aspects of the ONI Bill are positively directed towards the management and protection of personal information and privacy, but in a manner which is seen as appropriate to the functions of ONI as a national intelligence agency.

126 SOC, p. 9.

- ONI's information collection and reporting functions are such that it can be expected to collect more information than ONA. This is recognised in the ONI Bill, which provides a stronger, more transparent regime for the handling and protection of personal information than currently exists for ONA.

2.199 These matters set out in the PIA are relevant to the proportionality of the limitation on the right to privacy. The Attorney-General's response further notes that the PIA concludes that the secrecy provisions in the ONI Bill are more restrictive of the communication of ONI's information, including personal information, than the provisions in the Privacy Act. As noted above, the secrecy provisions apply to all ONI information and are not restricted to the unauthorised disclosure of personal information. In this respect, while the secrecy provisions may act as a potential safeguard in relation to the unauthorised disclosure of personal information, this also raises concerns in relation to the scope of the provisions and the right to freedom of expression. The secrecy provisions also do not fully address concerns about the *authorised* collection, use and disclosure of personal information. As noted above, the collection of private, confidential and personal information under the bill may be extensive. Further, there are broad powers for voluntary and compulsory disclosure from other government agencies. This raises particular concerns that the powers as drafted may not be the least rights restrictive approach.

2.200 In relation to ONI's proposed power to collect 'identifiable information'[127] under ONI's open source function, the content of the rules governing the collection of 'identifiable information' are important in determining the proportionality of the measures. The Attorney-General's response usefully provides a copy of the draft privacy rules to assist the committee in its consideration on the bill (**Attachment B** to the Attorney-General's response). The rules relevantly address a number of matters including what constitutes publicly available information and by whom it may be collected, as well as matters relating to the retention, handling and communication of 'identifiable information'. While there are specific restrictions on communicating 'identifiable information' about an Australian national, these safeguards do not appear to apply to non-nationals. Nevertheless the Attorney-General's response states that in addition to the possibility for the privacy rules to include requirements regarding the collection of open source information relating to non-nationals in the future, there are a number of other relevant safeguards in the bill including:

- ONI's collection role under paragraph 7(1)(g) is limited to the collection of information relating to matters of political, strategic, or economic significance to Australia that is accessible to any section of the public. The function does not authorise ONI to undertake unlawful activity to obtain the information.

127 'Identifiable information' means information about an Australian citizen or permanent resident, who is identified or reasonably identifiable: section 4.

- The disclosure of such information will be subject to the secrecy provisions in the Bill.

2.201 These are relevant safeguards in relation to the proportionality of the limitation imposed on the right to privacy. However, concerns remain that the measures as currently drafted may not be the least rights restrictive approach to addressing the stated objective of the measures. In relation to ONI's power to collect open source information, even in respect of Australian nationals, the measures would appear to permit the collection of a broad range of information and disclosure of this information in a broad range of circumstances. Taken together with the broad powers for ONI to collect information from other agencies, the measures as drafted would appear to be overly broad.

Committee response

2.202 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.203 The preceding analysis indicates that the measures may be incompatible with the right to privacy.

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

2.204 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.

2.205 'Discrimination' under articles 2 and 26 of the ICCPR includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination).[128] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively or disproportionately affects people with a particular personal attribute (for example, nationality or national origin).[129]

2.206 In this respect, while Australia maintains some discretion under international law with respect to its treatment of non-nationals, Australia has obligations not to

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

129 *Althammer v Austria*, Human Rights Committee Communication no. 998/01 (8 August 2003) [10.2].

discriminate on the grounds of nationality or national origin.[130] As acknowledged in the statement of compatibility, by providing that the proposed privacy rules (see above, [1.78]) are only required to apply to Australian citizens and permanent residents, the measure engages the right to equality and non-discrimination on the basis of nationality. That is, the measure allows for Australian citizens and permanent residents to be treated differently to people who do not fall into these categories.

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

2.208 In relation to the objective of the differential treatment, the statement of compatibility states it:

> …is to provide protections for Australians while facilitating the performance of ONI's functions in the interests of national security and for Australia's economic, strategic and political benefit.[131]

2.209 However, the statement of compatibility does not explain the importance of this objective in the context of the measure nor how the measure is rationally connected to that objective. The statement of compatibility instead states that 'special protection for Australians is a long-standing, core principle of accountability for intelligence agencies'.[132] While privacy protections for Australians may assist to ensure the accountability of intelligence agencies, it was unclear from the information provided why there needs to be differential treatment in the form of less protection of the right to privacy for those who are within Australia but are not Australian citizens or permanent residents.

2.210 In relation to proportionality, the statement of compatibility provides some information as to how the information collection powers of intelligence agencies are circumscribed. While this is relevant to the question of proportionality, it was unclear from the information provided whether excluding non-nationals from additional privacy protections is based on reasonable and objective criteria or represents the least rights restrictive approach. This raised questions as to whether the measure is compatible with the right to equality and non-discrimination.

2.211 Accordingly, the committee requested advice as to:

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

131 SOC, p. 6.

132 SOC, p. 6.

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

Attorney-General's response

2.212 In relation to the extent of the interference with the right to privacy for non-nationals, the Attorney-General's response states:

> ONI information related to non-nationals will only be collected for the purposes of performing the statutory functions of ONI. This information will also be protected under the secrecy provisions in the ONI Bill. As detailed above, the Privacy Impact Assessment into the ONI Bill noted that these secrecy provisions are more restrictive of the communication of ONI's information, including personal information, than the provisions in the Privacy Act relating to the disclosure of personal information. Further, the Bill does not prevent the Prime Minister from also making privacy rules concerning non-nationals, should he/she wish to.

2.213 While such factors are relevant to whether the measure is compatible with the right to equality and non-discrimination, it remains unclear as to whether the distinction between nationals and non-nationals is based on reasonable and objective criteria. In this respect, the Attorney-General explains that the human rights analysis of measures in the bill may have implications for similar measures in other legislation:

> Clause 53 of the Bill, which is the enabling provision for the privacy rules, is based upon section 15 of the Intelligence Services Act which requires the responsible Ministers for the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO) to make privacy rules to protect Australians. This privileged status is thus consistent with other Intelligence Services Act agencies…
>
> As the comments raised by the Committee would impact intelligence agencies more widely than just ONI, this topic may be best addressed by the Comprehensive Review of the Legal Framework Governing the National Intelligence Community, announced by the Attorney-General on 30 May 2018.

Committee response

2.214 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.215 Noting that the measure allows for nationals and non-nationals to be treated differently, the preceding analysis raises concerns as to whether the measure is compatible with the right to equality and non-discrimination.

2.216 The Attorney-General notes that issues related to the measures and the right to equality and non-discrimination would impact intelligence agencies more widely than just ONI and that this topic may be best addressed by the Comprehensive Review of the Legal Framework Governing the National Intelligence Community.

2.217 The committee recommends that the Comprehensive Review of the Legal Framework Governing the National Intelligence Community give consideration to the right to equality and non-discrimination and the committee's report.

Cooperation with entities in connection with ONI's performance of functions

2.218 Proposed section 13 provides that, subject to relevant approvals, ONI may cooperate with an authority of another country approved by an instrument, or any other person or entity, within or outside Australia.

Compatibility of the measure with the right to privacy

2.219 As set out above, the right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life. By providing that ONI may cooperate with an authority or person outside Australia, this measure appears to allow for the sharing of personal or confidential information. As such, the measure may engage and limit the right to privacy. While the right to privacy may be subject to permissible limitations in certain circumstances, this issue is not addressed in the statement of compatibility.

2.220 The committee therefore requested advice as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards in relation to the operation of the measure).

Attorney-General's response

2.221 The Attorney-General's response does not expressly address whether the measure is aimed at achieving a legitimate objective or is rationally connected to that objective for the purposes of permissibly limiting human rights. However, the Attorney-General's response explains that ONA has established guidelines and practices in place for the communication of information with foreign partners. As ONI is set up, ONI will develop new internal policies (in consultation with the IGIS) to govern ONI's cooperation with foreign partners. Such policies and practices are likely to be relevant to whether the measure is compatible with the right to privacy.

2.222 The Attorney-General's response explains the procedure for authorising cooperation with a foreign authority:

> The Director-General (or his or her delegate) will be required to authorise ONI's cooperation with an authority from another country before such cooperation takes place. Once an authorisation has been given, it will remain in place until amended or revoked by the Director-General or cancelled by the Prime Minister under subclause 13(5). Subclause 13(3) provides that the Director-General (or his or her delegate) must notify the Prime Minister on a monthly basis of each approval given during the month, and each variation or revocation made during the month.
>
> These requirements are based upon existing requirements that apply to the Australian Security Intelligence Organisation (ASIO) and agencies under the IS Act in respect of their cooperation with foreign authorities - with some modification to reflect ONI's cooperation is much less likely to be operational in nature than is the case with these agencies. The measures included in the ONI Bill are thus consistent with others across the intelligence community.

2.223 These authorisation processes may be capable of operating as a relevant safeguard.

2.224 The Attorney-General's response further states:

> Furthermore, ONI information will be protected under the secrecy provisions in the ONI Bill. As detailed above, the Privacy Impact Assessment into the ONI Bill noted that these secrecy provisions are more restrictive of the communication of ONI's information, including personal information, than the provisions in the Privacy Act relating to the disclosure of personal information. Further, the Bill does not prevent the Prime Minister from also making privacy rules concerning non-nationals, should he/she wish to.
>
> These matters will also remain subject to IGIS oversight, who will review ONI activity to ensure ONI acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights.

2.225 These matters are also relevant to the proportionality of the limitation the measure imposes on the right to privacy. However, noting that the Attorney-General

has not provided specific information as to the legitimate objective of the measure, it is difficult to assess whether the measure is only as extensive as strictly necessary to achieve that objective. Accordingly, in the absence of further information it is not possible to conclude that the measure is compatible with the right to privacy.

Committee response

2.226 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.227 Based on the information provided and the preceding analysis, it is not possible to conclude that the measure is compatible with the right to privacy.

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

2.228 Under international human rights law every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation on state parties to protect people from being killed by others or from identified risks. While the ICCPR 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 nation state.

2.229 The United Nations (UN) Human Rights Committee has made clear that international law prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UN Human Rights Committee stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in 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'.[133]

2.230 By providing that ONI may cooperate with an authority or person outside Australia, this measure appears to allow for the sharing of personal or confidential information overseas. Such sharing of information internationally could accordingly engage the right to life. This issue was not addressed in the statement of compatibility.

2.231 A related issue raised by the measure is the possibility that sharing of information may result in torture, or cruel, inhuman or degrading treatment or punishment. Under international law the prohibition on torture is absolute and can

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

never be subject to permissible limitations.[134] This issue was also not addressed in the statement of compatibility.

2.232 In relation to the right to life, the committee sought advice on the compatibility of the measure with this right (including the existence of relevant safeguards or guidelines).

2.233 In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, the committee sought advice in relation to the compatibility of the measure with this right (including any relevant safeguards or guidelines).

Attorney-General's response

2.234 The Attorney-General's response provides information addressing the committee's concerns as to whether sharing information with an authority of another country could lead to torture or cruel, inhuman, or degrading treatment or punishment or prosecution of a person for an offence involving the death penalty. In relation to these rights and in the context of information sharing powers, it is essential that there are effective safeguards in place. The Attorney-General's response indicates that the authorisation process operates as a relevant safeguard:

> The Director-General (or his or her delegate) will be required to authorise ONI's cooperation with an authority from another country before such cooperation takes place. Once an authorisation has been given, it will remain in place until amended or revoked by the Director-General or cancelled by the Prime Minister under subclause 13(5). Subclause 13(3) provides that the Director-General (or his or her delegate) must notify the Prime Minister on a monthly basis of each approval given during the month, and each variation or revocation made during the month.
>
> The Director-General (and the Prime Minister as part of their consideration of whether to revoke an authorisation) would consider a range of factors when deciding whether it would be appropriate for such an authorisation to be given, including the human rights record of the country/particular foreign authority.

2.235 It is relevant to the human rights compatibility of the measure that the Director-General will regularly review the authorisation and in doing so will consider the human rights record of particular countries or foreign authorities. In practice, this may reduce the risk that information is shared with foreign countries in circumstances that may not be compatible with Australia's human rights obligations. However, at the same time, it is noted that the authorisation process does not necessarily prevent the sharing of information in circumstances where there may be

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134 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, article 4(2); UN Human Rights Committee, *General Comment 20: Article 7* (1992) HRI/GEN/1, [3].

concerns that the disclosure may lead to a real risk of a person being tortured or prosecuted for an offence which is subject to the death penalty.

2.236 The Attorney-General's response also notes that the authorisation requirements are based upon existing requirements that apply to ASIO and agencies under the IS Act in respect of their cooperation with foreign authorities. The Attorney-General's response further notes that guidelines will be established by ONI (in consultation with the IGIS) for the communication of information with foreign partners. The response notes that these policies will ensure that consideration is given to the human rights records of the country and this will be factored into the internal approval mechanisms required to share information. Such an approach may provide important safeguards in relation to the disclosure of information. It is noted that much may depend on the adequacy and the content of these policies and guidelines. Of particular relevance will be whether the guidelines require that ONI decline to share information where it may result in a person being tortured; subject to cruel, inhuman, degrading treatment or punishment; or prosecuted for an offence carrying the death penalty. Without reviewing the content of these guidelines it is difficult to determine whether the measure is compatible with human rights.

2.237 Further, it is noted that discretionary or administrative safeguards may be insufficient for the purpose of ensuring compliance with the prohibition on torture. This is the case particularly given that there is currently no requirement under Australian law to decline to disclose information where it may result in a person being tortured or prosecuted for an offence carrying the death penalty.

Committee response

2.238 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.239 The preceding analysis indicates that unless there are adequate and effective safeguards in place, there is a risk that information sharing may occur in circumstances where it is incompatible with the prohibition on torture and cruel, inhuman, degrading treatment or punishment and the right to life, that is, where the death penalty may be applied.

2.240 Noting that ONI will be developing guidelines in relation to the disclosure of information to foreign partners, the committee requests a copy of the guidelines, once they are drafted, insofar as they relate to disclosure in situations where there may be risks associated with torture, and cruel, inhuman, or degrading treatment or punishment or the death penalty.

Mr Ian Goodenough MP
Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Aged Care Quality and Safety Commission Bill 2018;
- Commonwealth Places and Services (Facial Recognition) Bill 2018; and
- Crimes Legislation Amendment (Police Powers at Airports) Bill 2018.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

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

4 Althammer v Austria HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

The Hon Christian Porter MP
ATTORNEY-GENERAL

The Hon Peter Dutton MP
MINISTER FOR HOME AFFAIRS
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

MC18-006014

13 AUG 2018

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600
human.rights@aph.gov.au

Dear ~~Chair~~ Ian

Thank you for your letter of 27 June 2018 regarding the consideration by the Parliamentary Joint Committee on Human Rights (the Committee) of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (the Bill).

The Committee has requested further information to inform its consideration of the measures contained in the Bill and their consistency with Australia's human rights obligations. We apologise for the delay in responding to your correspondence. The enclosed document responds to the Committee's request for further information.

We thank the Committee for its robust consideration of the Bill and trust the additional information enclosed will assist the Committee.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

The Hon Peter Dutton MP
Minister for Home Affairs

Encl. Response to Report 6 of 2018 of the Parliamentary Joint Committee on Human Rights, concerning the Counter-Terrorism Legislation Amendment Bill (No. 1) 2018.

Response to the Parliamentary Joint Committee on Human Rights' Report 6 of 2018 concerning the Counter-Terrorism Legislation Amendment Bill (No. 1) 2018

Background

The Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (the Bill) extends the operation of a range of critical counter-terrorism provisions in the *Criminal Code*, the *Crimes Act 1914* (Crimes Act), and the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to ensure that law enforcement and security agencies continue to have they powers they need to respond to the ongoing threat of terrorism in Australia.

The Bill extends for a further three years the following regimes which are scheduled to sunset on 7 September 2018:

- the control order regime in Division 104 of the *Criminal Code*
- the preventative detention order (PDO) regime in Division 105 of the *Criminal Code*
- the declared areas provisions in sections 119.2 and 119.3 of the *Criminal Code*, and
- the stop, search and seize powers in Division 3A of Part IAA of the Crimes Act.

In doing so, the Bill also implements the Government's response to the recommendations of two independent reviews of these sunsetting provisions.

Firstly, three reports of the Independent National Security Legislation Monitor (INSLM) were tabled on 16 October 2017: the review of the declared areas provisions, the review of Divisions 104 and 105 of the *Criminal Code* (including the interoperability of the control order regime with the continuing detention order (CDO) regime in Division 105A of the *Criminal Code*), and the review of Division 3A of Part IAA of the Crimes Act (INSLM Report).

Secondly, on 1 March 2018, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) tabled two reports reviewing the operation of the sunsetting provisions:

- a review into police stop, search and seize powers, the control order regime and the PDO regime (PJCIS Powers Report), and
- a review into the declared areas provisions (PJCIS Declared Areas Report).

The Bill also extends for a further 12 months the operation of the Australian Security Intelligence Organisation's questioning, and questioning and detention powers in Division 3 of Part III of the ASIO Act.

Control orders

The Parliamentary Joint Committee on Human Rights (the Committee) has requested further advice as to whether:

- the control order regime as a whole is effective to achieve (that is, rationally connected to) its stated objective, and
- the limitations on human rights imposed by the control order regime is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least restrictive approach, and whether there are adequate and effective safeguards in place in relation to its operation).

Rationally connected to achieving a legitimate purpose

The control order regime achieves the legitimate objective of preventing serious threats to Australia's national security interests, including in particular, the prevention of terrorist acts. Preventative powers such as control orders play an important part of ensuring that law enforcement agencies are able to take proactive steps to mitigate terrorist threats in an ever evolving national security environment. The Committee recognised that the prevention of terrorist acts constitutes a legitimate objective for the purposes of international human rights law.[1]

Control orders are a measure of last resort, which are only relied upon when traditional law enforcement options such as arrest, charge and prosecution are not available. As noted by the PJCIS Powers Report, the limited use of the control order regime demonstrates that the preference of law enforcement agencies is to employ traditional law enforcement methods to more comprehensively address the threat posed by an individual.

In the INSLM Report, the INSLM referred to controls placed on one individual as having a deterrent effect and a beneficial impact on that individual by effectively diverting them from radicalisation. In another example, the INSLM noted that the controls protected the community by enabling law enforcement to prevent criminal acts from occurring.[2] The Committee's report acknowledges that these examples give "some evidence that the imposition of a control order could be capable of being effective in particular individual cases", but states that "some questions remain as to whether the control order regime as a whole is rationally connected to its objective..". The Government respectfully disagrees with this assessment, noting that the INSLM Report proffered these examples to "demonstrate their effectiveness in pursuing the objects of the regime".[3]

Six control orders have been made to date. This indicates there will be circumstances where law enforcement agencies may have sufficient information or intelligence to establish a serious concern regarding the threat posed by an individual that falls short of the evidentiary burden to commence criminal prosecution. However, without an appropriate preventative mechanism, law enforcement agencies have limited means to manage the threat in the short to medium term. Use of a control order is considered in conjunction with, and is complementary to, criminal prosecution, and allows a balance to be achieved between mitigating the risk to community safety and allowing criminal investigations to continue.

The limitations on human rights imposed by a control order are rationally connected to achieving the legitimate purpose of preventing a terrorist act. When determining which conditions to impose on an individual under a control order, the issuing court must consider whether the proposed obligation, prohibition or restriction is 'reasonably necessary, and reasonably appropriate and adapted' for the purposes of achieving one of the permitted purposes for a control order, such as protecting the public from a terrorist act (paragraph 104.4(1)(d)). This requires the issuing court to be satisfied that each condition under a control order must be effective in addressing the risk posed by the individual. Where a condition is not effective or necessary in addressing this threat, the issuing court may not impose that condition, or if it does impose the condition, may at a later time, upon application by the subject of the control order, determine that that condition is no longer necessary or effective to address the threat posed by the individual.

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[1] Parliamentary Joint Committee on Human Rights (PJCIS), Report 6 of 2018, para 1.20.
[2] Independent National Security Legislation Monitor (INSLM), Report 3 of 2017, para 8.19.
[3] Ibid.

Accordingly, the control order regime ensures that each of the limitations on a human right that may be imposed under a control order is rationally connected to minimising serious threats to Australia's national security, including in particular, the prevention of terrorist acts.

Reasonable and proportionate measure to achieve the legitimate purpose

The control order regime contains a number of safeguards to ensure that it represents the least restrictive way to achieve the legitimate purpose of preventing a serious threat to Australia's national security interests, including in particular, the prevention of terrorist acts.

Firstly, a control order is made by a judicial authority, being either the Federal Court or the Federal Circuit Court. This guarantees effective judicial oversight of the making of a control order. These courts are well placed to undertake the exercise of balancing the protection of the community with safeguarding individual rights and liberties.

Secondly, paragraph 104.4(1)(d) of the *Criminal Code* provides that the issuing court must be satisfied on the balance of probabilities that each of the obligations, prohibitions or restrictions to be imposed on the person by the control order is reasonably necessary, and reasonably appropriate and adapted for the purpose of achieving one of the permitted purposes for a control order, such as protecting the public from a terrorist. This ensures that only the obligations, prohibitions and restrictions directly capable of achieving the objective of the control order are imposed by the issuing court. This means that the control order is no more restrictive than it needs to be for the purpose of achieving the legitimate objective.

Thirdly, the control order regime allows for each application to be dealt with flexibly, and based on the circumstances of each case. For instance, for control order applications in relation to young persons between the age of 14 and 17, the issuing court must consider the best interests of the young person when determining whether each of the obligations, prohibitions or restrictions to be imposed on the individual is reasonably necessary, and reasonably appropriate and adapted to the protecting the public from a terrorist act (paragraph 104.4(2)(b)). Subsection 104.4(2A) outlines specific matters that the issuing court must take into account when determining what is in the best interest of the young person, including their age, maturity, background, the right of the person to receive an education, the benefit to the person of having a meaningful relationship with his or her family and friends and the physical and mental health of the individual.

In addition, paragraph 104.4(2)(c) provides that the issuing court must consider the impact of each of the proposed obligations, prohibitions or restrictions on the person's circumstances (including the person's financial and personal circumstances). This enables the control order regime to provide sufficient flexibility to treat the circumstances of each control order application differently, rather than imposing a blanket restriction on human rights without regard to the specific needs of the individual, or the threat they pose.

Fourthly, the control order regime contains mechanisms for assessing the ongoing need for a control order, and each of its obligations, prohibitions and restrictions. An individual subject to a control order may apply at any time to have a confirmed control order revoked or varied. The issuing court can revoke a control order if it is no longer satisfied on the balance of probabilities that the control order would substantially assist in the prevention of a terrorist act. Alternatively, the issuing court may remove certain obligations, prohibitions and restrictions in relation to an individual if it is no longer satisfied that the condition is reasonably necessary, and reasonably appropriate and adapted to achieving the purpose of protecting the public from a terrorist act. These review mechanisms ensure that the

intrusions on human rights that may be occasioned by a control order are no greater than necessary to achieve the legitimate objective.

The control order regime represents a reasonable and proportionate means of achieving the legitimate objective of preventing serious threat of Australia's national security interests, including in particular, the prevention of terrorist acts. The restrictions on human rights occasioned by a control order are not indiscriminate or disproportionate intrusions, but rather tailored to the specific threat being mitigated, and the individual circumstances of the individual who is the subject of the restrictions.

Extending the minimum duration of the time between and interim and confirmation proceeding

The Bill proposes to extend the minimum duration of time from the making of an interim control order to the confirmation proceeding from 72 hours to seven days. While this has the potential to limit the subject of the control order's right to contest the interim control order as soon as practicable, consistent with the right to a fair hearing, it also provides greater opportunity for the subject of the control order to prepare to present their case to the court.

Confirmation proceedings are complex, and may take both parties a substantial amount of time to prepare for. While subsection 104.5(1B) allows the issuing court to consider a range of factors when determining the date of the confirmation hearing, subsection 104.5(1A) enables the issuing court to set the confirmation date as early as 72 hours after the making of an interim control order. This could prevent both the subject of the control order and the AFP from being adequately prepared for the confirmation hearing.

To date, the issuing court, the AFP and the subject of the control order application, have been satisfied in holding confirmation proceedings several months after the making of an interim control order. In light of this reality, the proposed extension of time between the making of an interim control order and the confirmation date from 72 hours to seven days is unlikely to amount to an undue delay in an individual's right to contest the interim control order.

Preventative detention orders

The Committee has requested further advice as to:

- how the PDO regime is effective to achieve (that is, rationally connected to) its stated objective, and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

Rationally connected to achieving a legitimate purpose

The PDO regime achieves the legitimate objective of preventing serious threats to Australia's national security and, in particular, preventing terrorist acts. The Committee recognised that preventing serious terrorist attacks is likely to constitute a legitimate objective for the purposes of international human rights law.[4]

Under a Commonwealth PDO, a person can be detained for up to 48 hours to:

[4] Parliamentary Joint Committee on Human Rights (PJCIS), Report 6 of 2018, para 1.50, p. 14.

- prevent a terrorist act that is capable of being carried out, and could occur, within the next 14 days from occurring, or
- preserve evidence of, or relating to, a recent terrorist act.

In the current threat environment, there is a heighted risk of smaller-scale opportunistic attacks, undertaken principally by lone actors or small groups. While there is still the need to prepare for more complex attack plots, simple attack methodologies that enable individuals to act independently and with a high degree of agility remain the more likely form of terrorism in Australia. The simple nature of these attacks means preparation may not involve activity that is concerning enough to come to the attention of authorities immediately. In such circumstances, law enforcement agencies need to act quickly and decisively to disrupt terrorist acts and prevent catastrophic consequences to the community. As acknowledged in the INSLM Report, a PDO regime is necessary and proportionate to this threat environment as a means of protecting the public.[5]

As with control orders, the PDO is a measure of last resort, which is only sought in exceptional circumstances before a terrorist act occurs, or after an act of terrorism occurs to preserve evidence. As noted in the PJCIS Powers Report, the lack of use of the PDO regime reflects the understanding by the AFP that the PDO regime is only anticipated to be used 'in times of an unfolding emergency (or in its immediate aftermath) and when the traditional investigative powers available to law enforcement are inadequate to contain the threat'.[6]

While the Commonwealth PDO regime is yet to be used, there are scenarios when its use may be necessary and appropriate. In its supplementary submission to the PJCIS, the Attorney-General's Department (AGD) and the AFP provided the following example of when a PDO is an effective means of responding to a terrorist act:

> Consider there has been an explosion in a crowded place in the Melbourne central business district. There are significant casualties. Police arrest a person suspected of causing the explosion and establish that the terrorist suspect had called an unknown associate around the time of the attacks. The associate is previously unknown to police, and at this stage, there is insufficient information to reach the threshold for arrest, and further investigation is required. A Commonwealth PDO is issued by a senior AFP member to the associate.[7]

In this scenario, the detention of the associate is rationally connected to the prevention of a further terrorist act. The rational connection to the prevention of a terrorist act is outlined in the legislation itself which requires an analysis by the AFP member and the issuing authority of whether the PDO would 'substantially assist' in preventing a terrorist act occurring (paragraph 105.4(4)(c)). This ensures that a PDO can only be made if it is likely to be effective in achieving its objective of addressing a serious terrorist threat.

Similarly, each of the restrictions on human rights occasioned by the making of a PDO is rationally connected with preventing a terrorist act, or preserving evidence in the immediate aftermath of a terrorist act. For instance, the restrictions on communications with others, and the making of prohibited contact orders, are intended to assist in achieving the legitimate objective of preventing a terrorist act, or preventing the destruction of vital evidence in the aftermath of a terrorist act. These limitations on human rights are permissible to the extent that they are effective in achieving the legitimate objective of the PDO regime. The INSLM

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[5] Independent National Security Legislation Monitor (INSLM), Report 3 of 2017, para 10.13
[6] Parliamentary Joint Committee on Intelligence and Security, Review of police stop, search and seize powers, the control order regime, and the preventative detention order regime, para 4.78, p. 103.
[7] Attorney-General's Department and Australian Federal Police, Supplementary Submission to the Parliamentary Joint Committee on Intelligence and Security, p. 3.

Report also acknowledged the adequate protections of individual rights under the PDO regime.[8]

Based on the current nature of the terrorist threat, and the serious consequences to the public if a terrorist act were to occur, the PDO regime is rationally connected to the legitimate purpose of preventing serious threats to Australia's national security and, in particular, preventing terrorist acts.

Reasonable and proportionate measure to achieve the legitimate purpose

The PDO regime contains a number of safeguards to ensure that it represents the least restrictive way to achieve the legitimate purpose of preventing serious threat of Australia's national security interests, including in particular, preventing terrorist acts.

Firstly, the test for seeking a PDO by an AFP member, and making a PDO by an issuing authority[9], ensures that a PDO can only be exercised when necessary and appropriate. Subsection 105.4(4) provides that to obtain a PDO, an AFP member must:

- suspect on reasonable grounds that the subject of the PDO will:
    - engage in a terrorist act
    - possess a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or
    - has done an act in preparation for, or planning, a terrorist act
- be satisfied that making the PDO would substantially assist in preventing a terrorist act occurring, and
- be satisfied that detaining the individual for the period for which the individual is to be detained under the PDO is reasonably necessary for the purpose of preventing a terrorist act.

The 'terrorist act' referred to must be one that is 'capable of being carried out, and could occur, within the next 14 days' (subsection 105.4(5)).

The test for seeking and making a PDO also requires both the AFP member and the issuing authority to undertake a proportionality analysis. The PDO can only be sought and made where it would 'substantially assist' in preventing a terrorist act occurring. The AFP member and issuing authority must also consider whether detention of the individual under a PDO is 'reasonably necessary' for the underlying purpose of making a PDO. These criteria require the AFP member and issuing authority to weigh the effectiveness of the PDO against other measures that are available to prevent or respond to a terrorist threat. Accordingly, the test for seeking and making a PDO is targeted and narrowly framed, to ensure it is only used where it is likely to be effective, and in circumstances where it can prevent terrorist acts which are likely to occur within a short period of time.

A similar proportionality analysis is undertaken where a PDO is sought and made for the purposes of preserving evidence in the immediate aftermath of a terrorist act. In such circumstances, the AFP member and issuing authority must be satisfied that a terrorist act has occurred within the last 28 days, that it is necessary to detain the person to preserve evidence of, or relating to the terrorist act, and that detention is reasonably necessary to achieve this objective (subsect 105.4(6)).

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[8] Independent National Security Legislation Monitor (INSLM), Report 3 of 2017, para 10.13

[9] An 'issuing authority' for the purposes of an initial PDO is a senior AFP member. An 'issuing authority' for the purposes of a continued PDO is outlined in section 105.2.

Secondly, under the PDO regime, the AFP member must continue to justify the detention of an individual following the expiry of the initial PDO. An initial PDO, which is made by a senior AFP member as the issuing authority, can last for up to 24 hours. Should the AFP wish to extend the period of detention under a PDO for a further 24 hours, the AFP member must apply to an issuing authority for a continued PDO. An 'issuing authority' for the purposes of a continued PDO is defined in section 105.2 and includes a person who is a judge of a State or Territory Supreme Court, or a person who is a Judge of the Federal Court of Australia or of the Federal Circuit Court of Australian, who is acting in their personal capacity. In making a continued PDO, the issuing authority must consider afresh the merits of making the order, and be satisfied, after taking into account relevant information (including information that has become available since the initial PDO was made), of the test in subsection 105.4(4) or (6). This ensures that after the first 24 hours, the basis for a PDO must again be considered and can only be extended where the original test for a PDO continues to be satisfied. This ensures that an individual detained under a PDO is not subject to greater detention than is necessary to achieve the legitimate objectives of the PDO regime.

Thirdly, the PDO regime allows for flexibility in its application for different cases – such as individuals under the age of 18 and those incapable of managing their own affairs (section 105.29). For instance, a person who is under the age of 18 or incapable of managing their own affairs is entitled to have contact with a parent or guardian, or another person who is able to represent the person's interest. A person under the age of 18 who is detained under a PDO must also not be detained with persons who are 18 years or older, unless there are exceptional circumstances (section 105.33A).

Fourthly, while a detainee's right to contact others while under a PDO is necessarily limited so as to not undermine the effectiveness of the PDO in preventing or responding to a terrorist act, the detainee may still have contact with a range of individuals so as to communicate they are safe. These individuals include: family members, employers, business associates, lawyers, and any other person that the police officer detaining the individual agrees to (sections 105.35 and 105.36). The detainee may also contact the Commonwealth to make a complaint if necessary (section 105.36).

Fifthly, the PDO regime also provides that an individual detained under a PDO has the right to be treated with humanity and respect for human rights, and not to be subject to cruel, inhuman or degrading treatment (section 105.33). A contravention of this by a police officer is an offence and carries a maximum penalty of up to two years imprisonment (section 105.45).

Finally, the PDO regime also contains important review mechanisms such as the detainee's right to apply, on expiration of the PDO, to the Security Division of the Administrative Appeals Tribunal to seek merits review of the decision to make or extend a PDO. The detainee may also bring proceedings in a court for a remedy in relation to the PDO, or for their treatment under the PDO (section 105.51).

The PDO regime is proportionate to the legitimate purpose of preventing serious threats to Australia's national security interests, including in particular, preventing terrorist acts. It requires the AFP member and issuing authority to carefully consider whether the measure is necessary and whether the making of a PDO is the most effective means of preventing or responding to a terrorist act. The regime strikes the appropriate balance between safeguarding the community, and ensuring that the interference with an individual's rights is not greater than necessary to achieve the legitimate purpose of the regime.

Stop, search and seize powers

The Committee has requested further advice as to whether:

- each of the stop, question, search and seizure powers, and their proposed extension, is effective to achieve (that is, rationally connected to) its stated objective, and
- each of the stop, question, search and seizure powers, and their proposed extension, is a reasonable and proportionate measure for the achievement of that objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

Rationally connected to achieving a legitimate purpose

The stop, search and seize powers in Division 3A of Part IAA of the Crimes Act achieves the legitimate purpose of protecting Australia's national security, including in particular, preventing terrorist acts. The Committee recognised that this is likely to constitute a legitimate objective for the purposes of international human rights law.[10]

Law enforcement agencies can use the stop, search and seize powers where an individual is located in a Commonwealth place (such as an airport or a defence establishment), and the police officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act (section 3UB). Alternatively, these powers can be used where there is a prescribed security zone declaration in respect of a Commonwealth place. A declaration for a prescribed security zone can only be made if the Minister considers that the declaration would assist in preventing a terrorist act occurring, or in responding to a terrorist act that has occurred (section 3UJ).

Section 3UEA is the only power in Division 3A that may be exercised by law enforcement agencies outside of a Commonwealth place. Section 3UEA provides that a police officer may enter premises without a warrant if the police officer suspects on reasonable grounds that:

- it is necessary to search the premises for a thing, or seize a thing, in order to prevent the thing that is on the premises from being used in connection with a terrorism offence, and
- it is necessary to exercise the power without a search warrant because there is a serious and imminent threat to a person's life, health or safety.

The limitations on human rights that are occasioned by the exercise of the stop, search and seize powers are rationally connected to achieving the legitimate purpose of preventing a terrorist act. Each of these powers is intended to provide law enforcement agencies with additional information, or means, to prevent a terrorist act from occurring, or to respond to a terrorist act that has occurred. These powers are largely confined in their application to Commonwealth places, which are generally places of national significance, or areas of mass gathering (or both), where a terrorist act could have potentially catastrophic consequences. As stated on the Government's national security website in relation to Australia's National Terrorism Threat Advisory System, the symbolic appeal of an attack against a government or authority – such as the military, police and security agencies – elevates the threat to these entities.[11]

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[10] Parliamentary Joint Committee on Human Rights (PJCHR), Report 6 of 2018, para 1.26, p. 23.
[11] https://www.nationalsecurity.gov.au/securityandyourcommunity/pages/national-terrorism-threat-advisory-system.aspx

As noted in the PJCIS Powers Report, the stop, search and seize provisions are emergency powers which are only likely to be used 'in rare and exceptional circumstances'[12] to enable police to 'respond rapidly to terrorism incidents'.[13] While these powers have not yet been used by law enforcement agencies, they 'fill a critical, albeit narrow, gap in state and territory emergency counter-terrorism powers, by enabling law enforcement agencies to act immediately in the event of a terrorist threat to, or terrorism incident within, a Commonwealth place'.[14] In the joint submission from AGD and the Australian Federal Police (AFP) to the PJCIS, a hypothetical scenario was outlined in which the stop, search and seize powers would be an effective measure and markedly improve the capability of law enforcement agencies to respond to the threat of a terrorist act:

> AFP provides a Uniformed Protection Function at Garden Island Defence Precinct (NSW). The AFP's function in that regard is to provide for the safety and security of the Precinct and its population along with providing a first response capability in the event of a critical incident.
>
> In this hypothetical example, intelligence indicates that an unidentified person is planning to commit an edged weapon terrorist attack at the Precinct. A suspect is identified loitering in the public area for a prolonged period of time, constantly keeping his hands in his pocket and trying to secret himself from view of CCTV cameras with a black and white flag visible in his rear pocket.
>
> In this scenario reasonable grounds to suspect the person might be about to commit a terrorist act exist to exercise powers under Division 3A. The suspect is approached and required to provide their name and reason for being at the Precinct under section 3UC. The person provides their name and shows a NSW driver's licence. Intelligence checks identify that they are an associate of a known terrorism suspect. Meanwhile, police search the person under section 3UD, and seize a knife and Islamic State flag found in their possession. The person is arrested on suspicion of planning a terrorist act.[15]

In the current terrorism threat environment, an attack on a Commonwealth place is not unlikely.[16] It is therefore vital that law enforcement agencies have appropriate and targeted powers to prevent or respond to terrorist acts in Commonwealth places. The stop, search and seize powers are rationally connected to the legitimate purpose of preventing serious threats to Australia's national security and, in particular, preventing terrorist acts. Each of the limitations on human rights occasioned by the exercise of the stop, search and seize powers is necessary in achieving the legitimate objective of preventing a terrorist act.

Reasonable and proportionate measure to achieve the legitimate purpose

The stop, search and seize powers contain a number of safeguards to ensure that they represent the least restrictive way to achieve the legitimate purpose of preventing serious threat of Australia's national security interests, including in particular, preventing terrorist acts.

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[12] Parliamentary Joint Committee on Intelligence and Security, Review of police stop, search and seize powers, the control order regime, and the preventative detention order regime, para 2.32, p. 17.
[13] Ibid, para 2.62, p. 26.
[14] Australian Federal Police, Submission to the Parliamentary Joint Committee on Intelligence and Security, para 15, p. 2.
[15] Attorney-General's Department and Australian Federal Police, Submission to the Parliamentary Joint Committee on Intelligence and Security, pp. 2-3.
[16] Ibid, p. 2.

Firstly, as noted in the PJCIS Powers Report, the stop, search and seize powers are only likely to be exercised in emergency scenarios. Under such circumstances, it is anticipated that traditional law enforcement powers are unlikely to be as effective in responding to the terrorist threat. In a rapidly evolving threat scenario, the stop, search and seize powers are likely to represent the most effective means of responding to a terrorist threat, and therefore may represent the least restrictive way to achieve the legitimate objective of safeguarding the community from a terrorist act.

Secondly, the stop, search and seize powers are, with the exception of the emergency entry into premises power in section 3UEA, narrowly confined in their application to Commonwealth places. Accordingly, these powers are not broadly applicable and are limited in their exercise to locations which are generally of national significance or places of mass gathering (or both). Similarly, while section 3UEA is not limited in its application to a Commonwealth place, the circumstances in which it may be applied are narrowly confined to emergency scenarios, where rapid law enforcement action is necessary because there is a serious and imminent threat to a person's life, health or safety.

Thirdly, in exercising the stop and search power in section 3UD, a police officer must not use more force, or subject the person to greater indignity, than is reasonable and necessary in order to conduct the search (subsection 3UD(2)). Furthermore, a person must not be detained longer than is reasonably necessary for a search to be conducted (subsection 3UD(3)). Similarly, in searching a thing (including a vehicle), a police officer may use such force as is reasonable and necessary in the circumstances, but must not damage the thing by forcing it, unless the person has been given a reasonable opportunity to open the thing, or it is not possible to give that opportunity (subsection 3UD(4)). These safeguards ensure that the stop, search and seize powers are exercised in a proportionate manner and cause the least amount of interference with an individual's rights.

Fourthly, a police officer who is responsible for an item seized under section 3UE or section 3UEA must, within seven days, serve a seizure notice on the owner of the thing (or, if the owner cannot be found, the person from whom the thing was seized), to enable the owner to request for the return of the item (section 3UF).

Fifthly, where the Minister makes a declaration for a prescribed security zone in respect of a Commonwealth place, the Minister is subject to an ongoing requirement to revoke the declaration as soon as there is no longer a terrorism threat that justifies the declaration being continued, or if it is no longer required to respond to a terrorist act that has already occurred (subsection 3UJ(4)). This ensures that the inference with human rights that may be occasioned through the making of a prescribed security zone declaration does not last any longer than necessary to achieve the legitimate objective of the preventing or responding to a terrorist act.

Finally, the stop, search and seize powers are subject to important oversight mechanisms. For instance, complaints on the use of these powers by the AFP could be investigated by the Commonwealth Ombudsman or the Australian Commission for Law Enforcement Integrity. Similarly, the use of these powers by state and territory police can be reviewed by the appropriate jurisdictional oversight bodies, such as state and territory Ombudsman. In addition, the INSLM has the power to review the operation of counter-terrorism legislation, which includes the power to request information or produce documents for the purposes of performing the INSLM's function. This enables the INSLM to seek information and review documents associated with the exercise of stop, search and seize powers by the AFP.

The Bill strengthens these oversight arrangements by also requiring that as soon as possible after the exercise of the stop, search and seize powers by an AFP police officer, the Commissioner of the AFP must provide a report about the use of the powers to the Minister, the INSLM and the PJCIS. Furthermore, the Bill also introduces a new annual reporting requirement for the exercise by the AFP of the stop, search and seize powers.

These safeguards ensure that the stop, search and seize powers are targeted in their application and do not cause greater interference with human rights than is necessary to achieve the legitimate objective of preventing serious threat of Australia's national security interests, including in particular, preventing terrorist acts.

The Hon Christian Porter MP
Attorney-General

MC18-008568

31 AUG 2018

Mr Ian Goodenough MP
Member for Moore, LP
Parliament House
CANBERRA ACT 2600
Human.rights@aph.gov.au

Dear ~~Mr Goodenough~~ Ian

Thank you for your letter of 15 August 2018 in relation to the issues identified by the Parliamentary Joint Committee on Human Rights (the Committee) in Report 7 of 2018 regarding the Office of National Intelligence Bill 2018 (the Bill) and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018.

I offer the following information for the Committee's consideration.

I appreciate the Committee's consideration of these Bills, and trust this information will be of assistance to the Committee.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Response to the Parliamentary Joint Committee on Human Rights (including Attachments A and B)
CC. The Prime Minister, the Hon Scott Morrison MP

Parliament House, Canberra ACT 2600 • Telephone (02) 6277 7300 Fax (02) 6273 4102

Response to the Parliamentary Joint Committee on Human Rights

Office of National Intelligence Bill 2018

Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018

Offences for unauthorised use or disclosure of information

Compatibility of the measures with the right to freedom of expression

Committee Comment

The Parliamentary Joint Committee on Human Rights (Committee) has raised questions about whether the measures in the Office of National Intelligence Bill 2018 (Bill) relating to offences for unauthorised use or disclosure of information are compatible with the right to freedom of expression.

The Committee sought advice 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 objectives.

The Committee also sought advice as to whether it would be feasible to amend the secrecy offences to:

- appropriately circumscribe the scope of information subject to the prohibition on unauthorised disclosure or use under proposed sections 42 and 44;
- appropriately circumscribe the definition of what causes harm to national security for the purposes of proposed section 43;
- expand the scope of safeguards and defences; and
- reduce the severity of the penalties which apply.

Response

The development of the ONI Bill overlapped with the consideration by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (EFI Bill). Noting the PJCIS' recommendations on the EFI Bill, and the form in which that Bill passed Parliament, the ONI Bill including its Explanatory Memorandum will be amended to remove section 43 (the offence of subsequent communications of certain information) in its entirety. On that basis, this response only deals with clauses 42 and 44 of the Bill.

The offences in clauses 42 and 44 of the Bill are almost identical to the existing secrecy offences in sections 40A, 40J and 40K of the *Intelligence Services Act 2001* (I S Act) that currently apply to the communication of, and dealing with, information acquired by or on behalf of the Office of National Assessments (ONA) in connection with its functions. They are also consistent with the secrecy offences in the IS Act that apply in relation to other intelligence agencies.

Replication of the existing secrecy provisions through clauses 42 and 44 of the Bill is reasonable, necessary and proportionate to achieve the legitimate objectives of protecting national security; protecting the right to privacy of individuals whose information may be provided to ONI; and enabling ONI to perform its functions.

In order to effectively perform its functions, ONI will need to have access to wider range of information (frequently of a sensitive and classified nature) from a broader range of agencies than is currently required for ONA's functions. The offences in clauses 42 and 44 are part of a range of safeguards contained in the Bill to ensure that this information, as well as information generated by

ONI, is appropriately protected from unauthorised disclosure, particularly given the potentially devastating consequences that unauthorised disclosures and compromises of intelligence-related information can have.

Limiting the scope of the offences to ONI information of a particular security classification would be insufficient to provide adequate protection against harm to national security. It is well-recognised that the information handled by intelligence agencies is so sensitive that even isolated disclosures of seemingly innocuous information could cause harm; as these may be analysed collectively to reveal significant matters. Limiting the scope of the offences to the communication of information would be also insufficient to provide sufficient protection as it would not capture the full continuum of behaviour that may result in the unauthorised disclosure of information, limiting the ability of authorities to take steps to prevent significant harm to national security.

The offences in clauses 42 and 44 will only apply where the information or matter came into the person's knowledge or possession by reason of one the following circumstances: that the person is or was a staff member of ONI, that the person has entered into any contract, agreement or arrangement with ONI, or that the person has been an employee or agent of a person who has entered into a contract, agreement or arrangement with ONI.

This is in recognition of the special duties and responsibilities that apply to ONI staff and people with whom the agency has an agreement or arrangement, and the strong and legitimate expectation that those persons will handle all information obtained in that capacity in strict accordance with their authority at all times.

The offences do not constitute an absolute bar on the disclosure of ONI information and contain appropriate safeguards to facilitate the communication of ONI information in appropriate circumstances including:

- with the approval of the Director-General of National Intelligence (Director-General) or a staff member with authority to give such approval; and
- to an Inspector-General of Intelligence and Security (IGIS) official for the purpose of that official exercising a power, or performing a function or duty as such an official. This will include disclosures to the Office of the IGIS under the *Public Interest Disclosure Act 2013* that relate to an intelligence agency.

Given the existing exceptions and the limited application of the offences, the inclusion of a general public interest defence is not considered necessary.

The maximum penalties are consistent with the penalties that apply to the existing secrecy provisions in the I S Act and reflect the higher level of culpability on the part of persons who obtain ONI information in their capacity as an ONI staff member, or through a contract, arrangement or agreement with ONI.

The secrecy offences therefore represent a reasonable and proportionate limitation on the right to freedom of expression.

Compatibility of the measures with the right to be presumed innocent

Committee Comment

The Committee raised questions as to the compatibility of the offences that involve an offence-specific defence with the right to be presumed innocent. The Committee sought advice as to:

- whether these offences are aimed at achieving a legitimate objective for the purposes of international human rights law;
- how these offences are rationally connected to this objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and
- whether it would be feasible to amend the measures so that the relevant matters 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.

Response

The offence specific-defences are a reasonable and proportionate measure to achieving the legitimate objectives of protecting national security, the privacy of individuals and enabling ONI to perform its functions. Including the matters in the exceptions to the offences as elements of the offences would impact on the effectiveness of the offences in achieving these legitimate objectives. This is because it would be significantly more difficult and costly for the prosecution to prove, beyond a reasonable doubt (and in every case), that the circumstances in the exceptions did not exist.

In addition, as outlined above, the offences only apply to ONI staff and people with whom the agency has an agreement or arrangement. These individuals will be well aware of the sensitivity of the information being communicated or dealt with and the importance of ensuring appropriate authorisation when communicating and dealing with that information.

The reversal of proof provisions are proportionate, as the prosecution will still be required to prove each element of the offence beyond a reasonable doubt before a defence can be raised by the defendant. In circumstances where evidence in relation to an offence-specific defence is raised by the defendant, the prosecution will also need to disprove that evidence beyond a reasonable doubt.

Information gathering powers

Compatibility of the measures with the right to privacy

Committee Comment

The Committee raised questions as to whether the information gathering powers are a proportionate limitation on the right to privacy.

The Committee sought advice as to whether the measures are reasonable and proportionate to achieve the stated objectives, including:

- whether each of the information gathering powers are sufficiently circumscribed and accompanied by adequate and effective safeguards;
- how the measures constitute the least rights restrictive approach;
- in relation to the power to collect open source information, whether a copy of the proposed rules could be provided; and
- what safeguards will be in place in relation to the power to collect open source information from people who are not Australian citizens or permanent residents.

Response

As outlined above, in order to effectively perform its functions, ONI will need to have access to wider range of information (frequently of a sensitive and classified nature) from a broader range of agencies than is currently required for ONA's functions. In particular, ONI is likely to require access to a wide range of information from other agencies in the national intelligence community for the purposes of performing its enterprise management role, including administrative and expenditure information, capability information and information from third parties.

As outlined in detail in the statement of compatibility, the Bill contains a number of important safeguards to ensure that the measures are a reasonable and proportionate limitation on the right to privacy. This was reflected in the independent Privacy Impact Assessment (**Attachment A**) undertaken by the Australian Government Solicitor which concluded the following:

- Key aspects of the ONI Bill are positively directed towards the management and protection of personal information and privacy, but in a manner which is seen as appropriate to the functions of ONI as a national intelligence agency.
- ONI's information collection and reporting functions are such that it can be expected to collect more information than ONA. This is recognised in the ONI Bill, which provides a stronger, more transparent regime for the handling and protection of personal information than currently exists for ONA.

The Privacy Impact Assessment also noted that the secrecy provisions in the ONI Bill are more restrictive of the communication of ONI's information, including personal information, than the provisions in the *Privacy Act 1988* (Privacy Act) relating to the disclosure of personal information.

A copy of the draft privacy rules was previously provided to the PJCIS to assist in its inquiry into the Bill. It is also attached (the reference to the Prime Minister has been updated) for the Committee's information (**Attachment B**).

In addition to the ability for the privacy rules to include requirements regarding the collection of open source information relating to non-Australian persons, there are a number of other relevant safeguards in the Bill including:

- ONI's collection role under paragraph 7(1)(g) is limited to the collection of information relating to matters of political, strategic, or economic significance to Australia that is accessible to any section of the public. The function does not authorise ONI to undertake unlawful activity to obtain the information.
- The disclosure of such information will be subject to the secrecy provisions in the Bill.

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

Committee comment

The Committee raised questions as to whether the differential treatment is compatible with the right to equality and non-discrimination.

The Committee sought advice as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measures are effective to achieve that objective; and
- whether the measures are reasonable and proportionate to achieving the stated objective of the bill.

Response

Clause 53 of the Bill, which is the enabling provision for the privacy rules, is based upon section 15 of the Intelligence Services Act which requires the responsible Ministers for the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO) to make privacy rules to protect Australians. This privileged status is thus consistent with other Intelligence Services Act agencies.

ONI information related to non-nationals will only be collected for the purposes of performing the statutory functions of ONI. This information will also be protected under the secrecy provisions in the ONI Bill. As detailed above, the Privacy Impact Assessment into the ONI Bill noted that these secrecy provisions are more restrictive of the communication of ONI's information, including personal information, than the provisions in the Privacy Act relating to the disclosure of personal information. Further, the Bill does not prevent the Prime Minister from also making privacy rules concerning non-nationals, should he/she wish to.

As the comments raised by the Committee would impact intelligence agencies more widely than just ONI, this topic may be best addressed by the Comprehensive Review of the Legal Framework Governing the National Intelligence Community, announced by the Attorney-General on 30 May 2018.

Cooperation with entities in connection with ONI's performance of functions

Compatibility of the measure with the right to privacy

Committee comment

The Committee raised questions as to whether the measure about cooperation with entities in connection with ONI's performance of functions is compatible with the right to privacy.

The Committee sought advice as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Response

ONA has established guidelines and practices in place for the communication of information with foreign partners. As ONI is stood up, the Office will develop new internal policies (in consultation with the IGIS) to govern ONI's cooperation with foreign partners.

The Director-General (or his or her delegate) will be required to authorise ONI's cooperation with an authority from another country before such cooperation takes place. Once an authorisation has been given, it will remain in place until amended or revoked by the Director-General or cancelled by the Prime Minister under subclause 13(5). Subclause 13(3) provides that the Director-General (or his or her delegate) must notify the Prime Minister on a monthly basis of each approval given during the month, and each variation or revocation made during the month.

These requirements are based upon existing requirements that apply to the Australian Security Intelligence Organisation (ASIO) and agencies under the I S Act in respect of their cooperation with foreign authorities — with some modification to reflect ONI's cooperation is much less likely to be operational in nature than is the case with these agencies. The measures included in the ONI Bill are thus consistent with others across the intelligence community.

Furthermore, ONI information will be protected under the secrecy provisions in the ONI Bill. As detailed above, the Privacy Impact Assessment into the ONI Bill noted that these secrecy provisions are more restrictive of the communication of ONI's information, including personal information, than the provisions in the Privacy Act relating to the disclosure of personal information. Further, the Bill does not prevent the Prime Minister from also making privacy rules concerning non-nationals, should he/she wish to.

These matters will also remain subject to IGIS oversight, who will review ONI activity to ensure ONI acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights.

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

Committee comment

The Committee raised questions as to whether the measure about cooperation with entities in connection with ONI's performance of functions is compatible with the right to life and the prohibition on torture, or cruel, inhuman and degrading treatment or punishment. The Committee sought advice on the compatibility of the measure with these rights.

Response

The Director-General (or his or her delegate) will be required to authorise ONI's cooperation with an authority from another country before such cooperation takes place. Once an authorisation has been given, it will remain in place until amended or revoked by the Director-General or cancelled by the Prime Minister under subclause 13(5). Subclause 13(3) provides that the Director-General (or his or her delegate) must notify the Prime Minister on a monthly basis of each approval given during the month, and each variation or revocation made during the month.

The Director-General (and the Prime Minister as part of their consideration of whether to revoke an authorisation) would consider a range of factors when deciding whether it would be appropriate for such an authorisation to be given, including the human rights record of the country/particular foreign authority.

These requirements are based upon existing requirements that apply to ASIO and agencies under the I S Act in respect of their cooperation with foreign authorities — with some modification to reflect ONI's cooperation is much less likely to be operational in nature than is the case with these agencies. The measures included in the ONI Bill are thus appropriately adapted from the practices of the broader intelligence community.

Furthermore, ONA has established guidelines and practices in place for the communication of information with foreign partners. As ONI is stood up, the Office will develop new internal policies (in consultation with the IGIS) to govern ONI's cooperation with foreign partners. These policies will ensure that consideration is given to the human rights records of the country and this will be factored into the internal approval mechanisms required to share information.

REPORT

PRIVACY IMPACT ASSESSMENT: ESTABLISHING THE OFFICE OF NATIONAL INTELLIGENCE

19 June 2018

To:
Home Affairs and Intelligence Review Implementation Taskforce
Department of the Prime Minister and Cabinet

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REPORT

PRIVACY IMPACT ASSESSMENT – ESTABLISHMENT OF OFFICE OF NATIONAL INTELLIGENCE

1. INTRODUCTION

1.1. The Department of the Prime Minister and Cabinet (**the Department**) has asked AGS to conduct an independent privacy impact assessment (**PIA**) of the establishment of the new Office of National Intelligence (**ONI**). The creation of ONI was a primary recommendation of the 2017 Independent Intelligence Review. The Review also recommended that a new position of Director-General of National Intelligence[1] be established to head ONI and the national intelligence community and be the principal advisor to the Prime Minister on intelligence community issues.

1.2. The Department is leading the development of the Office of National Intelligence Bill 2018 (**ONI Bill**) and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018 (**C&T Bill**) to establish ONI and the position of Director-General.

1.3. In practical effect, the existing Office of National Assessments (**ONA**) will continue in existence under the new name of ONI. It is proposed that ONA's governing legislation, the *Office of National Assessments Act 1977* (**ONA Act**), be repealed and replaced by the ONI Act. ONI will absorb the current roles, functions and staff of ONA, and be given some new functions and powers. The C&T Bill would make consequential amendments to update other Commonwealth legislation and provide for necessary transitional arrangements.

1.4. Currently, ONA's functions include:

a. preparing assessments and reports on international matters that are of political, strategic or economic significance to Australia

b. co-ordinating Australia's foreign intelligence activities, and matters of common interest to Australia's foreign intelligence agencies

c. conducting evaluations of Australia's foreign intelligence activity.[2]

1.5. The ONI Bill expands ONA's existing functions encompassing assessment, coordination and evaluation and also makes provision for ONI to provide leadership in the 'national intelligence community'(**NIC**), defined in cl ^4 of the ONI Bill to mean the ONI, each intelligence agency and each agency with an intelligence role or function. Read with the definitions of 'intelligence agency' and 'agency with an intelligence role or function' in cl ^4, the NIC therefore extends to the 6 'traditional'

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1 References to 'the Director-General' in this PIA are to be read as references to the Director-General National Intelligence, unless otherwise specified – for example, 'Director-General of ONA'.

2 ONA Act s 5.

agencies of the Australian Intelligence Community[3], as well as the Australian Criminal Intelligence Commission (**ACIC**), and the following agencies with an intelligence role or function:

— the Australian Transaction Reports and Analysis Centre (**AUSTRAC**)

— the Australian Federal Police (**AFP**),

— the Department of Home Affairs

— the Department of Defence (other than AGO or DIO).

The Director-General will not only head ONI, but also lead the NIC.[4]

Scope of this PIA

1.6. The purpose of this PIA is to assess and make observations about the potential privacy implications of the establishment of ONI as proposed under the ONI Bill and the consequential amendments to the *Privacy Act 1988* (**Privacy Act**) proposed under the C&T Bill.

1.7. ONA is not subject to the Privacy Act, and it is proposed that ONI also not be subject to the Privacy Act.[5] Nonetheless, the Department has consulted with the Office of the Australian Information Commissioner and considers that it is appropriate for a PIA to be conducted to assess the privacy impacts of the ONI and C&T Bills.

1.8. The focus of this PIA is the privacy implications of the ONI Bill and the proposed consequential amendments to the Privacy Act that would be effected by the C&T Bill. It has been prepared with reference to the instructions we have received from the Department about the settled policy position of the Government as reflected in the draft Bills. The purpose of the PIA is limited to analysing and making observations concerning the potential impact of the draft Bills as drafted on the privacy of individuals, in particular by comparison with the current operation of ONA.

Assumptions made

1.9. We have prepared this PIA on the assumption that the ONI Bill and the C&T Bill so far as it would amend the Privacy Act are enacted in their current form.[6] For this reason, the comments we make and the conclusions we reach in this PIA should be taken to apply only to the Bills as presently proposed. If the ONI Bill is amended before it is enacted or the C&T Bill amends the Privacy Act in a different way to what

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3 ONA/ ONI, the Australian Security Intelligence Organisation (**ASIO**), Australian Secret Intelligence Service (**ASIS**), Australian Signals Directorate (**ASD**), Australian Geospatial-Intelligence Organisation (**AGO**) and Defence Intelligence Organisation (**DIO**).

4 See in particular cl 15 and cl 16 of the ONI Bill.

5 See discussion below at 4.1-4.3.

6 Draft ONI Bill dated 12 June 2018 at 08.32 AM; draft C&T Bill dated 7 June 2018 at 11.14 AM.

is currently proposed, then we recommend the Department consider obtaining a further or updated PIA to address the effect of those changes.

2. EXECUTIVE SUMMARY

2.1. The ONI Bill expands ONA's existing functions and in carrying out its information collection and reporting functions ONI may be involved in the collection of more information. However, to the extent this includes personal information of Australians, relevant provisions of the ONI Bill are positively directed towards enhancing the protection of personal privacy compared to the current position with ONA.

2.2. While ONI will not be subject to Privacy Act, the ONI Bill establishes a legislative framework for ONI's handling of information, including a secrecy regime and privacy rules for the protection of 'identifiable information'. This term is defined in essentially the same way as 'personal information' in the Privacy Act,[7] except that:

- it is limited to information about Australian citizens and permanent residents
- considering the definition of 'permanent resident' in cl ^4, it extends to certain bodies corporate.[8]

2.3. The proposed privacy rules are intended to be analogous to those applicable to other intelligence agencies. The relevant responsible Ministers in relation to ASIS, AGO and ASD are under s 15 of the *Intelligence Services Act 2001* to make written rules regulating the communication and retention of intelligence information concerning Australian persons, having 'regard to the need to ensure that the privacy of Australian persons is preserved as far as is consistent with the proper performance by the agencies of their functions.' Clause ^53 of the ONI Bill is in similar terms, including a requirement that in making the proposed privacy rules, the Prime Minster must first consult with the Inspector-General of Intelligence Security (**IGIS**) and the Attorney General (the Minister responsible for the Privacy Act).

2.4. The ONI Bill also includes provisions which specifically require ONI to consider, and take steps to protect, personal privacy. For example, there is an express requirement to consider privacy in the exercise of ONI's compulsory information gathering power.

2.5. Amendments to the Privacy Act in the C&T Bill and certain provisions of the ONI Bill will facilitate government agencies, including certain agencies with an intelligence function as defined in the ONI Bill, providing information, including personal information, to ONI. However, ONI will be required to handle any information it obtains in accordance with the information handling and secrecy regimes established under the ONI Bill and the privacy rules.

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7 Whenever the term 'personal information' is used in this PIA, it has the meaning given to that term in s 6 of the Privacy Act.

8 See the definition of 'identifiable information' in cl ^4 of the ONI Bill as compared with the definition of 'personal information' in s 6 of the Privacy. The only material difference is that 'identifiable information' is limited to information about Australian citizens and permanent residents, and 'permanent residents' includes certain bodies corporate. See also the discussion below at paragraph 5.42.

2.6. Overall, in our view the relevant provisions of the ONI Bill provide a stronger and more transparent regime for the handling and protection of personal information than currently exists for ONA.

3. METHODOLOGY

3.1. In preparing this PIA, we have considered the following material:

- Office of National Intelligence Bill 2018[9]
- Office of National Intelligence (Consequential and Transitional Provision) Bill 2018[10]
- 'ONA Guidelines to Protect the Privacy of Australians' (23 June 2017)
- Preliminary draft 'Rules to protect the privacy of Australians'[11]
- *Office of National Assessments Act 1977*
- *Privacy Act 1988.*

4. NON-APPLICATION OF THE PRIVACY ACT

4.1. The Privacy Act does not apply to ONA, and it is not proposed that it will apply to ONI. Instead, a separate regime for the handling of personal information and the protection of privacy will be established by the ONI Bill, adapted to the functions and operation of ONI including its function of providing leadership in the NIC.

4.2. The ONA Act currently does not impose any obligations or make any provisions in relation to privacy, although the Director-General of ONA has published privacy guidelines.[12] What is proposed under the ONI Bill is a regime that we understand has been developed with the intention of providing the maximum possible protection of personal privacy without, consistent with the approach in relation to other intelligence agencies, requiring ONI to comply with the Privacy Act.

4.3. In this section we consider the current application of the Privacy Act, and the amendments proposed to the Privacy Act by the C&T Bill. We consider the significance of these changes further below at 4.10 - 4.11.

Currently

Acts and practices of ONA and some other NIC agencies not covered by Privacy Act

4.4. The acts and practices of particular 'intelligence agencies' are effectively exempt from the operation of relevant provisions of the Privacy Act.[13] 'Intelligence agency' is

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9 Draft dated 12 June 2018 at 8.32 AM.

10 Draft dated 7 June 2018 at 11.14 AM.

11 We have only been provided with a preliminary draft of these Rules which may therefore be amended and differ from the form in which we have seen them when finalised.

12 See further below at 5.41.

13 Privacy Act s 7(1)(a)(i)(B) - read with *Freedom of Information Act 1982,* Div 1 of Pt 1 of Sch 2 – and s 7(2)(a).

defined in s 6(1) of the Privacy Act to mean ONA, ASIO and ASIS. The acts and practices of the ACIC,[14] DIO, AGO and ASD[15] are similarly excluded.

4.5. The acts and practices of other agencies and organisations relating to records that originated with or which have been received from these 7 agencies are also excluded from the operation of the Privacy Act.[16]

Disclosure of personal information by other agencies to ONA subject to Privacy Act

4.6. If an agency or organisation to which the Privacy Act applies discloses personal information to ONA, it is required to comply with the disclosure provisions in Australian Privacy Principle (APP) 6.

4.7. In contrast, the Privacy Act includes a specific exemption for acts or practices that involve disclosure of personal information to ASIO, ASIS or ASD.[17] This means that the Privacy Act has no application to, and therefore does not constrain, the disclosure of personal information to those agencies.

Proposed amendments to Privacy Act under the C&T Bill

Acts and practices of ONI not covered by Privacy Act

4.8. It is proposed that the definition of 'intelligence agency' in the Privacy Act be amended by substituting ONI for ONA.[18] Accordingly, like ONA, ONI will be effectively exempt from the operation of the Privacy Act.

Further exemption for disclosure of personal information by some agencies

4.9. It is proposed that the Privacy Act be amended to provide an exemption for the provision of personal information to ONI by agencies with an intelligence role or function, as defined in the ONI Bill. The term is defined in the ONI Bill to mean AUSTRAC, the AFP, the Department of Home Affairs and the Department of Defence (other than AGO and DIO) to the extent the agency performs specific functions relating to intelligence.[19] These 4 agencies are the only agencies within the NIC that are not otherwise exempt from the operation of the Privacy Act.[20]

Implications of proposed amendments to the Privacy Act

4.10. Under the proposed amendments, ONI would, as ONA is now, be exempt from the operation of the Privacy Act. This is consistent with other key intelligence agencies which are also exempt from the operation of the Privacy Act. This in part reflects the

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14 Privacy Act ss 7(1)(a)(iv), 7(2)(c).

15 Privacy Act s 7(1)(ca) – read with *Freedom of Information Act 1982*, Div 2 of Pt 1 of Sch 2 – and s 7(2)(b).

16 Privacy Act s 7(1)(f), (g) and (h).

17 Privacy Act s 7(1A).

18 C&T Bill, cl 85.

19 C&T Bill cl 86, read with definition of 'agency with an intelligence role or function' in cl ^4 of the ONI Bill.

20 See cl ^4 of the ONI Bill, definition of 'national intelligence community'.

unique nature of the work of these agencies in relation to intelligence and information collection.

4.11. The other amendment to the Privacy Act proposed in the C&T Bill would have the effect of exempting acts or practices involving the disclosure of personal information to ONI by the other agencies with an intelligence role or function as specified in the ONI Bill. At present, such acts or practices for those agencies are covered by the Privacy Act. While this change restricts the application of the Privacy Act, it is limited in scope. Only the acts or practices of the 4 relevant agencies would be exempt from the operation of the Privacy Act.

5. OVERVIEW OF IMPLICATIONS OF THE ONI BILL FOR PROTECTION OF PRIVACY

5.1. There are 4 ways in which the establishment of ONI in accordance with the ONI Bill has the potential to impact on personal privacy:

a. ONI will be established with statutory functions that mean it can be expected to collect more information than ONA, including more personal information

b. the ONI Bill makes provision for ONI to gather and for other government agencies to provide it with information, and imposes obligations on ONI with regard to the use and protection of information provided to it in these ways

c. the ONI Bill contains secrecy provisions restricting the communication of ONI information

d. the ONI Bill provides for the making, and ONI's compliance with, privacy rules relating to identifiable information.

5.2. In the discussion that follows, we will consider each of these matters in turn and will:

- describe what is proposed and compare it with the existing regime in the ONA Act
- identify the implications for the handling, or flow, of personal information
- analyse the privacy implications of the proposal.

5.3. This discussion concerns the privacy implications of the relevant aspect of the ONI Bill, and the mechanisms for handling information and protecting privacy that would be established by the ONI Bill. ONI will need to comply with these mechanisms when dealing with personal information it collects, either intentionally or incidentally, in the performance of its functions.

a. ONI's statutory functions compared with ONA

5.4. The statutory functions of ONI under the ONI Bill have implications for the amount of personal information the new agency will handle.

Existing arrangements under the ONA Act

5.5. Section 5(1) of the ONA Act sets out the functions of ONA, and relevantly includes the function:

'to assemble and correlate information relating to international matters that are of political strategic or economic significance to Australia and [to prepare reports and assessments]' (s 5(1)(a)).

The ONI Bill

5.6. ONI's functions are set out in cl ^7 of the ONI Bill and relevantly include:

> (c) to:
>
> (i) assemble, correlate and analyse information relating to international matters that are of political, strategic or economic significance to Australia, including domestic aspects relating to such matters; and
>
> (ii) prepare assessments and reports in relation to such matters in accordance with the Government's requirements;
>
> (d) to:
>
> (i) assemble, correlate and analyse information relating to other matters that are of political strategic or economic significance to Australia; and
>
> (ii) prepare assessments and reports in relation to such matters in accordance with the Government's requirements;
>
> if doing so would support the performance of any other function or the Director-General's functions, or complement the work of other intelligence agencies;
>
> ...
>
> (g) to collect, interpret and disseminate information relating to matters of political, strategic or economic significance to Australia that is accessible to any section of the public;

5.7. There are 2 key ways in which ONI's functions, as compared with ONA, may have privacy implications.

5.8. First, ONA's functions refer to dealing with 'information relating to international matters that are of political strategic or economic significance to Australia'. The Bill clarifies that ONI's functions include 'domestic aspects' that relate to such international matters (cl ^7(c)(i)), and to information relating to 'other matters that are of political strategic or economic significance to Australia' (cl ^7(d)).

5.9. Secondly, ONA does not have a specific statutory function of collecting, interpreting and disseminating information relating to matters of political, strategic or economic significance to Australia in relation to publicly accessible information. ONA's Open Source Centre collects, analyses and researches publicly available information (which may include personal information) concerning international developments that affect Australia's national interests in support of its functions. However, consistent with the scope of the agency's current functions, we understand ONA's open source collection activities are focussed on the collection of information or intelligence relevant to the activities of persons outside Australia.

5.10. The changes in cl ^7(1)(g) of the ONI Bill will support ONI's operation of the Open Source Centre by making it clear that ONI's functions include collecting, interpreting

and disseminating information that is publicly accessible. This recognises the agency's current activities in relation to publicly available information. The collection of publicly accessible 'identifiable information' will be regulated by privacy rules.[21] Through amendments to be made to the *Crimes Act 1914* (Crimes Act) in the C&T Bill,[22] for the purposes of ONI carrying out its function under cl ^7(1)(g),[23] this collection could lawfully be effected where necessary via an assumed identity under and in accordance with Part IAC of the Crimes Act. This brings ONI broadly in line with ASIO and ASIS as being an intelligence agency that may apply for an authority to acquire or use an assumed identity under that Act (although with some limitations).[24]

Privacy implications

5.11. To the extent that the performance of its functions will require the collection, use or disclosure of personal information, ONI may be dealing with more identifiable information than ONA; that is, ONI may collect and handle the personal information of more Australian citizens. This means there is an increased need as compared with ONA for ONI, should it be established, to take steps to ensure the appropriate handling of such information.

5.12. Additionally, material collected using the new function in cl ^7(1)(g) is likely to be much less sensitive from its open source nature than information collected from other intelligence agencies.

b. The ONI Bill will facilitate ONI gathering of information, but impose obligations on its use and protection

5.13. ONA is not subject to a statutory information handling framework, although it has a statutory entitlement to certain kinds of information. The ONI Bill will provide ONI with a statutory right to gather certain information, which may include personal information and for other government agencies to provide it with such information, but will also impose obligations on ONI with regard to the use and protection of that information.

Existing arrangements under the ONA Act

5.14. Subject to relevant legislative and secrecy provisions, ONA may access information that relates to international matters collected by other Commonwealth agencies in accordance with their governing functions. This includes:

a. personal information about Australians for ONA's assessment or evaluation functions

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21 See further below at 5.40 and following).

22 See cll 26-44 of the C&T Bill.

23 See proposed s 15KA(3) to be inserted by cl 32 of the C&T Bill.

24 Unlike other those other intelligence agencies, ONI will not be able to apply to a court for an order under Part IAC of the Crimes Act relating to the making of entries in a register of births, deaths or marriages (see cll 34 and 35 of the C&T Bill); it must also comply with requests from a participating jurisdiction for evidence of an assumed identity (see cl 42).

b. personal information about intelligence agency employees for ONA's evaluation functions.

5.15. More specifically, the Director-General of ONA is entitled under s 9 of the ONA Act to 'full access to all information relating to international matters that are of political, strategic or economic significance to Australia, being information in the possession of any Department, Commonwealth authority or arm of the Defence Force', except where furnishing that information would contravene the provisions of any law of the Commonwealth or any law of a Territory.

5.16. However, the ONA Act does not make any specific provision for the voluntary sharing of information with ONA by intelligence agencies or Commonwealth agencies more generally. In practice intelligence agencies and other Commonwealth agencies share information with ONA pursuant to the statutory functions and powers of those agencies and subject to any legislative or other restrictions on the disclosure of information, such as secrecy provisions and, where relevant for the particular agency, the Privacy Act.

5.17. As a matter of general administrative law principle, 'the purpose for which a power to require disclosure of information is conferred limits the purpose for which the information disclosed can lawfully be disseminated or used'.[25] Where a power to compel information is conferred under a statute, the power may only be used for the purpose for which it is conferred, whether stated expressly, or identifiable by implication. It follows that where information is obtained through the exercise of such a power, the information may not be used for purposes unrelated to the purpose for which it was obtained.

5.18. The ONA Act does not otherwise provide for any additional statutory restrictions on ONA's use of personal information. The 'ONA Guidelines to Protect the Privacy of Australians', which are currently administratively made, nevertheless provide that ONA may only communicate intelligence information concerning Australian persons 'where it is necessary to do so for the proper performance of ONA's functions or where such communications are required by law'.

The ONI Bill

5.19. The ONI Bill will give ONI the power to require Commonwealth authorities[26] to provide it with information relating to international matters in certain circumstances. The ONI Bill will also provide for the voluntary disclosure of information to ONI by:

- Commonwealth authorities for the purpose of ONI performing its functions under cl 7(1)(c) or (d)

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25 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 423.

26 Defined in cl ^4 of the ONA Bill in a way that includes Commonwealth government agencies and Departments, the Defence Force, bodies established or continued in existence for a public purpose under a law of the Commonwealth (established bodies) and bodies corporate in which the Commonwealth or an established body has a controlling interest.

- intelligence agencies for the purposes of ONI performing its functions.[27]

Power to require the provision of information relating to international matters

5.20. Clause ^37 of the ONI Bill provides:

> **^37 Requirement to provide information, documents or things to ONI relating to international matters**
>
> (1) For the purpose of ONI performing its function under paragraph ^7(1)(c), the Director-General may make a written request that a Commonwealth authority provide information, documents or things in its possession that relate to:
>
> (a) international matters of political, strategic or economic significance to Australia; or
>
> (b) domestic aspects relating to such international matters.
>
> (2) Before making a written request of a Commonwealth authority under subsection (1), the Director-General must:
>
> (a) consult with the Commonwealth authority; and
>
> (b) consider any concerns raised by the Commonwealth authority, including concerns about:
>
> (i) a contract, arrangement or understanding that would prohibit or limit the Commonwealth authority's ability to provide information, documents or things that would otherwise need to be provided in response to a request; or
>
> (ii) the need to provide personal information (within the meaning of the *Privacy Act 1988*) in response to a request.
>
> (3) A Commonwealth authority must provide any information, documents or things to ONI in response to a written request by the Director-General under subsection (1), unless and to the extent that a law of the Commonwealth, or of a State or Territory prohibits the provision (however described) of the information, documents or things.
>
> Note: For limits on the use that ONI may make of such information, documents or things, see section ^40.

5.21. Before compelling the production of information that relates to international matters and domestic aspects relating international matters under cl ^37, the Director-General must consult with the relevant Commonwealth authority and consider any concerns raised, as specified in cl ^37(2), including any concerns about the 'need to provide personal information (within the meaning of the *Privacy Act 1988*) in response to a request' made pursuant to that provision.

5.22. Furthermore, any information provided pursuant to the compulsory information gathering power in cl ^37 may only be used for the purposes of ONI's function in cl ^7(1)(c) (i.e. analysis, assessments and reports relating to international matters). The only exception to this restriction is where the head of the Commonwealth

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[27] Other obligations in relation to ONI's use and protection of identifiable information are also specified. These provisions are summarised below.

authority that provided the information gives written authorisation for its subsequent use in relation to the performance of another of ONI's functions, the exercise of ONI's powers, or the performance or exercise of the Director-General's functions or powers: cl ^40.

Voluntary provision of information

5.23. The ONI Bill authorises the voluntary provision of information to ONI by Commonwealth authorities and intelligence agencies, in certain circumstances. These provisions are each expressed in permissive terms, with the effect that where the agency, in its discretion, seeks to disclose information to ONI for the purposes of ONI's functions, the agency is authorised to do so, regardless of whether it could otherwise do so under the agency's own statutory functions.

5.24. Clause ^38(1) expressly provides that for the purpose of ONI performing its functions under cl ^7(1)(c) (analysis, assessments and reports relating to international matters) or (d) (analysis, assessments and reports relating to matters other than international matters), a Commonwealth authority 'may provide to ONI information, documents, or things that relate to matters of political, strategic or economic significance to Australia'.[28] Information may be provided to ONI even if doing so would not otherwise fall within the Commonwealth authority's statutory functions: cl ^38(2).

5.25. In addition, cl ^39(1) provides that for the purpose of ONI performing its functions, an intelligence agency or agency with an intelligence role or function may provide to ONI information, documents or things that relate, or may relate, to any of ONI's functions (cl ^39(1)). The relevant agency may provide information, documents or things to ONI under cl ^39 even if doing so would not otherwise fall within that agency's statutory functions (cl ^39(2)).

Use and protection of information

5.26. The ONI Bill will introduce new obligations on the Director-General in relation to the use and protection of certain information, documents or things.

5.27. As noted above at 5.22, cl ^40 ensures information, documents or things obtained in the exercise of the compulsory power in cl ^37 is only used for the purposes of the ONI's function under ^7(1)(c) unless the head of the relevant Commonwealth authority expressly agrees otherwise.

5.28. Clause ^41 of the ONI Bill makes special provision for the protection of information, documents or things provided to ONI under Division 1 of Part 1 of the Bill by intelligence agencies or an agencies with an intelligence role or function. This clause requires the Director-General to make arrangements with the head of the relevant agency for the protection of such material provided to ONI. Failing this, and subject to cl ^40, ONI must take all reasonable steps to ensure that the information,

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[28] Note, while the draft reviewed limited cl 38(1) to matters '(other than international matters)', we understand this was a drafting error due to the express reference in that provision to cl ^7(1)(c).

documents or things provided by the relevant agencies are appropriately stored, accessed, used or further disclosed.

Privacy implications

5.29. These provisions of the ONI Bill will ensure that ONI has broad scope to collect information from other agencies, either compulsorily or voluntarily, for the purposes of its functions. This could include personal information.

5.30. The compulsory information gathering power in cl ^37 is broad and applies to 'Commonwealth authorities', itself a broadly defined term under the ONI Bill. However, the power is not entirely unconstrained. It is limited to only certain of ONI's functions. It can be exercised to compel the provision of information by Commonwealth authorities only for the purpose of the ONI performing its functions relating to international matters. Additionally, the Director-General is obliged to consider any privacy concerns raised by the relevant Commonwealth authority prior to the exercise of the power. This will ensure privacy considerations are relevantly considered in the exercise of the power.

5.31. The provisions supporting the voluntary disclosure of information relevant to the ONI's functions do not expressly require consideration of privacy. Clause ^38 is permissive of a Commonwealth authority providing information to ONI even if doing so would not otherwise fall within the scope of that authority's statutory functions.

5.32. Most Commonwealth authorities will be subject to the Privacy Act. Those agencies are subject to obligations under the Privacy Act that preclude personal information about an individual that was collected for a particular purpose being used or disclosed for a secondary purpose, unless the individual has consented to the use or disclosure, or a relevant exception applies.[29]

5.33. One such exception is where the use or disclosure of the information is 'required or authorised by or under an Australia law'. It appears that cl ^38(2) of the ONI Bill will enable Commonwealth authorities to voluntarily disclose personal information obtained for the purposes of their own functions to the ONI on the basis the disclosure will be 'required or authorised by law' for the purposes of the Privacy Act.

5.34. Clause ^39 similarly provides for the voluntary disclosure of information to ONI by intelligence agencies. As noted above when discussing the proposed amendments to the Privacy Act under the C&T Bill, these agencies will not be subject to the restrictions on the disclosure of personal information in the Privacy Act when disclosing information to ONI.[30]

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[29] See in particular Australian Privacy Principle (APP) 6 in the Privacy Act. APP 6.1 relevantly prohibits the disclosure of personal information for a purpose other than that for which it was collected. APP 6.2 and 6.3 provide for various exceptions to the prohibition.

[30] We have not considered the implications of cll 38 or 39 for the disclosure of information to ONI other than to the extent the disclosing agency is otherwise subject to the Privacy Act. Commonwealth authorities and intelligence agencies will be subject to their own establishment legislation including applicable secrecy provisions when disclosing information to others, but any analysis of the secrecy provisions in other legislation is outside the scope of this PIA.

5.35. Significantly, ONI will have express legislative obligations in relation to the use and protection of information it collects, including personal information. Clause ^40 prohibits the use of information obtained in the exercise of the compulsory power in cl ^37 for purposes other than that for which it was obtained, except in very specific circumstances. To the extent that cl ^37 is used to compel the provision of personal information, it is expressly clear that it cannot generally be used for broader or other purposes. Furthermore, the obligation on ONI to make arrangements for the protection of information provided to ONI by other intelligence agencies emphasises the importance of proper and tailored handling and management of information, including personal information. These features of the ONI Bill are positive from a privacy management perspective.

c. The ONI Bill contains secrecy provisions restricting the communication of ONI information

5.36. ONI will be subject to a secrecy regime under which criminal penalties may be imposed in relation to unlawful communication of information. This regime will have obvious implications for the communication of personal information by ONI.

Existing arrangements under the ONA Act

5.37. ONA is subject to agency-specific offence provisions in the *Intelligence Services Act 2001* (**ISA**) relating to the unauthorised communication of information and unauthorised dealing with records and recording of information. There are also various Commonwealth laws which would restrict those working for ONA from disclosing official information.[31] However, the ONA Act itself makes no additional provision for the maintenance of confidentiality in, or secrecy of, information collected or held by the agency.

The ONI Bill

5.38. By contrast, ONI will be subject to the secrecy regime in Part 4 Division 2 of the ONI Bill. This includes a number of criminal offences relating to the unlawful communication of information:

a. Clause ^42 provides that it is an offence for a person who comes to know information held by ONI in connection to its functions, or otherwise relating to ONI's functions, because they are a staff member or contractor (or equivalent) of ONI to communicate that information within ONI unless this is in the course of their duties as a staff member or in accordance with the contract, and outside ONI unless they have authorisation.[32]

b. Clause ^43 provides that it is an offence for other persons (i.e. not current or former staff members or contractors) who come to know this type of information to communicate this information intending to cause harm to national security or

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31 See for example s 70 of the *Crimes Act 1914*.

32 Clause ^42 is in analogous terms to existing s 40A of the ISA, which will be repealed by the C&T Bill, cl 79.

to endanger the health or safety of another person, or knowing that the communication will, or is likely to, have that effect.

c. Clause ^44 provides for offences concerning unauthorised dealing with records and unauthorised recording of this type of information.[33]

There are various exceptions to these offences, including if the information is lawfully available, or the communication is to the IGIS.

Privacy implications

5.39. It is beyond the scope of this PIA to analyse the operation of the ONI Bill's secrecy obligations and offence regime. However, it is relevant when considering the privacy impacts of the ONA Bill to observe that the secrecy provisions are more restrictive of the communication of ONI's information, including personal information, than the provisions in the Privacy Act relating to the disclosure of personal information.[34]

d. ONI will be required to comply with privacy rules in relation to 'identifiable information'

5.40. While ONA has administratively developed guidelines relating to privacy, ONI will be legislatively required to comply with privacy rules, aimed at the protection of identifiable information, promulgated for the agency by the Prime Minister following consultation with the IGIS and Attorney General.

Existing arrangements under the ONA Act

5.41. As already noted, ONA is exempt from the operation of the Privacy Act. Nothing in the ONA Act or any other legislation requires ONA to comply with any other form of privacy rules. Unlike the *Intelligence Services Act 2001* agencies (ASIS, AGO and ASD), ONA is not required by legislation to have agency specific privacy rules or guidelines in place. However, following a review of the *Intelligence Services Act 2001* co-ordinated by the Department in 2005-6, a decision was made that ONA should be subject to privacy guidelines consistent with those applicable to those other intelligence agencies. The current guidelines are the 'ONA Guidelines to Protect the Privacy of Australians' dated 23 June 2017 and available on ONA's website.

The ONI Bill

5.42. The ONI Bill requires under cl ^53 that the Prime Minister make rules (the **privacy rules**) regulating the collection of 'identifiable information' under cl ^7(1)(g) (collection, interpretation and dissemination of publicly accessible material), and the communication, handling and retention by ONI of 'identifiable information' generally. 'Identifiable information' is defined in cl ^4 in the same way as 'personal information'

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33 Clause ^44 is in analogous terms to existing ss 44J and 44K of the ISA, which will be repealed by the C&T Bill, cl 79.

34 See in particular APP 6.

in the Privacy Act, except that it is limited to the information of Australian citizens and permanent residents[35] (rather than individuals generally).

5.43. Significantly, cl ^53(5) provides that ONI must not collect or communicate identifiable information except in accordance with the privacy rules.

5.44. In making the privacy rules, the Prime Minister must have regard to the need to ensure that the privacy of Australian citizens and permanent residents is preserved 'as far as is consistent with the proper performance by ONI of its functions' (cl ^53(3)). Further, the Prime Minister must consult with the Director-General, the IGIS and the Attorney-General before making the privacy rules, including by providing them with a copy of the proposed rules.

5.45. Draft privacy rules have been prepared which are in broadly analogous terms to the 2017 'ONA Guidelines to Protect the Privacy of Australians', and the privacy rules of ASIS, AGO and ASD. Like the ONA, ASIS, AGO and ASD privacy rules, the draft ONI privacy rules:

- state that identifiable information can only be retained, and may be communicated, where it is necessary to do so for the proper performance of ONI's functions, or where this is required or authorised by or under another Act,
- require that ONI take reasonable steps to ensure that identifiable information that ONI retains or communicates is recorded or reported in a fair and reasonable manner
- require that ONI take steps to facilitate the IGIS's oversight role, including providing IGIS access to all identifiable information held by ONI, consulting with the IGIS about communication, retention and handling of identifiable information, and advising the IGIS of any breach of these rules

5.46. In addition to these more general requirements, the draft privacy rules also impose specific obligations in relation to the collection of identifiable information under cl ^7(1)(g), including that:

a. the Director-General develop policies and procedures to be observed by ONI in the performance of this function

b. ONI obtain the authorisation of the Minister responsible for the Act before undertaking an activity for the specific purpose of collecting identifiable information, and the Minister may only give authorisation if satisfied of certain matters.

Privacy implications

5.47. The inclusion of a privacy rules regime in the ONI Bill clearly supports enhanced privacy protection. The proposed privacy rules are intended to be consistent with the analogous rules applying to other agencies in the NIC. Where necessary and

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35 The definition of 'permanent resident' in cl ^4 includes a natural person who is a permanent resident and also certain (Australian) bodies corporate, which means 'identifiable information' in this respect has a broader meaning than 'personal information' which is limited to natural persons.

appropriate these agency specific privacy rules can be tailored in recognition of the nature and purpose of the agency's national security functions.

5.48. The privacy rules are to be made by the Prime Minister and not the agency itself. In making the proposed rules, the Prime Minister must consult not only with the Director-General of the agency, but also the IGIS and Attorney General. This consultation will ensure the rules are informed by the independent advice and consideration of both national security and broader legal perspectives, including in relation to privacy.

6. OVERALL EFFECT AND IMPACT OF THE CHANGES

6.1. Key aspects of the ONI Bill are positively directed towards the management and protection of personal information and privacy, but in a manner which is seen as appropriate to the functions of ONI as a national intelligence agency. Some of these requirements are broadly similar to those imposed on other agencies within the NIC, such as the statutory requirement to have privacy rules.

6.2. ONI's information collection and reporting functions are such that it can be expected to collect more information than ONA. This is recognised in the ONI Bill, which provides a stronger, more transparent regime for the handling and protection of personal information than currently exists for ONA.

OFFICE OF NATIONAL INTELLIGENCE RULES TO PROTECT THE PRIVACY OF AUSTRALIANS

I, Scott Morrison, Prime Minister of Australia, being the Minister responsible for the Office of National Intelligence (ONI), make these Rules in accordance with section 53 of the *Office of National Intelligence Act 2018* (the Act).

In making these Rules, I have had regard to the need to ensure that the privacy of Australian persons is preserved as far as is consistent with the proper performance by ONI of its functions. Any activity undertaken by ONI must be proportionate to a legitimate end and be necessary in the circumstances. In the execution of ONI's functions, it will adhere to the principles of necessity, proportionality and propriety; meaning that consideration of the nature and consequences of the acts to be done will be weighed against the purposes for which they are carried out.

Before making the Rules, I:

a. consulted the Director-General of ONI, the Inspector-General of Intelligence and Security (IGIS) and the Attorney-General; and
b. provided a copy of the rules I was proposing to make to the Director-General of ONI, the IGIS and the Attorney-General.

Dated this the XX day of XX 2018.

[Signed] Scott Morrison

DEFINITIONS

Expressions used in these Rules have the same meaning as in the Act.

Assumed identities regime means the provisions contained in Part IAC of the *Crimes Act 1914*.

Australian person has the same meaning as in section 3 of the *Intelligence Services Act 2001*.

Identifiable information means information or an opinion about an identified Australian person, or an Australian person who is reasonably identifiable:

a. whether the information or opinion is true or not; and
b. whether the information or opinion is recorded in material form or not.

Publicly accessible information includes information that has been published or broadcast for public consumption, is available on request to the public, is accessible online (including through social-media platforms) or otherwise to the public, is available to the public by subscription or purchase, is made available at a meeting open to the public, or is obtained by visiting any place or attending any event that is open to the public, and includes information that requires conditions to be met before it can be accessed. In order to qualify as 'publicly accessible information', information need not be available to all sections of the public.

> Note: Examples of conditions that are required to be met before information can be accessed include a requirement to pay a fee or be a member of a group.

Minister means the Prime Minister, or any minister within the Prime Minister and Cabinet portfolio.

Ministerial Privacy Approval means an approval granted under rule 2.4.

National Intelligence Community agency has the same meaning as in section 4 of the Act.

Serious crime has the same meaning as in section 3 of the *Intelligence Services Act 2001*.

RULE 1 – PRESUMPTIONS ABOUT WHO IS AN AUSTRALIAN PERSON

1.1 For the purposes of these Rules, where it is not clear whether a person is an Australian person, the following presumptions shall apply unless there is evidence to the contrary, including from the context in which the information was collected or the content of the information:

a. a person within Australia is presumed to be an Australian person; and
b. a person outside Australia is presumed not to be an Australian person.

RULE 2 – COLLECTION OF IDENTIFIABLE INFORMATION

2.1 ONI, in the performance of its functions under paragraph 7(1)(g) of the Act, may collect publicly accessible information that is of political, strategic or economic significance to Australia.

2.2 ONI's Open Source Centre (OSC) is the only part of ONI which may carry out ONI's function described in paragraph 7(1)(g) of the Act.

Note: The Director-General may develop policies and procedures in relation to the performance of ONI's functions under paragraph 7(1)(g) of the Act.

2.3 The OSC is the only part of ONI which may use the assumed identities regime. The assumed identities regime may only be used:

a. to facilitate ONI's access to online platforms; and
b. in the performance of its functions under paragraph 7(1)(g) of the Act.

Additional conditions to be met before undertaking certain collection activities

2.4 ONI must obtain the approval of the Minister before the OSC undertakes activities where the following criteria apply:

a. an assumed identity will be used; and
b. the proposed activities have the specific purpose of collecting identifiable information.

2.5 Before the Minister gives a Ministerial Privacy Approval, the Minister must be satisfied that:

a. any activities which may be done in reliance on the Ministerial Privacy Approval are necessary for the proper performance of ONI's functions under paragraph 7(1)(g) of the Act; and
b. there are satisfactory arrangements in place to ensure that nothing will be done in reliance on the Ministerial Privacy Approval beyond what is necessary for the proper performance of ONI's functions under paragraph 7(1)(g) of the Act; and
c. there are satisfactory arrangements in place to ensure that the nature and consequences of activities done in reliance on the Ministerial Privacy Approval will

be reasonable, having regard to the purposes for which the activities are carried out.

Ministerial Privacy Approvals in an emergency

2.6 If the Director-General considers it necessary or desirable for ONI to undertake activities that would require a Ministerial Privacy Approval and is satisfied that the Minister is not readily available or contactable, the Director-General may approve the activities without first obtaining a Ministerial Privacy Approval. The Director-General must be satisfied of the matters specified in rule 2.5 before giving an approval.

2.7 If the Director-General gives an approval under rule 2.6, the Director-General must notify the Minister within 72 hours after the Director-General's approval is given.

2.8 If the Minister is notified by the Director-General under rule 2.7, the Minister must consider whether to give a Ministerial Privacy Approval in relation to the activities. If the Minister does not give a Ministerial Privacy Approval within 24 hours of receiving notification, the activities must cease, and the approval granted by the Director-General under rule 2.6 is of no further force or effect.

2.9 If the Director-General gives an approval under rule 2.6, the Director-General must advise the IGIS within 96 hours of giving the approval.

RULE 3 – RETENTION AND HANDLING OF IDENTIFIABLE INFORMATION

3.1 ONI may only retain identifiable information where it is necessary to do so for the proper and lawful performance of ONI's functions, or where the retention is otherwise authorised or required by law.

3.2 Where ONI retains identifiable information, ONI must ensure that:

a. the information is protected by such security safeguards as are reasonable in the circumstances against loss, against unauthorised access, use, modification or disclosure, and against other misuse; and
b. access to the information is only provided to persons who require such access for the proper performance of an ONI function.

RULE 4 – COMMUNICATION OF IDENTIFIABLE INFORMATION

4.1 ONI may only communicate identifiable information where it is necessary to do so for the proper performance of ONI's functions or where such communication is authorised or required by or under another Act.

4.2 This rule applies in addition to rule 4.1. ONI may communicate identifiable information concerning an Australian person only where:

a. the information is publicly accessible; or

b. the information concerns activities of an Australian person in respect of which the Australian person is a representative of the Commonwealth or a State or Territory in the normal course of official duties; or
c. the communication of the identifiable information is reasonably necessary for the purposes of:
    (i) maintaining Australia's national security;
    (ii) maintaining Australia's national economic well-being;
    (iii) promoting Australia's foreign relations;
    (iv) preventing or investigating the commission of a serious crime;
    (v) responding to an apparent threat to the safety of a person; or
d. the information relates to an Australian person who is, or is likely to be:
    (i) acting for, or is suspected of acting for, or on behalf of a foreign power;
    (ii) involved in activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List (within the meaning of regulation 13E of the *Customs (Prohibited Exports) Regulations 1958)*;
    (iii) involved in activities related to a contravention, or an alleged contravention, by a person of a UN sanction enforcement law; or
e. the information was, at the time of collection, collected in accordance with a Ministerial Privacy Approval granted under rule 2.4; or
f. the information relates, or appears to relate, to the performance of the functions of an intelligence agency or an agency with an intelligence role or function, and the information is provided by ONI to that agency; or
g. the information was provided to ONI by an intelligence agency or an agency with an intelligence role or function for the purposes of ONI's functions under paragraph 7(1)(d); or
h. the subject of the information has consented, either expressly or impliedly, to the communication of that information for use in accordance with ONI's functions.

RULE 5 – ACCURACY OF INFORMATION

5.1 ONI is to take reasonable steps to ensure that identifiable information that ONI retains or communicates is retained or communicated in a fair and reasonable manner.

RULE 6 – OVERSIGHT BY THE IGIS

6.1 To facilitate the oversight role of the IGIS, ONI is to take the following measures:
a. the IGIS is to have access to all identifiable information held by ONI;
b. the IGIS is to be consulted about the processes and procedures applied by ONI to the collection, communication, retention and handling of identifiable information;
c. where a presumption under rule 1 has been found to be incorrect, ONI is to advise the IGIS of the incident and measures taken by ONI to protect the privacy of the Australian person; and

d. in any case where a breach of these rules is identified, ONI is to advise the IGIS of the incident and the measures taken by ONI to protect the privacy of any affected Australian person or of Australian persons generally.

RULE 7 – PUBLIC ACCESS TO THE RULES

7.1 ONI is to ensure a copy of these rules is publicly available on the ONI website.

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia’s jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

2 For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- 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.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 edition, available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

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 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 proposed legislation, these defences or exceptions 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.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that 'civil; penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); Sayadi and *Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- 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. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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