Chapter 2[1]

Other legislation

2.1 This chapter provides an assessment of the human rights compatibility of:

- two bills introduced into the Parliament on 13 and 14 May (consideration of which had previously been deferred);[2] and
- one bill previously reported on.

2.2 The committee has also assessed the human rights compatibility of legislative instruments registered on the Federal Register of Legislation between 13 May 2020 and 5 June 2020.[3] This includes the Autonomous Sanctions (Designated and Declared Persons and Entities – Democratic People's Republic of Korea) Continuing Effect Declaration 2020 (No 1) [F2020L00638]. The committee has considered the human rights compatibility of similar instruments on a number of occasions.[4] As this legislative instrument does not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to this specific instrument at this time.

2.3 The committee has determined not to comment on the remaining non-COVID-19 related instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Other legislation, *Report 7 of 2020*; [2020] AUPJCHR 97.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2020*; p. 22, namely the Australian Security Intelligence Organisation Amendment Bill 2020 and the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020.

3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period (including legislation made in response to the COVID-19 pandemic), select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: https://www.legislation.gov.au/AdvancedSearch.

4 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) pp. 112-122; *Report 6 of 2018* (26 June 2018) pp. 104-131.See also *Report 4 of 2018* (8 May 2018) pp. 64-83; *Report 3 of 2018* (26 March 2018) pp. 82-96; *Report 9 of 2016* (22 November 2016) pp. 41-55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17-25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15-38; *Tenth Report of 2013* (26 June 2013) pp. 13-19; *Sixth Report of 2013* (15 May 2013) pp. 135-137.

Response required

2.4 The committee seeks a response from the relevant minister with respect to the following bills.

Australian Security Intelligence Organisation Amendment Bill 2020[5]

Purpose	This bill seeks to amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to: • allow the use of questioning warrants in relation to adults with respect to espionage, politically motivated violence (including terrorism) and acts of foreign interference, as defined in section 4 of the ASIO Act; • allow the use of questioning warrants in relation to minor's aged 14 to 18 years old with respect to politically motivated violence; • repeal the existing detention and questioning warrant provisions; • allow ASIO to request, and the Attorney-General to issue, questioning warrants orally in certain circumstances; • amend the eligibility requirements for the appointment of prescribed authorities; • provide a police officer with the power to conduct a search of a person in connection with a questioning warrant, and seize dangerous items and items that could be used to communicate the existence of the warrant or escape from custody; • introduce screening searches and person searches for people attending questioning including parents, and the ability for a police officer to retain any dangerous items and communication devices found; • prevent contact with specific lawyers; • allow a prescribed authority to appoint a lawyer for the subject of a questioning warrant in certain circumstances; and

5 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Security Intelligence Organisation Amendment Bill 2020, *Report 7 of 2020*; [2020] AUPJCHR 98.

	• permit the removal of a lawyer (and a minor's representative) from questioning where they are unduly disruptive.
Portfolio	Home Affairs
Introduced	House of Representatives, 13 May 2020
Rights	Liberty; freedom of movement; humane treatment in detention; privacy; fair trial; rights of the child; freedom of expression; rights of persons with disability
Status	Seeking additional information

ASIO compulsory questioning framework

2.5 Schedule 1 of the bill seeks to repeal and replace the Australian Security Intelligence Organisation's (ASIO) compulsory questioning framework, including amending the provisions related to questioning warrants, and abolishing questioning and detention warrants.[6]

2.6 The Director-General may apply to the Attorney-General for a questioning warrant in order to question a person about certain matters. For adults the warrant may be issued in relation to matters which relate to protecting Australia from espionage,[7] acts of foreign interference,[8] and politically motivated violence[9] (which would include acts of terrorism, as well as financing terrorism and offences relating to control orders, preventative detention orders and continuing detention orders).[10] For children aged between 14 to 18 years of age, a warrant may be issued in relation to matters that relate to the protection of Australia from politically motivated violence. The Attorney-General may issue a warrant in relation to an adult where they are satisfied that:

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6 *Australian Security Intelligence Organisation Act 1979*, Part III, Division 3, Subdivision C.

7 Offences related to espionage are set out at Part 5.2 of the *Criminal Code Act 1995*.

8 Offences relating to foreign interference are set out in Division 92 of the *Criminal Code Act 1995*.

9 Schedule 1, Part 1, item 10, proposed section 34A.

10 Schedule 1, Part 1, item 2 seeks to amend the definition of 'politically motivated violence' in section 4 of the *Australian Security Intelligence Organisation Act 1979* to encompass terrorism offences, being acts that are offences punishable under Subdivision A of Division 72 of the *Criminal Code Act 1995* which deals with offences related to the detonation of devices and Part 5.3 of the *Criminal Code Act 1995* which deals with offences related to terrorism, including: committing a terrorist act; engaging in training or providing training related to terrorism; possessing things or documents related to terrorist activities; or other acts related to terrorist activities.

- the person is at least 18 years old;
- there are reasonable grounds for believing that a warrant will substantially assist in the collection of intelligence that is important in relation to an adult questioning matter; and
- having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.[11]

2.7 Different criteria apply in relation to the issuing of a minor questioning warrant, as set out below at paragraph [2.59].

2.8 On receiving notice of a questioning warrant, a subject may contact a lawyer for legal advice about the warrant, subject to a number of limitations. A questioning warrant may require the subject to appear at a particular time for questioning, or to appear immediately. It may also authorise that a subject be apprehended and searched in order to ensure that they comply with the warrant. A subject may be questioned for up to 24 hours, or 40 hours where an interpreter is being used. Questioning warrants may operate for up to 28 days, and subjects may be prevented from travelling outside Australia during the warrant period, and be required to surrender their travel documents.

2.9 The bill includes a range of offence provisions regarding a failure to answer questions or the provision of false or misleading information. Information obtained during questions would be barred from being used in evidence against a subject, although any evidence derived from such information could be used against a subject for a related offence.

2.10 A subject (including a minor) would be prohibited from disclosing information related to a questioning warrant, including the fact that the warrant had itself been issued, as well as being prohibited from disclosing any operational information associated with the warrant for a period of two years.

Preliminary international human rights legal advice

Right to privacy

2.11 A questioning warrant authorises ASIO to request that a subject give information, or produce a record or other thing, that is, or may be, relevant to intelligence that is important in relation to an adult questioning matter.[12] ASIO may

11 Schedule 1, Part 1, item 10, proposed section 34BA. In relation to post-charge, or post-confiscation warrants, the Attorney-General must be satisfied that it is necessary for the purposes of collecting the intelligence, for the warrant to be issued, even though the person has been charged or the confiscation proceeding has commenced or the charge or proceeding is imminent. The Attorney-General must also be satisfied that there is in force a written statement of procedures to be followed in exercising the warrant.

12 Schedule 1, Part 1, item 10, proposed subsection 34BD(1)(b).

also request that the subject give information, or produce records or things including: the subject matter of any charge or confiscation proceeding, or imminent charge or confiscation proceeding, against the subject.[13] Further, a warrant may authorise a police officer to search the subject of a warrant and seize a record or thing which they reasonably believe is relevant to the collection of intelligence that is important in relation a questioning matter.[14] ASIO is further authorised to remove and retain items which have been produced by the subject.[15]

2.12 By compelling a person to provide information, or produce a thing or record; permitting the search of a person; permitting a police officer to enter premises in order to apprehend a person; and prohibiting a subject from overseas travel in some circumstances, these measures engage and may limit the right to privacy. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[16] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life. A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. Further, the right to privacy also includes the right to personal autonomy and physical integrity. The right may be permissibly limited, where it pursues a legitimate objective, is rationally connected to that objective, and proportionate.

2.13 The statement of compatibility recognises that the right to privacy is engaged and limited by these amendments. It states that the questioning powers, and associated powers to apprehend persons subject to a questioning warrant, seek to achieve the legitimate objective of ensuring ASIO can gather information in relation to national security.[17] This would appear to be a legitimate objective for the purposes of international human rights law and questioning a person about such matters would appear to be rationally connected to that objective. Further, as the statement of compatibility notes, permitting entry to premises in order to apprehend a subject serves an objective of ensuring that a subject appears before a prescribed authority.[18] However, questions remain as to whether these measures constitute a proportionate limitation on the right or privacy.

2.14 The statement of compatibility states that in the current national security environment, these powers are proportionate because of the serious threat posed by

13 Schedule 1, Part 1, item 10, proposed subsection 34BD(4).

14 Schedule 1, Part 1, item 10, proposed subsection34BE(3).

15 Schedule 1, Part 1, item 10, proposed section 34CE.

16 International Covenant on Civil and Political Rights, article 17.

17 See, statement of compatibility, p. 13.

18 Statement of compatibility, p. 13.

politically motivated violence and other activities threatening security, and given the significance of human intelligence.[19] It highlights several safeguards relating to the issue of questioning warrants, including the high threshold for issuing a warrant.[20] Foremost, it highlights the operation of the ASIO guidelines,[21] which require that the least intrusive techniques of information collection be used wherever possible, and that the means used for obtaining information be proportionate to the gravity of the threat and probability of its occurrence. However, it is not clear how these guidelines would operate in practice in this context.

2.15 The statement of compatibility also notes that the Inspector-General of Intelligence and Security (IGIS) may be present at the questioning of an individual.[22] This could serve as a safeguard against disproportionate interferences with a person's privacy (for example, a line of questioning which is unrelated to the matter in relation to which the warrant was issued). However this could only appear to assist where IGIS was present. In addition, the limitations around the use and disclosure of information obtained during questioning, which the statement of compatibility notes as a safeguard,[23] appear to have very limited value as a safeguard, as it is the compelled disclosure of that information itself which engages and limits the right to privacy.

2.16 It is also noted that a warrant can be issued by the Attorney-General, rather than a judicial officer. Enabling a political, rather than judicial, officer to issue questioning warrants which will likely have a significant impact on a person's rights, raises particular concerns. As the European Court of Human Rights has said, 'The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure'.[24] Consequently, questions remain as to the proportionality of the measures with respect to limiting the right to privacy.

2.17 The statement of compatibility does not identify that the power to conduct a frisk or ordinary search of a person's body when they are apprehended for

19 Statement of compatibility, p. 13.

20 Statement of compatibility, pp. 13-15.

21 These guidelines are the *Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence).* See, explanatory memorandum, p. 10.

22 Statement of compatibility, p. 14.

23 Statement of compatibility, p. 14.

24 *Klass and Others v Germany*, European Court of Human Rights, application no. 5029/71), (6 September 1978), [55].

questioning, and to subsequently screen and search persons at the point of questioning,[25] engages and may limit the right to privacy. These bodily searches, which would involve the running of hands over a person's body, and may require that a person remove certain articles of clothing,[26] engage and limit the right to privacy.

2.18 Further information is required to assess the compatibility of these measures with the right to privacy, and in particular:

- why it is appropriate that a questioning warrant be issued by the Attorney-General, rather than a judicial officer;
- whether the subject of a warrant can refuse to provide information, or produce a record or thing, on the basis that it is not relevant to the matters in relation to which the warrant has been issued, without exposing themselves to the risk of prosecution for an offence under section 34GD;
- the manner in which the ASIO guidelines would ensure that the least intrusive techniques of information collection is used, and with as little intrusion into individual privacy as is possible, in the specific context of questioning a subject pursuant to a questioning warrant;
- whether the ASIO guidelines are enforceable;
- whether the conduct of a bodily search and a search of a person's home is compatible with the right to privacy, having particular regard to safeguards to ensure that any limitation on the right is proportionate; and
- whether any additional safeguards would be put in place to protect the physical privacy and bodily integrity of vulnerable subjects, including children and persons with disabilities.

Committee view

2.19 The committee notes that the bill provides for the apprehension of subjects; would require a subject to attend questioning and provide information, and/or produce records or things; and provides for the search of a person and entry to premises. The committee notes that this engages and may limit the right to privacy. This right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.20 The committee considers that these powers seek to achieve the legitimate objective of ensuring ASIO can gather information in relation to national security.

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25 Schedule 1, Part 1, item 10, proposed section 34D.

26 See, *Australian Security Intelligence Organisation Act 1979,* section 4, which defines both 'frisk search' and 'ordinary search'.

2.21 In order to fully assess the compatibility of this measure with the right to privacy, the committee seeks the minister's advice as to the matters set out at paragraph [2.18].

2.22 Further, and in light of many issues of concern which have been raised in the preliminary international human rights legal advice in relation to this bill, we reiterate that the committee has not reached a concluded view as to the bill's compliance with human rights law and further reiterate:

- **(a) the committee's statutory role is to assess proposed legislation for compatibility with the seven core international human rights treaties to which Australia is a party and to report to the Parliament, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*;**
- **(b) in performing this function the committee receives legal advice from, and is assisted by, an external legal adviser and secretariat staff. Our report clearly sets out the legal advice received which is separate from any view of committee members; and**
- **(c) where the committee seeks a response or further response from the relevant minister, the committee is seeking information as to whether particular limitations on rights which have been identified are permissible as a matter of international human rights law. Most rights can be properly limited if it is demonstrated that the limitation is reasonable, necessary and proportionate.**

Apprehension of a person subject to a warrant

2.23 A warrant may require the subject to appear before a prescribed authority at a designated date and time,[27] or to appear immediately where the Attorney-General is satisfied that it is reasonable and necessary in the circumstances.[28] It may remain in force for no more than 28 days,[29] although it may be revoked earlier, or varied,[30] and subsequent questioning warrants may be issued.

2.24 A police officer may apprehend the subject of a warrant if this is authorised in the warrant, in order to bring the person before a prescribed authority for

27 Schedule 1, Part 1, item 10, proposed subsection 34BD(1).

28 Schedule 1, Part 1, item 10, proposed subsection 34BE(1).

29 Schedule 1, Part 1, item 10, proposed subsections 34BF(4)-(5).

30 Schedule 1, Part 1, item 10, proposed section 34BG.

questioning under the warrant.[31] In doing so, the police officer may enter premises, search the person and use such force as is necessary and reasonable.[32]

Preliminary international human rights legal advice

Right to liberty and freedom of movement

2.25 By providing for the physical apprehension of an individual in relation to a questioning warrant the bill engages and may limit the rights to liberty and freedom of movement. The right to freedom of movement includes the right to freely move within a country.[33] The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[34] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty.

2.26 The rights to freedom of movement and liberty may be permissibly limited where the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and constitutes a proportionate limitation.

2.27 The statement of compatibility recognises that the apprehension of a person who is subject to a warrant engages and limits the right to freedom of movement and the right to liberty.[35] It states that apprehension is to mitigate the risk of a person not attending questioning, and preventing them from alerting another person involved in an activity prejudicial to security, to destroy records or things. It states that this achieves the legitimate objective of ensuring the integrity of the questioning process and accordingly protects Australia's national security interests.[36]

2.28 Protecting the integrity of questioning and national security interests, would appear likely to constitute a legitimate objective for the purposes of international human rights law, and the power to apprehend a subject would appear to be rationally connected with that objective. As to whether the measure is proportionate to achieve the stated objectives, the statement of compatibility states the limitation is reasonable and proportionate, based on the safeguards built into the questioning

31 Schedule 1, Part 1, item 10, proposed section 34C.

32 Schedule 1, Part 1, item 10, proposed sections 34CA, 34CC and 34CD.

33 International Covenant on Civil and Political Rights, article 12.

34 International Covenant on Civil and Political Rights, article 9.

35 Statement of compatibility, pp. 8 and 10.

36 Statement of compatibility, p. 8.

warrant framework. In particular it notes that there are specific guidelines issued to the Director-General of Security issued under the ASIO Act. These guidelines require, when ASIO is collecting information, that its methods for doing so must be proportionate to the gravity of the threat posed and the probability of its occurrence; there should be as little intrusion into a person's privacy as possible; and the least intrusive techniques of information gathering should be used before resorting to more intrusive techniques.[37] The statement of compatibility also states that the subject of a questioning warrant is permitted to contact the IGIS or the Commonwealth Ombudsman to make complaints about their treatment.[38] The statement of compatibility also notes that apprehension will only be for the minimum time possible,[39] as a police officer can only apprehend in order to 'immediately' bring the subject of the warrant before the prescribed authority.[40]

2.29 These are important safeguards that assist with the proportionality of these powers. However, as noted above at paragraph [2.14], a warrant that can provide for the apprehension of the person is issued by the Attorney-General, rather than a judicial officer. Given the impact on the right to liberty and freedom of movement in apprehending a person subject to such a warrant, it is not clear that it is proportionate to the objective sought to be achieved to enable a political, rather than judicial, officer to issue a questioning warrant that authorises the apprehension of a person.

2.30 As such, further information is required in order to assess the compatibility of this measure with the rights to freedom of movement and liberty, in particular, why it is appropriate that a questioning warrant, that allows for the apprehension of a person, be issued by the Attorney-General, rather than a judicial officer.

Committee view

2.31 The committee notes that the bill provides for the physical apprehension of certain persons subject to questioning warrants. The committee notes that this engages and may limit the rights to freedom of movement and liberty. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.32 The committee considers that these powers seek to achieve the legitimate objective of protecting the integrity of questioning and thereby protecting national security interests.

37 Statement of compatibility, pp. 10-11.

38 Statement of compatibility, p. 11.

39 Statement of compatibility, p. 8.

40 Schedule 1, Part 1, item 10, proposed subsection 34C(1).

2.33 In order to fully assess the compatibility of this measure with the rights to freedom of movement and liberty, the committee seeks the minister's advice as to the matters set out at paragraphs [2.30].

Questioning warrants

2.34 The subject of a warrant may be questioned for a 'permitted questioning time' of up to 24 hours,[41] or 40 hours where an interpreter is being used. This 'permitted questioning period' is not calculated in terms of a continuous period from the point of attendance for questioning. It includes only the periods of time during which questioning is taking place, excluding time taken to undertake activities including contacting a lawyer, changing recording equipment, or receiving medical attention.[42]

Preliminary international human rights legal advice

Rights to liberty and freedom of movement

Prohibition on torture, cruel, inhumane or degrading treatment or punishment and right to humane treatment in detention

Rights of persons with disabilities

2.35 The execution of a questioning warrant necessitates that a subject appear before a prescribed authority for questioning for up to 24 hours (and 40 hours where an interpreter is used). It is unclear whether a subject may elect to leave a questioning session, noting that a person may be apprehended in order to appear for questioning and it would be an offence for a person to fail to give information or produce records.[43] It is also not clear if a person subject to such questioning can suspend the questioning after a certain period of time (i.e. to go home to sleep and eat meals), or if the person is required to stay until the questioning has ended.[44] If the person is effectively prohibited from leaving until the questioning is complete, this measure would engage and may limit the rights to freedom of movement and liberty. In addition, the compulsory questioning of subjects under warrant may also engage the prohibition on torture, cruel, inhumane or degrading treatment or punishment and the right to humane treatment in detention.

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41 Schedule 1, Part 1, item 10, proposed section 34DJ.

42 Schedule 1, Part 1, item 10, proposed section 34DL.

43 Schedule 1, Part 1, item 10, proposed subsection 34GD(3).

44 Schedule 1, Part 1, item 10, proposed section 34DL notes that the time for questioning does not include time taken for a number of matters, including for the subject of the warrant to receive medical attention, to engage in religious practices or to rest or recuperate. While this time is not included the questioning time, it is not clear that the person is able to leave the premises where they are being questioned during this time.

2.36 Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment (including under article 7 of the International Covenant on Civil and Political Rights (ICCPR)).[45] The prohibition on torture, cruel, inhuman and degrading treatment or punishment is absolute and may never be subject to any limitations. Article 10 of the ICCPR which guarantees a right to humane treatment in detention, complements article 7 such that there is a positive obligation on Australia to take actions to prevent the inhumane treatment of detained persons.[46] The UN Human Rights Committee has indicated that United Nations standards applicable to the treatment of persons deprived of their liberty are relevant to the interpretation of articles 7 and 10 of the ICCPR.[47]

2.37 All people deprived of their liberty in any form of state detention have the right to be treated with humanity and dignity.[48] This is a positive obligation, which requires that a person who is detained may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.[49] The right provides extra protection for persons in detention who are particularly vulnerable as they have been deprived of their liberty.

2.38 A person with disability may be questioned by ASIO pursuant to a questioning warrant. Consequently, these measures also engage and may limit the rights of persons with disabilities.

2.39 The statement of compatibility does not identify whether this measure engages the rights to liberty and freedom of movement. As such, no information has been provided as to the compatibility of this aspect of the measure with these rights.

2.40 The statement of compatibility acknowledges that the questioning warrant regime engages the prohibition on torture, cruel, inhuman or degrading treatment and the right to humane treatment in detention. The statement of compatibility highlights a number of safeguards that it states ensures the humane treatment of people who are subject to questioning warrants. Foremost, it notes that proposed section 34AG of the bill expressly obliges those exercising authority pursuant to a questioning warrant to treat the subject with humanity, and prohibits torture or other cruel, inhuman or degrading treatment,[50] and that a number of criminal

45 International Covenant on Civil and Political Rights (ICCPR), article 7; Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment (CAT), articles 3-5.

46 UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992) [3].

47 UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992) [5].

48 International Covenant on Civil and Political Rights, article 10.

49 UN Human Rights Committee, *General Comment No. 21 (1992) Article 10 (Humane treatment of persons deprived of their liberty)* [3].

50 Statement of compatibility, p. 7.

offences would be applicable to persons who contravene this provision. The statement of compatibility also notes that a statement of procedures will be developed under proposed section 34AF[51] to require that subjects be treated humanely, having regard to their health and welfare, and requiring 30 minute breaks after every four hours of continuous questioning.[52] The statement of compatibility further highlights the capacity of a subject to complain about their treatment to the IGIS or Commonwealth Ombudsman.[53]

2.41 However, while these could serve as valuable safeguards, it remains unclear what duration of time a person may be continuously kept for questioning by a prescribed authority pursuant to a questioning warrant. The bill provides that a person may be questioned for 8 hours, and that this period of time may be extended to 16 hours total, and then 24 hours total, and for up to 40 hours in total where an interpreter is being used. However, it is not clear whether such extended questioning would take place over multiple occasions, or whether that extended period of questions would take place for one continuous period of time, broken up only by the breaks in questioning which are provided for in the bill. Were questioning to take place on one occasion pursuant to a single questioning warrant, this would raise questions as to what further safeguards would apply to ensure that subject is treated humanely. For example, it is unclear whether an extended period of questioning would be required to cease overnight and the subject be provided with adequate facilities to eat, and to sleep and shower in privacy.

2.42 In addition, while the statement of compatibility states that the statement of procedures to be issued under section 34AF will set out requirements relating to humane treatment, such a statement has not yet been made and it remains to be seen what specific safeguards it will include. It is not clear why any such safeguards are not set out in the bill itself. In addition, the ability of a person to complain to the IGIS or Commonwealth Ombudsman regarding their treatment would only apply after the treatment took place. Further, regulations may prohibit or regulate access to certain information by lawyers acting for the person in connection with proceedings for a remedy relating to the treatment of the person in connection with such a warrant,[54] and it is unclear whether this would impede a person's ability to make a complaint about their treatment in detention.

2.43 In addition, and as noted above at paragraph [2.16], a questioning warrant can be issued by the Attorney-General, rather than a judicial officer. Enabling a

51 Schedule 1, Part 1, item 10, proposed section 34AF provides that such a statement will be a legislative instrument, but will not be subject to disallowance.

52 Statement of compatibility p. 7.

53 Statement of compatibility, p. 7.

54 Schedule 1, Part 1, item 10, proposed section 34FH.

political, rather than judicial, officer to issue questioning warrants which will likely have a significant impact on a person's rights, raises particular concerns.

2.44 The statement of compatibility identifies that the bill engages the right to support in exercising legal capacity for people with disabilities pursuant to article 12(3) of the Convention on the Rights of Persons with Disabilities (CRPD).[55] It states that excluding people with disabilities from the questioning warrant regime would leave a 'significant gap' in ASIO's ability to collect intelligence. The statement of compatibility further highlights safeguards which support the exercise of legal capacity for people with disabilities, including: the high threshold for issuing a warrant; the ability for the Attorney-General to authorise ASIO to question a person subject to restrictions or conditions, which could include the requirement that the person only be questioned in the presence of a lawyer; the requirement that the prescribed authority explain various matters to the subject of a warrant; and the independent oversight provided by the IGIS. However, as these safeguards would apply generally with respect to the issue of questioning warrants, it is not clear what additional protection they would provide where the subject has a disability. It is also not clear how and when a person exercising authority under a warrant, or a prescribed authority, would assess that a person does have, or appears to have, a disability.

2.45 Further, persons with disabilities have a right to be free from all forms of exploitation,[56] which has not been identified in the statement of compatibility. Exploitation refers to taking advantage of another person, including improper use of another person. In the context of criminal investigations, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has observed that:

> There is a power imbalance between the agencies that make up the criminal justice system and people with disability who are brought into contact with them. This is especially the case for people with cognitive or psychosocial disability, who may have difficulties understanding and navigating the criminal justice system without tailored support.[57]

2.46 Persons with disabilities must be provided with necessary modifications and adjustments in order to obtain effective access to justice during their participation on in the criminal justice system, including in pre-trial questioning.[58] The absence of such supports may give rise to a risk of discrimination against a person based on their disability.

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55 Statement of compatibility, p. 21.

56 Convention on the Rights of Persons with Disabilities, article 16.

57 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *The Criminal Justice System: Issues Paper* (January 2020), p. 5.

58 Convention on the rights of Persons with Disabilities, article 13.

2.47 The bill does not establish any explicit protections where a person with disability, or suspected disability, is the subject of a questioning warrant. The bill does not provide that an adult subject of a questioning warrant who has a cognitive, intellectual or other developmental disability must only be questioned in the presence of a lawyer. This leaves open the possibility of a person with disability being questioned without the presence of a lawyer. Further, it does not appear that lawyers advising vulnerable subjects would be provided with greater scope to speak to their clients during questioning, or to otherwise intervene on their behalf. Rather, it would appear that a lawyer may be prevented from answering a question put to them by the subject during questioning (see paragraphs [2.81] to [2.90] below). Further, the bill does not establish special provisions for the questioning of persons with disabilities, such as expressly permitting a person with disability to contact an advocate or other specialist representative in relation to the warrant, or requiring that a person with a disability be questioned only in the presence of such an additional non-lawyer representative, who can speak to the subject during questioning (indeed, the bill would prevent a person with disability from telling any support person about the existence of the warrant, see paragraphs [2.93] to [2.97] below).The absence of such explicit protections creates a risk that these measures may result in a person with disability being subject to exploitation.

2.48 Further information is required to assess the compatibility of these measures with the rights to freedom of movement, liberty, the prohibition on torture, cruel, inhumane or degrading treatment, the right to humane treatment in detention and the rights of persons with disabilities, in particular:

- the compatibility of the process of questioning a person pursuant to a questioning warrant with the right to liberty and the right to freedom of movement;
- the maximum total period of time (if any) (including a 'permitted questioning period', 'extended permitted questioning period', and all other periods of time) during which a subject may be questioned pursuant to a questioning warrant on a single occasion;
- whether a subject can leave a questioning session of their own volition at any point, or whether they may be prevented from leaving the session, and whether force may be used to prevent them from leaving;
- whether questioning pursuant to one questioning warrant may be spread across multiple occasions, including in cases where the permitted questioning time has been extended;
- whether, if a questioning session extends late into the evening, and a subject is not going to be released, they will be provided with adequate facilities in which to sleep, eat and shower in privacy;

- whether a subject must be provided with food and regular drinks when they appear for questioning, and be provided with breaks where required to attend to religious duties;
- what other safeguards and procedures will be instituted to protect the health and welfare of persons subject to a questioning warrant while they are appearing before a prescribed authority;
- whether a subject may complain to the IGIS or the Commonwealth Ombudsman about their treatment during questioning or apprehension, and seek a remedy, while that period of question is ongoing;
- what restrictions the regulations may implement to prohibit or regulate access to information by lawyers acting for a person in relation to their treatment in connection with such a warrant and what impacts this may have on the ability of a person to seek a remedy relating to their treatment;
- whether a person with, or believed to have, a cognitive, intellectual or other developmental disability could inform a family member, guardian, advocate and/or other specialist disability support worker that a questioning warrant had been issued against them without committing an offence;
- whether a person with, or believed to have, a cognitive, intellectual or other developmental disability may only be interviewed in the presence of a support person and a lawyer;
- how a person would be questioned under a questioning warrant where they do not have legal capacity because of a disability (including in circumstances where that person is subject to a guardianship order); and
- what other additional supports would be provided to a subject with, or believed to have, a cognitive, intellectual or other developmental disability.

Committee view

2.49 The committee notes that the bill provides that a person subject to a questioning warrant must attend for questioning for periods of up to 24 hours (and 40 hours where an interpreter is used). It is not clear whether a subject may elect to leave a questioning session. If the person is effectively prohibited from leaving until the questioning is complete, this measure would engage and may limit the rights to freedom of movement and liberty. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.50 In addition, the committee considers compulsory questioning of subjects under warrant may also engage the right to humane treatment in detention. In order to assess the compatibility of this measure with this right, the committee seeks the minister's advice as to the matters set out at paragraphs [2.48].

Prohibition on persons subject to a warrant leaving Australia

2.51 The bill seeks to make it an offence for a person who is the subject of a questioning warrant to leave Australia without the written permission of the Director-General,[59] and provides that such a person may be required to surrender their travel documents.[60] In addition, a person in relation to whom a warrant has been requested (but not yet issued) may be required to surrender their travel documents, and may be prohibited from leaving Australia.[61] Failure to comply with any of these requirements is an offence punishable by five years' imprisonment.

2.52 A questioning warrant remains in force for 28 days, but a new warrant may be made at the end of this period.[62]

Preliminary international human rights legal advice

Right to freedom of movement and protection of the family

2.53 In limiting the ability of a person who is the subject of a warrant (which may or may not have been issued) to leave Australia, this measure engages and limits the right to freedom of movement. The right to freedom of movement includes the right to leave any country.[63] The right to leave a country encompasses both the legal right and practical ability to leave a country, and therefore it applies not just to departure for permanent emigration but also for the purpose of travelling abroad. As international travel requires the use of passports, the right to freedom of movement encompasses the right to obtain necessary travel documents, such as a passport.[64]

2.54 In restricting the ability of people to leave the country, for persons with family members overseas, this may also engage and limit the right to protection of the family. he right to respect for the family requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.[65] An important element of protection of the family is to ensure family members are not involuntarily separated from one another.

2.55 The statement of compatibility does not recognise that these offences limit the right to freedom of movement or protection of the family, and as such provides

59 Schedule 1, Part 1, item 10, proposed section 34GA.

60 Schedule 1, Part 1, item 10, proposed section 34GB.

61 Schedule 1, Part 1, item 10, proposed sections 34G and 34GA.

62 Schedule 1, Part 1, item 10, proposed subsections 34BF(4) and (5).

63 International Covenant on Civil and Political Rights, article 12.

64 See UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [8]-[10].

65 International Covenant on Civil and Political Rights, articles 17 and 23, and the International Covenant on Economic, Social and Cultural Rights, article 10.

no analysis as to why such offences are necessary and whether there are adequate safeguards in place to ensure the measure is sufficiently circumscribed.

2.56 As such, further information is required as to the compatibility of this measure with the rights to freedom of movement and protection of the family, in particular:

- noting that questioning warrants may be issued by the Attorney-General orally in urgent circumstances, why is it necessary to apply the requirements for permission to travel to a person to whom a questioning warrant has not yet been issued;
- what are the likely circumstances in which the Director-General may give permission to travel and what considerations will be relevant to the Director-General's decision;
- what are the likely conditions that the Director-General may impose on any permission to travel; and
- will the Director-General consider the right to protection of the family in making such directions; and
- whether there is independent oversight of the Director-General's power to require that a person in relation to whom a warrant has been requested not leave the country.

Committee view

2.57 The committee notes that the bill would make it an offence for the subject of a questioning warrant to leave Australia without the written permission of the Director-General, and that such a person may be required to surrender their travel documents. The committee notes that this engages and may limit the right to freedom of movement and protection of the family. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.58 In order to assess the compatibility of this measure with rights to freedom of movement and protection of the family, the committee seeks the minister's advice as to the matters set out at paragraphs [2.56].

Questioning warrants for minors aged 14 and over

2.59 The bill would also enable ASIO to obtain a warrant in order to question a minor (aged between 14 and 18 years) about a 'minor questioning matter', being matters related to politically motivated violence.[66] The Attorney-General may issue a warrant where they are satisfied that:

66 Schedule 1, Part 1, item 10, proposed section 34A.

- the person is at least 14 years old;[67]
- there are reasonable grounds for believing that the person has likely engaged in, is likely engaged in, or is likely to engage in activities prejudicial to the protection of Australia from politically motivated violence;
- there are reasonable grounds for believing that a warrant will substantially assist in the collection of intelligence that is important in relation to a minor questioning matter; and
- having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.[68]

Preliminary international human rights legal advice

Rights of the child

2.60 This proposed extension of the compulsory questioning warrant regime to children engages and may limit the same human rights noted in relation to adult questioning warrants, set at above at paragraphs [2.11] to [2.56]. Under the proposed warrant regime, children could be:

- apprehended for questioning;
- subject to the same obligations with respect to answering questions and producing records or things; and
- prevented from overseas travel.

2.61 As such, questions arise as to the compatibility of the proposed questioning warrant regime with the rights of children to liberty,[69] freedom of movement,[70] the prohibition against torture and cruel, inhuman and degrading treatment[71] and humane treatment in detention,[72] and privacy.[73]

2.62 Children have special rights under human rights law taking into account their particular vulnerabilities.[74] Both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and

67 Schedule 1, Part 1, item 10, proposed section 34BC provides that a questioning warrant has no effect where the subject of the warrant is aged under 14 years.

68 Schedule 1, Part 1, item 10, proposed section 34BB.

69 Convention on the Rights of the Child, article 37.

70 Convention on the Rights of the Child, article 10.

71 Convention on the Rights of the Child, article 37.

72 Convention on the Rights of the Child, article 37.

73 Convention on the Rights of the Child, article 16.

74 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989), [1].

intellectual maturity than adults, and so are less culpable for their actions.[75] The detention of a child, for example, should only be used as a measure of last resort, and for the shortest appropriate period of time.[76] Further, every child deprived of liberty has the right to maintain contact with their family, and this should only be limited in exceptional circumstances and in a manner which is clearly described in law and not be left to the discretion of authorities.[77]

2.63 In addition, Australia is required to ensure that, in all actions concerning children, the best interests of the child shall be a primary consideration.[78] That is, a child's best interests are not just one consideration to be taken into account among other considerations. Rather, as the UN Committee on the Rights of the Child has explained:

> the expression 'primary consideration' [in article 3(1) of the Convention on the Rights of the Child] means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child.[79]

2.64 The statement of compatibility states that there can be a legitimate need to issue a warrant in relation to a child where the child is themselves engaged in activities prejudicial to security in relation to politically motivated violence.[80] It also states that the need for lowering the age from the existing 16 years to 14 years is illustrated by the politically motivated shooting by a 15 year old.[81] It also notes that the Parliamentary Joint Committee on Intelligence and Security recommended the age be lowered. However, other than one case involving a child under 16, no further information or evidence is presented demonstrating why existing laws are insufficient.

2.65 In deciding whether to issue a minor questioning warrant, the Attorney-General is required to consider the best interests of the person,[82] taking into account a range of factors where those matters are known to the

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75 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules) at: http://www.un.org/documents/ga/res/40/a40r033.htm.

76 UN Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, [85].

77 UN Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, [94].

78 Convention on the Rights of the Child, article 3(1).

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

80 Statement of compatibility, p. 20.

81 Statement of compatibility, p. 9.

82 Schedule 1, Part 1, item 10, proposed subsection 34BB(2).

Attorney-General and are relevant.[83] While this is important in helping to ensure that the best interests of the child are taken into account, it does not appear that the best interests of the child must be treated as the primary consideration when deciding whether to issue a warrant. The explanatory memorandum importantly states that it is intended that this consideration is a primary consideration in deciding whether to issue a warrant, but goes on to say 'also considering other legitimate matters, such as public safety and national interest'.[84] Consequently, it is not clear that the proposed measures do meet the obligation to give the child's best interests primacy.

2.66 The bill provides that, in contrast to an adult, a minor may only be questioned for continuous periods of two hours or less, separated by breaks.[85] However, a child may nevertheless be questioned for up to 24 hours (or 40 hours where an interpreter is used), and, as noted at paragraph [2.35], it is unclear whether a subject is effectively detained under a questioning warrant, and what could be the total duration of time the child may effectively be held (noting the need for breaks). Further, while the bill states that a minor must not be questioned without a lawyer being present,[86] and can only be questioned in the presence of their representative (such as a parent),[87] it appears that the lawyer may simultaneously serve as the child's representative.[88] The bill also makes provision for the prescribed authority to direct that a minor's representative be removed, if they consider their conduct is unduly disrupting questioning.[89] While a replacement representative can be requested, the prescribed authority can direct that questioning can occur in the

83 Schedule 1, Part 1, item 10, proposed subsections 34BB(3)-(4). These are: the age, maturity, sex and background (including lifestyle, culture and traditions) of the person; the person's physical and mental health; the benefit to the person of having a meaningful relationship with the person's family and friends; the right to receive an education; the right of the person to practice their religion; and any other matter that the Attorney-General considers relevant.

84 Explanatory memorandum, p. 45.

85 Schedule 1, Part 1, item 10, proposed subsection 34BD(2).

86 See, Schedule 1, Part 1, item 10, proposed subsection 34FA(1).

87 See, Schedule 1, Part 1, item 10, proposed subsection 34BD(2). A 'minor's representative' means the subject's parent or guardian, or another person who is: able to represent the subject's interests; is, as far as practicable in the circumstances, acceptable to the subject and, if applicable, to the prescribed authority; and is not a police officer, the Director-General, an ASIO employee or affiliate, or a person approved under section 24 of the ASIO Act to exercise authority under a warrant.

88 See, Schedule 1, Part 1, item 10, proposed subsection 34AA (as a representative can be someone who is able to represent the subject's interests). Schedule 1, Part 1, item 10, proposed subsection 34FD(2) provides that where a child is required to appear immediately for questioning, and a lawyer is present during that questioning, the prescribed authority may direct that the child can be questioned in the absence of a non-lawyer representative, in which case the lawyer would simultaneously take on the role of representative.

89 See, Schedule 1, Part 1, item 10, proposed section 34FG.

absence of the replacement in certain circumstances.[90] As such, it appears that there may be circumstances in which a child could be questioned with *only* a lawyer accompanying them, and without a parent or guardian.[91] In addition, a child's capacity to have a lawyer of their choosing represent them may be constrained,[92] such that when a child is directed to appear immediately, an appointed lawyer must be present, and the child is then given an option of contacting a lawyer of their choosing. However, noting a child's particular vulnerabilities it is not clear that a child, without any other representative present, would always appropriately understand they have such a choice, or the ability to organise a lawyer of their choice. No information has been provided as to whether a child's parent or guardian, or another adult nominated by the child, must be the preferred first choice of representative, and whether, in some circumstances, a child may be questioned with only an appointed lawyer to represent them.

2.67 In addition, a person would commit an offence if they were to disclose the fact that a warrant had been issued in relation to a child.[93] Although the bill provides that a prescribed authority *may* direct that a subject be permitted to disclose matters to certain persons,[94] it would appear that there may be circumstances in which a child would be prohibited from informing their own family that a warrant had been issued in relation to them, including in circumstances where they were apprehended for immediate questioning.

2.68 Consequently, further information is required in order to assess the compatibility of the proposed measures with the rights of the child, in particular:

- what evidence establishes that there is a pressing and substantial need to lower the age for the issuing of a questioning warrant to apply to children aged 14 years;
- whether a child's parent, guardian and/or family would always be notified that a warrant had been issued in relation to the child, and if not, why not (and what guidance is there in relation to this);

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90 See, Schedule 1, Part 1, item 10, proposed subsections 34FG(4)-(5).

91 See, Schedule 1, Part 1, item 10, proposed subsections 34FD(2)-(3) provide that such a direction may be made where a child has been required to appear immediately, and where no immediate appearance requirement exists.

92 Schedule 1, Part 1, item 10, proposed subsection 34F(4) provides that the prescribed authority may direct that a particular lawyer cannot be contacted in relation to the warrant. Schedule 1, Part 1, item 10, proposed subsection 34FB(2) states that where a child is required to appear immediately for questioning, they must be provided with an appointed lawyer and questioned in their presence, and then given the ability to contact a lawyer of their choice.

93 Schedule 1, Part 1, item 10, proposed section 34GF.

94 Schedule 1, Part 1, item 10, proposed subsection 34DE(1).

- whether the best interests of the child will be treated as the primary consideration in a decision to issue a minor questioning warrant (and not merely alongside other considerations);
- the maximum period of time a child may kept for questioning on one occasion (including non-permitted questioning time);
- whether a parent or guardian of the child, or another adult nominated by the child, must be the preferred first choice of minor's representative during questioning;
- whether the capacity for a lawyer to serve as both a child's lawyer *and* representative pursuant to the proposed measures may only take place in limited circumstances, and if so, in what circumstances; and
- whether and when a child would be permitted to disclose to their family that a warrant had been issued in relation to them.

Committee view

2.69 The committee notes that the bill would extend the compulsory questioning regime to children aged 14 years and over. The committee notes that this engages and may limit the rights of the child. Most of the rights of the child may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.70 In order to assess the compatibility of this measure with the rights of the child, the committee seeks the minister's advice as to the matters set out at paragraph [2.68].

Use of material from, or derived from, a questioning warrant

2.71 A person subject to a questioning warrant is required to give any information or produce any record or other things requested by ASIO.[95] Failure to comply would be a criminal offence, subject to up to five years imprisonment. As well as being issued in relation to a person not charged with an offence, a questioning warrant may be issued 'post-charge', that is, after a subject has been charged with a related offence which is yet to be resolved, or in cases where such a charge is imminent.[96] A person subject to a warrant is not excused from providing information or producing a record or thing on the basis that it may incriminate them.[97] Although anything said or

95 Schedule 1, Part 1, item 10, proposed subsection 34GD(3).

96 Schedule 1, Part 1, item 10, proposed section 34A. 'Imminent' means: the person is under arrest for an offence, but has not been charged with the offence; or a person with authority to commence a process for prosecuting the person for an offence has decided to commence, but not yet commenced, the process.

97 Schedule 1, Part 1, item 10, proposed subsection 34GD(5).

produced by them is not generally admissible in criminal proceedings against them (which provides a 'use immunity'),[98] this immunity does not extend to information derived from questioning materials (meaning there is no 'derivative use immunity').

2.72 The bill also provides that specified entities,[99] which have an existing authority to lawfully use or disclose questioning material, may lawfully disclose that material to a prosecutor of the subject pursuant to a court order, where a court is satisfied that the disclosure in the interests of justice.[100]

Preliminary international human rights legal advice

Right to a fair trial

2.73 Abrogating the privilege against self-incrimination, allowing information derived from the questioning to be used against the person in evidence, and allowing the information to be provided to the prosecution in certain circumstances, engages and appears to limit the right to a fair trial.[101] The right to a fair trial provides that in the determination of any criminal charge against a person, that person shall be entitled to certain minimum guarantees, including that they must not be compelled to testify against themselves.[102] This right may be permissibly limited, but only where a limitation seeks to achieve a legitimate objective, is rationally connected to that objective, and is proportionate.

2.74 The statement of compatibility recognises that the post-charge questioning provisions engage the right to a fair trial. However it states that the measure seeks to achieve the legitimate objective of obtaining information that is available in the mind of the person subject to the warrant in order to collect intelligence in relation to ongoing security threats, and to protect the public from harm caused by threats to national security.[103] This is likely to constitute a legitimate objective for the purposes

98 Schedule 1, Part 1, item 10, proposed subsection 34GD(6). This does not prevent such information being produced in offence in specified proceedings, including those related to the offence of providing false or misleading information.

99 Pursuant to Schedule 1, Part 1, item 10, subsection 34E(3), entities which may lawfully use or disclose questioning material are: the Director-General; an entrusted person; a person or body investigating whether the subject for the material committed an offence against a law of the Commonwealth or a State or Territory; the prosecutor of the subject; a prosecuting authority; a proceeds of crime authority; or any other person or body lawfully in possession of the questioning material.

100 Schedule 1, Part 1, item 10, section 34EA. Under proposed section 34EC(1), a court may further specify the use to which the prosecutors may put the material.

101 International Covenant on Civil and Political Rights, article 14; and Convention on the Rights of the Child, article 40.

102 International Covenant on Civil and Political Rights, article 14; and Convention on the Rights of the Child, article 40.

103 Statement of compatibility, p. 11.

of international human rights law. However, it is not clear that sharing information with the prosecutor of a person is necessarily rationally connected with that objective, noting, as the statement of compatibility does, that ASIO plays no role in criminal prosecutions, and seeks to question individuals to address the potential harm caused by ongoing security threats.[104]

2.75 With respect to safeguards, the statement of compatibility notes that the prescribed authority may make a direction regarding the use of questioning material, if they are satisfied that failure to do so would reasonably be expected to prejudice the person's right to a fair trial.[105] While this is an important safeguard, it does not appear that such a direction may be made with respect to derivative evidence (evidence derived from what the person was forced to disclose), noting that a prescribed authority would not appear to play any role in the gathering of any such evidence.

2.76 The statement of compatibility also notes that abrogating the privilege against self-incrimination is proportionate because there is a use immunity which prevents anything said or produced by the subject from being admissible in evidence against the person, except in limited circumstances.[106] However, as noted above, this immunity does not extend to information which has been derived from information provided (that is, a derivative use immunity). In addition, specified entities (including prosecutors) may lawfully use or disclose questioning material for the purpose of obtaining derivative material,[107] and that derivative material may be disclosed to a prosecutor pursuant to a court order.[108] This could have significant and broad-reaching implications for the person's right not to be compelled to testify against themselves. For example, a subject may be required to answer questions about a specific matter and while that answer itself cannot be used in evidence against the person, this information could be used to find other evidence against the person which could be used against them in court. This may have the practical effect that the subject had been compelled to testify against and incriminate themselves.

2.77 Further information is required in order to assess whether these measures are compatible with the right to a fair trial, in particular:

- how sharing questioning information with prosecutors (rather than other intelligence officers) is rationally connected to the objective of collecting intelligence to minimise the potential harm caused by ongoing security threats;

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104 Statement of compatibility, p. 11.

105 Schedule 1, Part 1, item 10, proposed subsection 34DF(1).

106 Statement of compatibility, p. 12.

107 Schedule 1, Part 1, item 10, section 34E.

108 Schedule 1, Part 1, item 10, proposed paragraph 34EB(1)(c).

- why the bill does not provide the subject of a questioning warrant with a derivative use immunity; and
- what factors a prescribed authority may take into consideration when considering the right of the subject to a fair trial.

Committee view

2.78 The committee notes that the bill would make it an offence for a person not to give information or produce record or other things if required to do so under a questioning warrant, even if that person had been charged with a related offence. It removes the common law privilege against self-incrimination and would allow material derived from such questioning to be shared with prosecutors.

2.79 The committee considers that this measure engages and may limit the right of a person not be compelled to testify against themselves. This aspect of the right to a fair trial may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.80 In order to assess the compatibility of this measure with the right to a fair trial, the committee seeks the minister's advice as to the matters set out at paragraph [2.77].

Restrictions on legal representatives

2.81 The bill provides that a subject may contact a lawyer for legal advice regarding a questioning warrant, subject to limitations.[109] If the prescribed authority is satisfied that an adult subject has had reasonable opportunity to contact a lawyer, and no lawyer is present during questioning, they may prevent the subject from contacting a lawyer at all.[110] Further, if a subject is questioned in the presence of a lawyer (including one who has been appointed for them), they may be prevented from contacting an alternative lawyer.[111]

2.82 A prescribed authority may also direct that the subject be prevented from contacting a particular lawyer if the prescribed authority is satisfied, on the basis of circumstances relating to the lawyer, that, if the subject were permitted to contact them: either a person involved in an activity prejudicial to security may be alerted that the activity is being investigated; or a record or other thing that the subject has

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109 Schedule 1, Part 1, item 10, proposed section 34F. For example, subsection 34F(2) would prevent a subject from contacting a lawyer if they have already contacted a lawyer who is present during questioning, and the Prescribed Authority is satisfied that the subject has had reasonable opportunity to contact another lawyer.

110 Schedule 1, Part 1, item 10, proposed section 34F(3).

111 Explanatory memorandum, p. 82.

been or may be requested to produce, in accordance with the warrant, may be destroyed, damaged or altered.[112]

2.83 In addition, the bill proposes that a lawyer's role during questioning would be restricted. A lawyer would not be permitted to intervene in questioning, or address the prescribed authority, except to request clarification of an ambiguous question, or to request a break in questioning in order to provide legal advice to the subject.[113] Further, if the prescribed authority considers the lawyer's conduct to be unduly disrupting the questioning of the subject, they may direct that the lawyer be removed from the place where the questioning is occurring.[114] Where a child is being questioned, a minor's representative could likewise be removed for being unduly disruptive.[115]

2.84 In addition, the bill provides that regulations may be made that could prohibit or regulate access to certain information by lawyers acting for a person in connection with proceedings for a remedy relating to a questioning warrant or their treatment in connection with such a warrant.[116]

Preliminary international human rights legal advice

Right to a fair trial

2.85 In limiting the role of lawyers giving advice to the subjects of a questioning warrant, where a questioning warrant has been issued post-charge (or questioning takes place post-charge), this would appear to engage and limit the right to a fair trial, which provides that a person should be able to be represented by a lawyer of their choosing.[117] It also requires that lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.[118]

2.86 The statement of compatibility recognises that preventing a person subject to a questioning warrant from contacting a specific lawyer engages the right to a fair trial. It states that proposed subsection 34F(4), which limits the choice of lawyer,

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112 Schedule 1, Part 1, item 10, proposed subsection 34F(4).

113 Schedule 1, Part 1, item 10, proposed subsection 34FF(3).

114 Schedule 1, Part 1, item 10, proposed subsection 34FF(6).

115 Schedule 1, Part 1, item 10, proposed section 34FG.

116 Schedule 1, Part 1, item 10, proposed section 34FH.

117 UN Human Rights Committee, *General Comment No. 32 (2007) Article 14: Right to equality before courts and tribunals and right to fair trial*, [37].

118 UN Human Rights Committee, *General Comment No. 32 (2007) Article 14: Right to equality before courts and tribunals and right to fair trial,* [34]. See also UN, *Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990*.

seeks to achieve the legitimate objective of ensuring that 'a lawyer is not used to communicate information to others involved in the security matter that may result in detrimental outcomes for Australia’s security', and notes that a subject would be able to contact lawyer.[119] However, in order to constitute a permissible limitation on the right to a fair trial, any limitation must be shown to be directed towards a legitimate objective. That is, an objective which is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not clear that there is a pressing and substantial need for this proposed limitation on a person's choice of lawyer. In particular, the statement of compatibility does not note that lawyers are subject to strict ethical obligations,[120] and subject to the disciplinary capacity of the Law Society or Bar Association within their jurisdiction, which may impose limitations on a lawyer's practicing certificate or revoke their qualification to practice law. Further, it is unclear what safeguards would ensure that such a power would be used proportionately. The statement of compatibility states that a safeguard on this is that the person subject to the questioning warrant can contact another lawyer if their chosen lawyer is excluded.[121] However, it remains unclear on what information, and from what sources, a prescribed authority could become satisfied that a particular lawyer poses a risk. It is also not clear if a subject could appeal or otherwise challenge such a direction not to have a lawyer of their choosing present. Furthermore, it is not clear that the proposed limitation on a choice of lawyer is the least rights-restrictive mechanism by which to achieve the stated objective. For example, is it unclear why an express prohibition on a lawyer from communicating information associated with the warrant or the questioning would not be effective to achieve the same objective.

2.87 The prescribed authority may also prevent the subject of a warrant from contacting a lawyer where satisfied that an adult subject has already had reasonable opportunity to contact a lawyer, and may prevent a subject from contacting an alternative lawyer if a lawyer is already there (even if this is one who has been appointed for them).[122] The statement of compatibility states that this is necessary to ensure that the person does not frustrate the questioning process, and to ensure that questioning can occur in a timely manner. [123] However, the bill does not provide

119 Statement of compatibility, p. 11.

120 For example, lawyers admitted to practice in New South Wales are subject to the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW). This provides that a solicitor must avoid any compromise to their integrity and professional independence, and prohibits a solicitor from engaging in conduct which demonstrates that they are not a fit and proper person to practise law, or which would bring the profession into disrepute (sections 4-5).

121 Statement of compatibility, p. 11.

122 Explanatory memorandum, p. 82.

123 Statement of compatibility, p. 12.

that the prescribed authority may only make such a direction when not to do so would cause a delay that would frustrate the process. It is also unclear what safeguards would be in place to ensure that this did not constitute a disproportionate limitation on the right to a fair trial. For example, it is unclear whether a subject with limited English, or a developmental disability, would be provided with a lawyer even though they may have technically had a reasonable opportunity to contact one on being given notice of the warrant.

2.88 The bill also provides that the lawyer's role during the questioning process is restricted, with the lawyer only able to intervene or address the prescribed authority in order to request clarification of an ambiguous question or to request a break in order to provide advice to their client, and the prescribed authority can refuse to grant such requests.[124] As such, it would appear that the lawyer could not question the relevance of any line of questioning or the manner of the questioning, which could seriously impede their role in representing their client's best interests. The bill also provides that where the prescribed authority considers the lawyer's conduct 'is unduly disrupting the questioning of the subject', it may direct that the lawyer be removed.[125] The explanatory memorandum states that this may include instances where, for example, a lawyer repeatedly interrupts questioning in a way that prevents or hinders questions being asked or answered.[126] The statement of compatibility does not recognise that this may constitute a limitation on the right of a person to be adequately represented by a lawyer of their choosing, and therefore does not explain the objective of this measure or any relevant safeguards. The explanatory memorandum provides that these measures are designed to prevent questioning from being frustrated in high-risk and time sensitive circumstances, and notes that a subject could contact another lawyer where a lawyer was removed for being 'unduly disruptive'.[127] However, it is not clear whether this restriction on a lawyer's role during questioning would be a proportionate limitation on the right of a person to be adequately represented by a lawyer of their choosing. It is not clear why it is necessary to limit a lawyer's role to merely clarifying ambiguous questions and asking for breaks to advise their client. No information has been provided as to why the prescribed authority is given an unfettered discretion[128] to refuse to grant any request from the lawyer to clarify an ambiguous question or to allow for a break so the lawyer can advise their client. As there are no criteria set out in the bill as to when the prescribed authority can refuse such requests, it could be that a lawyer is not allowed to question anything or even break to advise their client, which would

124 Schedule 1, Part 1, item 10, proposed section 34FF(3)-(5).

125 Schedule 1, Part 1, item 10, proposed subsection 34FF(6).

126 Explanatory memorandum, pp. 90-91.

127 Explanatory memorandum, p. 90.

128 See Schedule 1, Part 1, item 10, proposed subsection 34FF(5).

seriously limit their role as legal representative. It is also unclear at what point a lawyer's conduct may be regarded as reaching the threshold of 'disruptive' of the questioning, and whether this could impede a lawyer from providing their client with legal advice or from fully representing their client's best interests. Further, it does not appear that lawyers advising vulnerable subjects (including children and persons with a cognitive or developmental disability) would be provided with greater scope to speak to their clients during an interview, or to otherwise intervene on their behalf. Rather, it would appear that a lawyer may be prevented from answering a question put to them by the subject during questioning.

2.89 Finally, as the bill enables regulations to be made that could restrict a lawyer's access to information for proceedings for a remedy relating to a warrant,[129] this would appear to limit the lawyer's ability to represent their client in making a complaint or seeking redress in relation to anything that occurred during the questioning process.

2.90 Further information is required in order to assess the compatibility of these proposed measures with the right to a fair trial, in particular:

- whether a subject with a vulnerability, such as limited English, or a cognitive or developmental disability, would be provided with additional opportunities to contact a lawyer even where they may have already had a reasonable opportunity to contact one on being given notice of the warrant;
- in what circumstances, and based on what factors, a prescribed authority may direct that a subject who already received legal assistance from one lawyer (including one appointed for them) may not contact a further lawyer;
- what information, and from what sources, could a prescribed authority use to become satisfied that a particular lawyer poses a risk and therefore cannot be chosen to represent the person;
- why is it necessary to restrict the lawyer's role during questioning to that of merely requesting if they can seek clarification of a question or request a break in order to advise their client;
- why the bill provides the prescribed authority with the unfettered power to refuse a lawyer's request to ask for clarification of an ambiguous question or for a break in order to advise their client;
- whether any additional safeguards would be implemented to ensure that where a subject is vulnerable (including in the case of children, persons with limited English skills, and persons with disabilities) a lawyer can provide them with a sufficient degree of advice;

129 Schedule 1, Part 1, item 10, proposed section 34FH.

- whether a subject can appeal or otherwise challenge any directions that limit their choice of lawyer, or limit the role their lawyer can play during the questioning;
- why is it necessary to enable regulations to be made restricting a lawyer's access to information or proceedings relating to a warrant, and if access is prohibited how will a person who wishes to seek a remedy in relation to the questioning warrant or their treatment during questioning be able to effectively seek legal advice.

Committee view

2.91 The committee notes that the bill seeks to restrict the capacity of a subject to contact a lawyer of their choice, and limit the role of a lawyer during the questioning process. The committee notes that, in circumstances where questioning is taking place post-charge, this may engage and limit the right to a fair trial. This aspect of the right to a fair trial may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.92 In order to assess the compatibility of this measure with the right to a fair trial, the committee seeks the minister's advice as to the matters set out at paragraph [2.90].

Secrecy and disclosure provisions

2.93 The bill provides that a subject who has been apprehended for questioning is not permitted to contact any person from the point of apprehension to the point of questioning, except in specified circumstances such as where they are contacting a lawyer in relation to the warrant.[130] Furthermore, were a person to disclose the fact that a questioning warrant had been issued, while the warrant was in force, this would be an offence punishable by five year's imprisonment.[131] It would also be an offence to disclose any operational information obtained pursuant to such a warrant for two years after the warrant ceases to be in force.[132]

130 Schedule 1, Part 1, item 10, proposed section 34CB. A person who has been apprehended would also be able to contact a minor's representative (where relevant), and any other person whom the warrant is permitted to contact. Proposed subsection 34CB(2) further provides that this section would have no impact with respect to oversight of the IGIS, Commonwealth Ombudsman, or the subject's capacity to make a complaint to the Australian Federal Police, or other police service.

131 Schedule 1, Part 1, item 10, proposed subsection 34GF(1).

132 Schedule 1, Part 1, item 10, proposed subsection 34GF(2).

Preliminary international human rights legal advice

Right to freedom of expression and rights of people with disabilities

2.94 These secrecy provisions, which limit the capacity of persons to communicate with others that they have been apprehended and questioned in relation to a warrant, or to discuss the fact that a warrant has been issued, engage and limit the right to freedom of expression. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, or through any other media of an individual's choice.[133] It may be permissibly limited for purposes including national security,[134] however any limitation must seek to achieve a legitimate objective, be rationally connected to that objective, and be proportionate.

2.95 The statement of compatibility recognises that the secrecy provisions engage the right to freedom of expression. It states that the secrecy provisions are necessary to ensure the effectiveness of intelligence gathering operations, and prevent the disclosure of information which could impact the integrity of the questioning process under the warrant and the effectiveness of long-running related investigations.[135] Protecting the integrity of the investigation process is likely to constitute a legitimate objective for the purposes of international human rights law, and limitations on communications would appear to be rationally connected to that objective. However, it is not clear that this would constitute a proportionate limitation on the right to freedom of expression. The statement of compatibility states that the bill includes a number of safeguards, including that the person can disclose information that would ordinarily be subject to secrecy laws if authorised to do so, and can disclose it to their lawyer, a court, the IGIS or Commonwealth Ombudsman for the purposes of seeking a remedy or making a complaint.[136] However, while it is important that such disclosures be able to occur, these are limited exceptions to a broad ranging prohibition. The offence provision would mean, for example, that an adult who was apprehended under a warrant and held for questioning over a number of days, would be unable to tell their partner once they returned home where they had been, or their employer as to why they had not attended work, unless they were given authority to do so. It is unclear when a person may be authorised to disclose information, as no guidance is provided in the bill as to when permission may be given. It is also unclear why it is necessary to prohibit any disclosure without any link to whether the disclosure could prejudice national security. It is also noted that the bill attaches strict liability to the circumstances in proposed paragraphs 34GF(1)(c) and (2)(c) where the unauthorised disclosure is

133 International Covenant on Civil and Political Rights, article 19(2).

134 International Covenant on Civil and Political Rights, article 19(3).

135 Statement of compatibility, p. 19.

136 Statement of compatibility, p. 19.

made by the subject of the warrant, or their lawyer. As the explanatory memorandum notes, this means 'there is no need to prove fault in relation to the fact that the information relates to the issuance or content of the warrant or is operational information'.[137] Given the penalty for breach of these offences is up to five years imprisonment, it is not clear why it is appropriate to remove any need to prove fault, noting also that there is no defence for innocent or innocuous disclosures.

2.96 Further, it is not clear that subjects who are particularly vulnerable would be able to seek assistance in relation to the issue of a warrant, or after the fact. While children will be able to disclose to their parents, guardian or sibling that they are the subject of a warrant, there does not appear to be any provision for persons with disabilities (including those who have impaired mental capacity) to be able to contact an advocate or other specialist representative in relation to the warrant. Nor, as set out above at paragraphs [2.44] to [2.47], is there any provision in the bill that would allow a person with disability to be questioned only in the presence of such an additional non-lawyer representative. Such a limitation on a person's ability to contact other persons in relation to the warrant, to seek their help, may constitute a disproportionate limitation on the rights of persons with disability to freedom of expression.[138]

2.97 Further information is required to assess the compatibility of this measure with the right to freedom of expression, including the rights of persons with disabilities, in particular:

- when a person may be authorised to disclose information, and why the bill does not provide guidance as to the likely circumstances when permission may be given;
- why it is necessary to prohibit any disclosure relating to a questioning warrant, without any link to whether the disclosure could prejudice national security;
- why is it necessary to apply strict liability to elements of the offence and why is there no defence for innocent or innocuous disclosures;
- why is there no exception for persons with disabilities to be able to disclose the fact of the warrant to their advocate or specialist representative, and whether this is compatible with the rights of persons with disabilities.

Committee view

2.98 The committee notes that the secrecy provisions associated with the proposed compulsory questioning regime engages and may limit the right to

137 Explanatory memorandum, p. 105.

138 See the Convention on the Rights of Persons with Disabilities.

freedom of expression. The committee notes that person's with disability may require additional capacity to disclose matters related to the issue of a warrant in order to seek assistance and advocacy, which may engage the rights of persons with disability.

2.99 In order to assess the compatibility of this measure with the right to freedom of expression, including the rights of persons with disability, the committee seeks the minister's advice as to the matters set out at paragraph [2.97].

ASIO internal authorisation for use of tracking devices

2.100 Schedule 2 of the bill seeks to amend ASIO's powers with respect to the use of tracking devices. The ASIO Act currently provides that surveillance devices may only be used pursuant to a warrant issued by the Attorney-General.[139] This bill would expand that power to provide that ASIO may instead obtain internal ASIO authorisation to use a tracking device[140] (or enhancement equipment)[141] to track[142] a person or object.[143]

2.101 An ASIO employee or ASIO affiliate may request that an authorising officer (being the Director-General or an SES-level ASIO worker)[144] authorise the use of a tracking device with respect to a particular person (the identity of whom does not need to be known), or an object or class of objects.[145] The authorising officer may provide such authorisation where they are satisfied that there are reasonable grounds for believing that: the use of a tracking device in relation to a person, (or on or in an object or an object of a particular class) will, or is likely to, substantially assist the collection of intelligence in respect of the security matter.[146] The authorisation

139 Part III, Division Two, Subdivision D of the *Australian Security Intelligence Organisation Act 1979*.

140 Tracking device is proposed to be amended to mean 'any device capable of being used (whether alone or in conjunction with any other device) to track a person or an object', see Schedule 2, item 5. 'Device' is proposed to be amended to mean that it includes 'instrument, apparatus, equipment and any other thing (whether tangible or intangible).

141 Section 22 of the *Australian Security Intelligence Organisation Act 1979* defines 'enhancement equipment' to mean 'equipment capable of enhancing a signal, image or other information obtained by the use of the surveillance device'.

142 To 'track' is proposed to be amended to mean to 'determine or monitor: the location of the person or object; or the status of the object', Schedule 2, item 4.

143 Schedule 2, item 8.

144 Schedule 2, item 1, proposed section 22.

145 Schedule 2, item 8, proposed section 26G.

146 Schedule 2, item 8, proposed subsection 26G(6).

may remain in place for a period which the authorising officer considers to be reasonable and necessary in the circumstances, but not more than 90 days.[147]

2.102 An internal authorisation may allow an ASIO employee or affiliate to: install, use or maintain one or more tracking devices, and 'enhanced equipment';[148] track a person (including putting tracking devices in or on any object used or worn, or likely to be used or worn, by the person); enter into or onto, or alter such an object; do anything reasonably necessary to conceal the fact that anything has been done in accordance with the authorisation; and/or do any other thing reasonably incidental to any of the other categories.[149] An authorisation issued in relation to an object or class of objects may authorise ASIO to do one or more of the same activities with respect to an object or class of objects.[150] Further, an authorisation also permits ASIO to recover a tracking device at any time while the authorisation is in force, or within 28 days of its ceasing to be in force.[151]

2.103 The bill provides that an internal authorisation may not authorise: something which would involve entering a premises without permission from the owner or occupier, or interference with the interior of a vehicle without the permission of the person in lawful possession of it; the remote installation of a tracking device or enhancement equipment; or the installation, use or maintenance of a tracking device, or enhancement equipment, to listen to, record, observe or monitor the words, sounds or signals communicated to or by a person; or the doing of anything by ASIO if, apart from section 26G, ASIO could not do the thing without being authorised by a warrant issued under section 25A.[152]

Preliminary international human rights legal advice

Right to privacy

2.104 The proposed expansion of ASIO's surveillance powers with respect to the use of tracking devices engages and limits the right to privacy. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[153] A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of

147 Schedule 2, item 8, proposed subsection26H(3).

148 Section 22 of the ASIO Act defines 'enhanced equipment' as equipment capable of enhancing a signal, image or other information obtained by the use of the surveillance device.

149 Schedule 2, item 8, proposed subsection 26J(1).

150 Schedule 2, item 8, proposed subsection 26J(2).

151 Schedule 2, item 8, proposed subsection 26L(1). Proposed section 26R provides that where recovering a tracking device would require entry into a premises or vehicle, the Director-General may request that the Attorney-General issue a warrant permitting this action.

152 Schedule 2, item 8, proposed section 26K.

153 International Covenant on Civil and Political Rights, article 17.

autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy also includes the right to personal autonomy and physical integrity.

2.105 The right to privacy may be permissibly limited where a limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate.

2.106 The statement of compatibility recognises that this measure engages the right to privacy. It states that the ability to track people is necessary to protect the Australian community and Australia's national security interests, and involves monitoring individuals who pose a risk to the Australian community.[154] The protection of the Australian community from threats to national security likely constitutes a legitimate objective for the purposes of human rights law. The use of tracking devices where there are reasonable grounds for believing that this will assist in the gathering of intelligence related to security matters may be rationally connected with this objective. However, it remains unclear whether the use of such devices, subject only to internal ASIO authorisation, would constitute a proportionate limitation on the right to privacy.

2.107 The statement of compatibility states that the limitations on the kinds of activities which maybe authorised internally serves as a safeguard, noting that more invasive activities can only be authorised by the Attorney-General.[155] However, the activities which can be authorised internally still involve substantial interference with an individual's privacy. In fact, it is not apparent that some activities which may be internally authorised (e.g. planting a tracking device on the outside of a car) limit a person's right to privacy any less that an activity which must be authorised by the Attorney-General (e.g. planting a tracking device *inside* a person's car). Both activities have the same implications with respect to the tracking of a person's movements, and therefore on the right to privacy. As noted above at paragraph [2.16], where a person's right to privacy is limited, such as here by the use of a tracking device, this should be subject to effective control, which should normally be assured by the judiciary.[156] It is not clear that enabling ASIO to authorise itself to conduct such surveillance provides effective control over the use of these surveillance powers.

2.108 The statement of compatibility further notes that in exercising this power, ASIO would be bound by guidelines which require that it uses its powers appropriately, in a manner which is proportionate to the gravity of the threat and the

154 Statement of compatibility, p. 17.

155 Statement of compatibility, p. 17.

156 *Klass and Others v Germany*, European Court of Human Rights, application no. 5029/71), (6 September 1978), [55].

probability of its occurrence.[157] However, it is not clear how these guidelines would operate in this specific context. The statement of compatibility also notes that the IGIS would have independent oversight of activities associated with the use of tracking devices,[158] and the Director-General would be required to maintain an electronic register of all internal authorisation requests,[159] and notify the Attorney-General where an internal authorisation has been made.[160] These may serve as safeguards to the extent that they provide oversight over the proposed internal authorisation of tracking devices, after the tracking device has been deployed. However, whether they would practically safeguard against disproportionate limitations on the right to privacy in individual cases, is not clear.

2.109 It is also unclear what kinds of tracking devices could be authorised internally. It is proposed that the term 'device' be amended to include any thing, whether tangible or intangible.[161] However, the statement of compatibility does not explain what kinds of things this new expanded definition would capture, referring only to 'modern technology'.[162] Yet the types of tracking devices which could be deployed in relation to a person, object, or class of objects may directly influence the level of interference with a person's privacy.

2.110 Further information is required in order to assess whether these measures constitute a proportionate limit on the right to privacy, in particular:

- whether enabling ASIO to authorise itself to conduct surveillance provides effective control over the use of these surveillance powers, and whether this is consistent with international human rights law;
- what types of tracking devices could be authorised, both internally or by the Attorney-General, pursuant to the proposed amended definitions of 'track', 'device', and 'tracking device', which are not currently captured by the existing definitions in the ASIO Act;
- how the ASIO Guidelines would operate in this context to require that ASIO uses its powers appropriately, in a manner which is proportionate to the gravity of the threat and the probability of its occurrence; and

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157 Statement of compatibility, pp. 17-18. These guidelines are the *Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence).*

158 Statement of compatibility, p. 18.

159 Schedule 2, item 8, proposed section 26Q.

160 Schedule 2, item 17, proposed section 34AAB.

161 Schedule 2, item 2.

162 Statement of compatibility, p. 6.

- whether the Attorney-General could direct that activities which have been authorised by internal authorisation related to a tracking device may not proceed.

Committee view

2.111 The committee notes that the bill would allow ASIO to provide internal authorisation for the deployment of tracking devices by ASIO. The committee notes that this measure engages and limits the right to privacy. The right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.112 The committee considers that this measure seeks to achieve the legitimate objective of protecting the Australian community from threats to national security.

2.113 In order to fully assess the compatibility of this measure with the right to privacy, the committee seeks the minister's advice as to the matters set out at paragraph [2.110].

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020[1]

Purpose	This bill seeks to amend the *Migration Act 1958* to: • enable the minister to determine that a thing is a prohibited thing in relation to immigration detention facilities and detainees (whether or not they are in an immigration detention facility); and • amend existing search and seizure powers, including to allow authorised officers and their assistants to search, without a warrant, immigration detention facilities for a 'prohibited thing', and to allow the minister to issue binding written directions that make it mandatory for officers to seize certain items
Portfolio	Home Affairs
Introduced	House of Representatives, 14 May 2020
Rights	Privacy; family; freedom of expression; security of the person; torture and other cruel, inhuman and degrading treatment or punishment; humane treatment in detention; children's rights
Status	Seeking additional information

Prohibiting items in immigration detention

2.114 This bill seeks to amend the *Migration Act 1958* (the Migration Act) to regulate the possession of certain items in relation to immigration detention facilities and detainees (whether or not they are in an immigration detention facility). Proposed section 251A(2) would enable the minister to determine, by legislative instrument,[2] that an item is a 'prohibited thing'[3] if the minister is satisfied that:

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, *Report 7 of 2020*; [2020] AUPJCHR 99.

2 Schedule 2, item 2, proposed subsection 251A(4) provides that such a legislative instrument would be subject to disallowance under section 42 of the *Legislation Act 2003*.

3 Schedule 1, item 2, proposed subsection 251A(1) provides that a thing is a prohibited thing in relation to a person in detention (whether or not the person is detained in an immigration detention facility), or in relation to an immigration detention facility, if: (a) both: (i) possession of the thing is unlawful because of a law of the Commonwealth, or a law of the State or Territory in which the person is detained, or in which the facility is located; and (ii) the thing is determined under paragraph (2)(a); or (b) the thing is determined under paragraph (2)(b).

(a) possession of the thing is prohibited by law in a place or places in Australia; or

(b) possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility.

2.115 The bill includes examples of things that might be considered to pose a risk for the purposes of section 251(2)(b): mobile phones, SIM cards, computers and other electronic devices designed to be capable of being connected to the internet. The bill also provides that the power to make a thing a 'prohibited thing' (which officers are then generally authorised to search for and seize) applies to immigration detention facilities as well as other places approved by the minister as an alternative place of detention.[4]

Preliminary international human rights legal advice

Rights to security of the person, privacy, protection of the family, and freedom of expression

2.116 Prohibiting the possession of certain things by detainees in immigration detention facilities and other places of detention, engages a number of human rights. The measure is designed to 'ensure that the Department can provide a safe and secure environment for staff, detainees and visitors in an immigration detention facility'.[5] As such, if the measure is able to achieve this objective it could promote the right to security of the person. The right to security of the person[6] requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation.

2.117 However, the measures also appear to engage and limit a number of other human rights, including the right to privacy, the right to protection of the family, and the right to freedom of expression.

2.118 The bill states that the items that will be declared as 'prohibited things' will be set out in a legislative instrument. However, both the bill itself and the explanatory memorandum give examples of things that might be 'prohibited things', as being mobile phones, SIM cards and computers or other devices capable of being connected to the internet.[7] The explanatory memorandum also states that 'things' to

4 Schedule 1, item 2, proposed subsection 251A(5). See also example 2 under proposed subsection 251A(1) which states that a mobile phone may, if determined under paragraph (2)(b), be a prohibited thing in relation to a person in detention even if the person is not detained in an immigration detention facility.

5 Explanatory memorandum, p. 2.

6 International Covenant on Civil and Political Rights, article 9(1).

7 Schedule 1, item 2, example listed under proposed subsection 251A(2).

be determined may include prescription and non-prescription medications as well as health care supplements, where the person in possession is not the person to whom they are prescribed.[8] Therefore, while the precise items to be prohibited remain to be determined by legislative instrument, by setting up the mechanism in which the minister may declare certain items to be prohibited, the bill engages and limits the right to privacy. In particular, prohibiting the possession of mobile phones may interfere with detainees' private life and their right to correspond with others without interference. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[9] A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

2.119 Additionally, for persons in detention, the degree of restriction on a person's right to privacy must be consistent with the standard of humane treatment of detained persons.[10] Article 10 of the International Covenant on Civil and Political Rights provides extra protection for persons in detention, who are particularly vulnerable as they have been deprived of their liberty, and imposes a positive duty on states to provide detainees with a minimum of services to satisfy basic needs, including means of communication and privacy.[11] Persons in detention have the right to correspond under necessary supervision with families and reputable friends on a regular basis.[12]

2.120 Further, as the bill and explanatory materials make it clear that the power to determine prohibited things will include mobile phones, SIM cards and computers and other devices capable of accessing the internet, it would appear the measure is likely to have an impact on the ability of detainees to be in regular contact with any family that is not detained with them. This may limit the right to respect for the family, which requires the state not to arbitrarily or unlawfully interfere in family life.[13] It would also appear to limit the right to freedom of expression insofar as it would limit the ability of detainees to seek, receive and impart information. The right to freedom of expression includes the freedom to seek, receive, and impart

8 Explanatory memorandum, p. 8.

9 International Covenant on Civil and Political Rights, article 17.

10 Under Article 10(1) of the ICCPR; see *Angel Estrella v Uruguay,* UN Human Rights Committee Communication No. 74/80, UN Doc.CCPR/C/18/D/74/1980 (1983), [9.2].

11 See UN Human Rights Committee, *General Comment No.21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992).

12 *Angel Estrella v Uruguay,* UN Human Rights Committee Communication No. 74/80, UN Doc.CCPR/C/18/D/74/1980 (1983), [9.2].

13 International Covenant on Civil and Political Rights, articles 17 and 23, and the International Covenant on Economic, Social and Cultural Rights, article 10.

information and ideas of all kinds, either orally, in writing or in print or through any other media of a person's choice.[14]

2.121 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.122 The statement of compatibility notes that the objective of the bill is to:

> strengthen the Department of Home Affairs' ability to regulate the possession of particular items in immigration detention facilities in order to ensure that the Department can provide for a safe and secure environment for people accommodated at, visiting or working at an immigration detention facility.[15]

2.123 The explanatory memorandum also explains that evidence indicates that:

> detainees are using mobile phones and other internet-capable devices to organise criminal activities inside and outside immigration detention facilities, to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats to other detainees and staff.[16]

2.124 Protecting the health, safety and security of people in immigration detention is likely to be a legitimate objective for the purposes of international human rights law. Prohibiting certain items that may enable criminal activity within the immigration detention network also appears to be rationally connected to that objective.

2.125 However, there are questions as to whether giving the minister the power to prohibit any thing that the minister is satisfied might be a risk to the health, safety or security of persons in the facility, or 'to the order of the facility', is proportionate to the objective sought to be achieved. To be a proportionate limitation on these rights, the limitation should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.

2.126 For immigration detention, supervision of detainees' modes of communication must be understood in the context that detainees are not being detained while serving a term of imprisonment but rather are in administrative detention pending the processing of their application for a visa or for removal from Australia. It is not clear why it is necessary to prohibit items in immigration detention for *all* detainees (whether in the facility or not). The explanatory memorandum notes that immigration detention facilities accommodate a number of higher risk detainees who have entered immigration detention directly from a correctional facility,

14 International Covenant on Civil and Political Rights, article 19(2).

15 Statement of compatibility, p. 35.

16 Explanatory memorandum, p. 2.

including members of outlaw motorcycle gangs and other organised crime groups.[17] However, the bill applies to all detainees regardless of whether or not they pose a risk. This appears to include, for example, persons detained while awaiting determination of their refugee status, or those who have overstayed their visa and are detained prior to removal, who may not pose any risk of the kind described in the statement of compatibility. Yet as the bill is currently drafted this measure would prohibit even those who pose no risk from having things such as mobile phones that allow them to communicate with family and friends.

2.127 Another relevant consideration in determining the proportionality of the broad rule-making power conferred on the minister is whether there are adequate safeguards or controls over the measures. International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[18] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights.

2.128 In particular, laws that interfere with rights must specify in detail the precise circumstances in which such interferences may be permitted.[19] As noted earlier, proposed section 251A(2) enables the minister to make a legislative instrument that can determine that any 'thing' is prohibited in an immigration detention facility or for a detainee. The power can be exercised where the minister is satisfied that possession of the thing is prohibited by law or possession or use of the thing in the detention facility 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.[20] The bill provides that if a medication or health care supplement is determined to be prohibited, it will not be prohibited in relation to a particular person if it was prescribed or supplied for their individual use.[21] There is otherwise no limit on the type of 'things' that the minister may prescribe as being prohibited; the bill does not directly prohibit any thing, and the actual things that are to be prohibited are left to be determined by delegated legislation. No information is provided in the statement of compatibility as to how, and under what circumstances, the minister may be satisfied that an item 'might' pose such a risk. In particular, it is not clear what 'things' could pose a risk to the 'order' of the facility, and what evidence the minister would need to have to satisfy themselves that a thing would reasonably result in any such risk.

17 Explanatory memorandum, p. 2.

18 *Hasan and Chaush v Bulgaria,* European Court of Human Rights App No.30985/96 (2000), [84].

19 UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,* (1988), [8].

20 Schedule 1, item 2, proposed section 251A.

21 Schedule 1, item 2, proposed subsection 251A(3).

2.129 If a determination is made prohibiting access to mobile phones and other electronic devices that connect to the internet, it is not clear that detainees would have sufficient access to maintaining contact with their family and friends, or to exercise their freedom of expression. The statement of compatibility states that a number of alternative communication avenues will remain available to detainees, including landline telephones, access to the internet, access to facsimile machines and postal facilities.[22] However, the statement of compatibility also sets out a number of factors that apply to detainees using such facilities:

- while landline phones are available 24 hours a day without monitoring, private interview rooms may not always be available after hours. In addition, the statement of compatibility states that additional landline telephones have been installed at 'most' immigration detention facilities, which implies that not all facilities have additional landlines; and
- internet is available, however, an officer monitors the room, filters may block specific websites and immigration officials will retrospectively search any websites that have been accessed by detainees, and the internet search history of detainees.[23] The statement of compatibility also states that there is a booking system to access the internet and there are 'usually' no delays in the process (implying that there sometimes are delays).[24]

2.130 It would seem that although telephone and internet use is made available to detainees, this may not provide a similar degree of privacy to the use of a personal mobile phone or device connected to the internet, which could be used in a private location. It has also not been established that it is necessary to monitor the internet usage of *all* detainees, regardless of the level of risk they pose. In addition, mobile telephones have a range of functions that are not available on a landline phone, such as taking photos and videos that may also be used to exercise a detainee's right to freedom of expression (including in relation to conditions of detention). Access to a mobile telephone may also allow detainees more ready access (including via text messages) to family and friends, legal advisors or other support persons, than alternative means of communication. It is also not clear that should a determination be made prohibiting these things that the amount of landlines and internet facilities available would be sufficient to meet demand, or what the cost is to use such facilities (noting that landline calls to mobiles and international calls may be cost prohibitive).

22 Statement of compatibility, p. 39.

23 The statement of compatibility states that the monitoring of internet usage by detainees currently only occurs on Christmas Island, but that the Department is in the process of replicating the monitoring in mainland facilities, see statement of compatibility, p. 40.

24 Statement of compatibility, pp. 39-40.

2.131 In addition, the explanatory memorandum states that when a detainee is being removed from Australia,[25] requests by detainees to access legal assistance during their removal 'will be facilitated until such time as it is no longer reasonably practicable to do so', which will depend on the particular operational requirements in the facility.[26] This suggests there may be circumstances in which access to landline phones or the internet may not be available at all times prior to a person's removal from Australia (which could potentially prevent a detainee from obtaining urgent injunctive relief in relation to their removal from Australia). This raises further questions as to the proportionality of the measure.

2.132 It is also noted that the bill would not only apply to persons who are in immigration detention facilities, but also to those in Alternative Places of Detention (APOD). The explanatory memorandum explains that 'an APOD is a place of immigration detention used by the Department to meet the specific needs of detainees that cannot be adequately catered for' in an immigration detention facility.[27] This includes immigration transit accommodation and places in the broader community (e.g. hotels and motels). It is not clear what alternative communication options are available to persons in such alternative places of detention, and how this is connected to the stated legitimate objective of ensuring safety in immigration detention facilities.

2.133 In order to assess the compatibility of this measure with the rights to privacy, protection of the family, and freedom of expression, further information is required, as to:

- whether the measure is sufficiently circumscribed; in particular why the prohibition on possessing 'prohibited things' applies to all detainees, regardless of whether possession of such a thing by that individual detainee poses any risk;
- noting that the bill does not itself prohibit any 'things', what things (other than those listed in the explanatory materials) are likely to be prohibited on the basis that they 'might' be a risk to the health, safety or security of persons in the facility or to the order of the facility, and what type of evidence the minister would need to have to satisfy themselves that a thing would reasonably result in any such risk;
- whether there are sufficient alternative means of communication available to detainees if mobile phones and devices which can access the internet are prohibited, in particular:

25 *Migration Act 1958,* section 198.

26 Explanatory memorandum, p. 8.

27 Explanatory memorandum, p. 10.

- whether there is a cost for detainees in using landline phones or internet facilities;
- if private rooms are not available for using landline phones, whether a detainee will have any other means of ensuring their communications are private;
- whether there will be sufficient access to landline phones and internet facilities if all mobile phones and internet devices are prohibited (noting the likely increased demand);
- why it is appropriate that the internet usage and search history of *all* detainees will be monitored when using the internet facilities in the detention centres;
- whether detainees will have other means to take photographs or videos within the detention facility and send such images to those outside the facility (noting the potential impact on the right to freedom of expression);
- whether there will be circumstances in which a person who is subject to removal action from Australia will not be able to contact legal assistance during this process if they are not able to have access to a mobile phone; and
- what communication facilities are available to those in Alternative Places of Detention.

Committee view

2.134 The committee notes that the bill seeks to enable the minister to make a determination that detainees are prohibited from having access to certain things, such as mobile phones and internet enabled devices in an immigration detention environment.

2.135 The committee notes that the measure is designed to ensure that the Department of Home Affairs can provide a safe and secure environment for staff, detainees and visitors in an immigration detention facility. As such, if the measure is able to achieve this objective, the committee considers it would likely promote the right to security of the person. However, the committee notes that the measure is also likely to engage and may limit the rights to privacy, protection of the family and freedom of expression. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.136 In order to assess the human rights compatibility of this measure, the committee seeks the minister's advice as to the matters set out at paragraph [2.133].

Search and seizure powers

2.137 The bill seeks to strengthen the search and seizure powers in the Migration Act to allow for searches, without a warrant, for a 'prohibited thing', as well as to continue to search for a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape.[28] This includes the ability to search a person, the person's clothing and any property under the immediate control of the person for a weapon or escape aid or 'prohibited thing' (even if the officer has no suspicion the detainee has such an item),[29] the ability to take and retain possession of such items if found pursuant to a search,[30] and the ability to conduct strip searches to search for such items.[31] There is also an amendment to the powers to search and screen persons entering the immigration detention facility (such as visitors), including a power to request persons visiting centres to remove outer clothing (such as a coat) if an officer suspects a person has a weapon or escape aid or a prohibited thing in his or her possession, and to leave the prohibited thing in a place specified by the officer while visiting the immigration detention facility.[32] The bill also proposes to allow for 'other persons' to assist authorised officers in carrying out their search of an immigration detention facility.[33] Such a person would have the most of the same powers as an authorised officer (including the power to strip search detainees), subject to any directions given by the authorised officer.[34]

2.138 The bill would also give the minister the power to make a legislative instrument (which would not be subject to disallowance by the Parliament), that directs authorised officers to seize such items from certain classes of persons, specified things, specified immigration detention facilities (or all facilities) and could specify any circumstances in which such a direction could apply.[35]

2.139 A further search power introduced by the bill is the power for an authorised officer, without a warrant, to conduct a search of an immigration detention facility including accommodation areas, common areas, detainees' personal effects, detainees' rooms, and storage areas.[36] In conducting such a search, an authorised

28 Section 252A of the *Migration Act 1958*.

29 Schedule 1, item 7, proposed subsections 252AA(1) and (1A).

30 Schedule 1, item 5, proposed subsections 252(4) and (4A).

31 Schedule 1, item 11, proposed subsection 252A(1).

32 Schedule 1, item 32, proposed paragraph 252G(4)(e).

33 Schedule 1, item 19, proposed section 252BB.

34 Schedule 1, item 19, proposed subsection 252BB(2).

35 Schedule 1, item 2, proposed subsection 251B(6).

36 Schedule 1, item 19, proposed section 252BA.

officer 'must not use force against a person or property, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search'.[37]

Preliminary international human rights legal advice

Prohibition against torture, cruel, inhuman and degrading treatment or punishment, and right to humane treatment in detention

2.140 By providing authorised officers, and their assistants, with the power to conduct strip searches to find out whether there is a 'prohibited thing' or weapon or escape device hidden on a detainee,[38] or to use force to search them,[39] the prohibition against torture, cruel, inhuman and degrading treatment or punishment may be engaged. Article 7 of the International Covenant on Civil and Political Rights provides that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[40] This is an absolute right, and no limitation on this right is permissible under international human rights law. The aim of article 7 is to protect both the dignity and the physical and mental integrity of the individual.[41]

2.141 The amended search and seizure powers may also engage the right to humane treatment of persons in detention,[42] which provides that all people deprived of their liberty must be treated with humanity and dignity. It applies to everyone in any form of state detention, including immigration detention, and to privately run detention centres where they are administered under the law and authority of the state. The right provides extra protection for persons in detention, who are particularly vulnerable as they have been deprived of their liberty. This right complements the prohibition on torture, cruel, inhuman and degrading treatment or punishment,[43] such that there is a positive obligation on Australia to take actions to prevent the inhumane treatment of detained persons.[44]

2.142 The UN Human Rights Committee has indicated that United Nations standards applicable to the treatment of persons deprived of their liberty are relevant to the interpretation of articles 7 and 10 of the International Covenant on

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37 Schedule 1, item 19, proposed subsection 252BA(7).

38 Schedule 1, items 11-14.

39 Schedule 1, item 19, proposed subsection 252BA(7).

40 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is also protected by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

41 UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (1992), [2].

42 International Covenant on Civil and Political Rights, article 10.

43 International Covenant on Civil and Political Rights, article 7.

44 UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992), [3].

Civil and Political Rights.[45] In this respect, the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) state that intrusive searches (including strip searches) should be undertaken only if absolutely necessary, that prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches, and that intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner.[46] Further, the European Court of Human Rights (ECHR) has found that strip searching of detainees may violate the prohibition on torture and cruel, inhuman or degrading treatment or punishment where it involves an element of suffering or humiliation going beyond what is inevitable for persons in detention.[47] While the court accepted that strip-searches may be necessary on occasion to ensure prison security or to prevent disorder or crime, the court emphasised that prisoners must be detained in conditions which are compatible with respect for their human dignity.[48] While the jurisprudence of the ECHR is not binding on Australia, the views of the court in relation to the prohibition on torture, cruel, inhuman or degrading treatment or punishment may be instructive in determining the scope of Australia's human rights obligations.

2.143 The statement of compatibility does not acknowledge whether the right to freedom from torture, cruel, inhuman and degrading treatment or punishment is engaged, but does acknowledge that the amendments to the search and seizure powers may engage the right to be treated humanely. However, it states that existing provisions and amendments in the bill contain protections designed to protect detainees and their property.[49] It notes that strip searches must first be authorised by a departmental official or the Australian Border Force Commissioner, or for a child 10 to 17 years old, by a magistrate. It also notes that the Migration Act[50] requires that a strip search of a detainee:

> (a) must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search;
>
> (b) must be conducted in a private area;
>
> (c) must not be conducted on a detainee who is under 10;

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45 UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992), [10].

46 Rule 52(1) of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules*).

47 *Frerot v France,* European Court of Human Rights Application No.70204/01, 12 June 2007, [35]-[49].

48 *Frerot v France,* European Court of Human Rights Application No.70204/01, 12 June 2007, [35]-[49].

49 Statement of compatibility, p. 41.

50 *Migration Act 1958*, subsection 252B(1).

(d) must not involve a search of the detainee's body cavities;

(e) must not be conducted with greater force than is reasonably necessary to conduct the strip search.

2.144 It also notes that the bill introduces a requirement that an authorised officer who conducts a search must not use more force against a person, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search. As such, the statement of compatibility states that the amendments are consistent with the right to humane treatment in detention as there are sufficient protections provided by law to ensure that respect for detainees' inherent dignity is maintained during the conduct of searches.[51]

2.145 The safeguards set out in the statement of compatibility and contained in section 252A of the Migration Act indicate that there is some oversight over the conduct of strip searches. However, it is noted that the current power to conduct strip searches is limited to circumstances where there are reasonable grounds to suspect a detainee may have hidden in his or her clothing a weapon or other thing capable of being used to inflict bodily injury or to help the detainee escape from detention.[52] The amendments will extend this power to where an officer suspects on reasonable grounds that a person may have hidden on the person a 'prohibited thing', including a mobile telephone.[53] Given the broad power of the minister to declare an item a 'prohibited thing' (as discussed above), this considerably expands the bases on which strip searches can be conducted, which raises questions as to whether the expanded powers to conduct strip searches are consistent with the requirement under international human rights law that strip searches only be conducted when absolutely necessary.

2.146 In relation to the power of authorised officers to use force to conduct searches of immigration detention facilities, while the power limits the use of force to no more force than is reasonably necessary in order to conduct the search, no information is provided in the statement of compatibility as to whether there is any oversight over the exercise of that power, such as consideration of any particular vulnerabilities of the detainee who is subjected to the use of force, and any access to review to challenge the use of force.

2.147 There is also no information in the statement of compatibility as to what training a person who conducts a strip search, or search involving the use of force,

51 Statement of compatibility, p. 41.

52 *Migration Act,* subsection 252A(1).

53 Schedule 1, item 14.

must have in the use of such powers.[54] An 'authorised officer' is defined in the Migration Act to mean an officer authorised in writing by the minister, the secretary of the department or the Australian Border Force Commissioner.[55] There does not appear to be any legislative requirement that such officers be trained in the use of force or how to conduct strip searches. Further, the extension of authorised officers' powers to an assistant[56] raises concerns as to whether there are adequate safeguards. Proposed subsection 252BB(2) sets out the powers that an authorised officer's assistant would have in relation to a search of an immigration facility, to enter and to exercise most of the same functions and duties as are conferred on the authorised officer, including the power under section 252A to conduct strip searches. However, no information is provided in the explanatory materials about who the authorised officers' assistants will be, or what training or qualifications they will be required to have.

2.148 In order to assess whether the proposed amendments to the search and seizure powers are compatible with the prohibition on torture, cruel, inhuman and degrading treatment or punishment and the right to humane treatment in detention, further information is required; in particular:

- whether strip searches to seize 'prohibited items' are only conducted when absolutely necessary;
- whether there exists any monitoring and oversight over the use of force by authorised officers and their assistants, including access to review for detainees to challenge the use of force and the strip search powers;
- why coercive search powers are granted to authorised officers' 'assistants'; and
- what training and qualifications, if any, will 'authorised officers' and their 'assistants' require in order to exercise these powers.

Rights to security of the person, privacy and bodily integrity, and children's rights

2.149 The statement of compatibility states that enabling the search and seizure of items that are prohibited in immigration detention facilities will improve the health and safety of detainees and others in the facility.[57] As such, if the measure is able to achieve this objective it could promote the right to security of the person. The right

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54 The statement of compatibility states that authorised officers 'will be provided with training and guidance in relation to the exercise of their new seizure powers', but does not provide any explanation of any training required for the use of search powers, see statement of compatibility, p. 35.

55 *Migration Act 1958*, section 5.

56 Schedule 1, item 19, proposed section 252BB.

57 Statement of compatibility, p. 38.

to security of the person[58] requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation.

2.150 However, the screening of detainees,[59] conducting strip searches of detainees,[60] and searches of immigration detention facilities[61] also engage and limits the right to privacy. For persons in detention, the degree of restriction on a person's right to privacy must be consistent with the standard of humane treatment of detained persons.[62]

2.151 The right to privacy extends to protecting a person's bodily integrity. Bodily searches, and in particular strip searches, are an invasive procedure and may violate a person's legitimate expectation of privacy. The amendments to allow searches of persons, including strip searches, to seize prohibited items therefore engage and limit the right to bodily integrity. The UN Human Rights Committee has emphasised that personal and body searches must be accompanied by effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched, and further that persons subject to body searches should only be examined by persons of the same sex.[63]

2.152 While the Migration Act prohibits strip searches of children under the age of 10,[64] children detained in immigration facilities between the ages of 10 and 18 may be subject to the search and seizure powers, including strip searches, under specified conditions.[65] In this respect, a number of Australia's obligations under the Convention on the Rights of the Child (CRC) are engaged. In particular, the amended search and seizure powers may engage article 16 of the CRC, which provides that no child shall be subject to arbitrary or unlawful interference with his or her privacy. The bill may also engage article 37 of the CRC which provides (relevantly) that children must not be subjected to torture or other cruel, inhuman or degrading treatment or

58 International Covenant on Civil and Political Rights, article 9(1).

59 Schedule 1, item 8.

60 Schedule 1, items 11-14.

61 Schedule 1, item 19, proposed section 252BA.

62 Under Article 10(1) of the International Covenant on Civil and Political Rights; see *Angel Estrella v Uruguay,* UN Human Rights Committee Communication No. 74/80, UN Doc.CCPR/C/18/D/74/1980 (1983), [9.2].

63 UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,* (1988), [8].

64 *Migration Act 1958*, paragraph 252B(1)(f).

65 For example, for a detainee who is at least 10 but under 18, only a magistrate may order a strip search: subparagraph 252A(3)(c)(ii).

punishment,[66] and that every child deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.[67]

2.153 The right to privacy (including the right to bodily integrity) and many of the rights of the child may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[68]

2.154 The statement of compatibility does not specifically acknowledge that the rights of the child in particular are engaged or limited by the bill. It does acknowledge that the new search and seizure powers engage and 'represent a limitation on the right to detainees' privacy'.[69] In this respect, the statement of compatibility notes that the objective of the bill is to 'provide for a safe and secure environment for people accommodated at, visiting or working at an immigration detention facility'. The statement of compatibility explains that immigration detention facilities now accommodate 'an increasing number of higher risk detainees' awaiting removal, who have often 'entered immigration detention directly from a correctional facility, including members of outlaw motorcycle gangs and other organised crime groups'.[70] As such, the statement of compatibility states that the limitation on the right to privacy is proportionate as it is 'commensurate to the risk that currently exists in immigration detention facilities'.[71]

2.155 Protecting the health, safety and security of people in immigration detention is likely to be a legitimate objective for the purposes of human rights law, and it may be that broadening the search and seizure powers may be effective to achieve (that is, rationally connected) to that objective. However, the measure must also be demonstrated to be proportionate to the objective sought to be achieved, and this requires that it be the least rights restrictive way to achieve the stated objective and that there be sufficient safeguards in place to protect vulnerable people.

2.156 As set out at paragraph [2.126], it is not clear why it is necessary to prohibit items in immigration detention, and search for and seize such items, from *all* detainees (whether in the facility or not), regardless of the level of risk they may pose. The level of risk posed by persons detained due to the exercise of the minister's character-ground visa cancellation powers is likely to be very different to that posed by people seeking to be recognised as refugees or a tourist having overstayed their visa. The statement of compatibility does not explain why it is

66 Convention on the Rights of the Child, article 37(a).

67 Convention on the Rights of the Child, article 37(c).

68 However, the prohibition of torture (enshrined in Article 37(a) of the Convention on the Rights of the Child) is an absolute right, which cannot be derogated from, or limited, for any reason.

69 Statement of compatibility, p. 37.

70 Statement of compatibility, p. 36.

71 Statement of compatibility, p. 37.

necessary to enable authorised officers to search all detainees without a warrant (including strip-searches and searches of a detainee's room and personal effects), for 'prohibited things' such as mobile phones.

2.157 In relation to the power to strip search to locate and seize a 'prohibited thing', no information is provided in the statement of compatibility as to whether consideration has been given to alternative and less-intrusive methods of searching for prohibited items prior to conducting a strip search. For example, in relation to mobile telephones, it is unclear why it would be necessary to undertake a strip search when alternative and less intrusive screening methods, such as a walk-through metal detector, may adequately identify if a mobile phone is in a person's possession. It would appear that a strip search is not necessarily a method of last resort, as proposed subsection 251B(5) provides that strip searches may be conducted irrespective of whether a search or screening procedure is conducted under sections 252 and 252AA[72] (which are less intrusive). This raises concerns as to whether this aspect of the bill is the least rights restrictive option available.

2.158 It is also noted that while there are limitations placed on the power to conduct strip searches (such as a requirement that an officer must suspect 'on reasonable grounds' that a person may have items hidden on them, and it is necessary to conduct a strip search to recover the item[73]), the bases on which an officer may form a suspicion on reasonable grounds are broad. In particular, one of the bases on which an officer may form a suspicion on reasonable grounds is based on 'any other information that is available to the officer'.[74] The statement of compatibility does not explain what 'any other information' may entail.

2.159 In light of the broad nature of the power to prohibit, search for and seize 'prohibited things' that is introduced by the bill, and the obligation under international human rights law that limitations on privacy are appropriately circumscribed, there are concerns as to whether this aspect of the bill is a proportionate limitation on the right to privacy (including the right to bodily integrity), and is compatible with the rights of the child.

2.160 In addition, the bill would enable authorised officers and their assistants to conduct searches without the need for any suspicion that a detainee has in their possession any such item.[75] This could enable searches to occur at any time, regardless of any assessment of whether a detainee has such a thing on their body,

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72 *Migration Act 1958,* sections 252 (searches of detainees) and 252AA (screening of detainees).

73 *Migration Act 1958*, paragraphs 252A(3)(a) and (b), as amended by Schedule 1, item 14.

74 *Migration Act 1958*, paragraph 252A(3A)(c). The other grounds upon which suspicion on reasonable grounds may be formed are based on a search conducted under section 252 or a screening procedure conducted under section 252AA: section 252A(3A)(a) and (b).

75 Schedule 1, item 4, proposed subsection 252(2). Reasonable suspicion is needed for strip searches.

in their clothing or in their property. While the ability to search for 'prohibited things' does not apply to detainees who are living in residential detention,[76] the search and seizure powers would allow an authorised officer to search such residences, without any need for suspicion, to try to find evidence of any 'document or other thing' that may be evidence for grounds for cancelling the person's visa.[77] It is not clear why it is necessary and appropriate that such warrantless powers should apply, including to those living in residential detention, without any need for the officer to have formed a reasonable suspicion that the persons possess such items.

2.161 In order to assess whether the proposed amendments to the search and seizure powers are compatible with the right to privacy and the rights of the child, further information is required, in particular:

- why the search and seizure powers in the bill apply to all detainees regardless of the level of risk they pose, and whether in practice all detainees (regardless of risk) will be searched for 'prohibited items';
- why the search powers enable authorised officers to search a detainee without any requirement that the officer suspects the detainee possesses a relevant thing;
- whether the power to conduct a strip search is appropriately circumscribed; and
- whether the amended search and seizure powers (in particular the power to strip search) are compatible with the rights of the child, in particular articles 16 and 37 of the Convention on the Rights of the Child.

Committee view

2.162 The committee notes that the bill seeks to amend the existing search and seizure powers in the *Migration Act 1958*, including to allow authorised officers and their assistants to strip search, without a warrant, immigration detainees and to search for 'prohibited things' (such as mobile phones).

2.163 The committee notes that the measure is designed to ensure that the Department of Home Affairs can provide a safe and secure environment for staff, detainees and visitors in an immigration detention facility'. As such, if the measure is able to achieve this objective the committee considers it would likely promote the right to security of the person.

2.164 However, the committee notes that the measure may engage the prohibition on torture, cruel, inhuman and degrading treatment or punishment and the right to humane treatment in detention. It may engage and limit the rights to

76 *Migration Act 1958*, subsection 252(4B).

77 Schedule 1, item 5, proposed subsection 252(4).

privacy and the rights of the child, and these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.165 In order to assess the human rights compatibility of this measure, the committee seeks the minister's advice as to the matters set out at paragraphs [2.148] and [2.161].

Concluded matters

2.166 The committee has concluded its examination of this matter on the basis of the response received.

2.167 Correspondence relating to this matter is available on the committee's website.[1]

Telecommunications Legislation Amendment (International Production Orders) Bill 2020[2]

Purpose	The bill seeks to amend the *Telecommunications (Interception and Access) Act 1979* to establish a new framework for international production orders to provide Australian agencies access to overseas communications data for law enforcement and national security purposes
Portfolio	Home Affairs
Introduced	House of Representatives, 5 March 2020
Rights	Privacy; effective remedy; life; and prohibition against torture, cruel, inhuman or degrading treatment or punishment
Status	Concluded examination

2.168 The committee requested a response from the minister in relation to the bill in *Report 4 of 2020*.[3]

International Production Orders to access personal telecommunications data

2.169 The bill seeks to provide the legislative framework for Australia to give effect to future bilateral and multilateral agreements for cross-border access to electronic information and communications data.[4] To do so, the bill seeks to introduce International Production Orders (IPOs). Such orders would allow Commonwealth, state and territory law enforcement and national security agencies to acquire data

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Telecommunications Legislation Amendment (International Production Orders) Bill 2020, *Report 7 of 2020*; [2020] AUPJCHR 100.

3 Parliamentary Joint Committee on Human Rights, *Report 4 of 2020* (9 April 2020), pp. 9-26.

4 Explanatory memorandum, p. 1.

held in a foreign country by a designated communications provider, and to allow foreign governments to access private communications data.[5]

2.170 Proposed new Schedule 1 to the *Telecommunications (Interception and Access) Act 1979* (Interception Act) sets out the scheme, and proposes the introduction of three new types of IPOs, relating to:

- the interception of telecommunications data for up to 90 days;
- accessing stored communications and telecommunication data (for example, stored messages, voice mails, video calls); and
- telecommunications data (being information about the communication, but not including the substance of the communication).

2.171 IPOs can be issued for three different purposes:

- to enforce a number of serious offences or offences punishable by imprisonment of at least seven years (for intercepted material) or three years (for stored communications data and telecommunications data);[6]
- in connection with the monitoring of a person subject to a control order;[7] and
- in connection with the carrying out of the Australian Security and Intelligence Organisation's (ASIO) functions.[8]

2.172 IPOs to enforce the criminal law or monitor a person subject to a control order can be issued by a judge (or in some cases a magistrate) or a nominated member of the AAT. IPOs that relate to the carrying out of ASIO's functions can be issued by a nominated AAT Security Division member.

2.173 It would appear that once an IPO is granted, foreign communications providers, subject to there being an agreement between Australia and that country, would then be able to provide Australian law enforcement agencies and ASIO with access to private communications data.[9]

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5 Statement of compatibility, [3] and [8].

6 See Schedule 1, item 43, proposed new Schedule 1, Part 2.

7 See Schedule 1, item 43, proposed new Schedule 1, Part 3.

8 See Schedule 1, item 43, proposed new Schedule 1, Part 4.

9 Statement of compatibility, [8].

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.174 The interception and disclosure of personal telecommunications data which reveals a person's conversations and messages engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[10] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.175 The initial analysis found that the objectives of the bill, to protect national security, public safety, address crime and terrorism and protect the rights and freedoms of individuals by providing law enforcement and national security agencies with the tools they need to keep Australia safe, would appear to constitute legitimate objectives for the purposes of international human rights law, and the measures appears to be rationally connected to this objective.

2.176 The question was whether the measures in the bill are proportionate to achieving the stated objective, in particular whether the measures are sufficiently circumscribed and whether there are sufficient safeguards in place.

2.177 The initial analysis considered that in order to fully assess the proportionality of this proposed measure, in particular the adequacy of the safeguards that apply, further information was required as to:

- why the bill does not include provision for Public Interest Monitors to apply nationwide (rather than only in Victoria and Queensland) and why the Monitors have no role in an application for an IPO to access stored telecommunications data;
- whether the interference with the right to privacy is greater for the interception of communications than accessing stored communications data, and if so, why;
- why the power to issue an IPO is conferred on a member of the AAT, of any level and with a minimum of five years' experience as an enrolled legal

10 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been processed contrary to legal provisions, every person should be able to request rectification or elimination. UN Human Rights Committee, *General Comment No. 16: Article 17* (1988), [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011), [18].

practitioner, and whether this is consistent with the international human rights law requirement that judicial authorities issue surveillance warrants;

- why does the bill not require, in all instances, that before issuing an IPO the decision-maker turn their mind to considering whether doing so would be likely to have the least interference with a person's privacy;
- why the bill does not require, in all instances, that IPOs may only be issued where to do so will be likely to 'substantially' assist an investigation (rather than simply being 'likely to assist');
- how the timeframe for the duration of an interception IPO was chosen and why interception IPOs issued in connection with carrying out ASIO's functions are twice as long as those to investigate serious offences;
- why there is no provision in the bill to ensure that if the circumstances that led to the issuing of the IPO have changed, such that the IPO is no longer warranted, that the IPO ceases to have effect;
- why are existing powers to investigate serious crimes insufficient to achieve the objectives of the measure, such that a separate power to issue an IPO in relation to control orders is considered necessary;
- why do the control order IPOs not require the judge or AAT member to consider the gravity of the conduct being investigated;
- what does conduct that is 'prejudicial to security' mean, and is this sufficiently certain to allow people to know what conduct it covers;
- why can an IPO to access telecommunications data be granted if it would be in connection with the performance of ASIO's functions, without any other requirement that there is any alleged prejudice to national security;
- why does the bill not provide that an AAT member when determining whether to issue an IPO must consider how much the privacy of any person would be likely to be interfered with by issuing the order, or the gravity of the conduct being investigated; and
- whether all of the exceptions to the prohibition on the use, recording or disclosure of protected information obtained pursuant to an IPO are appropriate. It would be useful if a justification were provided in relation to each of the exceptions in proposed sections 153-159 and how these are compatible with the right to privacy.

Right to an effective remedy

2.178 If IPOs are issued inappropriately they may violate a person's right to privacy. The right to an effective remedy requires states parties to ensure access to an

effective remedy for violations of human rights.[11] This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[12]

2.179 The initial analysis considered that in order to assess whether any person whose right to privacy might be violated by the issuance of an IPO would have access to an effective remedy, further information was required as to:

- whether a person who was the subject of an IPO will be made aware of that after the investigation has been completed; and
- if not, how such a person would effectively access a remedy for any violation of their right to privacy.

2.180 The full initial legal analysis is set out in *Report 4 of 2020*.

Committee's initial view

2.181 The committee noted that the measure engages and limits the right to privacy. In order to fully assess whether the measure is proportionate to the important objective of protecting national security and public safety, and addressing crime and terrorism, the committee sought the minister's advice as to the matters set out at paragraph [2.177].

2.182 The committee also noted that the measure engages the right to an effective remedy. In order to fully assess whether the right to an effective remedy is available, the committee sought the minister’s advice as to the matters set out at paragraph [2.179].

Minister's response[13]

2.183 The minister advised:

> *Right to privacy*
>
> *1. why the bill does not include provision for Public Interest Monitors to apply nationwide (rather than only in Victoria and Queensland) and why the Monitors have no role in an application for an IPO to access stored telecommunications data;*

11 International Covenant on Civil and Political Rights, article 2(3).

12 See, UN Human Rights Committee, General Comment 29: States of Emergency (Article 4), (2001), [14].

13 The minister's response to the committee's inquiries was received on 21 May 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

In accordance with the current approach to domestic interception warrants under the *Telecommunications (Interception and Access) Act 1979* (TIA Act), the Bill aligns international production orders for interception to ensure that, where Public Interest Monitors are available in relation to domestic interception warrants, they will also be available for interception international production orders.

At present, the Public Interest Monitors only exist within Victoria and Queensland. Other Australian states and territories have not legislated for this office within their jurisdictions. Consequently, the Bill reflects this and only provides for the Public Interest Monitors in Victoria and Queensland. These authorities were established in Victoria under the *Public Interest Monitor Act 2011* (Vic), and various pieces of legislation in Queensland, including the *Police Powers and Responsibilities Act 2000* (Qld) and the *Crime and Corruption Act 2001* (Qld).

Currently, the Victorian and Queensland Public Interest Monitors perform an oversight role over their jurisdiction's law enforcement agencies including when applying for certain types of warrants, such as interception warrants. Consistent with these laws, the Bill intentionally gives the ability to facilitate the role of the Public Interest Monitors for international production orders relating to interception.

2. *whether the interference with the right to privacy is greater for the interception of communications than accessing stored communications data, and if so, why;*

The thresholds in the Bill reflect the current thresholds for the use of similar powers under the TIA Act. The creation of a 'stored communications' framework, governing access to email, SMS, voicemail, and other stored communications held by carriers, was a recommendation of the 2005 *Review of the Regulation of Access to Communications.* This Review considered stored communications were distinct from those communications intercepted live because written communications provided an opportunity for 'second thoughts' and the potential avoidance of self-incrimination which was not possible during spontaneous communication like calls. The ability to think twice meant that access to stored communications was less privacy intrusive and could therefore occur at a lower offence threshold than telecommunications interception. (Anthony Blunn, *Review of the Regulation of Access to Communications* (2005) paras 1.4.2-1.4.3).

The terms of reference for the Comprehensive Review of the Legal Framework of the National Intelligence Community (the Comprehensive Review) included reviewing legislation containing agency investigative powers, such as the *Surveillance Devices Act 2004* and the TIA Act. The Government will consider the findings of the Comprehensive Review.

3. *why the power to issue an IPO is conferred on a member of the AAT, of any level and with a minimum of five years' experience as an enrolled legal practitioner, and whether this is consistent with the*

international human rights law requirement that judicial authorities issue surveillance warrants;

The Bill provides for a range of independent decision-makers to authorise interception activities, and access to stored communications and telecommunications data. A comparison table for the Committee's convenience breaking down which decision-makers can authorise different types of international production orders and the current TIA Act warrants and authorisations is at Annexure A.

The role of nominated Administrative Appeals Tribunal (AAT) members is critical as independent decision makers in authorising investigatory powers under the TIA Act. This is alongside judges (and magistrates in certain instances).

For example, nominated AAT members have played a role in approving interception warrants under the TIA Act since 1998. The role of nominated AAT members as independent issuing authorities also exists in other legislation, such as the *Surveillance Devices Act 2004.*

For national security international production orders, the involvement of the Attorney-General reflects the current issuing process for domestic national security orders for interception and access to stored communications, which also require ministerial authorisation.

While it is important to ensure that there is a lawful and independent decision-maker in investigatory powers legislation, there is no requirement under international human rights law for Australia to ensure specifically that it is a judicial authority that authorises investigatory powers. This position is reflected in other legislation including the *Surveillance Devices Act 2004* and the TIA Act.

4. *why does the bill not require, in all instances, that before issuing an IPO the decision maker turn their mind to considering whether doing so would be likely to have the least interference with a person's privacy;*

The privacy considerations that must be taken into account are tailored to the international production order being sought. When considering an application for an interception international production order in relation to a control order under Part 3 of Schedule 1 to the Bill, the decision maker must consider whether interception would be the method that is likely to have the least interference with any person's privacy. This additional protection is considered appropriate because control order international production orders have a protective or preventative purpose by facilitating monitoring of the person's compliance with the requirements of the control order, and the person is not necessarily suspected of involvement in further criminal activity since the control order was imposed.

While this requirement does not apply to international production orders for law enforcement and national security, authorities considering applications for those orders will be required to have regard to privacy

impacts in deciding whether to issue those orders. For example, for international production orders under Part 2 of the proposed Schedule, before issuing an international production order for law enforcement, the decision maker must consider, among other things:

- how much the privacy of any person or persons would be likely to be interfered with by intercepting communications;
- the gravity of the alleged conduct;
- to what extent methods of investigating the [serious offences] that do not involve intercepting communications have been used by, or are available to, the interception agency;
- how much the use of such methods would be likely to assist in connection with the investigation by the interception agency of the [serious offences]; and
- how much the use of such methods would be likely to prejudice the investigation, whether because of delay or for any other reason.

The decision maker for an international production order for national security must consider, among other things:

- to what extent methods of obtaining intelligence relating to security that are less intrusive have been used by, or are available to the Australian Security Intelligence Organisation (ASIO);
- how much the use of such methods would be likely to assist ASIO in obtaining intelligence relating to security; and
- how much the use of such methods would be likely to prejudice ASIO in carrying out its function of obtaining intelligence relating to security.

Taken in totality, these considerations ensure that the decision maker conducts a thorough assessment of the privacy impacts of the order, and that actions taken under the international production, including the necessary interference with a person's privacy, are proportionate to the relevant conduct.

In addition, ASIO is subject to separate requirements for conducting its activities, including under *'Ministerial Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluation and communicating intelligence relevant to security (including politically motivated violence)'*, issued under section 8A of the Australian Security and Intelligence Organisation Act 1979.

The Guidelines provide that information to be obtained by ASIO is to be done in a lawful, timely and efficient way and in accordance with the following:

- any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence;

- inquiries and investigations into individuals and groups should be undertaken using as little intrusion into individual privacy as is possible, consistent with the performance of ASIO's functions; and
- wherever possible, the least intrusive techniques of information collection should be used before more intrusive techniques.

B-Party considerations for interception international production orders

B-Party interception assists law enforcement agencies and ASIO to counter measures adopted by persons of interest to evade electronic surveillance, such as adopting multiple telecommunications services. The ability, as a last resort, to target the communications of an associate of a person of interest will ensure that the utility of interception is not undermined by evasive techniques adopted by persons of interest.

B-Party interception may only be authorised for a period of 45 days, a shorter period than applicable to non B-Party interception (90 days), acknowledging this type of interception inherently involves greater privacy intrusion.

Additionally, the decision-maker is further restricted from issuing a B-Party interception international production order unless they are satisfied the agency has exhausted all other practicable methods of identifying the services that is being used by the person alleged to be committing the serious crimes.

In the case of national security international production orders, the nominated AAT Security Division member must consider whether other, less intrusive means of obtaining intelligence relating to security are available, or have been used, which must be weighed against its effectiveness and potential to prejudice ASIO in carrying out its functions.

5. *why the bill does not require, in all instances, that IPOs may only be issued where to do so will be likely to 'substantially' assist an investigation (rather than simply being 'likely to assist');*

The thresholds adopted for the Bill broadly mirror existing domestic warrant thresholds.

The decision to use the terminology *'likely to assist'* as opposed to *'substantially assist'* was made to provide Australia's national security and law enforcement agencies with the operational flexibility they need to carry out their functions in order to investigate, detect and prevent serious crimes, and threats to national security including terrorism. For example, telecommunications data, such as account details and IP addresses, are often collected during the early stages of an investigation. When seeking an order, agencies need to demonstrate that this information is likely to assist the investigation, for example by determining a link between an account and the suspected criminal activity or offender and thereby identifying further lines of inquiry. As well as this, it would be reasonably appropriate for the requesting agency to establish that the disclosure of the relevant information would be likely to assist in connection with the

investigation. However, particularly during the early stages of an investigation, it would be extremely difficult for agencies to demonstrate in advance of reviewing the information that the information would 'substantially assist' the investigation.

Control order international production orders have a higher threshold of 'substantially assist'. As noted in the response to question 4, the Government considers it appropriate for additional protections in relation to control order international production orders. This is because these orders have a protective or preventative purpose. The use of 'substantially assist' also reflects the threshold for domestic interception warrants in relation to control orders under the TIA Act, and the grounds for issuing a control order under Division 104 of the *Criminal Code Act 1995.* These include, amongst other grounds, that the control order would' substantially assist' in preventing a terrorist act or provision of support for or facilitation of a terrorist act.

6. *how the timeframe for the duration of an interception IPO was chosen and why interception IPOs issued in connection with carrying out ASIO's functions are twice as long as those to investigate serious offences;*

The maximum duration for interception international production orders aligns with the requirements of the TIA Act. Under section 9B(3A) of the TIA Act, ASIO interception warrants must not exceed 6 months (or 3 months in the case of B-party warrants). Under section 49(3) of the TIA Act, law enforcement interception warrants must not exceed 90 days (or 45 days for B-party warrants). In cases where interception is required, longer timeframes are necessary to support operational requirements. As these operations are often highly changeable, this means that the orders that support them require a higher degree of flexibility. For this reason, interception orders have a longer maximum timeframe than other orders.

The nature of ASIO's work is primarily focused on the prevention and detection of activities prejudicial to security. As a result, timeframes often shift and the threat level is constantly changing.

ASIO's focus on the identification, prevention and disruption of security threats requires a longer-term view of activities, involving the recruitment or radicalisation phases (of either espionage or politically motivated violence activities), as well as the planning and operational phases. This means that these are often protracted investigations, necessitating the ability to apply for an international production order of longer duration.

The Bill also requires the issuing authority to consider specific factors in determining whether to issue an international production order and the issuing authority can also consider any other matters it considers relevant. One of these other relevant matters may be the duration of the order and the Bill provides sufficient flexibility for issuing authorities to determine a shorter period of duration for an order in appropriate circumstances.

In practice, the duration of an interception international production order would be determined on a case-by-case basis by the decision-maker determining the application. The period of time sought for interception activities would be determined by the requirements of each individual investigation, and the agency applying for the order would be responsible for furnishing the decision-maker with sufficient evidence to justify the appropriate duration for interception under the order.

7. *why there is no provision in the bill to ensure that if the circumstances that led to the issuing of the IPO have changed, such that the IPO is no longer warranted, that the IPO ceases to have effect;*

Clauses 114 and 116 of Schedule 1 to the Bill place an obligation on the chief officer of agencies and the Director-General of Security to revoke an order if satisfied that the grounds on which the order was issued have ceased to exist. The revocation must be set out in a written instrument. In circumstances where an order is revoked after it has been given to the designated communications provider, clauses 115 and 117 place an obligation on the agency to give the instrument of revocation to the Australian Designated Authority. The Australian Designated Authority would then have an obligation to give the instrument to the designated communications provider as soon as practicable.

This mechanism is designed to remove any doubt about the status of an international production order when the grounds for issuing an order no longer exist and the time at which the order ceased to be in force. It will also serve to protect privacy by clearly indicating to the agency, the Australian Designated Authority and the designated communications provider, that the order has ceased to be in force.

8. *why are existing powers to investigate serious crimes insufficient to achieve the objectives of the measure, such that a separate power to issue an IPO in relation to control orders is considered necessary;*

Terrorism poses a significant threat to national security and public safety, and is of substantial concern for law enforcement agencies and the Australian community. The control order regime addresses the challenge posed by terrorism or by involvement in hostile activity in a foreign country by mitigating the threat posed by specific, high-risk individuals. The use of interception warrants under the TIA Act to monitor those subject to control orders supports the monitoring of compliance with conditions imposed, and better mitigates the risk of terrorism and involvement in hostile activity in a foreign country. If a person subject to a control order perceives there is little likelihood of noncompliance with the control order being detected, there is little incentive for them to comply with the terms of the order, and the specific preventative effect of a control order is potentially undermined.

Under the existing TIA Act, agencies are able to obtain domestic warrants and authorisations for data held by Australian communications service

providers for the purposes of monitoring a person subject to a control order, and to detect planning and preparatory acts for a terrorist act or in hostile activity in a foreign country. However, these powers are increasingly unlikely to be effective in all cases due to Australians' increasing use of on line communications platforms operated from foreign countries and data stored internationally, outside of Australian agencies' reach.

Accordingly, the Government considers it appropriate to enable certain agencies to apply for control order international production orders in order to obtain information from designated communications providers based overseas that are covered by a designated international agreement. Consistent with the TIA Act framework for domestic warrants in relation to control orders, agencies will only be able to apply for control order international production where the relevant thresholds can be met.

9. why do the control order IPOs not require the judge or AAT member to consider the gravity of the conduct being investigated;

Control order international production orders would be issued for the purposes of protecting the public from terrorist acts, preventing the provision of support for terrorist acts or involvement in hostile activity in a foreign country, or to determine whether a control order is being complied with. As control order international production orders have a protective or preventative purpose, the person to be targeted would not necessarily be suspected of any specific criminal conduct. Given this, the Government considers that the gravity of the conduct being investigated does not need to be a mandatory consideration for control order international production orders.

10. what does conduct that is 'prejudicial to security' mean, and is this sufficiently certain to allow people to know what conduct it covers;

The Bill enables ASIO to seek international production order on the basis of thresholds which are also utilised in many of ASIOs warrants and which, in most cases (in relation to orders for interception or stored communications), centre on the concept of a person engaged in, or reasonably suspected of being engaged in, or being likely to engage in, *activities prejudicial to security.*

The phrase *'activities prejudicial to security'* is not exhaustively defined in the ASIO Act or the TIA Act. Section 4 of the ASIO Act provides that *'activities prejudicial to security'* includes any activities concerning which Australia has responsibilities to a foreign country as referred to in paragraph (b) of the definition of security in this section. Section 4 of the ASIO Act defines *security* as meaning:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

The terms 'Acts of foreign, interference' 'attacks on Australia's defence' 'politically motivated violence' and 'promotion of communal violence ' are each further defined in the ASIO Act.

Conduct that is prejudicial to security would therefore cover a person's engagement in any of the above activities, including planning the activities. For example, a person would be engaged in conduct that is prejudicial to security if the person engages in espionage or plans a terrorist attack.

This term is used across a range of Acts and other instruments relating to Australian national security. In particular, the TIA Act adopts the term in the threshold for domestic interception warrants for ASIO. The ASIO Act adopts the term in the thresholds for surveillance device warrants and identified person warrants.

The Ministerial Guidelines to which ASIO is subject provide that *activities relevant to security* not only means physical acts of the sort specified in the definition of security but also includes the acts of conspiring, planning, organising, counselling, advising, financing, or otherwise advocating or encouraging the doing of those things. The Guidelines also provide that *activities prejudicial to security* means activities that are relevant to security and which can reasonably be considered capable of causing damage or harm to Australia, the Australian people, or Australian interests, or to foreign countries to which Australia has responsibilities.

11. *why can an IPO to access telecommunications data be granted if it would be in connection with the performance of ASIO's functions, without any other requirement that there is any alleged prejudice to national security;*

The threshold 'in connection with the performance of ASIO of its functions' reflects the threshold in the TIA Act. The decision to use this threshold was made to provide ASIO with the operational flexibility it needs to carry out its functions. International production orders for interception and stored communications have an additional requirement that there are reasonable grounds for suspecting the person is engaged in, or is likely to engage in,

activities prejudicial to security. The Government considers it appropriate for additional protections to apply to international production orders for interception and stored communications.

Under section 8A of the ASIO Act, ASIO is required to comply with Ministerial Guidelines. These guidelines stipulate that when conducting its activities, ASIO must apply the principle of proportionality to ensure the least intrusion necessary into an individual's privacy, and any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence. Therefore whilst clause 107 only requires that the international production order be in connection with the performance of ASIO's functions, in practice the decision to seek access to telecommunications data must only be made in circumstances where the decision-maker is satisfied that the disclosure is in connection with the performance by ASIO of its functions, is proportionate to the gravity of the threat posed and the probability of its occurrence, and will be undertaken with as little intrusion into individual privacy as possible.

Access to telecommunications data enables preliminary investigative work to be undertaken that can rule individuals in or out of further investigation. Without telecommunications data, other potentially more intrusive investigative methods would need to be employed in order to make the appropriate assessment that an individual meets the required threshold for investigation. Alternatively, without telecommunications data, an investigation may not be undertaken due to lack of information to establish the required threshold (for example, to meet the threshold for international production order for telecommunications interception or stored communications), potentially increasing the risk of unmitigated security threats. The proposed threshold for international production order relating to telecommunications data will enable ASIO to access telecommunications data at an appropriate speed for these preliminary investigations.

12. *why does the bill not provide that an AAT member when determining whether to issue an IPO must consider how much the privacy of any person would be likely to be interfered with by issuing the order, or the gravity of the conduct being investigated;*

For international production order relating to national security, the AAT member must have regard to a number of matters listed in clause 89(5), including to what extent less intrusive methods (of obtaining the information are available to ASIO, how much the use of such methods would be likely to assist ASIO in carrying out its function of obtaining intelligence relevant to security, as well as such other matters (if any) that the nominated AA T member considers relevant. The AAT member must consider the availability of less intrusive methods and weigh such methods against how this would be likely to assist or prejudice ASIO—for example, because of delay or for other reasons.

The Bill thereby provides a broad discretion to enable the decision-maker to consider and balance the proportionality of the investigative method applied against privacy impacts and the gravity of the conduct being investigated. In this way, the Bill recognises ASIO's role as being anticipatory and protective in nature, with ASIO expected to identify and act against threats before harm has occurred. On that basis, the matters which the AAT member is required to consider are appropriate.

Further, section 10.4 of the Ministerial Guidelines to which ASIO is subject (issued under section 8A of the ASIO Act) requires ASIO to apply proportionate investigative methods, balancing the gravity of the threat posed and the probability of its occurrence.

As per our response to question 4, similar to the framework for domestic warrants under the TIA Act, authorities considering applications for international production orders would be required to make an overall assessment weighing up privacy impacts against the needs of law enforcement or national security. However, as interception of communications is considered to be the most intrusive of surveillance powers, additional requirements have been expressly included in relation to interception international production orders.

13. Whether all of the exceptions to the prohibition on the use, recording or disclosure of protected information obtained pursuant to an IPO are appropriate. It would be useful if a justification were provided in relation to each of the exceptions in proposed sections 153-159 and how these are compatible with the right to privacy.

An explanation of the justification for each of the exceptions in clauses 153-159 of Schedule I of the Bill is set out below:

- Sub-clauses 153(1)(a), (b), (c), (d), (e) and (f): these exceptions support the objectives of protecting national security and public safety and addressing crime and terrorism by enabling agencies to deal with the information and evidence they need to investigate or prosecute serious criminal offences. The gravity of the offences and actions covered by these provisions, and potential significant impact on the Australian community should a person carry out an action means it is appropriate to limit a person 's right to privacy under these exceptions.
- Sub-clause 153(1)(h): this exception supports the objective of protecting national security by enabling ASIO to access and deal with the information it needs to perform its national security functions. The objective of protecting Australia's national security illustrates an appropriate limitation on a person's right to privacy under this exception.
- Sub-clauses 153(1)(i), 153(1)(j) and 153(1)(k): these exceptions support the objectives of preventing and investigating terrorism by enabling agencies and courts to deal with the information they need

to consider the issues relating to control orders, preventative detention orders and continuing detention orders. These exceptions, which aim to prevent and investigate terrorism offences, also represent a reasonable limitation on a person's right to privacy.

- Sub-clauses 153(1)(I) and (t): these exceptions ensure the effectiveness of the civil penalty regime within the Schedule. They will enable protected information to be used in investigating contraventions of the compliance provisions, such as those under Part 8, or the reporting of the outcome of those proceedings. This enhances the accountability and transparency of the regime.
- Sub-clauses 153(1)(m), (n), (o), (p), (q), (r), (3) and (4) and clauses 154 and 155: these exceptions support accountability, transparency and oversight mechanisms in proposed Schedule 1 of the TIA Act and existing legislation by enabling oversight bodies and Ministers to access the information they need to provide oversight of agencies' use of the legislation and compliance with legislative requirements. Again, the aim of ensuring appropriate oversight and accountability under these exceptions also demonstrates a reasonable limitation on a person's right to privacy.
- Sub-clauses 153(1)(u), (v), (w), (x), (y), (5), (6) and (7): these exceptions support the objectives of protecting national security and public safety and addressing crime and terrorism by enabling disclosure of information to foreign partner countries and international bodies to support investigation and prosecution of serious criminal offences. As these exceptions aim to protect Australia's national security and ensure public safety, they are also illustrating a reasonable limitation on a person's right to privacy.
- Sub-clauses 153(1)(s) and (z): these exceptions support the objective of addressing serious crime by enabling relevant stakeholders, including the Australian Designated Authority and Department of Home Affairs and law enforcement and national security agencies to deal to information necessary to administer Schedule 1 of the Bill and the designated international agreements underpinning Schedule 1 of the Bill. The gravity of the offences and actions covered by these provisions, and potential significant impact on the Australian community should a person carry out an action means it is appropriate to limit a person's right to privacy under these exceptions.
- Clause 156: this exception supports corporate transparency by enabling designated communications providers to disclose statistics to their shareholders and the public on the number of international production orders they have received. This exception balances individual privacy by only permitting the disclosure of aggregate statistics, and also go towards the aim of providing transparency and accountability.

- Clause 157: these exceptions support accountability, transparency and oversight mechanisms under Commonwealth, state and territory laws by enabling investigators, legal advisors and courts to obtain the information they need to conduct a range of legal proceedings related to integrity and anti-corruption. The aim of ensuring appropriate oversight and accountability under these exceptions also demonstrates a reasonable limitation on a person's right to privacy.
- Clause 158: these exceptions support the objectives of protecting public safety and addressing crime by enabling stored communications data obtained under an international production order to be used in a range of Commonwealth, state and territory proceedings including, for example, confiscation or forfeiture of property proceedings and coroner's inquests. Stored communications data can be invaluable to these types of proceedings and ensure the decision-maker has all the information to make fulsome decisions. These are reasonable limitations on a person 's privacy to protect the safety of the community and also to support existing criminal proceedings.
- Clause 159: these exceptions support the objectives of protecting public safety and addressing crime by enabling telecommunications data obtained under an international production order to be used for purposes in connection with enforcement of a criminal law or law imposing pecuniary penalty of the protection of the public revenue. These exceptions ensure that telecommunications data that has been obtained can be used for a range of purposes to protect the community from suspected criminal conduct, misconduct and anti-competitive behaviour, in addition to assisting in the location of missing persons. The exception permits the use of telecommunications data to ensure that members of the community are meeting their lawful obligations under Australian revenue laws, such as taxation laws, in order to protect the public revenue. These are reasonable limitations on a person's privacy to protect the safety of the community and also to support existing criminal proceedings.

Right to an effective remedy

In order to assess whether any person whose right to privacy might be violated by the issuance of an IPO would have access to an effective remedy, further information is required as to:

1. *whether a person who was the subject of an IPO will be made aware of that after the investigation has been completed; and*

Ordinarily, persons of interest or those who were subject to covert investigatory powers are not notified of the use of covert investigatory powers unless there is a specific requirement under law to do so (for example, a prosecutor's legal obligation to disclose material used to build a case against an individual for prosecution). This has been the consistent

practice for warrants under the TIA Act and other Commonwealth legislation that confers covert investigatory powers.

If a person becomes aware of the use of covert investigatory powers while the investigation is ongoing, this could obviously put the investigation at risk by tipping off those engaging in criminal conduct about the investigation and the capabilities and methodologies being employed. However, notifying a person after the conclusion of an investigation can also have significant ramifications for future law enforcement and ASIO methodologies and the legitimate need to keep technical capabilities that relate to electronic platforms/services confidential.

Public disclosure of the details of an international production order or the information collected under it may reveal to criminal entities and organisations that using that particular service is subject to, or could be subject to, electronic surveillance. For example, knowing that a certain website or forum is monitored may mean that many months or years of law enforcement efforts to penetrate crime networks (such as on line child sexual abuse groups) can be lost. This ultimately reduces the effectiveness of Australian law enforcement agencies and ASIO to keep the Australian community safe from serious crime.

Even where the subject of the international production order has been cleared of any criminal activity, this does not necessarily reduce the risk that the disclosure may impact future law enforcement and ASIO methodologies and the protection of technical capabilities. For example, the person subject to the international production order could inadvertently jeopardise future law enforcement and ASIO operations by publicly announcing they were subject to certain types of orders on certain services.

2. *if not, how such a person would effectively access a remedy for any violation of their right to privacy.*

Although a person would not be notified that data relating to them has been obtained under an international production order, stringent measures are in place to protect individual privacy. In keeping with the approach in the TIA Act, subject to limited exceptions, the Bill prohibits the disclosure of information obtained under an international production order, or in relation to an international production order, in order to promote the privacy of individuals and to protect sensitive law enforcement and national security investigations.

The Bill balances the impact on privacy and the covert nature of the investigatory powers by ensuring effective oversight, record keeping, and independent authorisation. In particular, there is public ministerial reporting on the use of the regime. The Commonwealth Ombudsman and Inspector-General of Intelligence and Security will provide oversight over agencies' use of the international production order framework through audit and inspections to determine compliance with legislative requirements.

> A person who is the subject of an international production order, as revealed during the preparation for or conduct of criminal proceedings, can challenge such an order and the admissibility of evidence gathered in Australian courts where evidence is used in a prosecution.

Concluding comments

International human rights legal advice

Right to privacy

Public Interest Monitors

2.184 The bill provides that where Victorian and Queensland law enforcement agencies make an application for an IPO, the Public Interest Monitors that exist in those states can appear at hearings of IPO applications to test the content and sufficiency of the information relied on, can question any person giving information, and can make submissions as to the appropriateness of granting the application, which must be considered by the judge or AAT member when deciding whether to grant an IPO. The initial analysis noted that Public Interest Monitors would serve as an important safeguard, but noted that these monitors were only present where a request was made in Victoria and Queensland. The minister has advised that this is the case because currently, only these two jurisdictions have legislated to establish Public Interest Monitors. Consequently, the role of Public Interest Monitors as a safeguard would be limited only to IPO requests made in Queensland and Victoria, and provide no safeguard with respect to IPO requests made in the majority of jurisdictions.

2.185 As set out in the statement of compatibility, Public Interest Monitors strengthen the protections in the bill against arbitrary and unlawful interference with privacy.[14] As the suspect is not able to be personally represented at the application for the IPO, having an independent expert to appear at the hearing to test the content and sufficiency of the information relied on, to question any person giving information, and to make submissions as to the appropriateness of granting the application, is an important safeguard to protect the rights of the affected person. As the European Court of Human Rights has held:

> the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding his rights.[15]

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14 Statement of compatibility, [30].

15 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015), [233].

2.186 The statement of compatibility provides that 'there is scope to accommodate similar oversight bodies in the framework, should they be established in other jurisdictions in the future'.[16] However, there is nothing in the legislation to this effect, and as currently drafted, the majority of jurisdictions in Australia would have no such protection. It remains unclear why this bill could not itself establish Public Interest Monitors that apply to jurisdictions that do not otherwise have them, and if Public Interest Monitors are established in these jurisdictions, to ensure these bodies will automatically be able to appear at hearings of IPO applications.

2.187 In addition, the initial advice noted that the safeguard value of the Public Interest Monitor would not apply to an application for an IPO for stored communications data or telecommunications data. Access to stored communications data would enable agencies to access all existing messages, including text messages and recordings of voice and video messages. The minister advised that the interference with privacy was considered to be greater for the interception of communications rather than stored communications data because of the opportunity for 'second thoughts' which is provided by stored communications, as opposed to communications which are being intercepted live. The minister noted that this understanding of the privacy implications reflected the findings of a review into the regulation of access to communications in 2005. However, while the ability to apply 'second thoughts' when sending a written message may have some impact in relation to the potential to avoid self-incrimination, it does not appear to affect the level of privacy interference. It therefore remains unclear that the interference with personal privacy is so much less when accessing stored communications than intercepting communications, that it would mean there was no need for the involvement of the Public Interest Monitor.

Issuing authority

2.188 Further information was sought as to why it was considered appropriate to enable non-judicial officers, such as members of the Administrative Appeals Tribunal (AAT), of any level and with a minimum of five years' experience as an enrolled legal practitioner, to issue an IPO, having particular regard to the international human rights law position that judicial authorities are best placed to issue surveillance warrants. The minister noted that the bill provides for a range of independent decision-makers to authorise interception activities, and provided a table indicating that an eligible AAT member may issue all types of IPOs. The minister also noted that AAT members have played a role in approving interception warrants under the Act since 1998, and pursuant to other legislation. However, the fact that AAT members have been used to issue warrants in the past and in other circumstances does not explain whether their use is compatible with human rights in this instance.

16 Statement of compatibility, [30].

2.189 The minister also stated that there is no requirement under international human rights law for Australia to ensure specifically that it is a judicial authority which authorises investigatory powers. However, as noted in the initial analysis, the European Court of Human Rights has said that in the field of surveillance and interception, it is desirable to entrust supervisory control to a judge, noting that judicial control offers the best guarantees of proper procedure.[17] It has stated that 'control by an independent body, normally a judge with special expertise, should be the rule and substitute solutions the exception, warranting close scrutiny'.[18] This approach has been further noted by the United Nations Special Rapporteur on the right to privacy, who included, in the 2018 draft general principles of the right to privacy, that where State law provides for the use of surveillance systems, that law shall:

> provide that the individual concerned is likely to have committed a serious crime or is likely to be about to commit a serious crime and in all such cases such domestic law shall establish that an independent authority, having all the attributes of permanent independent judicial standing, and operating from outside the law enforcement agency or security or intelligence agency concerned, shall have the competence to authorise targeted surveillance using specified means for a period of time limited to what may be appropriate to the case.[19]

2.190 Noting that AAT members do not have security of tenure, or generally the same levels of expertise as judges, it is not clear that they would necessarily have all the attributes of permanent independent judicial authority. As such, it is not clear that enabling non-judicial officers, with potentially only five years of experience as a legal practitioner, to issue an IPO would adequately safeguard the right to privacy. Noting that judicial authorisation is considered to be 'best practice'[20] in authorising surveillance methods at international law, it may be appropriate for the bill to be amended to remove the role of AAT members in issuing IPOs, or at a minimum, restrict this to senior members of the AAT.

Additional safeguards

2.191 The bill currently provides an additional safeguard before an interception IPO can be issued in relation to control orders, namely that the judge or AAT member must have regard to whether intercepting communications 'would be the method

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17 *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, application no. 47143/06 (4 December 2015), [233].

18 *Szabó and Vissy v Hungary*, European Court of Human Rights, application no. 37138/14 (6 June 2016), [77].

19 United Nations Special Rapporteur on the right to privacy, *Draft Legal Instrument on Government-led Surveillance and Privacy*, Version 0.6 (2018), p. 16.

20 See *Case of Big Brother Watch and Others v The United Kingdom*, European Court of Human Rights, application nos. 58170/13, 62322/14 and 24960/15, (13 September 2019), [320].

that is likely to have the least interference with any person's privacy'.[21] This is in addition to considering how much the privacy of any person would be likely to be interfered with. This is an important safeguard to help prevent the arbitrary interference with the right to privacy. In relation to why the bill does not provide that this safeguard apply before issuing an IPO for all purposes, the minister advised that additional protection was considered appropriate for control order IPOs as these have 'a protective or preventative purpose' and the person is not necessarily suspected of any criminal involvement.

2.192 The minister also advised that in the case of IPOs for law enforcement, these are subject to a range of privacy considerations, including consideration of: how much the privacy of a person is likely to be interfered with; the gravity of the alleged conduct; to what extent other methods of investigation are available; and how much the use of such methods would be likely to assist or prejudice the investigation. Further, IPOs for national security require consideration of: to what extent methods of obtaining intelligence that are less intrusive have been used, or are available; and how much the use of such methods would be likely to assist or prejudice ASIO in carrying out its work. The minister has stated that, together with the role of the ASIO guidelines, and taken in totality, these considerations ensure that a decision-maker conducts a thorough assessment of the privacy impacts of an order, and that any actions taken under the order are proportionate to the relevant conduct. These are important safeguards and assist with the proportionality of the measure. However, it is noted that the ASIO guidelines have not been revised in more than 10 years, during which time ASIO's capabilities have expanded significantly. Consequently, it is unclear as to the extent of the safeguard value provided by these guidelines, noting that they do not appear to take into account new types of data, and volumes of data, which may be obtained pursuant to an IPO.[22]

2.193 The minister further highlights that where an IPO may authorise the interception of a communications service of a person who is *not* a person involved in an investigation of a relevant offence (a B-party), a decision-maker must be satisfied that the agency has exhausted all other practicable methods of identifying the service that is being used by the person allegedly committing serious crimes. The minister further describes B-party IPOs as a last resort, which is only available for half the period of time as other interceptions. However, noting that the person who would be the subject of a B-party IPO would not themselves be suspected of committing an offence, it is unclear why an explicit consideration of whether this method of investigation would be likely to have the least interference with that

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21 Schedule 1, item 43, proposed new paragraph 60(5)(f).

22 See, submission by the IGIS to the Parliamentary Joint Committee on Intelligence and Security inquiry into the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/IPOBill2020/Submissions.

person's privacy would not be appropriate. Further, the mere fact that a law enforcement B-party IPO may only be issued for a 45-day period, as opposed to 90 days, does little to minimise the intrusion into personal privacy.

2.194 The minister further advised that the bill does not require, in all instances, that IPOs may only be issued where to do so will be likely to 'substantially' assist an investigation (rather than simply being 'likely to assist'), as this differential threshold broadly reflects existing domestic warrant thresholds. The minister noted that accessing telecommunications data may take place during the early stages of an investigation, and it would be very difficult for agencies to demonstrate at that early stage that the information would 'substantially assist' the investigation.

Duration of interception IPO

2.195 Further information was sought as to how the timeframe for the duration of an interception IPO was chosen and why interception IPOs issued in connection with carrying out ASIO's functions are twice as long as those to investigate serious offences. The minister explained that these maximum durations align with the requirements under the *Telecommunications (Interception and Access) Act 1979*. The minister noted that longer timeframes are necessary in cases of interception to support operational requirements, which are often highly changeable, and may involve protracted investigations. The minister also notes that these timeframes are determined on a case-by-case basis, and that an issuing authority may determine that a shorter period of time is appropriate.

2.196 The minister further advised that the chief officer of agencies and the Director-General of Security are obliged, by written instrument, to revoke an IPO if satisfied that the grounds on which the order was issued have ceased to exist.[23] This would appear to be a useful safeguard against arbitrary interference with the right to privacy.

Control orders

2.197 The bill provides that IPOs can be issued in order to monitor persons subject to a control order so as to protect the public from a terrorist act, prevent support for terrorist and hostile act overseas and determine whether the control order has been, or is being, complied with. The initial analysis noted that it is already an offence for a person to fail to comply with the conditions of a control order,[24] which is subject to imprisonment of up to five years. The minister provided further information as to why existing powers to investigate serious crimes are not sufficient to achieve the objectives of the measure, such that a separate power to issue an IPO in relation to control orders is considered necessary. The minister explained that if a person subject to a control order perceives that there is little likelihood of non-compliance

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23 See, Schedule 1, item 43, proposed sections 114 and 116.

24 Section 104.27 of the *Criminal Code Act 1995*.

with that order being detected, there will be little incentive for them to comply with it, thereby undermining the preventative role of the control order. The minister further noted that existing powers were increasingly unlikely to be effective in monitoring the subject of a control order, including because of Australians' increasing use of platforms operating from foreign countries, and with data stored internationally.

2.198 As to why control order IPOs do not require a judge or AAT member to consider the gravity of the conduct being investigated, the minister stated that a control order IPO would have a protective or preventative purpose, meaning that the person being targeted would not necessarily be suspected of any specific criminal conduct. The purpose of a control order IPO would be to protect the public from terrorist acts, including by preventing the provision of support for terrorist acts or involvement in hostile activity in a foreign country, or to determine whether a control order is being complied with. While this explanation is noted, as indicated in the initial analysis, the control order regime itself engages and limits multiple human rights[25] of people who have not necessarily been charged or convicted of any offence. Enabling their communications to be under surveillance to check if they are complying with an order issued against them, without any need to suspect any breach, or to consider the gravity of the conduct, raises additional human rights concerns.

National security

2.199 Further information was sought as to the meaning of conduct that is ‘prejudicial to security’ for the purposes of the bill. The minister explained that section 4 of the ASIO Act defines 'activity prejudicial to security' and 'security' to include any activities concerning which Australia has responsibilities to a foreign country in relation to: espionage; sabotage; politically motivated violence; promotion of communal violence; attacks on Australia's defence system; acts of foreign interference; or the protection of Australia's borders from serious threats.[26] However, as the minister notes, the ASIO guidelines further provide that 'activities prejudicial to security' means activities that are 'relevant to security and which can reasonably be considered capable of causing damage or harm to Australia'. It is noted that this would appear to be a significantly broader definition than the already non-exhaustive definition of 'security' and 'activity prejudicial to security' in the ASIO Act. However, these definitions may be sufficiently certain so as to satisfy the quality of law test under international human rights law.

25 See Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2019), pp. 21-36.

26 ASIO Act, s 4. The terms 'acts of foreign interference', 'attacks on Australia's defence', 'politically motivated violence', and 'promotion of communal violence' are likewise defined in the ASIO Act.

2.200 Further information was also sought as to why an IPO to access telecommunications data could be granted if it would be 'in connection with the performance of ASIO’s functions', without any other requirement that there is any alleged prejudice to national security. The minister stated that the decision to use this threshold was made to provide ASIO with the operational flexibility needed to carry out its functions, noting that this proposed threshold will enable ASIO to access telecommunications data at an appropriate speed to undertake preliminary investigations.

2.201 The minister also noted that the requirement that ASIO comply with ministerial guidelines, which require a decision-maker to consider the gravity of a threat posed, ensures that in practice, the gravity of the threat posed and its probability of occurrence, will be taken into consideration. As noted in the initial analysis, while this may constitute something of a safeguard, it remains unclear why these requirements are not set out in legislation, such that they form part of the decision to be made when the warrant is issued. As it stands, an IPO for ASIO to access telecommunications data could be issued if disclosing the data to ASIO would be 'in connection with the performance' by ASIO of its functions, not because there are grounds for suspecting a person is engaging in activities prejudicial to security.

2.202 In addition, clarification was sought as to why the bill does not provide that an AAT member, when determining whether to issue an IPO, must consider how much the privacy of any person would be likely to be interfered with by issuing the order, or the gravity of the conduct being investigated. The minister noted an AAT member would be required to have regard to a range of matters, including any matters which they consider relevant, and stated that this provides a broad discretion to enable the decision-maker to consider and balance the proportionality of the investigative method being applied against privacy impacts. However, no information has been provided as to why an explicit requirement that they consider how much the privacy of the person would be likely to be interfered with would be inconsistent with their role, or otherwise inappropriate, including as the AAT member already appears to have the *discretion* to make such an assessment. The inclusion of such an explicit requirement would assist with the proportionality of the proposed measure.

Disclosure of protected information

2.203 Proposed new Part 11 provides that it is an offence to use, record or disclose protected information, being information obtained in accordance with an IPO or other information relating to an IPO. However, there are numerous exceptions to this, which would allow such information to be used, recorded, disclosed or used in evidence. Additional information was sought as to why each of these proposed exceptions are appropriate, and how they are compatible with the right to privacy. The minister provided information with respect to each of these proposed exceptions, including advising that they generally support ASIO's objective of protecting national security and public safety, and generally constitute an

appropriate limit on the right to privacy in this context. However, as noted in the preliminary legal advice, not all of the proposed exceptions appear to be connected with the objectives of protecting national security and keeping Australia safe. For example, the proposed exceptions in proposed section 159, would allow telecommunications data obtained in accordance with an IPO (or relating to an IPO) to be used, recorded or disclosed for the enforcement of a law imposing a pecuniary penalty or the protection of the public revenue.[27] The minister has advised that these support the objectives of 'protecting public safety and addressing crime', including by permitting the use of telecommunications data to ensure that members of the community are meeting their obligations under Australian revenue laws. However, protecting public revenue does not appear to have any connection with the objective of protecting national security or public safety, or even necessarily addressing crime as laws imposing pecuniary penalties or the protection of the public revenue may involve penalties that are not criminal in nature. Further, the proposed exceptions in clause 158 (relating to stored communications) likewise appear to have very broad application, applying to proceedings for the recovery of a pecuniary penalty which could render an individual liable for a pecuniary penalty of at least 60 penalty units.[28] The minister has advised that these exceptions support the objective of protecting public safety and addressing crime by allowing the use of stored communications data in proceedings such as coroner's inquests and forfeiture of property proceedings. The minister notes that such data can be invaluable, and enable a decision-maker to make 'fulsome decisions'. However, the response does not address why it is necessary to apply the exceptions to those relating to proceedings for relatively minimal pecuniary penalties. As such it is not clear that all of the exceptions in proposed sections 158 and 159 to enable the use, recording, disclosure or use in evidence of information derived from, or related to, an IPO would be rationally connected to the stated objective and constitute a proportionate limitation on the right to privacy.

2.204 In addition, some of the proposed exclusions which the minister has stated will support accountability and oversight of matters associated with IPOs, would appear to have limited value. For example, proposed subsections 153(1)(p)-(q) provide that protected information may be used or disclosed where an IGIS official is exercising power pursuant to the *Inspector-General of Intelligence and Security Act 1986*, and where an Ombudsman official is exercising power under the *Ombudsman Act 1976.* However, this does not permit such use or disclosure when such an official is exercising powers pursuant to other legislation, such as the ASIO Act, *Freedom of Information Act 1982*, or the *Public Interest Disclosure Act 2013*. Further, it would appear that such officials would bear an evidentiary burden in demonstrating that they can use such an exception under proposed section 153. Consequently, the

27 See, Schedule 1, item 43, proposed paragraphs 159(1)(d) and (e).

28 Which is currently $12,600, see *Crimes Act 1914*, section 4AA.

capacity for these independent agencies to oversee activities related to the issue of IPOs may be significantly curtailed, particularly with respect to public interest disclosures.

Concluding comments

2.205 The interception and disclosure of personal telecommunications data which reveals a person's conversations and messages engages and limits the right to privacy. The bill would appear to seek to achieve the legitimate objective of protecting national security, public safety, address crime and terrorism and protecting the rights and freedoms of individuals by providing law enforcement and national security agencies with the tools they need to keep Australia safe. Further, most of the measures appear to be rationally connected to this objective. However, it is not clear that all of the measures in the bill are proportionate to achieving the stated objective, in particular that they are sufficiently circumscribed and that there are sufficient safeguards in place. Of particular concern is that while there are Public Interest Monitors available to IPO requests made in Queensland and Victoria, there is no equivalent safeguard with respect to IPO requests made in the majority of jurisdictions. Nor does the Public Interest Monitor have a role to play in relation to access to stored communications (only in relation to interception of communications). Concerns also remain that many of the IPOs can be issued by any level member of the AAT (with the only requirement that they have five years or more legal experience). It is not clear that enabling non-judicial officers, with potentially only five years of experience as a legal practitioner, to issue an IPO would adequately safeguard the right to privacy.

2.206 The minister's response relied heavily on safeguards that exist in ministerial guidelines, which help to ensure that an ASIO decision-maker will conduct a thorough assessment of the privacy impact of an IPO. However, these guidelines do not appear to have been revised in more than 10 years, during which time ASIO's capabilities have expanded significantly. Consequently, the extent of the safeguard value provided by these guidelines is unclear. There are also a number of safeguards that apply to the issuance of some IPOs but not to others, that if applied to all IPOs would improve the overall safeguards to protect against the arbitrary interference with the right to privacy.

2.207 It is also noted that the bill would enable the communications of persons subject to a control order to be under surveillance to check if they are complying with an order issued against them, without any need to suspect any breach, or to consider the gravity of the conduct. Noting that the control order regime itself engages and limits multiple human rights, this raises additional human rights concerns. It is also of concern that an IPO for ASIO to access telecommunications data could be issued if disclosing the data to ASIO would be 'in connection with the performance' by ASIO of its functions, not because there are grounds for suspecting a person is engaging in activities prejudicial to security. Finally, there are concerns that not all of the exceptions in proposed sections 158 and 159, to enable the use,

recording, disclosure or use in evidence of information derived from, or related to, an IPO, would be rationally connected to the stated objective and constitute a proportionate limitation on the right to privacy.

2.208 As currently drafted, the bill is not sufficiently circumscribed and does not contain sufficient safeguards to ensure the measures do not arbitrarily limit the right to privacy. It is noted that if the bill were amended to include the following matters, this would assist in improving the compatibility of the bill with the right to privacy:

- establish a mechanism to provide for an independent expert (such as a Public Interest Monitor) to appear at the hearing for an IPO in all jurisdictions, for both the interception of communications and stored communication data, to test the content and sufficiency of the information relied on, to question any person giving information, and to make submissions as to the appropriateness of granting the application;[29]
- noting that judicial authorisation is considered to be 'best practice' in authorising surveillance methods at international law, remove the role of AAT members in issuing IPOs, or at a minimum, restrict the role to senior members of the AAT;[30]
- require that all IPOS issued for any purpose require that the judge or AAT member have regard to whether this method of surveillance 'would be the method that is likely to have the least interference with any person's privacy';[31]
- require that a judge or AAT member issuing a control order IPO be required to consider the gravity of the conduct being investigated;[32]
- require that when determining whether to issue an IPO, it is necessary to consider how much the privacy of the person would be likely to be interfered with by issuing the order;[33]

29 Amendments to Schedule 1, item 43, proposed subsection 153(3).

30 Amendments to Schedule 1, item 43, proposed sections 15 and 17; Schedule 1, item 43, Part 2, Division 1, Subdivision A (IPOs relating to the enforcement of the criminal law); Subdivision B (IPOs relating to interception); Schedule 1, item 43, Part 3, Division 2 (IPOs relating to interception: control orders); and Schedule 1, item 43, Part 4 (IPOs relating to national security).

31 Amendments to Schedule 1, item 43, proposed subsections 30(5), 39(3), 48(5), 69(3), 78(5), 89(5), 98(3) and 107(5).

32 Amendments to Schedule 1, item 43, proposed subsections 60(5) and 69(3).

33 Amendments to Schedule 1, item 43, proposed subsections 30(5), 39(3), 48(5), 60(5), 69(3), 78, 89(5), 98(3), and 107(5).

- remove proposed exceptions to the prohibition on the use, recording and disclosure of protected information obtained pursuant to an IPO which relate to pecuniary penalties and protecting the public revenue;[34] and
- amend the proposed exceptions to the prohibition on the use, recording and disclosure of protected information obtained pursuant to an IPO which relate to the provision of independent oversight and accountability, to ensure that the statutory functions of agencies including the IGIS and Commonwealth Ombudsman are not unduly limited.[35]

Right to an effective remedy

2.209 Further information was sought as to whether an individual would have a right to an effective remedy with respect to any breach of their right to privacy. In particular, information was sought as to whether a person who was the subject of an IPO will be made aware of that after the investigation has been completed. The minister advised that persons who are subject to covert investigatory powers are not notified of the use of that power, unless there is a specific obligation to do so (for example, where they are being prosecuted for a related offence). The minister further stated that notifying a person at the conclusion of an investigation could have significant ramifications for future law enforcement and ASIO methodologies, meaning that there is a need to keep technical capabilities confidential. The minister reiterated that the Inspector-General of Intelligence and Security (IGIS) and the Commonwealth Ombudsman provide oversight of the IPO framework through audits and inspections. However, it is relevant that the IGIS has stated that the bill should be amended to provide that the IGIS is regularly notified of all IPOs issued within three months.[36]

2.210 It appears that a person whose right to privacy has been breached would have an extremely limited capacity to seek a remedy in relation to that breach, as there would appear to be very limited circumstances in which they would become aware that such a breach had taken place. The oversight of the Commonwealth Ombudsman and the IGIS would not appear to provide an individual with any remedy (see also above at paragraph [2.204]). Consequently, it is unclear that an individual would have access to an effective remedy for any violation of their right to privacy.

2.211 As noted in the initial analysis, United Nations bodies and the European Court of Human Rights have provided specific guidance as to what constitutes an

34 Schedule, item 43, proposed sections 158 and 159.

35 Amendments to Schedule 1, item 43, proposed subsections 153(1)(p)-(q).

36 See, submission by the IGIS to the Parliamentary Joint Committee on Intelligence and Security inquiry into the Telecommunications Legislation Amendment (International Production Orders) Bill 2020, p. 16. At https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/IPOBill2020/Submissions.

effective remedy where personal information is being collected in the context of covert surveillance activities. The United Nations High Commissioner for Human Rights has explained that in the context of violations of privacy through digital surveillance, effective remedies may take a variety of judicial, legislative or administrative forms, but those remedies must be known and accessible to anyone with an arguable claim that their rights have been violated.[37] The European Court of Human Rights has also stated that if an individual is not subsequently notified of surveillance measures which have been used against them, there is 'little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his knowledge and thus able to challenge their legality retrospectively'.[38] The court acknowledged that, in some instances, notification may not be feasible where it would jeopardize long-term surveillance activities.[39] However, it explained that '[a]s soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should, however, be provided to the persons concerned'.[40] As such, having no mechanism by which a person is notified that an IPO was issued in relation to them, even after the surveillance and any associated investigations has ended, is not consistent with the obligation under international human rights law to provide an effective remedy.

Committee view

2.212 The committee thanks the minister for this response. The committee notes that the bill seeks to introduce International Production Orders to allow Commonwealth, state and territory law enforcement and national security agencies to acquire data held in a foreign country by a designated communications provider.

2.213 The committee notes that these measures engage and limit the right to privacy. This right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considers that the bill seeks to achieve the legitimate objective of protecting national security and public safety, addressing crime and terrorism and protecting the rights and freedoms of individuals by providing law enforcement and national security agencies with the tools they need to keep Australia safe.

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37 Report of the Office of the United Nations High Commissioner for Human Rights on The right to privacy in the digital age (A/HRC/27/37, [40].

38 *Roman Zakharov v Russia* (European Court of Human Rights, Grand Chamber, (Application no. 47143/06) 2015,[234]. See also, *Klass and Others v Germany* (European Court of Human Rights, Plenary Court, (Application no. 5029/71) 1978, [57].

39 *Roman Zakharov v Russia* (European Court of Human Rights, Grand Chamber, (Application no. 47143/06) 2015, [287].

40 *Roman Zakharov v Russia* (European Court of Human Rights, Grand Chamber, (Application no. 47143/06) 2015, [287]. See also *Klass and Others*, [58].

2.214 The committee considers the bill contains important safeguards designed to help protect the right to privacy of persons subject to surveillance. However, as currently drafted, the bill may not be sufficiently circumscribed or contain sufficient safeguards to ensure the measures do not arbitrarily limit the right to privacy. In order to improve the compatibility of the bill with the right to privacy, the committee recommends that consideration be given to amending the bill to:

- **establish a mechanism to provide for an independent expert (such as a Public Interest Monitor) to appear at the hearing for an IPO in all jurisdictions (noting that this role exists in Victoria and Queensland), for both the interception of communications and stored communication data, to test the content and sufficiency of the information relied on, to question any person giving information, and to make submissions as to the appropriateness of granting the application;**[41]
- **noting that judicial authorisation is considered to be 'best practice' in authorising surveillance methods at international law, limit the issuing of IPOs to a role performed by senior members of the AAT;**[42]
- **require that a judge or AAT member issuing a control order IPO be required to consider the gravity of the conduct being investigated;**[43] **and**
- **require that when determining whether to issue an IPO, it is necessary to consider how much the privacy of the person would be likely to be interfered with by issuing the order.**[44]

2.215 The committee also notes that as a person who is the subject of an IPO would rarely know if an IPO had been issued in relation to them, it does not appear that individuals affected by an IPO would be likely to be able to access an effective remedy for any violation of their right to privacy.

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

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41 Amendments to Schedule 1, item 43, proposed subsection 153(3).

42 Amendments to Schedule 1, item 43, proposed sections 15 and 17; Schedule 1, item 43, Part 2, Division 1, Subdivision A (IPOs relating to the enforcement of the criminal law); Subdivision B (IPOs relating to interception); Schedule 1, item 43, Part 3, Division 2 (IPOs relating to interception: control orders); and Schedule 1, item 43, Part 4 (IPOs relating to national security).

43 Amendments to Schedule 1, item 43, proposed subsections 60(5) and 69(3).

44 Amendments to Schedule 1, item 43, proposed subsections 30(5), 39(3), 48(5), 60(5), 69(3), 78, 89(5), 98(3), and 107(5).

Providing communications data to a foreign government

2.217 Schedule 1, item 13 of the bill seeks to amend the *Mutual Assistance in Criminal Matters Act 1987* ('Mutual Assistance Act') to broaden the scope of materials which the Attorney-General may authorise be provided to a foreign country, to include 'protected IPO intercept information', 'protected IPO stored communications information' or 'protected IPO telecommunications data information' relevant to offences punishable by certain periods of imprisonment or the death penalty.[45]

2.218 The bill also provides that all applications for an IPO must nominate a 'designated international agreement'.[46] Proposed section 3[47] provides that if there is an agreement between Australia and a foreign government (or two or more governments) and that agreement is specified in the regulations, it is a 'designated international agreement'. However, it also provides that where one or more offences against the law of the foreign country are punishable by death, the agreement cannot be specified unless the minister has received a written assurance from the foreign government relating to 'the use or non-use', in connection with any proceeding for prosecuting a death penalty offence, of Australian-sourced information obtained in accordance with such an order.[48]

Summary of initial assessment

Preliminary international human rights legal advice

Right to life and prohibition against torture, cruel, inhuman or degrading treatment or punishment

2.219 Providing that protected IPO intercept information can be shared with a foreign country to investigate or prosecute an offence against the laws of that country that is punishable by the death penalty, engages and may limit the right to life.[49] The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty

45 The terms 'protected IPO intercept information', 'protected IPO stored communications information', and 'protected IPO telecommunications data information' would be defined in subsection 3(1) of the Act, pursuant to amendments in Schedule 1, Part 1, Item 11.

46 Schedule 1, item 43, proposed subsections 22(2), 33(2), 42(2), 52(2), 63(2), 72(2), 83(2), 92(2) and 101(2). The order itself must also set out the name of the designated international agreement, see proposed paragraphs 31(3)(d), 40(3)(d), 49(3)(d), 61(3)(d), 70(3)(d), 79(3)(d), 90(3)(c), 99(3)(c), and 108(3)(c).

47 Schedule 1, item 43, proposed section 3.

48 Schedule 1, item 43, proposed subsection 3(2) and (5).

49 International Covenant on Civil and Political Rights, article 6.

(such as Australia) from exposing a person to the death penalty in another state.[50] The provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies is also prohibited.[51] In 2009, the UN Human Rights Committee stated 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'.[52]

2.220 The sharing of information, including personal information, with foreign countries, may also, in some circumstances, expose individuals to a risk of torture or other cruel, inhuman or degrading treatment or punishment. International law absolutely prohibits torture and cruel, inhuman or degrading treatment or punishment.[53] There are no circumstances in which it will be permissible to subject this right to any limitations. The statement of compatibility does not identify that the right is engaged, and as such no assessment of its engagement is provided.

2.221 The initial analysis considered that in order to fully assess the compatibility of the measure with the right to life and the prohibition on torture, cruel, inhuman or other degrading treatment or punishment, further information was required as to:

- why the bill does not provide that an international agreement will not be designated unless there is a written assurance that information provided pursuant to an IPO will not be used in connection with any proceeding by way of a prosecution for an offence against the law of the foreign country that is punishable by death;
- what safeguards are in place to ensure that information from an IPO would not be shared overseas in circumstances that could expose a person to torture, or cruel, inhuman or degrading treatment or punishment.

2.222 The full initial legal analysis is set out in *Report 4 of 2020*.

Committee's initial view

2.223 The committee noted the legal advice that the measures engage and may limit the right to life and the prohibition against cruel, inhuman or degrading treatment or punishment. In order to fully assess the compatibility of the bill with

50 Second Optional Protocol to the International Covenant on Civil and Political Rights.

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

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

53 International Covenant on Civil and Political Rights, article 7, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

these rights, the committee sought the minister's advice as to the matters set out at paragraphs [2.221].

Minister's response

2.224 The minister advised:

> 1. *why the bill does not provide that an international agreement will not be designated unless there is a written assurance that information provided pursuant to an IPO will not be used in connection with any proceeding by way of a prosecution for an offence against the law of the foreign country that is punishable by death;*
>
> The Bill requires that prior to entering into an agreement, the government of a foreign country must give the Minister written assurance about the use or non-use of Australian-sourced information in any prosecution for an offence that is punishable by death.
>
> This provision is designed to be flexible as to the form, content and nature of the written assurance as this will depend on the particular foreign country, including their laws and practices in relation to death penalty matters, and the particular agreement, including its scope and whether it is bilateral or multilateral. It also accommodates the use of exculpatory material (material that goes towards a person's innocence) in a prosecution.
>
> The Government anticipates that agreements will be treaties rather than instruments of less than treaty status. Parliamentary processes that precede the ratification of any agreements with foreign countries will provide checks and balances for all elements of that agreement, including ensuring Australia's opposition to the death penalty is upheld appropriately.
>
> 2. *what safeguards are in place to ensure that information from an IPO would not be shared overseas in circumstances that could expose a person to torture, or cruel, inhuman or degrading treatment or punishment.*
>
> Article 7 of the ICCPR states:
>
> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*
>
> Article 3(1) of the CAT states:
>
> *No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*
>
> While the Bill will give effect to future bilateral and multilateral cross-border access to data agreements between Australia and other countries, it does not, however, affect the substance of Australia's adherence to the

> prohibition against torture, cruel, inhuman or degrading treatment or punishment.
>
> Sub-clauses 153(5), (6) and (7) of the Bill ensure that information obtained pursuant to an international production order can be provided to foreign countries in response to a mutual legal assistance (MLA) request from a foreign country and to international bodies such as the International Criminal Court and International War Crimes Tribunal. The *Mutual Assistance in Criminal Matters Act 1987* (MACMA) provides that the Attorney-General must refuse a MLA request from a foreign country where there are substantial grounds for believing that, if the request was granted, a person would be in danger of being subjected to torture (paragraph 8(1)(ca)). In instances where providing MLA to a foreign country may expose a person to other cruel, inhuman or degrading treatment or punishment, the Attorney-General has a general discretion to refuse the MLA request (paragraph 8(2)(g) of the MACMA).
>
> This matter will be considered further in negotiations for each designated international agreement. Parliamentary processes that precede the ratification of any formal agreements with foreign countries will provide the opportunity for close scrutiny of all elements of each agreement.

Concluding comments

International human rights legal advice

2.225 With respect to the right to life, the minister noted that prior to entering into an agreement, a foreign government must provide the minister with a written assurance about the 'use or non-use' of Australian-sourced information in any prosecution for an offence that is punishable by death. The minister explained that this provision is designed to be flexible as to the form, content and nature of the written assurance, and accommodate the use of exculpatory material in a prosecution. The minister noted that the government anticipates that such agreements will be treaties, and that parliamentary processes will therefore precede the ratification of any such agreements, thereby providing checks and balances.

2.226 From this response, however, it would appear that there is nothing in the bill that would prohibit mutual assistance where it may lead to the imposition of the death penalty. That is, a foreign government could provide the minister with a written assurance that they *will* use Australian-sourced information in a prosecution for an offence punishable by death, and this will have met the technical requirements under this bill. It remains unclear why, if the clear intention is not to enter into such an agreement where such information could be used in prosecutions for offences punishable by death, the bill does not specifically provide for this. The fact that it does not raises significant concerns as to Australia's international obligations relating to the right to life.

2.227 In addition, the bill does not contemplate that the provision of information pursuant to a designated international agreement could expose a person to torture

or other cruel, inhuman or degrading treatment or punishment. The minister advised that the *Mutual Assistance in Criminal Matters Act 1987* provides that the Attorney-General must refuse a mutual legal assistance request from a foreign country where there are substantial grounds for believing that, if the request were granted, a person would be in danger of being subjected to torture.[54] However, as noted in the initial analysis, this does not specifically require that the Attorney-General consider whether there is a risk of a person being subjected to cruel, inhuman or other degrading treatment or punishment. The minister further stated that this matter will be considered in negotiations for each individual agreement.

2.228 The prohibition against torture and other cruel, inhuman or degrading treatment or punishment is absolute. It may not be subject to *any* limitation of any kind. The absence of an explicit requirement in this bill to consider whether providing information pursuant to a designated international agreement gives rise to a risk of a person being subjected to cruel, inhuman or degrading treatment or punishment is concerning, particularly noting that the Attorney-General is not required to turn their mind to whether there is such a risk in the case of a request for mutual legal assistance. There remains a significant risk that the proposed measures are, therefore, not compatible with the absolute prohibition against torture, or other cruel, inhuman or degrading treatment or punishment. It is noted that if the bill were amended to include the following matters, this would assist in lessening the risk that these measures are incompatible with these rights:

- provide that information may only be provided to a foreign government where an assurance has been received that the information will not be used in relation to proceedings for an offence which may be punishable by the death penalty, or may only be used in circumstances where such a penalty will not be sought;[55] and
- require that the Attorney-General must refuse to provide assistance to a foreign government pursuant to an IPO if there are substantial grounds for considering a person may be subjected to cruel, inhuman or degrading treatment or punishment if such assistance were provided.[56]

Committee view

2.229 The committee thanks the minister for this response. The committee notes that the bill would broaden the scope of Australian-sourced information that may be provided to a foreign country, including foreign countries which use the death penalty.

54 *Mutual Assistance in Criminal Matters Act 1987* , section 8(1)(ca).

55 Amendment to Schedule 1, item 43, proposed section 3.

56 Amendment to Schedule 1, item 6; and item 43 proposed sections 83, 92, and 153.

2.230 The committee notes that providing that protected IPO intercept information can be shared with a foreign country to investigate or prosecute an offence against the laws of that country that is punishable by the death penalty, engages and may limit the right to life. In addition, the sharing of information, including personal information, with foreign countries, may risk, in some circumstances, exposing individuals to torture or other cruel, inhuman or degrading treatment or punishment.

2.231 The committee welcomes the government's advice that it anticipates that agreements with foreign countries will uphold Australia's opposition to the death penalty. However, it notes that there is nothing in the bill that would prohibit mutual assistance where it may lead to the imposition of the death penalty. In addition, the bill does not specifically require that the Attorney-General consider whether there is a risk of a person being subjected to cruel, inhuman or degrading treatment or punishment, if mutual assistance were provided to a foreign country.

2.232 **In order to reduce the risk that information may be shared with a foreign country which could expose a person to the death penalty or to cruel, inhuman or degrading treatment or punishment, the committee recommends that consideration be given to amending the bill to:**

- **provide that information may only be provided to a foreign government where an assurance has been received that the information will not be used in relation to proceedings for an offence which may be punishable by the death penalty, or may only be used in circumstances where such a penalty will not be sought;[57] and**
- **require that the Attorney-General must refuse to provide assistance to a foreign government pursuant to an IPO if there are substantial grounds for considering a person may be subjected to cruel, inhuman or degrading treatment or punishment if such assistance were provided.[58]**

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

Exemptions from existing privacy protections for orders and requests from foreign countries

2.234 The bill also provides that where there is a designated agreement between Australia and a foreign country and the foreign country issues an order or makes a request in accordance with that agreement, then the usual protections in the

57 Amendment to Schedule 1, item 43, proposed section 3.

58 Amendment to Schedule 1, item 6; and item 43 proposed sections 83, 92, and 153.

Telecommunications (Interception and Access) Act 1979 and *Privacy Act 1988* do not apply.[59]

Summary of initial comments

Preliminary international human rights legal advice

Right to privacy

2.235 Removing existing protections designed to prevent the use of surveillance mechanisms without a warrant or order, or the disclosure of personal information, engages and limits the right to privacy. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.236 The initial analysis considered that in order to more fully assess the compatibility of this measure with the right to privacy, further information was required as to:

- what is the legitimate objective of removing existing privacy protections to allow personal telecommunications data to be intercepted and accessed by foreign governments; and
- what safeguards apply before foreign governments can issue an order or make such a request and what oversight mechanisms are there before such agreements are entered into.

2.237 The full initial legal analysis is set out in *Report 4 of 2020.*

Committee's initial view

2.238 The committee noted the legal advice that this measure engages and limits the right to privacy. In order to fully assess the compatibility of this measure with the right to privacy, the committee sought the minister's advice as to the matters set out at paragraph [2.236].

Minister's response

2.239 The minister advised:

> 1. *what is the legitimate objective of removing existing privacy protections to allow personal telecommunications data to be intercepted and accessed by foreign governments;*
>
> Our collective safety and security depends on the ability of Australian agencies to maintain lawful and efficient access to electronic evidence. The Bill creates a framework for ensuring that Australia can enter into international cross-border access to data agreements with trusted foreign countries while respecting privacy interests and foreign sovereignty.

59 Schedule 1, item 43, proposed new sections 167 and 168.

However, the benefits of allowing Australian law enforcement agencies and ASIO to be able to directly issue orders on foreign providers, cross-border arrangements and agreements would need to be reciprocal.

For example, in order for Australia to be a qualifying foreign government that is able to enter into an agreement under the United States Clarifying Lawful Overseas Use of Data (CLOUD) Act, it must ensure the removal of blocking statutes. Blocking statutes are laws that would prevent the United States Government from issuing legal process directly on Australian providers to access electronic information held in Australia. This means the relevant provisions under the TIA Act, *Telecommunications Act 1997,* and *Privacy Act 1988* that prevent such access must be lifted, ensuring that United States law enforcement can lawfully request this kind of information from Australian providers directly.

As transnational, serious and organised crime is becoming more prevalent, enabling reciprocal access to data will assist Australia's international partners to successfully prevent, investigate and prosecute serious criminal activity in their own jurisdictions, which can have benefits for Australia's own law enforcement efforts. Agreements negotiated will have a range of safeguards and restrictions to ensure respect for privacy and civil liberties, requirements for appropriate thresholds, and independent authorisation processes, to ensure orders are reasonable, necessary and proportionate.

2. *what safeguards apply before foreign governments can issue an order or make such a request and what oversight mechanisms are there before such agreements are entered into.*

The overarching designated international agreement and the law of the foreign country that applies to any incoming international production order request will establish the limitations and safeguards that apply when the relevant foreign government sends orders to Australian providers, similar to the safeguards for requests made under the *Mutual Legal Assistance in Criminal Matters 1987.*

The Australian Government will undertake a thorough assessment of the privacy regime of the foreign country before entering into any agreement. Agreements will also provide for privacy matters such as the limitation on use and handling of Australian data and destruction of records.

Prior to entering into an agreement with a foreign country that applies the death penalty, the government of the foreign country must give the Minister written assurance about how Australian sourced information will be used in any proceeding by way of prosecution for an offence that is punishable by death in the foreign country, including for exculpatory purposes. The written agreement may specify restrictions or conditions on the use of Australian-sourced information including that it is not to be used in prosecutions for death penalty offences.

The Bill also enables a foreign designated communications provider to object to an Australian international production order, because it does not comply with the designated international agreement. The Australian Designated Authority may cancel an international production order, including following dispute resolution with the designated communications provider or the government of a foreign country.

Supporting this framework will be Agreements that have a range of safeguards and restrictions to ensure respect for privacy and civil liberties, requirements for appropriate thresholds, and independent authorisation processes, to ensure orders are reasonable, necessary and proportionate.

Oversight mechanisms

Before any agreement becomes operational, the following mechanisms will assist Australia to ensure privacy protections are appropriate:

- The Australian Government will do a thorough assessment of the privacy regime of the foreign country before entering into, and during, any agreement negotiations.
- The Attorney-General and the Minister for Foreign Affairs will approve any proposed agreement before it is signed. Both Ministers have unique responsibilities for both domestic and international privacy matters.
- Any agreement will be referred to the Joint Standing Committee on Treaties (JSCOT) for consideration. The Department of Home Affairs will prepare a National Interest Analysis when referring the matter to JSCOT, which will consider privacy implications.
- Stakeholders and members of the public will be able to make submissions to JSCOT indicating any privacy concerns that JSCOT will take into account before providing its recommendations.
- Before Australia can ratify an Agreement, regulations will be made under the TIA Act to declare the agreement as a 'designated international agreement'. Such regulations will be subject to the normal disallowance periods in parliament. Any disallowable legislative instruments will also be accompanied by a Statement of Compatibility with Human Rights.

Concluding comments

International human rights legal advice

2.240 The minister has explained that the removal of existing privacy protections to allow personal telecommunications data to be intercepted and accessed by foreign governments is necessary, because Australia must reciprocate the type of information access which it seeks to obtain from those same governments. The minister states that enabling reciprocal access to data will assist Australia's international partners to successfully prevent, investigate and prosecute

transnational, serious and organised crime in their own jurisdictions, and that this can have benefits for Australia's own law enforcement efforts.

2.241 The minister stated that, for example, Australia must ensure the removal of 'blocking statutes' in order to enter into an agreement under the United States Clarifying Lawful Overseas Use of Data (CLOUD) Act. However, it is unclear why the bill seeks to remove existing privacy protections in all instances, not merely where a foreign law necessitates such a removal in order for an agreement to be entered into.

2.242 The minister has further stated there are several safeguards and oversight mechanisms which would apply before foreign governments could issue an order or make such a request. In particular, the minister notes that prior to entering into an agreement, the Australian government would undertake a thorough assessment of the privacy regime of the foreign country, and that the agreement itself would provide for privacy matters including limitations on the use and handling of Australian data, and the destruction of records. If a thorough privacy assessment was done this may operate as a safeguard; however, it appears that Australia would have very limited capacity to monitor or enforce any such privacy requirements in overseas jurisdictions. The minister further stated that agreements will have a range of safeguards and restrictions to ensure respect for privacy and civil liberties, requirements for appropriate thresholds, and independent authorisation processes. However, the minister did not particularise what those further safeguards and restrictions would be, and there is nothing in the bill that would require the agreements to include such safeguards.

2.243 With respect to oversight mechanisms, the minister noted that any agreement would need to be approved by both the Attorney-General and the Minister for Foreign Affairs, would be referred to the Parliamentary Joint Standing Committee on Treaties for consideration, and be declared as a 'designated international agreement' as a disallowable legislative instrument under the TIA Act. The requirement that a designated international agreement be subject to disallowance may serve as a safeguard; however, it is likely that other objectives, rather than the right to privacy, would be the focus of consideration when any decision was made to disallow any such instrument.

2.244 As the bill provides no information as to what will be in the relevant international agreement, and no requirement that the minister be satisfied that the laws and practices of the foreign country contain adequate human rights protection, removing existing protections designed to prevent the use of surveillance mechanisms without a warrant or order, or the disclosure of personal information, is likely to constitute an impermissible limit on the right to privacy. It is noted that it would assist in improving the compatibility of the bill with the right to privacy if the bill were amended to require the minister to be reasonably satisfied before naming

an agreement in the regulations that it contains sufficient safeguards and independent processes to protect the right to privacy.[60]

Committee view

2.245 The committee thanks the minister for this response. The committee notes the bill would remove all existing privacy protections against intercepting and accessing personal communications data where a foreign government with whom Australia has a designated international agreement makes a request or order to do so.

2.246 The committee considers this measure engages and limits the right to privacy. This right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.247 The committee understands the minister's advice that it is necessary to remove all existing Australian laws that would prevent trusted foreign governments from lawfully requesting electronic information from Australian providers directly, in order for Australian law enforcement agencies and ASIO to be able to directly issue orders on foreign providers.

2.248 The committee welcomes the minister's advice that the government will undertake a thorough assessment of the privacy regime of the foreign country before entering into an international agreement, noting that it is the law of the foreign country that will establish the limitations and safeguards that apply when the relevant foreign government sends orders to Australian providers.

2.249 However, as the bill provides no information as to what will be in the relevant international agreement, and no requirement that the minister be satisfied that the laws and practices of the foreign country contain adequate human rights protection, the committee considers there is some risk that removing existing protections designed to prevent the use of surveillance mechanisms without a warrant or order, or the disclosure of personal information, may impermissibly limit the right to privacy.

2.250 In order to improve the compatibility of the bill with the right to privacy, the committee recommends that consideration be given to amending the bill to require the minister to be reasonably satisfied before naming an agreement in the regulations, that it contains sufficient safeguards and independent processes to protect the right to privacy.[61]

60 See Schedule 1, item 43, proposed section 3.

61 See Schedule 1, item 43, proposed section 3.

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

Senator the Hon Sarah Henderson

Chair