

## Dissenting Report by Labor and Greens members<sup>1</sup>

1.1 Australian Labor Party and Australian Greens members (the dissenting members) of the Parliamentary Joint Committee on Human Rights (the committee) seek to issue dissenting remarks in relation to the:

- Australian Security Intelligence Organisation Amendment Bill 2020; and
- Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020.

1.2 The dissenting members consider it regrettable that it has again become necessary to prepare yet another dissenting report for this previously non-partisan legislative scrutiny committee. This committee has a specific legislative scrutiny function: to inform both houses of Parliament as to the compatibility of proposed and existing Australian legislation with international human rights law. It has been established to contribute meaningfully to the consideration of human rights by the Parliament.<sup>2</sup>

1.3 To achieve this, committee members consider expert legal advice as to the application of international human rights law. The committee does not rubber stamp this advice. Rather, committee members seek to scrutinise and consider that advice, and form their own opinions as to the weight of those conclusions and recommendations. Indeed, there is typically scope for differences of opinion regarding complex legal matters. However, the dissenting members consider that just as the legal advice to the committee must be evidence-based and well reasoned, any substantial deviation from, or rejection of, the legal advice as to the compatibility of a measure with international human rights law likewise requires a persuasive foundation, and must be based on convincing evidence. Consequently, where the majority committee view does not reflect the legal advice provided to the committee, and the dissenting members consider that such an evidence-based foundation has not been established, the issue of a dissenting report, while undesirable, is both appropriate and necessary.

1.4 The committee's scrutiny *Report 9 of 2020* is extensive. Consequently, this dissenting report does not repeat the legal advice or the minister's response, both of which are set out in the majority report. The comments below address only those matters in relation to which the dissenting members disagreed with the committee view contained in the majority report, and where the dissenting members make additional comments with respect to the committee view.

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, *Dissenting Report by Labor and Greens members, Report 9 of 2020*; [2020] AUPJCHR 122.

2 Mr Harry Jenkins MP, Chair, Parliamentary Joint Committee on Human Rights, *House of Representatives Hansard*, 20 June 2012, p. 7176.

## **Australian Security Intelligence Organisation Amendment Bill 2020**

1.5 This 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.

### *ASIO compulsory questioning framework*

1.6 The proposed measures would compel a person to provide information, or produce a thing or record; permit the search of a person; permit a police officer to enter premises in order to apprehend a person; and prohibit a warrant subject from overseas travel in some circumstances. These measures therefore engage and may limit the right to privacy. This right may be permissibly limited, where it pursues a legitimate objective, is rationally connected to that objective, and proportionate.

1.7 These proposed powers seek to achieve the objective of ensuring that ASIO can gather information in relation to national security. The dissenting members agree that this would appear to be a legitimate objective for the purposes of international human rights law, and that questioning a person about such matters would appear to be rationally connected to that objective. As to whether the measure is proportionate, the dissenting members likewise agree with the majority report that it remains unclear whether such safeguards are sufficient such that the measure would, in all instances, constitute a proportionate limitation on the right to privacy (including the rights of persons with disabilities to privacy).

**1.8 The dissenting members further consider that, having regard to the coercive powers which would be triggered by the issue of a questioning warrant, it remains unclear that the proposed sole power for the Attorney-General to issue a questioning warrant (without the judicial oversight which the *Australian Security Intelligence Organisation Act 1979* currently requires) would be accompanied by sufficient safeguards such that it would constitute a proportionate limitation on the right to privacy.**

**1.9 The dissenting members consider that, in addition to the proposed amendments to the bill set out in paragraph [1.46] of the majority report, the proportionality of these proposed measures with respect to the right to privacy would be assisted were the bill to be amended such that:**

- (a) a compulsory questioning warrant must not be authorised unless a current or former member of the judiciary has approved the issuance of such a warrant;<sup>3</sup> and**

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3 Amendment to Schedule 1, Part 1, item 10, proposed sections 34B and 34BF.

- (b) **questioning under a questioning warrant cannot progress without the presence of an Inspector-General of Intelligence and Security (IGIS) official.**<sup>4</sup>

#### *Apprehension of a person subject to a warrant*

1.10 The bill would provide for the apprehension of a warrant subject in particular circumstances, enabling a police officer to physically apprehend a person, as well as enter premises to do so, and to search the person and use such force as is reasonable and necessary.

1.11 The dissenting members agree with the majority report that it appears that the apprehension of a warrant subject may only be authorised in strictly defined circumstances, and that a person may only be apprehended in order to immediately take them to the place of questioning. Further, it would appear that the ASIO Guidelines, and the external oversight mechanisms, have the capacity to provide a significant safeguard with respect to the use of this apprehension power in practice. However, the dissenting members disagree with the committee view expressed at paragraph [1.66], that it is proportionate for the Attorney-General, rather than a judicial officer, to issue the warrant.

**1.12 The dissenting members consider that the proposed capacity for the Attorney-General, a political officer, to issue a warrant and to authorise the apprehension of a person, rather than or absent the additional oversight of a judicial officer, raises particular concerns as to whether the proposed apprehension power permissibly limits the rights to liberty and freedom of movement.**

**1.13 The dissenting members consider that the proportionality of these proposed measures would be assisted were the bill to be amended to provide that a compulsory questioning warrant, including one that authorises the apprehension of a person, must not be authorised unless a current or former member of the judiciary has approved the issuance of such a warrant.**<sup>5</sup>

#### *Questioning warrants*

1.14 The subject of a warrant may be questioned for a 'permitted questioning time' of up to 24 hours,<sup>6</sup> 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.<sup>7</sup> The bill provides that the subject of a questioning warrant would commit

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4 Amendment to Schedule 1, Part 1, item 10, proposed section 34JB.

5 Amendment to Schedule 1, Part 1, item 10, proposed sections 34B and 34BF.

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

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

a criminal offence if they fail to give any information or produce any record or thing requested of them.<sup>8</sup>

1.15 While a warrant subject would not be physically barred from leaving a place of questioning, it cannot be said that they would be 'at liberty', or free to leave without facing potentially serious criminal consequences. That is, their attendance in compliance with a questioning warrant may be more analogous to being held in police custody following an arrest, than to voluntarily visiting a police station and being free to leave without facing a criminal consequence.<sup>9</sup> As the minister advised, the bill does not prescribe time limits for questioning an adult on a single occasion. Rather, it provides that the prescribed authority may set breaks between periods of questioning by giving directions for the subject's further appearance.<sup>10</sup> These breaks may last, as the minister advised, from minutes to days, and it is not clear whether a person could leave the place of questioning during these breaks without committing an offence. Consequently, it appears that there would be no maximum period of time during which a warrant subject could be questioned on a single occasion. Noting that the bill would require that continuous periods of questioning be separated by breaks, this suggests that a maximum questioning period of up to 24 hours for an adult could in fact take place over a far longer continuous period of time. Where a subject requires the use of an interpreter, providing for an extension of questioning by up to 40 hours, this continuous period of time would potentially be even longer, potentially over a number of days or weeks.

1.16 The dissenting members agree that these proposed measures may have a particular impact on people with disability, having regard to the particular rights of such persons to be free from exploitation. The dissenting members agree with the majority report that while the process of questioning would appear to be directed towards the legitimate objective of ensuring that ASIO has the capability to collect intelligence in relation to serious threats to Australia's security, there is some risk that in practice the measure may be used in a way that would impermissibly limit the rights of persons with disability.

**1.17 The dissenting members consider that it is not clear that the proposed questioning power would constitute a proportionate limitation on the right to liberty, or the right to freedom of movement.**

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8 Schedule 1, Part 1, item 10, proposed section 34GD.

9 The UN Human Rights Committee has explained that examples of deprivation of liberty include police custody, remand detention, imprisonment, after conviction, house arrest, administrative detention, involuntary hospitalization, as well as being involuntarily transported. See, UN Human Rights Committee, *General Comment No. 35* (liberty and security of the person) (2014) [5].

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

**1.18** The dissenting members consider that, in addition to the proposed amendments set out at paragraph [1.103] of the majority report, the proportionality of the proposed questioning power would be assisted were the bill to be amended to provide:

- (a) a maximum duration of time during which a warrant subject may be required to be in attendance at a place of questioning on one occasion;<sup>11</sup>
- (b) specific requirements with respect to the conduct of the questioning itself (including establishing that warrant subjects be provided with food, water and toilet facilities);
- (c) that when the period of time in which a warrant subject is required to be in attendance at a place of questioning exceeds a certain period (for example, 14 hours), that they be allowed to leave to go home to sleep (without risking criminal prosecution), or if an issuing authority considers that would likely prejudice the investigation, that the person be provided with adequate sleeping and washing facilities;<sup>12</sup> and
- (d) that an IGIS official must be present during any questioning and if the IGIS raises any concern about the conduct of questioning, or a warrant subject's treatment during questioning, the prescribed authority must suspend questioning in order to consider that concern (rather than this being discretionary).<sup>13</sup>

**1.19** Further, the dissenting members consider that it would assist in improving the proportionality of these measures if guidelines and training programs for officers exercising power under a questioning warrant were established to assist them to identify persons with disability and respond appropriately.

*Prohibition on persons subject to a warrant leaving Australia*

1.20 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, and provides that such a person may be required to surrender their travel documents. 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.

1.21 The dissenting members agree with the majority report that this measure would appear to be accompanied by safeguards which may be effective to ensure

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11 Amendment to Schedule 1, Part 1, item 10, proposed sections 34BD, 34BE, and 34BF.

12 Amendment to Schedule 1, Part 1, item 10, proposed section 34AG.

13 Amendment to Schedule 1, Part 1, item 10, proposed sections 34DC-DE.

that any limitation on the right to freedom of movement and protection of the family is proportionate to the objective sought to be achieved.

**1.22 The dissenting members consider that, in addition to the proposed amendment set out at paragraph [1.121] of the majority report, the proportionality of these measures may be further assisted if the bill were amended to provide that:**

- (a) the prohibition on travel only applies after a warrant has been issued (rather than once the warrant has been requested);<sup>14</sup> and**
- (b) where the total permitted questioning period pursuant to a questioning warrant has been exhausted, the warrant ceases to be in force.<sup>15</sup>**

*Questioning warrants for minors aged 14 and over*

1.23 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.

1.24 The proposed expanded compulsory questioning power with respect to children aged 14 years and over limits the rights of the child. The minister advised that the Attorney-General will be required to consider the best interests of the child when deciding whether to issue a warrant, but that this must be considered alongside a legitimate security need to issue and execute a questioning warrant against a child. However, under the Convention on the Rights of the Child the best interests of the child is a 'primary' consideration, as compared with other considerations—it is not just one primary consideration among other equally primary considerations. It follows that it may be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child.

1.25 The dissenting members consider that, from the information provided by the minister, questions remain as to whether this limitation on the rights of child meets the threshold of a 'pressing and substantial concern' such as to establish a legitimate objective. Further, the dissenting members consider that the proposed measures do not appear to be accompanied by sufficient safeguards such that they would constitute a proportionate limitation on the rights of the child, including the obligation to consider the best interests of the child and their rights to liberty, freedom of movement, humane treatment in detention, and privacy.

**1.26 The dissenting members consider that the provisions relating to the issue of a minor questioning warrant engage and may impermissibly limit a number of**

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14 Amendment to Schedule 1, Part 1, item 10, proposed sections 34G and 34GA.

15 Amendment to Schedule 1, Part 1, item 10, proposed subsection 34BF(4).

rights belonging to children. Children have special rights under human rights law taking into account their particular vulnerabilities.<sup>16</sup> Both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.<sup>17</sup>

**1.27** The dissenting members consider questions remain as to whether there is sufficient evidence to establish that there is a pressing and substantial concern in relation to the need to question children aged under 16. Further, the dissenting members consider that the proposed measures do not appear to be accompanied by sufficient safeguards such that they would constitute a proportionate limitation on the rights of a child.

**1.28** The dissenting members consider that, in addition to the proposed amendment set out at paragraph [1.150] of the majority report, the proportionality of the measure would be assisted if the bill were amended to:

- (a) require that the Attorney-General must consider the best interests of the child as a primary consideration in determining whether to issue a questioning warrant;<sup>18</sup>
- (b) require that the Attorney-General must, in issuing a minor questioning warrant, turn their mind to directing that the minor may disclose the fact that a warrant has been issued against them to a member of their family; or to a specified person, or class of persons (e.g. a teacher), and that the minor be notified of this on service of the warrant;<sup>19</sup>
- (c) require that an officer of the IGIS must be present while a minor is being questioned;<sup>20</sup>
- (d) clarify when a minor's representative's conduct will be deemed to have reached the threshold of being 'unduly disruptive', and provide explicitly that the minor's representative may speak directly to the child during questioning, and answer questions from the child;<sup>21</sup>

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

17 *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>.

18 Amendment to Schedule 1, Part 1, item 10, proposed subsection 34BB(2).

19 Amendment to Schedule 1, Part 1, item 10, proposed section 34BB.

20 Amendment to Schedule 1, Part 1, item 10, proposed section 34JB.

21 Amendment to Schedule 1, Part 1, item 10, proposed section 34FG.

- (e) establish a reasonable maximum period of time during which a child may be required to attend for questioning on one single occasion;<sup>22</sup> and
- (f) require the prescribed authority to consider the best interests of the child as the primary consideration, as well as the child's age and competence, in determining whether to make any direction related to the execution of a minor questioning warrant.<sup>23</sup>

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

1.29 A person subject to a questioning warrant is required to give any information or produce any record or other things requested by ASIO. 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. Although anything said or produced by them is not generally admissible in criminal proceedings against them (which provides a 'use immunity'), this immunity does not extend to information derived from questioning materials (meaning there is no 'derivative use immunity').

1.30 The dissenting members agree with the majority report that it is not clear that sufficient safeguards would operate such that this limitation on the privilege against self-incrimination may be considered proportionate.

**1.31 The dissenting members consider the absence of a derivative use immunity<sup>24</sup> raises questions as to the efficacy of safeguards regarding the right to a fair trial, and in particular, the right not to incriminate oneself.**

**1.32 Noting the potential impact on the right to a fair trial of these provisions, the dissenting members recommend that a review be undertaken as to what effect these provisions have on the right to a fair trial in practice.<sup>25</sup>**

*Restrictions on legal representatives*

1.33 The bill would establish a range of limitations on a warrant subject's capacity to contact a lawyer, or to contact a particular lawyer of their choosing, and would significantly restrict the role of a lawyer during the questioning process.

1.34 The dissenting members consider that it is not clear that the proposed ability to restrict a warrant subject's choice of lawyer would constitute a permissible limitation on the right to a fair trial, in particular the right to be represented by a

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22 Amendment to Schedule 1, Part 1, item 10, proposed section 34DJ.

23 Amendment to Schedule 1, Part 1, item 10, proposed section 34DE.

24 In Schedule 1, Part 1, item 10, proposed subsection 34GD(6).

25 For example, the bill could require the Independent National Security Legislation Monitor to undertake such a review.



lawyer of one's own choosing,<sup>26</sup> and the requirement for lawyers to be able to advise and to represent persons charged without restrictions, influence, pressure or undue interference from any quarter.<sup>27</sup> In particular, it is not clear that there is a pressing and substantial need for this proposed limitation on a person's choice of lawyer, as no evidence has been provided that there are circumstances where lawyers suspected of, or known to have, engaged in conduct which is related to that being investigated, have appeared to assist a warrant subject and the prescribed authority has been unable bar them from doing so. Further, it is not clear that the proposed provisions, which may restrict a person's access to a lawyer where they are being questioned, are accompanied by sufficient safeguards such that this would constitute a proportionate limitation on the right to a fair trial.

**1.35 The dissenting members note that no evidence has been provided that demonstrates lawyers have been involved in activities contrary to national security, such as to establish that there is a pressing and substantial need to limit a person's choice of lawyer. The dissenting members consider that it does not appear that the restrictions on a person's access to a lawyer where they are being questioned, and limitations on a lawyer's capacity to advise their client during the questioning process, are accompanied by sufficient safeguards such that this would constitute a proportionate limitation on the right to a fair trial.**

**1.36 The dissenting members consider that, in addition to the proposed amendments set out in the majority report at paragraph [1.200], the proportionality of these measures would be assisted if the bill were amended to provide:**

- (a) a prescribed authority may only make a direction that a person cannot contact another lawyer where not to do so would cause a delay that would unduly frustrate the questioning process, having regard to all the circumstances associated with the questioning matter, and the particular circumstances of that warrant subject;<sup>28</sup>**
- (b) if a warrant subject attends without a lawyer, the prescribed authority must make inquiries of them as to why this is, and to determine whether they seek additional time in order to contact a lawyer of their choosing;<sup>29</sup>**

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

27 See, 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*.

28 Amendment to Schedule 1, Part 1, item 10, proposed section 34F.

29 Amendment to Schedule 1, Part 1, item 10, proposed section 34F and 34FB.

- (c) that specific information as to the meaning of 'unduly disrupt' be included for the purposes of proposed subsection 34FF(6);<sup>30</sup>
- (d) that a prescribed authority must provide a lawyer and warrant subject with reasonable breaks, during which they must provide a reasonable opportunity for the lawyer to advise the client;<sup>31</sup>
- (e) that if a lawyer or warrant subject requests a break, and the prescribed authority refuses the request, they must provide reasons for their decision;<sup>32</sup> and
- (f) that proposed section 34FH set out the basis on which a lawyer's access to information for proceedings related to a warrant may be prohibited or limited.<sup>33</sup>

#### *Secrecy and disclosure provisions*

1.37 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. 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. 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.

1.38 The dissenting members agree with the majority report that it is not apparent, from the information provided, that the bill would provide a warrant subject with a disability or some other vulnerability with a sufficient degree of additional support to ensure that they are able to disclose the fact that a warrant has been issued against them, and seek advice and support.

**1.39 The dissenting members disagree with the majority report that these measures which limit the right to freedom of expression are proportionate. The dissenting members consider that it is not apparent from the information provided by the minister that the imposition of a blanket prohibition on the disclosure of information associated with a questioning warrant, qualified by a series of permitted disclosures, constitutes a proportionate limitation on the right to freedom of expression.**

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30 Amendment to Schedule 1, Part 1, item 10, proposed subsection 34FF(6).

31 Amendment to Schedule 1, Part 1, item 10, proposed subsection 34FF(2).

32 Amendment to Schedule 1, Part 1, item 10, proposed subsection 34FF(5).

33 Amendment to Schedule 1, Part 1, item 10, proposed section 34FH.

**1.40** The dissenting members consider that, in addition to the proposed amendment set out in the majority report at paragraph [1.221], the proportionality of these measures would be assisted if the bill were amended to provide:

- (a) a defence for a person to make such a disclosure when the disclosure occurred without any intention to jeopardise security or where the disclosure was innocuous and would not reasonably be likely to jeopardise security;<sup>34</sup> and
- (b) that the prescribed authority must, during the questioning process, consider whether to make a direction enabling a warrant subject and/or their lawyer to disclose information related to the warrant (including the fact of the issue of the warrant itself) to specified persons (for example, family members or employers).<sup>35</sup>

*ASIO internal authorisation for use of tracking devices*

1.41 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. This bill would expand that power to provide that ASIO may instead obtain internal ASIO authorisation to use a tracking device (or enhancement equipment) to track a person or object.

**1.42** The dissenting members consider that it does not appear that the proposed internal authorisation scheme relating to the use of tracking devices would be sufficiently constrained or accompanied by adequate safeguards such that it would constitute a proportionate limitation on the right to privacy.

**1.43** The dissenting members consider that, in addition to the proposed amendments in the majority report at paragraph [1.247], the proportionality of these measures would be assisted if the bill were amended to:

- (a) clarify the definition of a 'tracking device';<sup>36</sup>
- (b) provide that use of a tracking device may only be internally authorised with respect to a person where the issuing officer is satisfied that there are reasonable grounds for believing that to do so would substantially assist the collection of intelligence in respect of the security matter and that the person is engaged in or is reasonably

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34 Amendment to Schedule 1, Part 1, item 10, proposed section 34GF.

35 Amendment to Schedule 1, Part 1, item 10, proposed section 34DE, having regard to proposed subsections 34GF(5)(e) and (6).

36 Amendment to Schedule 2, item 5, proposed section 22.

suspected of being engaged in, or of being likely to engage in, activities prejudicial to security;<sup>37</sup>

- (c) provide that the Director-General must give the Attorney-General a written report where an internal authorisation has been given within one month from the day on which the authorisation has been made,<sup>38</sup> and
- (d) provide that the IGIS must be notified on each occasion that ASIO has internally authorised that a tracking device may be used.<sup>39</sup>

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### **Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020**

1.44 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), and 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.

#### *Prohibiting items in immigration detention*

1.45 The dissenting members agree that 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, and prohibiting certain items that may enable criminal activity within the immigration detention network also appears to be rationally connected to that objective.

1.46 However, the dissenting members consider that it does not appear that 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. There is no limit in the proposed legislation that would ensure that only detainees who pose a risk of such sort would be subject to the search and seizure powers. While it may be the intention not to apply these powers to low-risk detainees, there is no such safeguard in the legislation and no transparency as to what such operational policy guidance would look like. As such, the legislation itself would allow things such as mobile phones to be seized from detainees without any requirement that they pose

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37 Amendment to Schedule 2, item 8, proposed subsection 26G(6).

38 Amendment to Schedule 2, item 17, proposed subsection 34AAB(1).

39 Amendment to Schedule 2 new Subdivision DA.

any risk to the health, safety or security of persons in the facility or to the order of the facility. In addition, it does not appear that the alternative means of communication available to detainees who would no longer be able to access mobile phones and internet capable devices would sufficiently protect their right not to have their private and family life arbitrarily or unlawfully interfered with, and their right to freedom of expression.

**1.47 The dissenting members consider that the broad scope of the proposed power to allow the minister to declare items as 'prohibited things' (including mobile phones) means there is a significant risk that the powers could be exercised in a manner which is not compatible with the rights to privacy and freedom of expression and the right of detainees not to be subjected to arbitrary or unlawful interference with family.**

**1.48 The dissenting members consider that the proportionality of the proposed measure would be assisted if the bill were amended to:**

- (a) provide that a thing can only be designated as a 'prohibited thing' when possessed by a detainee who it can reasonably be demonstrated would pose a risk to the health, safety or security of persons in the facility or to the order of the facility if they possessed such a thing;**
- (b) require sufficient alternative means of private communication to be made freely available to detainees; and**
- (c) require that the implementation of alternative means of communication be monitored in all detention facilities.**

#### *Search and seizure powers*

1.49 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. 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), the ability to take and retain possession of such items if found pursuant to a search, and the ability to conduct strip searches to search for such items.

1.50 The dissenting members note that the bill, as drafted, does not require authorised officers must undertake specific training before they are able to exercise strip search and use of force powers, or require that strip searches be used as a last resort, or require officers to have formed any suspicion before undertaking general searches.

1.51 The dissenting members agree with the majority report that given the absence of legislative protections within the Migration Act for effective oversight of

the search and seizure powers, there is some risk that in practice the exercise of the proposed powers may not comply with the prohibition on degrading treatment or the right to humane treatment of persons in detention.

1.52 In addition, dissenting members note that the bill would allow for searches of prohibited things without the need for an authorised officer to have formed a reasonable suspicion, and would enable a legislative instrument to be made that could direct offices to seize any prohibited thing (including mobile phones) from any detainee without the need to assess any specific risk. The dissenting members agree that, in the absence of legislative limits within the Migration Act, the measure therefore risks arbitrarily interfering with the right to privacy (including the right to bodily integrity) and with the rights of the child.

**1.53 The dissenting members consider that, in addition to the recommended amendments set out at paragraph [1.386] of the majority report, the compatibility of this measure may be assisted if the bill were amended to:**

- (a) remove the power for a person acting as an 'assistant' of an authorised officer to conduct strip searches or use force against a person;**
- (b) provide that an officer may only search a detainee where they have first formed a reasonable suspicion that the detainee has in their possession the thing being searched for;**
- (c) provide that the minister's power to direct officers to seize a thing can only be exercised in the way the minister has indicated it will be used, that is, that it can only be exercised in relation to things that are unlawful to possess (such as child abuse material); and**
- (d) provide that a thing can only be designated a 'prohibited thing' when possessed by a detainee who it can reasonably be demonstrated would pose a risk to the health, safety or security of persons in the facility or to the order of the facility if they possessed such a thing.**

1.54 The dissenting members draw the above human rights concerns to the attention of the minister and the Parliament.

**Graham Perrett MP  
Deputy Chair  
Member for Moreton**

**Steve Georganas MP  
Member for Adelaide**

**Senator Nita Green**  
**Senator for Queensland**

**Senator Pat Dodson**  
**Senator for Western Australia**

**Senator Nick McKim**  
**Senator for Tasmania**