Responses from legislation proponents — Report 9 of 2020[1]

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ACTING MINISTER FOR HOME AFFAIRS

Ref No: MS20-001230

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your correspondence of 17 June 2020, requesting further information on the Australian Security Intelligence Organisation Amendment Bill 2020.

I have attached my response to the Parliamentary Joint Committee on Human Rights' Scrutiny Report 7 of 2020 as requested.

Yours sincerely

CHRISTIAN PORTER

RESPONSE TO THE PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS
HUMAN RIGHTS SCRUTINY REPORT 7 OF 2020

Australian Security Intelligence Organisation Amendment Bill 2020

This paper responds to issues that the Parliamentary Joint Committee on Human Rights raised in relation to the Australian Security Intelligence Organisation Amendment Bill 2020 (the **Bill**) in its *Human rights scrutiny report 7 of 2020*.

The Bill would, if passed:

- repeal the Australian Security Intelligence Organisation's (**ASIO**) current questioning and detention regime set out in Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (**ASIO Act**)
- introduce a reformed compulsory questioning framework for ASIO, and
- amend ASIO's tracking device framework to support operational agility, mitigate risk to ASIO's surveillance operatives, and resolve the current disadvantage faced by ASIO when engaging in joint operations with law enforcement agencies.

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]:

- **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**

Why it is appropriate that a questioning warrant be issued by the Attorney-General, rather than a judicial officer

The existing questioning framework in Division 3 of Part III of the ASIO Act requires ASIO to seek the Attorney-General's consent before applying to an issuing authority for the issue of a questioning warrant. This multi-step process is inconsistent with the authorisation of other domestic ASIO warrants and not conducive to the efficient or timely execution of a questioning warrant. The Bill would remove the issuing authority role, and provide the Attorney-General with sole responsibility for issuing a questioning warrant.[1] This would include an express power to vary or revoke a

[1] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, ss 34BA and 34BB.

questioning warrant, and the ability to authorise the subject's apprehension.[2] In its review of the operation, effectiveness and implications of Division 3 of Part III of the ASIO Act, the PJCIS found it appropriate that the Attorney-General issue questioning warrants.[3]

As the First Law Officer of the Commonwealth with responsibility for the rule of law and oversight of intelligence agencies, the Attorney-General currently issues all other ASIO special power warrants in the ASIO Act. This includes search, surveillance device and computer access warrants. This provides ministerial oversight of the intended use of intrusive powers for national security purposes, and establishes ministerial accountability, a central principle of Australia's parliamentary system. In his Third Report of the Royal Commission on Intelligence and Security, Justice Hope highlighted that Ministers are required to accept clear responsibility for the agencies of the intelligence community and are accountable to Parliament for the agencies within it.

The Attorney-General's role is separate but complementary to the provision of independent oversight and review by the Inspector-General of Intelligence and Security (**IGIS**) as to the legality and propriety of the activities undertaken by ASIO for national security purposes.

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

A questioning warrant may only authorise ASIO to request the subject of a questioning warrant provide information, or produce records or other things that are, or may be, relevant to intelligence that is important in relation to an adult questioning matter, or a minor questioning matter, as the case may be.[4] Questioning in relation to an adult is therefore limited to matters that relate to the protection of, and of the people of, the Commonwealth and the several States and Territories from espionage, politically motivated violence, or acts of foreign interference, whether directed from, or committed within, Australia or not.[5] The scope of a minor questioning warrant is further limited to matters that relate to the protection of, and of the people of, the Commonwealth and the several States and Territories from politically motivated violence, whether directed from, or committed within, Australia or not.[6]

The Bill does not provide the subject of a questioning warrant with the right to 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. The relevance of a particular line of questioning may not be apparent to the subject of a questioning warrant, but nonetheless be important in relation to an adult or minor questioning matter. The subject of a questioning warrant will commit an offence under subsection 34GD(3) if they fail to comply with a request to give information, or produce any record or thing, in accordance with the warrant. The subject will not commit an offence where they do not have the information, or are not in possession or control of the record or thing requested.[7]

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[2] *Ibid*, ss 34BG(1) and 34BE(2).
[3] PJCIS report on the operation, effectiveness and implications of Division 3 of Part III of the ASIO Act, [3.123] – [3.124].
[4] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BD.
[5] See definition of adult questioning matter, Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34A.
[6] See definition of minor questioning matter, Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34A.
[7] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34GD(4).

These offences are reasonable and proportionate measures which are necessary to ensure the effectiveness of a questioning warrant.

Introducing specific provisions that may enable the subject of a questioning warrant to avoid answering certain questions on the grounds of relevance may undermine the compulsory questioning process. In many circumstances, a questioning warrant would be issued in relation to an individual who would otherwise be reluctant to voluntarily provide information, or where there is an urgent need to obtain the intelligence. If a reluctant individual were permitted to withhold information, this would undermine the central purpose of a questioning warrant, which is primarily used to gather potentially critical intelligence relevant to espionage, politically motivated violence, or acts of foreign interference. Therefore, in order to ensure the functionality of a questioning warrant, it is necessary to impose a positive obligation on the subject to provide information in order to obtain intelligence that may be used to investigate serious threats to security.

Where the subject of a questioning warrant believes that the information requested is outside the scope of the warrant, the subject retains the right to make a complaint to the IGIS. The IGIS may be present at the questioning of an individual,[8] and it remains open to the IGIS to raise any concern about the impropriety or illegality of any exercise, or purported exercise, of powers under a questioning warrant. If such a concern is raised, the prescribed authority may give a direction to suspend questioning under the warrant to allow the concern to be addressed.[9] Furthermore, should the request be outside the scope of the warrant, the offence would not apply. The subject of a questioning warrant will only commit an offence where the request for information or the production of records is in accordance with the warrant.[10]

The Bill provides for specific safeguards in relation to information obtained under a questioning warrant. If the Director-General is satisfied that information, which may include personal information, obtained under a questioning warrant is not required for the purposes of the performance of ASIO's functions, the Director-General must cause the record or copy of this information to be destroyed.[11]

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

The *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)* (**Guidelines**), issued pursuant to section 8A of the ASIO Act, must be observed by ASIO in the performance of its functions relating to obtaining, correlating, evaluating and communicating of intelligence relevant to security. The Guidelines stipulate that ASIO must operate in accordance with the following principles:

- 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

[8] *Ibid*, s 34JB.
[9] *Ibid*, s 34DM.
[10] *Ibid*, s 34GD(3)(b).
[11] *Ibid*, s 34HC.

    - with due regard for the cultural values, mores and sensitivities of individuals of particular cultural or racial backgrounds, consistent with the national interest
- the more intrusive the investigative technique, the higher the level of officer that should be required to approve its use
- wherever possible, the least intrusive techniques of information collection should be used before more intrusive techniques, and
- where a threat is assessed as likely to develop quickly, a greater level of intrusion may be justified.

The Guidelines apply broadly to all ASIO operations. ASIO ensures that its internal procedures, including those that relate to questioning warrants, are consistent with the Guidelines. In accordance with these principles, where possible, ASIO would seek to conduct a voluntary interview in preference to requesting a questioning warrant – compulsory questioning would almost never be the first option for obtaining intelligence. ASIO may consider requesting a compulsory questioning warrant to obtain intelligence in the following circumstances:

- where other methods of collecting the intelligence are likely to be ineffective
- where there is an urgent need to obtain the intelligence, and questioning the person would immediately produce relevant intelligence
- when ASIO assessed the individual may be more willing to divulge information under compulsion, for example, due to criminal offences associated with not complying with the warrant
- when the person is likely to reveal the fact or content of ASIO's interest to third parties, if not for the prospect of criminal prosecution for disclosure, or
- where the person has refused a voluntary interview, or ASIO assesses that they would refuse.

In accordance with the Guidelines, ASIO would not request a questioning warrant in a situation where the assessed threat does not justify the intrusion of executing a compulsory questioning warrant, or the intelligence can be obtained by other means. The Guidelines also include a number of requirements relating to the collection, use, handling and disclosure of personal information,[12] which manage the privacy impacts of such collection, use, handling and disclosure.

Whether the ASIO guidelines are enforceable

Pursuant to section 8A of the ASIO Act, the Minister may issue guidelines to the Director-General to be observed in the performance of ASIO's functions and the exercise of its powers. The Guidelines are binding on ASIO as they are issued by the Minister in accordance with section 8A of the ASIO Act. In accordance with the *Inspector-General of Intelligence and Security Act 1986*, the IGIS assesses ASIO's compliance with the Attorney-General's Guidelines.

The IGIS conducts regular inspections of the operational activities of Australian intelligence and security agencies, including ASIO. The IGIS can also conduct inquiries and handle complaints. IGIS staff have full access to information held by Australian intelligence and security agencies. As part of an inspection of the operational activities of ASIO, IGIS staff may review compliance with the Guidelines.

[12] *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)*, section 13.

If the IGIS completes an inquiry into a matter, including matters that relate to ASIO's compliance with the Guidelines, the IGIS must prepare a report setting out conclusions and recommendations as a result of the inquiry, and give a copy of the report to the head of the Commonwealth agency to which it relates, and the responsible minister.[13] Where, in the opinion of the IGIS, the head of a Commonwealth agency does not, as a result of the conclusions and recommendations set out in a report, take adequate and appropriate action within a reasonable period, the IGIS may:

- discuss the matter with the responsible Minister and prepare a report relating to that matter, and
- give a copy of the report to the Attorney-General, and if required, the Prime Minister.[14]

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

Article 17 of the *International Covenant on Civil and Political Rights* (**ICCPR**) provides that no one shall be subjected to arbitrary or unlawful interference with their privacy or home. The use of the term 'arbitrary' means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.[15] The United Nations Human Rights Committee has interpreted 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.[16] A permissible limitation on Article 17 by public authorities may include where the information about an individual's private life is essential in the interests of society. The interests of society may include national security, such that the limitation may be found to be permissible for this purpose.[17]

Article 16 of the *Convention on the Rights of the Child* (**CRC**) provides that no child shall be subject to arbitrary or unlawful interference with his or her privacy. Lawful and non-arbitrary interferences with a child's privacy are permissible limitations.

Searches of persons subject to a questioning warrant

Section 34CC would enable a police officer to conduct a frisk or ordinary search of a subject who has been apprehended. While this search is primarily to ensure the safety of officers and ensure the integrity of a questioning warrant, police may also seize records or other things of intelligence value as part of the search if authorised by the Attorney-General in the warrant. Section 34D would enable a police officer to request that a person undergo a screening procedure at the place of questioning. The officer may also request that a person undergo a voluntary ordinary search or a frisk search, if the officer suspects on reasonable grounds that it is prudent to conduct an ordinary search or a frisk search of the person in order to ascertain whether the person is carrying a dangerous item or a communication device.

[13] *Inspector-General of Intelligence and Security Act 1986*, s 22.
[14] *Ibid,* s 24.
[15] United Nations Human Rights Committee General Comment No 16 at paragraph 7*: Article 17 (Right to Privacy)*, [4].
[16] UN Human Rights Committee, *Views: Communication No. 488/1992,* 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia*'), [8.3].
[17] United Nations Human Rights Committee *General Comment No 16* at paragraph 7*: Article 17 (Right to Privacy).*

This limitation on the right to privacy is necessary and proportionate to achieve the legitimate objective of ensuring that a person is not a danger to themselves or others while being apprehended or attending questioning. These powers will also ensure that a person does not alert others involved in security relevant activities, communicate sensitive information during or after, or destroy, damage or alter records or other things relevant to the questioning warrant.

There are a number of safeguards to protect an individual's right to privacy in the conduct of any search or screening procedure. An ordinary search or a frisk search of the subject must, if practicable, be conducted by a police officer of the same sex as the subject. In conducting an ordinary search or frisk search of the subject of a questioning warrant who is being apprehended, a police officer may only use such force as is necessary and reasonable. The IGIS may also be present at any search or screening of an individual, and the subject of a questioning warrant may make a complaint to the Commonwealth Ombudsman, or a State or Territory complaints agency in relation to the conduct of any search or screening procedure.

These safeguards will ensure that any search or screening of a person is proportionate and necessary to ensure the safety of officers involved in questioning and the integrity of the questioning process, and therefore Australia's national security.

Entry to premises to apprehend subject

Where a police officer is authorised under section 34C to apprehend the subject of a questioning warrant, and the officer believes on reasonable grounds that the subject is on a particular premises, section 34CA would provide the officer with the power to enter premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night, only for the purpose of searching the premises for the subject or apprehending the subject. This power is necessary and proportionate to ensuring the reasonable execution of a questioning warrant.

Where a questioning warrant authorises apprehension, there would be reasonable grounds for believing that, if the subject is not apprehended, the subject is likely to alert a person involved in an activity prejudicial to security that the activity is being investigated, not appear, or destroy, damage or alter, or cause another person to destroy, damage or alter, a record or other thing the subject has been or may be requested under the warrant to produce. If police officers were not afforded the power to enter any premises, they would be effectively precluded from enforcing a questioning warrant while the person subject to a warrant remains situated on any land, place, vehicle or aircraft. Execution of the warrant would rely on the person voluntarily leaving the premises which could hold up the process of enforcing the warrant and potentially jeopardise ASIO's investigation.

The power to enter any premises under section 34CA is a reasonable measure which remains proportional to the legitimate security concerns it aims to address. In enforcing a warrant, a police officer is confined to using force which is necessary (essential) and reasonable (objectively proportionate) in the circumstances. The police are also subject to their own guidelines in relation to the use of force. For example, the AFP are bound by the *Commissioner's Order on Operational Safety*, which provides guidelines as to what is considered reasonable or excessive force while emphasising principles of negotiation and conflict de-escalation as primary considerations prior to the use of physical force.

The Order is designed to ensure that AFP appointees effectively manage the response to conflict or potential conflict situations using the AFP use of force model and operational safety principles stipulated within the Order. For example, under these principles any application of force must be reasonable, necessary and proportionate to the threat or resistance offered, the primary

consideration must be the safety of all persons involved and negotiation is the preferred means of confrontation management wherever possible.

Once a person is apprehended by a police officer, that officer is required to bring the person immediately before a prescribed authority, who must inform the person of their rights and obligations. If the subject of a warrant wishes to make a complaint about the police entering their premises, they may contact the Ombudsman at any time to make this complaint. The person must be provided with facilities to make such a complaint. The subject of a warrant also has the right to contact a lawyer and may seek judicial remedy in relation to any improper entrance to premises.

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

ASIO has policies and procedures governing how compulsory questioning is conducted under the existing framework. These are currently being updated in line with the measures proposed in the Bill. These updated policies and procedures will continue to address ASIO's engagement with vulnerable subjects, including children and people with disabilities.

Some additional safeguards will be included in the statement of procedures to be made under section 34AF. For example, the existing statement of procedures issued under section 34C of Division 3 of Part III of the ASIO Act provides that:

- the subject must not be transported in a vehicle with inadequate ventilation or light, or in a way which would expose the subject to unnecessary physical hardship
- all persons present during questioning or any period of detention under a warrant must interact with the subject in a manner that is both humane and courteous, and must not speak to the subject in a demeaning manner, and
- the subject must not be questioned in a manner that is unfair or oppressive in the circumstances.

In addition, section 34AG will provide that a subject must be treated with humanity and with respect for human dignity, and must not be subjected to torture or to cruel, inhuman or degrading treatment, by any person exercising authority under the warrant or implementing or enforcing a direction of the prescribed authority. The obligation to treat subjects humanely will ensure that the physical privacy and bodily integrity of subjects, including vulnerable subjects, are maintained to the extent it is possible to do so.

The *Commissioner's Order on Operational Safety* provides that AFP appointees must not handcuff a child or young person unless they believe on reasonable grounds it is essential to safely transport the child to protect the welfare or security of the child or any other person. In addition, the prescribed authority supervises questioning to ensure that the warrant is executed within the confines of the law and may make a number of directions in relation to the conduct of all people involved in the execution of a questioning warrant.

As noted above, the IGIS may also be present at any search or screening of an individual, and the subject of a questioning warrant may make a complaint to the Commonwealth Ombudsman, or a State or Territory complaints agency in relation to the conduct of any search or screening procedure.

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]:

- **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.**

Please refer to the response above, under the heading 'why it is appropriate that a questioning warrant be issued by the Attorney-General, rather than a judicial officer'.

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]:

- **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 [sic] 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.**

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

Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. Article 12(3) provides that this right can be permissibly limited if the limitations are provided by law, are necessary to protect national security or the rights and freedoms of others, and are consistent with the other rights in the ICCPR.

The proposed measures in the Bill permissibly limit the right to freedom of movement by requiring a person who is subject to a questioning warrant to appear before a prescribed authority for questioning, either immediately upon notification of the issuing of the warrant, or at a time specified by the warrant. These measures are directed at the legitimate objective of enabling ASIO to conduct questioning that will substantially assist in the collection of intelligence that is important in relation to the protection of, and of the people of, the Commonwealth and the several States and Territories from espionage, politically motivated violence, or acts of foreign interference.

The ability to question a person for the purpose of obtaining intelligence in relation to these matters is necessary to ensure that ASIO has the capability to collect intelligence in relation to serious threats to Australia's security. Without this ability, and in circumstances in which ASIO's other intelligence-collection powers may be less effective, ASIO would be dependent upon the goodwill of a person to provide necessary information about the most significant national security threats to Australia. If a person were to voluntarily cooperate with ASIO, there would be no need to utilise a questioning warrant.

The measures proposed in the Bill contain extensive safeguards to ensure that any limitation on the right to freedom of movement is proportionate to achieving the legitimate objective noted above. In order for a questioning warrant to be issued, the Attorney-General must be satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a 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. The availability of other, equally effective methods is a factor tending against the issuing of a warrant but is not required to be conclusive.

In addition, in requesting questioning warrants, ASIO must comply with the requirements in the Guidelines. The Guidelines relevantly provide that the means used for obtaining information must be proportionate to the gravity of the threat and the probability of its occurrence. The Guidelines further provide that, wherever possible, the least intrusive techniques of information collection should be used. In addition, the Guidelines require consideration to be given to whether a threat is likely to develop quickly. In these cases, a greater degree of intrusion may be justified. ASIO's compliance with the Guidelines, including in the making of requests for questioning warrants, is subject to the independent oversight of the IGIS.

Once a questioning warrant is issued, a number of safeguards apply to ensure that restrictions on the individual's right to freedom of movement are limited only to the extent necessary to achieve the legitimate objective. A person can only be questioned for a cumulative maximum of 24 hours

(approved by the prescribed authority in eight hour extendable increments up to the 24 hour maximum). Where an interpreter is present, the maximum permitted cumulative questioning time is 40 hours.

Under the Statement of Procedures made under section 34AF, additional protections will apply to the conduct of questioning. For example, under the existing Statement of Procedures, a person must not be questioned for more than four continuous hours without being offered a 30-minute break. If the warrant is a minor questioning warrant, the minor may only be questioned for continuous periods of 2 hours or less, separated by breaks directed by the prescribed authority.[18] As a person who is subject to a questioning warrant is not in detention, that person is free to move as they choose when questioning is not taking place (subject to any directions of the prescribed authority, and limitations on leaving Australia).

In addition to the supervision of ASIO's questioning by an independent prescribed authority, the IGIS may also be present at questioning and has the ability to raise concerns about any impropriety or illegality. The person who is the subject of a warrant has the right to contact the IGIS at any time to make a complaint, and also has the right to contact a lawyer and have a lawyer present during questioning.[19] These oversight mechanisms ensure that questioning is carried out for the purpose for which it is approved, within a fixed maximum time limit, and that the person is afforded opportunities (via the IGIS and their lawyer) to make representations or raise concerns if he or she considers that there is impropriety or illegality.

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

The Bill provides that questioning may occur for up to eight hours, which may be extended by the prescribed authority to a maximum of 24 hours.[20] Where an interpreter is present, the Bill provides that, where a subject has been questioned for up to 24 hours, the questioning period can be extended to 40 hours.[21] A questioning warrant may remain in force for a period of no longer than 28 days.[22]

The prescribed authority may set breaks between periods of questioning by giving directions under paragraph 34DE(1)(e) for the subject's further appearance before the prescribed authority for questioning. The questioning of a minor may only occur for continuous periods of two hours or less, separated by breaks directed by the prescribed authority.

The Bill does not otherwise prescribe time limits for questioning an adult on a single occasion. However, the existing Statement of Procedures specifies that a person must not be questioned for more than four continuous hours without being offered a 30-minute break.

[18] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BD(2)(b).
[19] *Ibid*, ss 34F-34FA.
[20] *Ibid*, s 34DJ.
[21] *Ibid*, s 34DK.
[22] *Ibid*, s 34BF(4).

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

The revised framework contained in the Bill repeals ASIO's current detention power and introduces an apprehension power to ensure attendance at questioning, prevent the tipping off of others or the destruction of security relevant records or other things.[23] If a warrant authorises apprehension, the period of apprehension will begin when the subject is given written notice of the warrant, and include the time it takes to search the person (if necessary), and transport the person to the place of questioning. The apprehension power will cease to have effect when the subject appears before the prescribed authority for questioning. The apprehension power does not include a general power to detain a subject for questioning under the warrant.

As a person who is subject to a questioning warrant is not in detention, that person is free to move as they choose when questioning is not taking place (subject to the limitations on leaving Australia, which ensure that warrants are not frustrated by individuals absenting themselves from the jurisdiction to avoid questioning). A subject may also leave questioning of their own volition at any point. Under the Bill, ASIO does not have the authority to prevent a subject from leaving a questioning session, or to use force to prevent them from leaving. However, a subject that leaves a questioning session before questioning was finished may commit an offence (for example, for failing to appear or failing to give information).[24]

Whether questioning pursuant to one questioning warrant may be spread across multiple occasions, including in cases where the permitted questioning time has been extended

Yes. As noted above, the prescribed authority may set breaks between periods of questioning by giving directions under paragraph 34DE(1)(e) for the subject's further appearance before the prescribed authority for questioning. These breaks could range from minutes to days. The prescribed authority has this ability at any time during questioning, regardless of whether it falls within the initial questioning period or any extended questioning period.

However, the prescribed authority does not have the authority to require a subject's further appearance for questioning if the total time for questioning permitted under the warrant has elapsed (24 hours, or 40 hours if an interpreter is present), or the 28 day period for which the warrant may be in force has expired.

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

As noted above, under the Bill ASIO would not have the ability to detain questioning subjects.

It is possible that critical operational requirements would necessitate continued questioning that would result in delays to opportunities to sleep. However, as a general principle, the prescribed authority would be required to ensure they have adequate opportunity to rest, eat, shower, and sleep consistent with section 34AG and consistent with a subject's right to 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

[23] *Ibid*, Subdivision C.
[24] *Ibid*, s 34GD.

The Bill does not prescribe whether a subject must be provided with food and regular drinks when they appear for questioning, or whether subjects should be provided with breaks where required to attend to religious duties.

To the extent they are expressly provided for, such matters will be addressed in the statement of procedures that will be made under section 34AF. The current statement of procedures, for example, provides that a subject must have access to fresh drinking water and clean toilet and sanitary facilities at all times during questioning.

The existing statement of procedures also requires the subject be permitted to engage in religious practices as required by his or her religion. And the Bill acknowledges breaks for religious practices are likely to occur as they are expressly carved out of time that is questioning time in subparagraph 34DL(b)(vii).

The provision of breaks to afford adequate opportunity for food, regular drinks, and engagement in religious duties would also be consistent with the requirements of section 34AG to treat subjects humanely.

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

The Bill contains numerous safeguards that will ensure the protection of the health and welfare of persons subject to a questioning warrant while appearing before a prescribed authority. These are:

- the independent status of the prescribed authority, who is present to ensure questioning is conducted only in accordance with ASIO's legislated functions
- the existing statement of procedures requiring that the subject be provided with necessary medical or other health care, the ability of the IGIS, or IGIS staff, to be present at the questioning of a subject
- the ability for the IGIS to raise concerns with the prescribed authority, who must consider the IGIS's concern and make directions accordingly
- the provisions of the statement of procedures to be made under section 34AF, and
- the obligation on ASIO to ensure that questioning subjects are treated with humanity and with respect for human dignity, and must not be subjected to torture or to cruel, inhuman or degrading treatment.

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 [sic] is ongoing

Yes, a questioning subject may complain to the IGIS or the Commonwealth Ombudsman, or another relevant State or Territory complaints agency, about their treatment during questioning or apprehension, and seek a remedy, while a period of questioning is ongoing.

The following provisions are designed to ensure that a questioning subject is aware of, and can take advantage of that right:

- the notice of the warrant and the prescribed authority must inform the subject that they may make a complaint to the IGIS, the Commonwealth Ombudsman, or relevant complaints agency[25]

[25] *Ibid*, s 34BH(2)(g) and 34DC(1)(i).

- while apprehended, a questioning subject cannot be prevented from contacting the IGIS, the Ombudsman (for a complaint about the Australian Federal Police if applicable) or a complaints agency in relation to a state or territory police force (if applicable), amongst others[26]
- a questioning subject who has been apprehended must, if requested by the subject, be provided with facilities to make a complaint to the IGIS, the Commonwealth Ombudsman, or relevant complaints agency[27]
- a person exercising authority under the warrant must, if requested by the subject, provide access to facilities to make a complaint to the IGIS, the Commonwealth Ombudsman, or a relevant complaints agency, provided the prescribed authority has made a direction to defer questioning to enable this,[28] and
- a questioning subject will not commit an offence under the secrecy provisions when making permitted disclosures, which include disclosures for the purpose of making a complaint to the IGIS, the Commonwealth Ombudsman, or a complaints agency.[29]

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

It is intended that the regulations that would be made under the Bill in relation to access to information by lawyers will be substantially the same as existing sections 7 and 8 of the *Australian Security Intelligence Organisation Regulation 2016* (the **Regulation**). The Bill, and the regulations to be made under it, will maintain the interaction between the Regulation, secrecy provisions, and access to security information by a lawyer for a subject of a questioning warrant, in relation to remedy proceedings in court, that exist in the current Division 3 of Part III questioning framework. The regulations will, however, be updated to reflect the repeal of the detention power, and changes in terminology and legislative references.

Section 7 of the current Regulation made under section 34ZS(6) of the ASIO Act (renumbered as section 34GF in the Bill) provided that a prescribed authority must not give written permission to a legal adviser of a subject to communicate to anyone else information that:

- is obtained during the questioning or detention of the subject, and
- relates to:
    - sources or holdings of intelligence, or
    - ASIO's method of operations.

Section 8 of the current Regulation, made under section 34ZT of the ASIO Act (renumbered as 34FH in the Bill), regulates access to security information by a lawyer acting for a person in connection with proceedings for a remedy relating to:

- a warrant issued under Division 3 of Part III of the Act in relation to the person, or
- the treatment of the person in connection with such a warrant.

It provides that access to security information may be given to the lawyer only if:

[26] *Ibid*, s 34CB(2).
[27] *Ibid*, s 34CB(2)(c)
[28] *Ibid*, s 34DI.
[29] *Ibid*, s 34GF(5).

- the lawyer has been given a security clearance in relation to the information at the level considered appropriate by the Secretary of the Department, or
- the Secretary of the Department is satisfied that giving the lawyer access to the information would not be prejudicial to the interests of security.

It further provides that access to security information may be given to the lawyer subject to any conditions that the Secretary of the Department considers appropriate, including conditions relating to the use, handling, storage or disclosure of the information, and that nothing in the section entitles a lawyer who has been given a security clearance to be given access to security information.

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

Should a questioning subject have a cognitive, intellectual or other developmental disability, the prescribed authority could make a direction that the subject may contact a family member, guardian, advocate and/or other specialist disability support worker to advise that a questioning warrant had been issued against them, without committing an offence.

In addition, if the subject was a minor, then they could inform such a person if that person was their minor's representative.

Where a questioning subject has a cognitive, intellectual or other developmental disability, the safeguards built into the Bill, including the requirement for humane treatment, the role of the prescribed authority, and oversight by the IGIS, would ensure that questioning was conducted in an appropriate manner having regard to the nature of the disability. This may include providing the subject with an opportunity to contact, and have present, a specialist disability support worker. This would maximise the possibility of obtaining valuable intelligence from the subject, and ensure any requirements or conditions specific to the subject can be managed with the assistance of a qualified professional.

Impact of questioning threshold

Under the new framework, an adult questioning warrant cannot be issued unless the Attorney-General is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to the 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. In considering whether it would be reasonable in all the circumstances for warrant to be issued, the fact that the subject has a disability would be a relevant factor for consideration.

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

There is no specific provision in the Bill requiring the presence of a support person for persons with a cognitive, intellectual or other developmental disability. However, as noted above, it would be appropriate to provide such a subject with an opportunity to contact, and have a support person present to maximise the possibility of obtaining valuable intelligence from the subject, and ensure any requirements or conditions specific to the subject can be managed with the assistance of a qualified professional.

Were a warrant issued in relation to a person with, or believed to have, a cognitive, intellectual or other developmental disability, the safeguards built into the Bill, including the requirement for humane treatment, the role of the prescribed authority, and oversight by the IGIS would ensure that questioning was conducted in an appropriate manner having regard to the nature of the person's disability.

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)

The Attorney-General must be satisfied that there are reasonable grounds for believing that the warrant will *substantially assist* the collection of intelligence that is important in relation to the protection of, and of the people of, the Commonwealth and the several States and Territories from espionage, politically motivated violence, or acts of foreign interference, 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. Therefore it is unlikely that ASIO would seek to obtain a questioning warrant in relation to a person who does not have legal capacity.

Were a warrant issued in relation to such a person, then the safeguards built into the Bill, including the requirement for humane treatment,[30] the role of the prescribed authority, and oversight by the IGIS, would ensure that questioning was conducted in an appropriate manner having regard to the nature of the disability.

What other additional supports would be provided to a subject with, or believed to have, a cognitive, intellectual or other developmental disability

Before conducting questioning, ASIO would take into account any situation of potential vulnerability that the person might be in (for example, whether they have a disability, or are a refugee or survivor of other trauma). Any particular requirements relating to the health and/or mental wellbeing of the person would form part of the conduct of the questioning, noting that the Statement of Procedures requires that subjects are not questioned in a manner that is unfair or oppressive in the circumstances.

ASIO's conduct of the questioning under these circumstances would be subject to the supervision of the prescribed authority, and the IGIS may also choose to be present.

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]:

- **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**
- **will the Director-General consider the right to protection of the family in making such directions, and**

[30] *Ibid*, s 34AG.

- **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.**

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

The Bill includes requirements for people subject to a questioning warrant (and in some instances, a request for a questioning warrant if notified of that request) to surrender their passports for the duration of the warrant (and if notified of the warrant request, for the duration of the warrant application preceding this). Failure to surrender a passport is an offence, carrying a maximum penalty of five years' imprisonment. The Bill further prohibits people who are subject to a warrant (or a warrant request, if notified of that request) from leaving Australia for the duration of the warrant without the written approval of the Director-General. Contravention of this prohibition is a criminal offence, carrying a maximum penalty of five years' imprisonment.

A requirement that a person surrenders his or her passport for a fixed time (being the duration of the warrant, and in certain cases the preceding period when a warrant application is determined) is necessary to ensure that warrants are not frustrated by the actions of people who may choose not to comply with them by leaving Australia when informed that a warrant is issued (or when notified that a warrant request is made). As it is likely that a questioning warrant would be issued in relation to a person who is not voluntarily cooperating with ASIO, the flight risk of such a person is high, warranting the specific passport surrender and travel prohibition provisions in the Bill. Given that warrants are directed to the collection of intelligence relevant to politically motivated violence, espionage and foreign interference, there may also be significant security risks in enabling a person who is believed to have information relevant to such an offence from leaving Australia.

These provisions are particularly significant given the proposed expansion of the powers to investigate threats of espionage and foreign interference. The maximum penalty of five years' imprisonment provides a strong deterrent to such behaviour, and is commensurate to the significance of ASIO's operations and the potential security risk presented by the departure of a person who is the subject of a warrant or warrant request. Further, the prohibition on leaving Australia is subject to an exception, where the person has obtained the Director-General's written consent, which allows for exceptional circumstances in which there is a legitimate need for the person to travel, and the Director-General is of the view that any flight risk is capable of being managed. The Director-General's decision-making in this regard is subject to the independent oversight of the IGIS.

The limitations on the right to freedom of movement are proportionate to the legitimate objective of ensuring that a questioning warrant is not frustrated by the subject leaving Australia, because they are enlivened only where a warrant is issued (and, in some instances, where a warrant application is on foot). In order to require the surrender of travel documents, the Director-General must believe on reasonable grounds that the person may leave Australia, and the person's leaving would be likely to impact on the person's ability to comply with the questioning warrant. A passport is only surrendered for the duration of the warrant (or the duration of the warrant application if request is refused).

The Director-General is under a statutory obligation to cause the return of the travel documents to the person as soon as practicable after the earlier of the refusal by the Attorney-General of a warrant request, or the end of the duration of a warrant if issued (the Director-General can also

cause the passport to be returned earlier). Therefore, travel documents can only be confiscated for a finite duration that is specifically linked to a legitimate intelligence collection need, and is subject to precisely stated legislative criteria.

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

The Bill deliberately does not prescribe the circumstances in which the Director-General may give permission to travel and the considerations that may factor into such a decision. Any such decision would depend on operational and security circumstances specific to the matter to which the questioning relates. The Director-General, would, in any event, consider all factors known to him or her that are relevant to the decision to grant permission to travel.

Whether questioning was required urgently to obtain critical intelligence and whether a questioning subject would be at risk of not returning to Australia would be key considerations in any decision to grant travel permission.

What are the likely conditions that the Director-General may impose on any permission to travel

Any conditions the Director-General may impose on a decision to grant permission to travel will depend on the operational circumstances of the matter. Conditions may include requirements to make regular contact with ASIO, stay within specified areas, or to not contact specified individuals who are involved in matters prejudicial to security.

Will the Director-General consider the right to protection of the family in making such directions

Where the right to protection of the family is a relevant consideration in granting permission to travel, or imposing conditions on any permission to travel, the Director-General would consider it.

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

As noted above, the IGIS may inquire into any matter relating to compliance by ASIO with laws of the Commonwealth or the States and Territories, ministerial directions or guidelines, or human rights requirements. The IGIS may also inquire into the propriety of ASIO's actions and the effectiveness and appropriateness of procedures relating to legality or propriety.

The IGIS's oversight role would therefore extend to the Director-General's power to require that a person in relation to whom a warrant has been requested not leave the country.

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]:

- **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)**
- **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.**

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

Currently, ASIO may seek a questioning warrant against a person as young as 16 years of age. A special threshold applies, requiring the Attorney-General to be satisfied that on reasonable grounds that it is likely the minor will commit, is committing, or has committed a terrorism offence.[31] The Bill retains an equivalent threshold, while lowering the minimum age of questioning to 14 years of age, and broadening the scope of questioning in relation to a minor from terrorism offences to politically motivated violence.[32] A minor questioning warrant cannot be issued in relation to espionage or foreign interference. A questioning warrant will have no effect if the subject is under 14 years old.[33]

This approach is consistent with the findings of the Parliamentary Joint Committee on Intelligence and Security that, in principle—and with appropriate safeguards—lowering the minimum age of a questioning subject to 14 may be a necessary measure for protecting the community from terrorism.[34] As suggested by the Committee, the Bill inserts an additional requirement that the Attorney-General, in deciding whether to issue a minor questioning warrant, must consider the best interests of the child.[35]

Why there is a pressing and substantial need for these powers

The risks posed by minors engaged in politically motivated violence, including terrorism, has recently been starkly illustrated by British police arresting and charging a 14 year old male with plotting a terror attack involving bombs containing shrapnel and bleach.[36]

In the last five years, ASIO has provided critical security information to law enforcement to disrupt three major terrorist attacks involving teenagers under the age of 18. In May 2015, a 17 year old male was identified as being in contact with Australian members of Islamic State in Iraq and the Levant (ISIL) in Syria. This terrorist organisation was encouraging the minor to undertake terrorist attacks in Australia. Subsequently, the minor was arrested and pled guilty to one charge of acting in preparation for a terrorism offence.

In April 2016, another minor was arrested and charged with one count of acts in preparation for a terrorist offence. This minor was a 16 year old male who attempted to obtain firearms and explosive

[31] *Australian Security Intelligence Organisation Act 1979,* s 34ZE(4)(a).
[32] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BB(1)(b).
[33] *Ibid*, s 34BC.
[34] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (2018), 80 [3.151].
[35] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BB(2).
[36] The Independent, '14-year-old boy accused of making bombs with shrapnel for Islamist terror attack appears in court', 19 June 2020 (https://www.independent.co.uk/news/uk/crime/terror-attack-eastleigh-teenager-islamist-bomb-hampshire-old-bailey-latest-a9574226.html).

to support an intention to conduct a terrorist attack on Anzac Day. Further, in October 2016, counter-terrorism police arrested two 16 year olds after they were observed entering a Sydney gun shop and purchasing two bayonets. One of the teens was found with a note that linked their anticipated actions to ISIL. This investigation led to the pair being charged with acts done in preparation for, or planning, a terrorist act, and for being members of a terrorist organisation.

These cases demonstrate that minors are involved in the planning and preparation of politically motivated violence in Australia. The ability of law enforcement, in collaboration with ASIO, to detect minors who are preparing to conduct a terrorist attack highlights the need for ASIO to have compulsory questioning powers that allow the Organisation to collect intelligence quickly in a predictive and anticipatory capacity.

Since 2003, when these powers were first introduced, ASIO has seen an increase in the number of minors involved in terrorism. Specifically, one of the seven terrorist attacks conducted in Australia since 2014 was carried out by a young person of school age, and three of the 18 disrupted plots have involved minors.

- In 2015, NSW police employee Curtis Cheng was murdered by a radicalised 15 year old.
- Since May 2015, ASIO have undertaken three major disruptions involving teenagers under 18 years of age which led to minors being charged with preparing for a terrorist act.

ASIO is particularly concerned that vulnerable and impressionable young people, including children as young as 14, will continue to be at risk of being ensnared in extremist material on the internet.

- Islamist extremist groups and supporters continue to disseminate propaganda designed to radicalise, recruit and inspire terrorist attacks in the West, including Australia. ISIL's approach to propaganda set the standard among Islamist extremists, but right-wing extremists will also continue to produce internet-savvy, sophisticated messaging.
- Extreme right-wing online forums proliferate on the internet, and attract international memberships, including from Australians. These online forums share and promote extremist right-wing ideologies, and encourage and justify acts of violence. ASIO expect such groups will remain an enduring threat, making more use of online propaganda to spread their messages of hate.

It is important to note this power can only be used if the 14 year old is the subject of a politically motivated violence investigation. Within this context, it is important that ASIO's security intelligence tools, which enable ASIO to access valuable and accurate security intelligence, reflect this reality. ASIO has ensured a number of safeguards have been included in the framework to enable ASIO to appropriately question minors.

ASIO's ability to compulsorily question minors engaged in activities prejudicial to security can also provide further information into the intent of adult leadership figures of terrorist organisations with whom they are associated. As the internet becomes a significant factor in the radicalisation of younger people, so does the ability of terrorist actors to conceal or obfuscate their identity and location through encryption or other anonymising technologies. Therefore, minors known to be involved in politically motivated violence may hold particularly unique human intelligence that ASIO would not otherwise have access to.

In a hypothetical, there is a known a network of associates, a number of whom are aged between 14 and 16, and who are known to support overseas Islamist extremist groups and politically motivated violence more broadly. The individuals are radicalised by an adult leader of the group who

encourages the minors to conduct martyrdom operations. ASIO assesses that a number of group members are planning an imminent onshore attack, but does not have the short-term information to clarify the individuals' intentions and no basis is formed to reach thresholds for counter-terrorism offences.

In these circumstances, a minor questioning warrant would allow ASIO to seek insights into the prejudicial activities of the minors as well as the intent of the adult leadership figure and provide the opportunity for ASIO to hold the subject accountable for dishonest answers. This human intelligence would be invaluable for the protection of Australia's national security.

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)

The Bill provides that the subject of a minor questioning warrant may contact a minor's representative at any time after the subject is given notice of the warrant.[37] If a minor's representative is not present when the minor appears before the prescribed authority, the minor may request that a minor's representative be present.[38] If the warrant does not include an immediate attendance requirement, the prescribed authority may defer questioning to enable the minor's representative to be present.[39] In certain circumstances, the subject's lawyer may act as the minor's representative where a non-lawyer representative is not present at questioning.[40]

A minor's representative is a parent or guardian of the subject, or another person who is able to represent the subject's interests, and as far as practicable in the circumstances, is acceptable to the subject and the prescribed authority.[41]

A prescribed authority may also direct that a questioning subject be permitted to contact their parent, guardian and/or family member.[42]

However, there is no requirement in the Bill for a parent, guardian and/or family member to always be notified that a questioning warrant had been issued in relation to the minor. This is to ensure that:

- the minor is able to nominate their own representative – a person they are comfortable with – rather than requiring automatic notification to individuals with whom the minor may not have a good relationship
- information concerning ASIO's operations and procedures does not become public, as this has the potential to prejudice ASIO's operations, particularly in relation to the matter in respect of which the questioning warrant was issued, and
- other individuals who may also be involved in activity prejudicial to security do not have the opportunity to tip off others – which could jeopardise ASIO's investigation – or damage records or things relevant to ASIO's investigation.

[37] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34F(1)(b).
[38] *Ibid*, s 34FD.
[39] *Ibid*, s 34FD(3).
[40] *Ibid,* ss 34F(1), 34FD and 34FG.
[41] *Ibid*, s 34AA.
[42] *Ibid*, s 34DE.

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)

Australia's obligations with respect to children arise principally under the Convention on the Rights of the Child. Article 3(1) provides that, in all actions concerning children, the best interests of the child shall be a primary consideration. Decisions to issue and execute questioning warrants in relation to a child aged 14 to 17 years are actions concerning children for the purpose of Article 3(1). Accordingly, the measures proposed in the Bill engage the obligation to ensure that the best interests of the child are a primary consideration in such decisions.

In requiring consideration of the best interests of a child in relevant decisions, Article 3(1) relevantly requires the best interests of the child who is the subject of the decision to be a primary consideration. This does not mean that the best interests of the child should be the sole consideration, or necessarily the determinative consideration, but rather, should be considered alongside any other competing interests and relevant considerations arising in the circumstances of individual cases.

The Attorney-General, in deciding whether to issue a minor questioning warrant, must consider the best interests of the child.[43] In considering the best interests of the child, the Attorney-General must take into account the following matters, to the extent known:

- the age, maturity, sex and background of the person
- the physical and mental health of the person
- the benefit to the person of having a meaningful relationship with the person's family and friends
- the right of the person to receive an education
- the right of the person to practise their religion, and
- any other matter the Attorney-General considers relevant.

Such factors must also be considered alongside a legitimate security need to issue and execute a questioning warrant in relation to a person under 18 years of age. As noted above, there is evidence in Australia and internationally of young teenagers being involved in terrorist activity. Therefore, it is necessary for the provisions of Division 3 of Part III to apply to people under the age of 18, as automatically excluding persons under the age of 18 may result in the loss of critical intelligence to the prevention of a terrorist attack. It is not sufficient to rely merely on the willingness of such people to offer information in a law enforcement interview, since such information may be directly used against them in a prosecution.

As noted in paragraph 80 of the Explanatory Memorandum to the Bill, it is intended that this consideration is a primary consideration in deciding whether to issue a minor questioning warrant. It is necessary that this be considered alongside other legitimate considerations, and not in isolation, as the best interests of the child is not, and cannot be, the sole consideration in a decision to issue a minor questioning warrant. To ensure that adequate consideration is given to the best interests of the child where an application is made for a questioning warrant in relation to a child, a higher legislative threshold requiring consideration of the child's best interests must be satisfied in order to obtain a questioning warrant.

[43] *Ibid*, s 34BB(2).

The maximum period of time a child may kept for questioning on one occasion (including non-permitted questioning time)

A minor may be kept for questioning for the same period as an adult, although the prescribed authority must ensure that questioning only continues for continuous periods of two hours or less.[44]

The age and competence of a minor the subject of a questioning warrant would also be a relevant factor for the prescribed authority in any decision to defer questioning, or excuse the subject from further questioning. The existing Statement of Procedures in relation to warrants issued under Division 3 of Part III requires that any period of questioning or detention may only take place under conditions that take full account of the subject's particular needs and any special requirements having regard to the subject's age.

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

The Bill does not specify a preferred first choice of minor's representative. It is a matter for the minor themselves to decide which individual they will seek to have as their representative, or to decide they would prefer to have only a lawyer, and not a non-lawyer representative, present (in which case, the lawyer would also act as the minor's representative).[45] Depending on the minor's choice, a minor's representative may well be a parent, guardian, or another adult who meets the requirements of section 34AA(2).

Please also note the response below, concerning the circumstances in which a lawyer may serve as both the subject's lawyer and minor's representative.

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

Yes, a prescribed authority may give a direction that a lawyer may act as both the subject's lawyer and as their minor's representative in limited circumstances. The circumstances are:

- where the warrant includes an immediate appearance requirement and a lawyer is present, in which case the prescribed authority must give a direction that the subject may be questioned in the absence of a non-lawyer representative (and if requested by the subject, must direct that the subject must be permitted to contact a non-lawyer representative)[46]
- where the warrant does not include an immediate appearance requirement, the subject has requested a non-lawyer representative, the prescribed authority is satisfied that such time as is reasonable to enable a non-lawyer representative to be present during the questioning has passed (the prescribed authority can defer questioning for this purpose) and a lawyer for the subject is present during the questioning[47]
- where the warrant does not include an immediate appearance requirement, a lawyer is present, and the subject voluntarily chooses not to request that a non-lawyer representative be present during the questioning,[48] or

[44] *Ibid*, s 34BD(2)(b).
[45] *Ibid*, s 34FD.
[46] *Ibid*, s 34FD(2).
[47] *Ibid*, s 34FD(3).
[48] *Ibid*, s 34FD(4).

- where the minor's representative has been removed from questioning for unduly disrupting questioning of the subject, in which case the subject may contact a replacement minor's representative.[49]

In these circumstances, the prescribed authority must issue a direction that the subject may be questioned under the warrant in the absence of a non-lawyer representative.

Whether and when a child would be permitted to disclose to their family that a warrant had been issued in relation to them

A minor would be permitted to disclose to their family member that a warrant had been issued in relation to them if that family member was their minor's representative.

The prescribed authority may also direct that a questioning subject, their lawyer, or their minor's representative be permitted to contact and disclose information to a specified person, including their family members.[50] In deciding whether to give such a direction, the prescribed authority must take into account:

- the person's family and employment interests, to the extent that the prescribed authority is aware of those interests
- the public interest
- the risk to security if the permission were given, and
- any submissions made by the person, the person's lawyer or ASIO.[51]

The subject would otherwise be bound by the secrecy offences in section 34GF. An exception to the secrecy offences is the ability of the subject to make a permitted disclosure to a minor's representative or sibling.[52]

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]:

- **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**
- **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.**

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

Article 14(1) of the ICCPR provides that in the determination of a person's obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 14(3)(g) of the ICCPR provides that in the determination of any criminal charge, a person shall not be compelled to testify against himself. This article is engaged by the compulsory questioning offences provided in section 34GD, which require a person to give

[49] *Ibid*, s 34FG.
[50] *Ibid*, s 34GF(6).
[51] *Ibid*, s 34GF(10).
[52] *Ibid*, s 34GF(5)(f).

information or produce a record or thing in accordance with a warrant even if the information, or production of the record or thing, might tend to incriminate the person or make them liable for a penalty. If a person does not provide the requested information, or produce the record or thing, they will commit an offence punishable by a maximum sentence of 5 years imprisonment.

The provisions in the Bill relating to the use and disclosure of questioning material post-charge and post-confiscation application closely mirror equivalent provisions in the *Australian Crime Commission Act 2002* (**ACC Act**) and the *Law Enforcement Integrity Commissioner Act 2006* (**LEIC Act**). Those provisions are based on the 'principle of legality', identified by the majority of judges in *X7 v Australian Crime Commission* (2013) 248 CLR 92, which requires 'that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness'.[53]

Section 34E of the Bill would specifically authorise the use and disclosure of questioning material to obtain other material (derivative material). Consistent with the equivalent provisions in the ACC Act and LEIC Act, derivative material will be admissible in a prosecution of the subject, but may only be provided to a prosecutor if the disclosure is:[54]

- a pre charge disclosure of the material
- a post charge disclosure of derivative material obtained from pre charge questioning material, or
- a post charge disclosure of derivative material obtained from post charge questioning material made under a court order, the court having been satisfied that the disclosure is required in in the interests of justice.

These safeguards minimise the impact that derivative material has on the effectiveness of a person's ability to claim the privilege against self-incrimination. Further, section 34EC would specifically preserve a court's power to make any orders necessary to ensure the fair trial of a subject for derivative material (or questioning material) is not prejudiced by the possession or use of the material by a prosecutor of the subject.

The measures permitting disclosure of derivative material to prosecutors are necessary to achieve, and rationally connected to achieving, the legitimate aim of protecting Australia's national security interests. As noted in the Bill's Explanatory Memorandum,[55] security threats, including politically motivated violence, which poses an imminent threat to life by way of terrorism, and espionage and acts of foreign interference are now occurring at an unprecedented scale and level of sophistication. In addition, rapid technological advances, such as encryption, also hamper ASIO's technical tools resulting in potential intelligence gaps. Human intelligence is vital in assisting to overcome these challenges posed by technological advancements. The ability to disclose derivative material to prosecutors, in circumstances that ensure that a subject's right to a fair trial is not unduly prejudiced, will assist in preventing significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately Australia's national security.

[53] Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, quoting *X7 v Australian Crime Commission* (2013) 248 CLR 92 (X7) at 153 per Kiefel J.
[54] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34EB(1).
[55] Explanatory Memorandum to the Australian Security Intelligence Organisation Amendment Bill 2020 at [47].

Why the bill does not provide the subject of a questioning warrant with a derivative use immunity

As noted above, the safeguards contained in the derivative use provisions are specifically designed to minimise the impact that derivative material has on the effectiveness of a person's ability to claim the privilege against self-incrimination. In circumstances where a subject has been charged with an offence, derivative material cannot be disclosed in a way that would foreseeably undermine the fair trial of the subject.

The Bill implements these safeguard arrangements, rather than providing a broad derivative use immunity, because it is reasonable in the circumstances to permit the use of derivative material to disrupt and prevent serious harm to Australia's national interests, including through the prosecution of a subject.

A derivative use immunity could also undermine attempts to criminally prosecute a subject. It could require the prosecution to prove the provenance of each piece of evidence before it could be admitted, and result in pre-trial arguments being used to inappropriately delay the resolution of charges against the subject. This was the experience of the then-National Crime Authority, before the *National Crime Authority Legislation Amendment Act 2001* removed the derivative use immunity.[56]

For the same reasons, it would be inappropriate to require a court order for the disclosure of any derivative material to a prosecutor.

What factors a prescribed authority may take into consideration when considering the right of the subject to a fair trial

The Bill does not prescribe any specific factors that the prescribed authority must take into consideration when considering the right of the subject to a fair trial under section 34DF. This ensures the prescribed authority is able to exercise the full range of their discretion in considering a subject's right to a fair trial. Any consideration by a prescribed authority would necessarily take into account the nature of the questioning material, and its potential impact on any trial of the accused.

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]:

- **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**

[56] Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p 19.

- **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; 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, and**
- **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.**

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

The subject of a questioning warrant, whether or not vulnerable or subject to a disability, may contact a lawyer at any time after they have been given notice of the warrant for the purpose of obtaining legal advice in relation to the warrant.[57] ASIO must also provide the subject with facilities to contact a lawyer of their choice.[58]

There are no specific provisions providing a subject with a vulnerability or disability with additional opportunities to contact a lawyer, as the Bill already provides ample opportunity for a subject to contact a lawyer. Any vulnerability or disability could be a relevant consideration when the prescribed authority considers whether an adult has had a reasonable opportunity to contact a lawyer. As such, it is open to the prescribed authority to provide additional opportunities to a vulnerable person to contact a lawyer, even where they may have already been given an opportunity to do so.

In addition to this, the IGIS has the ability to be present at questioning and raise concerns with the prescribed authority, who must consider the IGIS's concern and make directions accordingly. If there were concerns surrounding the opportunity afforded to a person to contact a lawyer, the IGIS may raise this with the prescribed authority, and the prescribed authority may give a direction that the person be provided with a further opportunity to contact a lawyer.

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

Subdivision F of the Bill outlines the right of a subject to contact a lawyer and to have a lawyer present at questioning. This subdivision sets out some limited exceptions to these rights where necessary to ensure the questioning of the subject under the questioning warrant is not frustrated.

The prescribed authority may prevent a subject from contacting another lawyer if:

- there is already a lawyer for the subject present during questioning, and the lawyer was not appointed by the prescribed authority (i.e., was of the subject's choice), or the lawyer was

[57] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34F(1)(a).
[58] *Ibid*, s 34FB(2)(b).

appointed by the prescribed authority, but the prescribed authority is satisfied the subject had a reasonable opportunity to contact another lawyer, or[59]

- there is no lawyer present during questioning, and the prescribed authority is satisfied the subject had a reasonable opportunity to contact a lawyer.[60]

These directions ensure that the subject is not able to disrupt questioning by making repeated requests to contact a lawyer in circumstances where they have a lawyer present, or have had a reasonable opportunity to contact a lawyer. The subject may have had a reasonable opportunity where the prescribed authority has already deferred questioning to afford them this opportunity, or where the subject had a reasonable period of notice prior to questioning commencing to contact a lawyer. For example, a notice may have been served several days in advance, providing sufficient opportunity for the subject to contact a lawyer prior to their appearance for questioning.

Factors that may be considered by the prescribed authority in making a direction preventing the subject from contacting another lawyer may include:

- the urgency of the security matter
- any delays already incurred to enable the subject to contact another lawyer, or
- the reasons given by the subject for contacting another lawyer.

As outlined above, the IGIS has the ability to be present at questioning and raise concerns with the prescribed authority, who must consider the IGIS's concern and make directions accordingly. If there were concerns surrounding the opportunity afforded to a person to contact another lawyer, the IGIS may raise this with the prescribed authority, and the prescribed authority may give a direction that the person may contact another 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

The Bill does not prescribe the sources of information a prescribed authority may use to become satisfied that a particular lawyer poses a risk and therefore cannot be chosen to represent a person.

The most likely sources of information are from intelligence collected by ASIO, or from the AFP or a state or territory police force. The decision to prevent contact with a lawyer must be based on circumstances relating to that particular lawyer. For example, it would be appropriate to prevent contact with a particular lawyer under this section if there is information that suggests the lawyer is involved in an espionage activity which is related to the questioning matter, and consequently may alert others involved in the matter that is being investigated.

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

When the subject of a warrant is questioned before a prescribed authority, a lawyer is limited to requesting clarification of an ambiguous question, or requesting a break in questioning in order to provide advice to the subject. During a break in questioning, a lawyer may request an opportunity to address the prescribed authority on a matter.[61] These restrictions reflect the nature of questioning proceedings under a questioning warrant, which are designed to elicit information rather than being criminal proceedings against the person. If a lawyer is allowed to unduly disrupt questioning this

[59] *Ibid*, s 34F(2).
[60] *Ibid*, s 34F(3).
[61] *Ibid*, s 34FF.

could jeopardise the timely gathering of information and could prevent ASIO from collecting relevant information on serious national security matters. These limitations are reasonable, necessary and proportionate to ensure the effectiveness of questioning under a questioning warrant.

Accommodations are made within the Bill to allow a lawyer to provide assistance to their client throughout the questioning process. Lawyers must be given reasonable breaks in questioning to provide advice to their client and, the lawyer may request a break in questioning to provide advice to the subject. If a lawyer is concerned about the treatment of their client, he or she may assist the client in making a complaint to the IGIS, who may attend questioning and raise the matter with the prescribed authority. If the subject of a questioning warrant cannot afford a lawyer, it is also open to the person to apply for financial assistance under section 34JE, which is subject to the approval of the Attorney-General.

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

For the same reasons as set out above.

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

Before conducting questioning, ASIO would take into account any situation of potential vulnerability that the person might be in. Any particular requirements would form part of the conduct of the questioning, noting that the Statement of Procedures requires that subjects are not questioned in a manner that is unfair or oppressive in the circumstances.

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

A subject may make a complaint to the IGIS should directions that limit a subject's choice of lawyer or the role they can play during questioning be of concern. The IGIS, in turn, is empowered to raise concerns with the prescribed authority about the conduct of questioning, who must consider the IGIS's concern.[62]

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

The regulations intended to be made under the Bill that would regulate a lawyer's access to information are designed to ensure the protection of classified material. They would require that a lawyer has an appropriate security clearance, and that the Secretary of the Department of Home Affairs be satisfied that giving the lawyer access to the information would not be prejudicial to the interests of security.

The regulations would not prohibit a lawyer from receiving access to information or proceedings, but rather ensure that classified material is not handled inappropriately, or by a person whose access to information would be prejudicial to security.

[62] *Ibid*, s 34DM.

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]:

- **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, and**
- **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.**

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

The Bill contains two secrecy provisions which engage the right to freedom of expression by restricting the disclosure of information. Subsection 34GF(1) operates while a warrant is specified to be in force, and prevents a person from disclosing information without authorisation where the information is operational information or indicates the fact that the warrant has been issued or a fact relating to the content or to the questioning or apprehension of a person in connection with the warrant. Subsection 34GF(2), on the other hand, operates for two years after the warrant ceases to be in force, and prevents a person from disclosing operational information without authorisation where that information has been obtained as a direct or indirect result of a warrant being issued or executed. Operational information is defined as information indicating that ASIO has or had, a source of information or an operational capability, method or plan.

These secrecy laws contain a number of safeguards that will allow them to function in a reasonable and proportionate manner. Persons who are subject to a warrant may disclose information which would ordinarily be subject to secrecy laws if authorised to do so by the prescribed authority, Director-General or the Attorney-General. A person may also disclose information relating to a questioning warrant:

- to a lawyer for the purpose of seeking legal advice or obtaining representation in legal proceedings seeking a remedy relating to a questioning warrant
- to initiate, conduct or conclude legal proceedings in relation to a remedy relating to a questioning warrant
- to make an application for financial assistance under subsection 34JE(1), or
- to the IGIS, the Commonwealth Ombudsman or a State or Territory complaints agency, in relation to a questioning warrant.

These permitted disclosures ensure that the rights of the subject of a warrant are maintained while appropriately protecting sensitive information. In deciding whether to give permission to make a disclosure, the prescribed authority, the Director-General or the Attorney-General (as the case requires) must take into account:

- the person's family and employment interests, to the extent that the prescribed authority is aware of those interests
- the public interest

- the risk to security if the permission were given, and
- any submissions made by the person, the person's lawyer or ASIO.

This does not limit the matters that may be taken into account. The Bill is flexible as to the circumstances in which permission may be given to make a disclosure. This is to ensure the discretion is not limited, and maximise potential opportunities for disclosure.

Why it is necessary to prohibit any disclosure relating to a questioning warrant, without any link to whether the disclosure could prejudice national security

Knowledge of the mere fact of the existence of a questioning warrant may present operational risk and therefore prejudice national security. Knowledge of the existence of a warrant could result in information concerning ASIO's operations, methods and tradecraft, and areas of focus, becoming public. This in turn could limit ASIO's ability to collect intelligence in accordance with its functions and therefore 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

Subsection 34GF(3) of Schedule 1 of the Bill applies strict liability to the following physical elements of the offences:

- the information indicates the fact the warrant has been issued or a fact relating to the content of the warrant or to the questioning or apprehension of a person in connection with the warrant, and
- the information is operational information.

Consequently the prosecution is not required to prove fault for these elements. The prosecution does not need to establish that the person knew, intended or was reckless to, the nature of the information.

The person's culpability must be established for the remaining elements of the offence. In particular, the act of disclosing information is the substantive element of the offence and carries the fault element of intent. Therefore, to establish the offence, the prosecution must prove that the person intended to disclose information beyond a reasonable doubt.

The *Guide to Framing Commonwealth Offences* provides that applying strict liability to a particular physical element of an offence may be justified where requiring proof of fault would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element.[63] The Senate Standing Committee for the Scrutiny of Bills concluded that strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent.[64]

The application of strict liability to the elements in section 34GF is necessary to ensure that a person cannot avoid criminal responsibility because they did not turn their mind to whether the information was operational information or information about the warrant. The strict liability elements of the secrecy offences at section 34GF only apply to unauthorised disclosures made by a subject, or their lawyer engaged in questioning, in relation to operational information that indicates the fact that the

[63] *Commonwealth Guide to Framing Criminal Offences*, 25.
[64] Australian Parliament, Senate Standing Committee for the Scrutiny of Bills, Application of Absolute and Strict Liability Offences in Commonwealth Legislation (2002), 259.

warrant has been issued, or a fact relating to the content of the warrant or to the questioning or apprehension of a person in connection with the warrant - where the warrant is still in force, and where the warrant is no longer in force, the information disclosed is operational information.

Consistent with the *Guide to Framing Commonwealth Offences*, requiring knowledge of these elements would undermine deterrence of the offence. There are legitimate grounds for penalising a person lacking 'fault' in knowing or being reckless to the nature of operational information because the person engaged in conduct which may prejudice a security intelligence operation, and cause harm to Australia's national security. Upon service of the notification of the warrant the subject will be advised of the terms of the warrant both verbally and in writing. This will include their secrecy obligations and associated consequences of breaching those obligations. The prescribed authority will also remind the subject of these obligations at the beginning and end of questioning—this is likely to include information about the gravity of harm associated with an unauthorised disclosure given the operational information that may be disclosed.

The subject will also have their lawyer with them to clarify any concerns they have about these obligations throughout the course of questioning. There are legitimate grounds for penalising the lawyer without a fault element as the lawyer will also be reminded of his or her secrecy obligations and the serious consequences of making an unauthorised disclosure. The lawyer should have an enhanced understanding of the gravity of harm associated with the disclosure of sensitive operational information. As such, it would not be appropriate for the prosecution to be required to prove intention or recklessness in relation to this element of the offence, nor for there to be a defence available in relation to innocent or innocuous disclosures.

The Senate Standing Committee for the Scrutiny of Bills has previously concluded that strict liability may be appropriate where it is difficult to prosecute fault provisions, particularly those involving intent. The Standing Committee noted that strict liability had been applied in a range of circumstances, including where it is difficult for the prosecution to prove a fault element because a matter is peculiarly within the knowledge of the defendant.[65] The application of strict liability avoids the evidential difficulties for the prosecution to prove beyond reasonable doubt that the accused knew, intended, or was reckless as to whether the information was operational or about a warrant.

For these reasons, it is not appropriate for the prosecution to be required to prove intention or recklessness in relation to the physical elements of the offence with respect to operational information and information about the warrant.

Notwithstanding the strict liability of these elements in section 34GF, the defence of mistake of fact is available under section 6.1 of the *Criminal Code*. That is, a person is not criminally responsible for an offence that has a physical element for which there is no fault element if:

- at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts, and
- had those facts existed, the conduct would not have constituted an offence.

[65] Australian Parliament—Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002), 259.

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

As noted above, should a questioning subject have a cognitive, intellectual or other developmental disability, the prescribed authority could make a direction that the subject may contact 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.

In addition, if the subject was a minor, then they could inform such a person if that person was their minor's representative.

Where a questioning subject has a cognitive, intellectual or other developmental disability, it would generally be appropriate to provide them with an opportunity to contact, and have present, a specialist disability support worker. This would maximise the possibility of obtaining valuable intelligence from the subject and ensure any requirements or conditions specific to the subject can be managed with the assistance of a qualified professional.

There is therefore no need for a specific exception in the Bill for persons with disabilities to be able to disclose the fact of the warrant to their advocate or specialist representative.

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]:

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

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

The Bill will enable ASIO to use tracking devices under an internal authorisation, rather than under a warrant, where use of the device does not involve interference with the inside of a vehicle or entry to premises without permission. The Bill will also clarify that ASIO may use tracking devices without a warrant or authorisation in states and territories where it is not unlawful.

The amendments to allow ASIO to use tracking devices under an internal authorisation will bring ASIO's tracking device provisions under the ASIO Act broadly in line with law enforcement agencies' powers under the *Surveillance Devices Act 2004*. The current requirement to obtain a warrant in all circumstances can restrict ASIO from acting with sufficient speed to respond to time critical threats. It also creates a heightened level of risk to ASIO officers due to the need to maintain constant

physical surveillance on potentially dangerous subjects where ASIO has insufficient time to obtain a warrant.

Controls and safeguards

The Bill provides robust safeguards to ensure that ASIO's ability to internally authorise tracking devices provides effective control over the use of the surveillance devices powers.

Firstly, internal authorisations may only be granted by senior personnel, being the Director-General of Security or Senior Executive Service ASIO employees or affiliates.[66]

Secondly, the circumstances in which ASIO can internally authorise a tracking device are strictly limited. An internal authorisation would not allow the use of a tracking device if it would involve:

- entry onto premises without permission
- interference with the interior of a vehicle without permission
- remote installation of tracking devices or anything authorised under a computer access warrant that is not expressly authorised under an internal authorisation, or
- the use of a tracking device to listen to, record, observe or monitor the words, sounds or signals of a person.[67]

Proposed section 26P requires the Director-General or an SES-level authorising officer, to take such steps as are necessary to ensure action under the internal authorisation is discontinued where that person is satisfied that the grounds for the internal authorisation have ceased to exist.

The Bill also introduces a warrant for the recovery of tracking devices.[68] This warrant may be required where recovery of a tracking device is not possible under an internal authorisation because it would require entry to premises or interference with the interior of a vehicle without permission. This ensures that a further control – a warrant – is required for circumstances where ASIO would need to engage in more intrusive activity.

These controls are complemented by strong oversight provisions. The new framework requires the Director-General to provide the Attorney-General with a written report within three months from when the internal authorisation ceases to be in force, outlining the details of:

- the extent to which the authorisation assisted ASIO in carrying out its functions
- the security matter in respect of the authorisation
- the name of any person whose location was determined by the use of the device
- the period which the tracking device was used
- the object in or on which the device was installed and the premises where the object was located at the time of installation
- compliance with restrictions or conditions, if any, stipulated in the authorisation, and
- variation of the authorisation.[69]

The new framework also requires the Director-General to establish and maintain a register of requests for internal authorisations containing the following information:

- the name of the person who made the request

[66] Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 2, s 26G.
[67] *Ibid*, s 26K.
[68] *Ibid*, s 26R.
[69] *Ibid*, item 17.

- the security matter in respect of the request
- the day on which the authorisation was given or refused
- the name of the authorising officer who gave or refused the authorisation
- the location of any record relating to the request, and
- if the authorisation was given:
    - the day on which the authorisation ceased to be in force, and
    - whether action under the authorisation was discontinued and if so, the day it was discontinued.[70]

The reporting and register requirements will facilitate effective oversight of the internal authorisation framework by both the Attorney-General and the IGIS. The IGIS has broad powers to oversee the activities of ASIO. In carrying out this oversight role, the IGIS has full access to information held by ASIO and undertakes regular inspections of ASIO's operational activities.

Compatibility with international human rights law

The legitimate objective of the amendments to the definition of tracking devices is to allow ASIO to use modern capabilities and technology to monitor an individuals' location by remotely deploying tracking devices under a warrant. The legitimate objective of the amendments that provide ASIO with the ability to internally authorise the use of other less-intrusive tracking devices is to allow ASIO to rapidly deploy devices that solely track a person's pattern of movement in joint operations with law enforcement and in time critical circumstances. The limitation on the right to privacy achieves the legitimate objective of protecting Australia's national security interests. The power to track an individual is reasonable, necessary and proportionate to achieving the legitimate objective of protecting Australia's national security interests as it allows ASIO to monitor the movements of individuals who pose a risk to Australia's national security.

Section 26G provides ASIO the ability to rapidly deploy certain tracking devices, in certain circumstances, under an internal authorisation given by either the Director-General or a Senior Executive Service (SES) ASIO employee or ASIO affiliate. There are explicit protections, for example under section 26K, to ensure that internal authorisations for the use of tracking devices do not authorise ASIO to do things in circumstances where it would be more appropriate for ASIO to seek a warrant from the Attorney-General.

The framework engages Article 17 of the ICCPR and Article 16 of the CRC as an internally authorised tracking device may be used to track a person's location and limits their right to privacy. The requirement for an ASIO employee or affiliate (a person performing functions or services for ASIO in accordance with a contract, agreement or other arrangement) to seek an authorisation from the Director-General or a SES ASIO employee or affiliate of ASIO in order to deploy a tracking device, in conjunction with the extensive safeguards, ensures that ASIO acts lawfully and not arbitrarily.

The legitimate objective of the ability to track people is to protect the Australian community and Australia's national security interests. The power to track a person is reasonable, necessary and proportionate to achieving the legitimate objective of protecting Australia's national security interests as it allows ASIO to monitor the location of a person or object where the use of the device will, or is likely to, substantially assist the collection of intelligence in respect of a matter which is important in relation to security.

[70] *Ibid*, s 26Q.

The framework contains safeguards to ensure that the measures are not arbitrary by prohibiting the internal authorisation of the following acts (section 26K), which all require warrants from the Attorney-General:

- entering premises or interfering with the interior of a vehicle without permission
- the remote installation of a tracking device or enhancement equipment in relation to the device
- the installation, use or maintenance of a tracking device, or enhancement equipment in relation to the device, to listen to, record, observe or monitor the words, sounds or signals communicated to or by a person, and
- the doing of any thing by ASIO if, apart from section 26G, ASIO could not do the thing without it being authorised by a computer access warrant issued under section 25A.

Further, ASIO is bound to observe the Guidelines (issued pursuant to section 8A of the ASIO Act), which require that the use of its powers are appropriate and the means for obtaining information must be proportionate to the gravity of the threat and the probability of its occurrence. The Guidelines also provide that information obtained by ASIO must be collected with as little intrusion to privacy as possible and that information may only be collected that is relevant to security.

Section 26P provides a further safeguard by requiring the Director-General or an SES ASIO employee or ASIO affiliate to take such steps as are necessary to ensure action under the internal authorisation is discontinued where that person is satisfied that the grounds for the internal authorisation have ceased to exist.

Further, the IGIS has broad powers to oversee the activities of ASIO. In carrying out this oversight role, the IGIS has full access to information held by ASIO and undertakes regular inspections of ASIO's operational activities.

Section 26R provides the power for the Attorney-General to issue a warrant for the recovery of an internally authorised tracking device. This engages Article 17 of the ICCPR and Article 16 of the CRC as it allows ASIO to recover tracking devices installed, used or maintained by ASIO under an internal authorisation, where retrieval of the device requires entry on to a premises or interference with the interior of vehicle. The ability for ASIO to seek a warrant to recover a tracking device from the Attorney-General ensures that ASIO is able to do so under lawful authority.

The legitimate objective of section 26R is to provide a legal framework to support ASIO's lawful recovery of tracking devices in circumstances where ASIO needs to enter private premises or interfere with the interior of a vehicle without permission. Pursuant to section 26R, the Attorney-General will have the power to issue a warrant to recover a tracking device or enhancement equipment in relation to the device where failure to do so would be prejudicial to security. The ability to recover tracking devices deployed under internal authorisations under a warrant is reasonable, necessary and proportionate to achieving the legitimate objective of ASIO in acting lawfully and protecting Australia's national security interests by enabling ASIO to conduct its surveillance covertly.

ASIO only requests the issuing of warrants after considering the application of the Guidelines issued under s 8A of the ASIO Act, including the requirement that the use of powers under a warrant is appropriate and within ASIO's functions provided under section 17 of the ASIO Act.

These measures provide appropriate safeguards to ensure that interferences with privacy under warrants that provide for the ability to recover tracking devices are reasonable, necessary and proportionate to achieving the outcome of protecting national security.

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

Tracking device

The Bill updates the definition of 'tracking device' to mean any device capable of being used (whether alone or in conjunction with any other device) to track a person or an object.[71] This amended definition removes the requirement for a tracking device to be 'installed'. The new definition ensures that ASIO is able to conduct its operations in the most efficient and effective way, with the ability to use modern technologies, subject to strict accountability requirements and restrictions. For example, ASIO will be able to seek a warrant to remotely track a person or an object, in circumstances where ASIO has an operational need to track the person or object in a State or Territory where it is unlawful to conduct this type of surveillance.

ASIO's scope to obtain a warrant to facilitate remote tracking will also improve safety protections for ASIO employees and affiliates, who may become the target of violence if their identity or activities are discovered in the course of installing, maintaining or recovering a tracking device.

This amendment will also better align the definitions of different surveillance devices within the Act, and between the Act and the *Surveillance Devices Act 2004*. More closely aligning these definitions will assist ASIO employees and affiliates in the practical application of the legislation.

Track

The Bill repeals the definition of 'track' and replaces it with a definition to mean determining or monitoring the location of a person or object, or the status of the object.[72] This amendment is necessary to reflect the updated meaning of 'tracking device'.

Device

Currently, the Act defines a 'device' as including an instrument, apparatus and equipment. The Bill substitutes 'equipment' with 'equipment and any other thing (whether tangible or intangible)'.[73] The definition captures all relevant things that could be used to listen, observe or track a person or object.

What kind of tracking devices can be used?

The new definition is technologically neutral and is intended to capture, among other things, electronic and non-electronic devices, instruments, apparatus, equipment, substances and any other things. The definition is not intended to be exhaustive and will apply to both tangible objects and non-tangible things, for example, remote tracking. This change will also apply to the definitions of listening device and optical surveillance device and ensures that ASIO will be able to use the most technologically and operationally appropriate method of surveillance to give effect to a warrant issued under Subdivision D of Division 2 of Part III of the Act.

[71] *Ibid*, item 5.
[72] *Ibid*, item 4.
[73] *Ibid*, item 2.

Relationship between new definition of 'tracking device' and the internal authorisation of tracking devices

The new definition of 'tracking device' will have limited application in the context of internally authorised tracking devices. This is because proposed section 26K of the Bill specifically excludes the remote installation of a tracking device pursuant to an internal authorisation. ASIO will still require a warrant to remotely track a person or an object.

Proposed section 26K would also exclude from any internal authorisation:

- entering premises or interference with the interior of a vehicle without permission
- listening, recording, observing or monitoring the words, sounds or signals communicated to or by a person, or
- doing anything that would otherwise require a warrant under section 25A (computer access warrants).

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

ASIO does not have the power to conduct surveillance on ordinary members of the public going about their normal business, with or without a warrant, unless it is for the purpose of obtaining intelligence relating to a security threat. ASIO's functions in relation to obtaining, correlating, evaluating and communicating intelligence relevant to security are performed in accordance with the Guidelines. The decision to make use of specific ASIO powers is considered in line with the gravity and immediacy of the threat. Wherever possible, ASIO uses the least intrusive method available to collect security intelligence.

ASIO ensures that its internal procedures, including those that relate to tracking devices, are consistent with the Guidelines. The Guidelines are relevant before an internal authorisation for a tracking device would be issued. The Guidelines require that wherever possible, the least intrusive techniques of information collection should be used before more intrusive techniques.[74] As a result, an internal authorisation for a tracking device could only be issued where less intrusive techniques of collecting information have been exhausted or are not reasonably available. The Guidelines also contain a number of factors that ASIO must consider in deciding to conduct an investigation.[75]

The Guidelines require that inquiries and investigations be undertaken using as little intrusion into individual privacy as possible, and with due regard for cultural values, mores and sensitivities of individuals of particular cultural or racial backgrounds.[76] The Guidelines also include a number of requirements relating to the collection, use, handling and disclosure of personal information.[77] This ensures that any internal authorisation for a tracking devices takes into account a number of factors relevant to the privacy of any individual to be tracked with a tracking device.

For example, a tracking device may be more likely to be considered in a situation involving the potential for an imminent attack, where any loss of coverage could result in loss of an opportunity

[74] 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)*, paragraph 10.4(d).
[75] *Ibid*, paragraph 9.1.
[76] *Ibid*, paragraph 10.4(b).
[77] *Ibid*, section 13.

for authorities to disrupt a threat, or in situations involving violent individuals where there is an increased risk to officer safety, than in situations where these factors were not present.

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

No, noting that the Attorney-General will ordinarily only become aware through subsequent reporting that an internally authorised tracking devices had been used at any particular time. However, section 26Q requires the Director-General to establish and maintain a register of requests for internal authorisations. The IGIS will have full access to this register for the purpose of inspections and reviews in order to oversight the legality and propriety of activities undertaken under an internal authorisation.

The Hon Greg Hunt MP
Minister for Health
Minister Assisting the Prime Minister for the Public Service and Cabinet

Ref No: MC20-020400

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
human.rights@aph.gov.au

09 JUL 2020

Dear Chair Sarah

Thank you for your letter of 20 May 2020 concerning *Report 6 of 2020* (Report) of the Parliamentary Joint Committee on Human Rights. The Report includes a request for advice as to the compatibility with human rights, of the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment Determination (No. 2) 2020* (Amendment No. 2) and the Privacy Amendment (Public Health Contact Information) Bill 2020 (Privacy Amendment Bill).

As noted in my letter to you on 28 May 2020, the Australian Government has taken unprecedented steps to manage and respond to the risks to human health posed by the COVID-19 pandemic. This has included my making the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020*, as well as a number of amendments to that instrument, including Amendment No. 2. The Government has also put in place a wide range of other measures to address the pandemic, including the Privacy Amendment Bill. My colleague, the Attorney-General, the Hon Christian Porter MP, will be responding to your request for advice in relation to the Privacy Amendment Bill.

The Determination

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (Determination) specifies requirements to prevent or control the entry, emergence, establishment or spread of COVID-19 in designated remote areas in Australia, including establishing requirements for entry into those areas. These designated areas include remote indigenous communities in Queensland, Western Australia, South Australia and the Northern Territory.

On average, Australians living in remote areas have shorter lives, high levels of disease and face more challenges in accessing and using health services. In addition, Aboriginal and Torres Strait Islander people experience a burden of disease 2.3 times the rate of other Australians, which may increase the risk of severe infection.

In particular, Aboriginal and Torres Strait people in remote areas face a relatively high risk of severe disease from COVID-19 especially having regard to their higher burden of disease. The Determination and its amendments are designed to manage the risk posed by COVID-19 to remote communities in designated areas, by preventing or controlling the entry, emergence,

establishment or spread of COVID-19 in those areas.

Amendments to the Determination

The Determination has been amended a number of times to improve the operational effectiveness of the Determination and to manage the risk posed by COVID-19. This includes amendments to remove designated areas where I have been satisfied that the Determination is no longer necessary.

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment Determination (No. 1) 2020* (Amendment No. 1), limits the operation of essential activities to cases of urgency or in a manner agreed with a human biosecurity officer and varies the areas designated areas on and from 8 April 2020.

Amendment No.2, requires a person entering a designated area not to have been in a foreign country in the 14 days preceding entry and varies the areas designated on and from 24 April 2020.

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No.3) Determination 2020* (Amendment No. 3), excludes some areas, such as the Northern Territory, from 5 June 2020 and allows certain persons to enter designated areas in certain circumstances such as for officials to fulfil regulatory obligations under Australian law relating to requirements on the export of food or agricultural commodities.

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 4) Determination 2020 (Amendment No. 4)*, excludes Western Australia from the Determination on and from 5 June 2020 in light of the measures they have put in place to manage the risks posed by COVID-19.

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 5) Determination 2020* (Amendment No. 5), excludes Queensland from the Determination on and from 12 June 2020 in light of the measures they have put in place to manage the risks posed by COVID-19.

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 6) Determination 2020* (Amendment No. 6), excludes the designated areas of the Maralinga Tjarutja Lands, the Point Pearce community and the Nepabunna community in South Australia from the Determination on and from 19 June 2020 in light of the measures they have put in place to manage the risks posed by COVID-19.

Human Rights

Notwithstanding a Statement of Compatibility with Human Rights is not required for these instruments; I note that they engage the right to life, right to freedom of movement, rights of equality and non-discrimination and right to health. In particular, COVID-19 represents a severe and immediate threat to human health in Australia and has the ability to cause high levels of morbidity and mortality.

The measures restrict entry into remote communities to reduce the risk of COVID-19 to residents of those communities. The limitations on the rights of equality and non-discrimination and right to freedom of movement are reasonable, necessary and proportionate. These measures promote the rights to life and health and are necessary to pursue a legitimate public health objective given the risks posed by COVID-19 to the health of Aboriginal and Torres Strait Islander people living in remote areas. I am also satisfied that the application of these measures to these communities is proportionate given their application for a discrete period. These measures are appropriate, likely to be effective, and are no more restrictive or intrusive than necessary.

As stated in my earlier letter, I am satisfied that the measures taken by the Government are necessary and appropriate to prevent or control the entry, emergence, establishment and/or spread of COVID-19 in Australia. The compatibility of these measures with human rights will continue to be an important consideration in the development of any additional measures taken by the Government in addressing the COVID-19 pandemic.

Thank you for writing on this matter.

Greg Hunt

cc: The Hon Christian Porter MP, Attorney-General and Minister for Industrial Relations

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
Cyber Safety and the Arts

MS20-000108

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
Canberra ACT 2600

Dear Senator Henderson Sarah

Thank you for your letter dated 6 February 2020 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) requesting further information regarding rights to freedom of expression and assembly arising from the Broadcasting Services (Transmitter Access) Regulations 2019 (TA Regulations) and the right to freedom of expression, freedom of assembly, and the right to privacy arising from the National Museum of Australia Regulations 2019 (NMA Regulations).

TA Regulations

The Committee noted that section 31 of the TA Regulations engages and limits the rights to freedom of expression and assembly and this was not acknowledged in the Statement of Compatibility. Further information was requested in order to assess the compatibility of section 31 of the TA Regulations, and in particular:

- the objective of the measure;
- whether there are any less rights restrictive means of achieving the objective; and
- what safeguards are in place to protect the rights of freedom of expression and assembly?

Section 31 supports the ACCC's power under section 13 of the TA Regulations to control the way that arbitration hearings proceed and to address improper and threatening behaviour. The provisions preserve the integrity and due conduct of the public arbitration proceedings by discouraging the use of insulting language towards a member of the ACCC who is exercising powers, or performing functions or duties, as a member of the ACCC for the purposes of an arbitration hearing; or interrupting an arbitration hearing; or creating a disturbance, or participate in creating or continuing a disturbance, in a place where an arbitration hearing is being conducted.

During drafting of the TA Regulations, the ACCC process in the TA Regulations was assessed by Attorney-General Department officials as meeting the requirements for an Alternate Dispute Resolution mechanism.

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While the offence under section 31 has moved to a strict liability regime under the new TA Regulations (with the safeguard of the privilege of self-incrimination), the objective of section 31 is to ensure that the public ACCC arbitration proceedings can be conducted in an orderly, civil and appropriate manner and in such a way that also protects the rights and freedoms of others (including the participants of the proceedings at risk. The TA Regulations aim to set a high threshold which ensures that inadvertent and accidental actions of people are not captured by the offence provisions, while ensuring that the ACCC process maintains integrity and accountability.

I consider the pursuit of this public order objective, which creates some limitation on the rights to freedoms of expression and assembly (by operation of the offence provision at section 31), strikes an appropriate balance between the pursuit of this legitimate objective and the freedoms. In this case, there is a rational connection between the objective of the measure the need to infringe the particular rights of freedom of expression and assembly.

The behaviours identified in section 31 would arguably not be accepted by any of the participants in an ACCC arbitration. There is also a continued expectation that such behaviours would not be tolerated in the context of a statutory arbitration process being conducted in a civil society and if breached, the consequence of a penalty is not unreasonable. The underpinning objective of the ACCC arbitration mechanism is to ensure that access disputes are resolved in an efficient and timely manner and discourage conduct of parties to delay access to transmitter facilities, vital to the delivery of broadcasting services to the public.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) allow for some restrictions to be placed on the freedoms. Consistent with the ICCPR and the ICESCR:

- the restriction on the freedoms imposed by section 31 is expressly provided for by legislation; and is necessary to achieve the desired purpose and objective of maintaining public order in connection with the conduct of the ACCC arbitration hearings and proceedings;
- the dealing with these human rights is proportionate to the achievement of the objective of maintaining public order.

In developing the TA Regulations, regard was had to whether there were less restrictive means of achieving the objective of maintaining public order and it was concluded that there was not, particularly in light of the potential public disorder that could arise if there was no meaningful deterrent for insulting, disruptive behaviour or unreasonable disturbances.

Furthermore, during targeted consultation on the draft Regulations, no concerns were raised by stakeholders about section 31 not adequately achieving the correct balance between freedom of expression and this offence provision. I am satisfied that there is a clear understanding of the behavioural standard expected by participants in the ACCC arbitration process and section 31 provides and effective and proportionate mechanism to ensure the maintenance of public order and in connection with the conduct of the ACCC's public arbitration hearings.

The continued application of the common law privilege against self-incrimination provides an effective and important safeguards to protect the rights of freedom of expression and assembly.

The Committee may also wish to note that a Replacement Explanatory Statement for the TA Regulations was registered on 14 February 2020. This was in response to the Senate Committee for Scrutiny of Delegated Legislation views about the need for explicit statements that there was no abrogation of the privilege against self-incrimination for all relevant offences in the Regulations (including the offence under section 31). The revised wording also makes it very clear that there are safeguards in place, particularly for relevant offences.

NMA Regulations

The Committee sought advice as to the compatibility of the sections 13, 14 and 15 of the NMA Regulations with the rights to freedom of expression and freedom of assembly. In particular, the Committee sought advice on the provisions which enable an authorised officer to prohibit entry of persons and direct persons to leave Museum premises, if the authorised officer believes on reasonable grounds that the conduct of the persons is 'likely to cause offence'. The Committee also sought advice on the compatibility of subsection 14(2) with the right to privacy. The Committee asked for information on:

a) the objective of the measures;
b) whether there are any less rights restrictive means of achieving these objectives; and
c) the safeguards in place to protect the rights to freedom of expression and assembly, and privacy.

Right to freedom of expression and freedom of assembly

Sections 13-15 of the NMA Regulations do not directly engage the right to freedom of expression and freedom of assembly. To the extent that these rights may be indirectly engaged by the exercise of these powers, the limitations strike a suitable balance and are necessary in the interests of public safety, public order, and for the protection of the rights of staff and patrons on the Museum premises (including their right to enjoy and take part in cultural life).

Sections 13-15 of the NMA Regulations provide for consistency with regulations supporting some other National Collecting Institutions eg. National Library Regulations 2018 - s13 (prohibiting entry) and s14 (directions to leave), and the Australian National Maritime Museum Regulations 2018 - s14 (prohibiting entry), s15 (directions to leave) and s16 (apprehension). The objectives behind these powers are:

- section 13 (*prohibiting entry*) – provides that in certain circumstances, an authorised officer may prohibit a person or group of persons from entering Museum premises. These powers are required to provide authorised officers the ability to prevent the conduct of a person or a group of persons from risking the safety of staff, the public and Museum material. Section 13 is also relevant if action has previously been taken under s14 or s15

- section 14 (*directions to leave*) – provides that in certain circumstances, an authorised officer may direct a person or a group of persons to leave Museum premises, or any part of the Museum premises, where an authorised officer has reasonable grounds for believing that: the safety of the public or staff is or may be endangered, conduct is likely to cause offence, or the person or group intends to commit, is committing, or has committed, an offence against the Regulations. Authorised officers may take a photo of a person/s (s14(2)(a))
  and direct a person/s to provide them with personal information (s14(2)(b))
- section 15 (*apprehension*) – provides that in certain circumstances, an authorised officer may apprehend a person, remove the person from Museum premises or, hold the person in their custody pending being taken into custody by the police, where an authorised officer has reasonable grounds for believing that: a person on or in Museum premises intends to interfere, is interfering with, or has interfered with, Museum material, intends to damage, is damaging, or has damaged Museum premises or Museum material, or is refusing, or has refused, to comply with a direction given by an authorised officer in the performance of the officer's duties.

Section 12 relates to the appointment and identification of authorised officers. Authorised officers appointed under the NMA Regulations are trained and expected to act appropriately in accordance with their responsibilities. Section 12(1) provides that 'the Director may appoint in writing, certain persons to be authorised officers if the Director is reasonably satisfied that the person has received appropriate training. (A volunteer is not authorised to be appointed as an authorised officer under the NMA Regulations.)

The NMA's current training material provides guidance to authorised officers about the scope of their powers under the NMA Regulations and the legal framework in which those powers operate, in order to be able to assess and respond to an incident appropriately. The materials include an explanation of the grounds that an authorised officer must be satisfied of before exercising a particular power as well as a number of scenarios to provide authorised officers with a more in-depth understanding of the interaction of the different powers available to them.

Authorised officers are given an outline of the requirement for them, in exercising their powers, to have 'reasonable grounds' for their belief that a certain set of circumstances exist, and must be what a reasonable person would objectively believe. This provides a safeguard that in exercising their powers under the regulations (when it will be appropriate to, and how to exercise the power, and merits review of any decision), authorised officers will be cognisant of the need to balance human rights such as freedom of expression, with the rights of people on museum premises.

Section 32 provides for applications to be made to the Administrative Appeals Tribunal (AAT) for review of an authorised officer's decision under s13. The AAT appeal mechanism in s32 does not reference s14 or s15. This is because s13 states that a decision to prohibit entry may be triggered by previous exercise of the powers under s14 or s15. Should a person or persons be prohibited from entering Museum premises – including after previously being directed to leave under s14 or previously being apprehended under s15, they may make an application for review of the decision to the

AAT. That is, the practical effect is that the same series of actions are able to be contested through exercise of the review right in s32. This provides another important safeguard to the exercise of the power.

Right to privacy

Subsection 14(2) provides that if an authorised officer issues a direction to leave on the basis that the authorised officer has reasonable grounds for believing that the person or group intends to commit, is committing, or has committed, an offence against the NMA Regulations, the authorised officer may take a photograph of the person and/or direct the person to provide the person's name and residential address to the authorised officer.

Subsequent to the Senate Standing Committee on Regulations and Ordinances (SSCRO) raising issues about the collection and use of personal information under section 14 of the NMA Regulations, I approved a Replacement Explanatory Statement for the NMA Regulations. The replacement statement includes additional information to clarify why subsection 14(2) enables authorised officers to collect personal information and that such information will be managed in accordance with the Australian Privacy Principles. The replacement Explanatory Statement is available on the website of the Federal Register of Legislation.

Important safeguards to the exercise of the power include that authorised officers appointed under the NMA Regulations are appropriately trained and expected to act in accordance with their responsibilities. This includes treating personal information collected in the course of their duties in accordance with the Australian Privacy Principles (refer 'Right to freedom of expression and freedom of assembly' above). These measures are necessary and proportionate.

Thank you for bringing the Committee's concerns to my attention. I hope the information in this letter is of some help.

21/6/2020

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MC20-012015

Senator the Hon Sarah Henderson
Chair of the Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Henderson~~ Sarah

Thank you for your email dated 1 July 2020, concerning further information required to finalise deliberations on the Coronavirus Economic Response Package Omnibus Bill 2020.

Please find below responses to the queries in your email.

1. **What healthcare entitlements are available to those on a pension compared to those on JobSeeker (including entitlements supplied directly through Services Australia or via the States and Territories), and the possible monetary value of any such entitlements.**

   There are three main types of Commonwealth concession cards issued by the Australian Government.

   - the **Pensioner Concession Card** (PCC) for all pensioners (Age, Disability and Carer) and Parenting Payment Single recipients.
     - Some JobSeeker Payment recipients are also issued with a PCC including those who:
       - have a partial capacity to work; or
       - are a single principal carer of a dependent child; or
       - are aged 60 and over and have been in continuous receipt of payment for nine months or more.
   - the **Health Care Card** (HCC) generally for social security allowees, such as recipients of JobSeeker Payment and Youth Allowance (this category includes the Low Income Health Care Card for people on a low income); and
   - the **Commonwealth Seniors Health Card** (CSHC) for eligible self-funded retirees who have reached Age Pension qualification age but are not eligible for the Age Pension.

Concession cards provide access to a range of Commonwealth concessions including bulk billing at the discretion of the doctor, cheaper Pharmaceutical Benefits Scheme (PBS) prescription items, and access to the lower thresholds of the PBS and Extended Medicare Safety Nets.

The following health benefits are available to all concession cards:

- lower out-of-pocket costs for Pharmaceutical Benefits Scheme medicines;
- bulk-billed general practitioner appointments, at the discretion of the general practitioner;
- reduced out-of-hospital medical expenses after reaching the Concessional Extended Medicare Safety Net threshold ($692.20 in 2020).

Holders of a Pensioner Concession Card also receive:

- free hearing assessments and hearing rehabilitation, including the supply and fitting of free hearing aids from a range of service providers; and
- low-cost maintenance of hearing aids and a regular supply of batteries.

Commonwealth Government concession cards are also used by state, territory and local governments, and some private enterprises, to provide cardholders with other discounts on things like utilities, council rates and public transport. The Commonwealth Government has no jurisdiction over the provision of these concessions. For example, information about the concessions provided by state and territory governments can be found at www.nsw.gov.au/living-nsw/concessions-and-rebates (for NSW) and www.vic.gov.au/health-and-social-support (for Victoria).

The monetary value a cardholder receives depends on their circumstances.

2. What entitlements are available to persons on a pension compared to those on JobSeeker under the National Disability Insurance Scheme and the Aged Care system

Services are not based on the type of payment a person is receiving.

National Disability Insurance Scheme

- People with disability are able to access assistance under the National Disability Insurance Scheme (NDIS) if they meet the requirements set out in the National Disability Insurance Scheme Act 2013, including meeting the age, residency and disability or early intervention requirements. Generally, a person will meet the disability access criteria if their disability is permanent and significantly affects their communication, mobility, self-care or self-management.
- The NDIS does not determine eligibility based solely on the types of disability or on the presence of an underlying condition, illness or injury. Rather, in all cases, a person with disability should test their eligibility for the NDIS with the National Disability Insurance Agency (NDIA), and should they be determined as eligible, the NDIA will provide the person with an individualised package of supports that match their circumstances and goals.

Aged Care

- The Aged Care Act 1997 (Act) does not preclude/exclude any person from entitlements under the Act, irrespective of their age, means or nationality, where an approved provider provides any of the three types of aged care services. Residential aged care, home care and/or flexible care are available to a person who has been approved by an Aged Care Assessment Team (ACAT) as requiring that type and level of care.
- While the Australian Government is the majority funder of aged care, it is expected that everyone receiving aged care will use their income (in home care) and income and assets (in residential aged care) to contribute to the costs of their care, when they can afford to do so. The amount that a person can be asked to contribute will be assessed by Services Australia. The same means assessment rules apply to all persons irrespective of the type of income support pension the person may receive or whether or not the person receives income support.

3. **What indexation rates are applied to persons in receipt of a pension and those on JobSeeker, and how this may affect each of these payments.**

Pensions

- Base pensions are indexed twice a year, in March and September, to the higher of the increase in the Consumer Price Index (CPI) and the increase in the Pensioner and Beneficiary Living Cost Index (PBLCI).
- PBLCI was introduced to ensure pension indexation better reflects changes to pensioners' costs of living. The PBLCI basket of goods and services is weighted to recognise that pensioners spend more of their income on essentials.
- After indexing to price increases, base pension rates are compared to the wages benchmark and increased to meet the benchmark if required. The benchmark is 41.76 per cent of Male Total Average Weekly Earnings for the combined couple rate of pension. The single rate of pension is 66.33 per cent of the combined couple rate.
- These arrangements ensure pension rates are more responsive to pensioners' actual living cost increases and keep pace with community living standards as measured by wages.

JobSeeker Payment

- Base rates are indexed twice a year, in March and September, to the increase in the Consumer Price Index (CPI).

4. **How much income those on a pension can earn compared to those on JobSeeker before their payments are reduced, and by what amounts.**

Pensions

- The pension income test free area is $178 per fortnight for singles and $316 per fortnight for couples combined.
- For each dollar of income over the income test free area, the single pension is reduced by 50 cents (the taper rate). For couples, their combined pensions are reduced by 50 cents.

JobSeeker Payment

- **Personal income test:** recipients can earn up to $106 per fortnight before their eligibility for income support is affected. Income above this amount gradually reduces the payment received by 50 cents in the dollar for income between $106 and $256 and by 60 cents in the dollar for income above $256.
- **Partner income test:** from 27 April 2020, a temporary change to the partner income test taper rate has been in effect, with a reduction in the taper rate from 60 cents to 25 cents. As a result, partner income reduces a person's payment by 25 cents for each dollar that exceeds the partner income free area of $996 per fortnight.

Thank you again for raising this matter with me. I hope this information is of assistance.

Yours sincerely

Anne Ruston

17 / 7 / 2020

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MC20-008259

Senator the Hon Sarah Henderson
Senator for Victoria
Chair
Parliamentary Joint Committee on Human Rights
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Dear Sarah, ~~Senator Henderson~~

Thank you for the email of 1 May 2020, from the Parliamentary Joint Committee on Human Rights (the Committee), regarding *the Coronavirus Economic Response Package Omnibus Act 2020* (the Act).

I note the issues the Committee has outlined in *Report 5 of 2020 - Human rights scrutiny report of COVID-19 legislation,* in relation to the fortnightly COVID-19 supplement (also known as the Coronavirus Supplement) not applying to all social security payments.

I appreciate the need for scrutiny around the rights to an adequate standard of living and social security, as well as the right to equality and non-discrimination. I have provided some additional information below in relation to the social security payments to which Coronavirus Supplement applies and the reasons behind this, for the Committee's consideration.

The $550 fortnightly Coronavirus Supplement is a temporary measure to provide additional support for allowance recipients in recognition of the economic impact of the Coronavirus pandemic, which will directly impede people's ability to find and retain paid employment over coming months. The Supplement is in recognition of the depressed job market as a result of Coronavirus, which may make it more difficult for people who are, or become, unemployed to find new work in the coming few months. Accordingly, the Coronavirus Supplement is payable to JobSeeker Payment and related payments and allowances, as people on these payments are generally expected to participate in the labour market.

Pensions are generally paid at a higher rate than other social security payments, such as JobSeeker Payment, because they are designed to provide support for people who are unable to support themselves through substantial paid employment.

The Committee also notes in its report that there may be other social security benefits that apply to pensioners, which are not the subject of the Act. Although people receiving a pension are ineligible for the Coronavirus Supplement, they are instead receiving two Economic Support Payments of $750. The first was paid from 31 March 2020 and the

second will be paid from 13 July 2020. The second Economic Support Payment will be paid to people who do not receive the Coronavirus Supplement.

People receiving a pension payment who were also working, may be eligible for $1,500 per fortnight JobKeeper Payment.

In addition, some pensioners will benefit from the Australian Government's decision to reduce both the upper and lower social security deeming rates. From 1 May 2020, the upper deeming rate will be 2.25 per cent and the lower deeming rate will be 0.25 per cent. The reductions reflect the low interest rate environment and its impact on income from savings. The change will benefit around 900,000 income support recipients, including around 565,000 Age Pensioners.

The following additional assistance is also available to pensioners to increase their economic security:

- subsidised prescription medicines under the Pharmaceutical Benefits Scheme
- assistance for people who rent in the private rental market, through Rent Assistance
- the exemption of the principal home from the assets test for homeowners
- assistance for people in remote areas through an additional allowance
- subsidised aged care
- subsidised health care and related products
- concessions to pensioners by state and territory governments. These concessions include subsidised rates for home owners, utilities such as electricity and water, and public transport and vehicle registration fees. Concessions offered vary between states.

Thank you for raising these matters with me. I trust the information provided will be of assistance to the Committee.

Yours sincerely

Anne Ruston

20/5 / 2020

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-001236

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in response to your email of 18 June 2020 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee) regarding the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* (the 2020 Regulations). In *Report 7 of 2020: Human rights scrutiny report* (the Report), the Committee sought my further advice as to the compatibility of the 2020 Regulations with the right of equality and non-discrimination.

Firstly, the Committee asked whether the amendments made by the 2020 Regulations apply to the purchase of any land at any value including residential land and, if so, how does the measure connect to the stated objective of protecting vulnerable businesses.

The 2020 Regulations do not change the monetary thresholds that apply to the acquisition of residential land or vacant commercial land. The monetary thresholds for acquisitions of these land types were nil prior to the making of the 2020 Regulations. Therefore, foreign persons seeking to acquire residential land or commercial land have generally had to seek approval regardless of the value of the proposed acquisition. This has been the policy of successive Australian Governments.

The 2020 Regulations only affect the monetary thresholds that apply to acquisitions of agricultural land, developed commercial land and developed commercial land considered to be sensitive, as well as interests in businesses and entities. For your ease of reference Annexure A sets out the thresholds as they applied before the 2020 Regulations were made. You will see that the change in thresholds relates only to the above-mentioned acquisitions.

Secondly, the Committee asked what the application fees are that apply to foreign persons seeking to purchase property as a result of changes made by the 2020 Regulations. Fees are payable for every notice or application submitted under the *Foreign Acquisitions and Takeovers Act 1975* and *Foreign Acquisitions and Takeovers Regulation 2015*. The 2020 Regulations did not change the fee payable. Rather, some investors, who previously were not, but will now be, required to seek foreign investor approval, will be required to pay the applicable fee. The fees reflect the value of the acquisition, so investors of lower value acquisitions will pay a lower fee. The current schedule of fees is at Annexure B.

As a result of the changes, a partial fee waiver is in place for foreign investors who are foreign non-government investors purchasing developed commercial land. The waiver provides that these investors pay a fee of $2,000 rather than $26,200 which would normally be payable under the

standard schedule of fees. This aligns the fee paid by foreign non-government investors with the fee paid by government investors. The monetary threshold that applies to foreign government investors for acquisitions in developed commercial land, being nil, has not changed.

Thirdly, the Committee asked what the timeframe is by which the Treasurer will make decisions regarding investments by foreign persons. Under the *Foreign Acquisitions and Takeovers Act 1975*, the Treasurer has 30 days to consider an application. If I do not make a decision in this timeframe the application is deemed to have been approved. There are avenues to extend the timeframe in consultation with the applicant. My department remains committed meeting urgent commercial deadlines wherever possible.

Fourthly, the Committee asked what safeguards are in place to ensure that foreign persons are not disproportionately affected by this measure. As mentioned in my previous letter dated 15 May 2020, the 2020 Regulations apply to agreements entered into on or after my announcement. In this way, investors were able to enter into agreements understanding how Australia's foreign investment framework would apply to them. This approach also preserves the operation of agreements that were in place at the time of the announcement.

Finally, the Committee asked why these changes are made on an ongoing basis, rather than including a sunset date. The continuing uncertainty around the Coronavirus, its ongoing impact on the economy and foreign investment into Australia, and the need to have these measures in place protecting the national interest are the considerations underpinning this decision.

On 5 June 2020, I announced significant reforms to Australia's foreign investment review framework. Announcing the reforms, I said the intention is for a seamless transition from the temporary Coronavirus measures, which include the Regulations, to the reforms measures, which are scheduled to commence on 1 January 2021. While certain aspects of the temporary measures will be replaced by the reform measures, other aspects will return to pre-Coronavirus settings. As part of the development of the new framework, consideration will be given to the most appropriate way to reverse the effect of the Regulations and, where necessary, replace them with the provisions of the new framework. However, given the current uncertainties about the duration of the Coronavirus pandemic, I consider it is currently too early to specify an end-date for the application of the 2020 Regulations.

Thank you for raising these matters with me.

Yours sincerely

THE HON JOSH FRYDENBERG MP

26 / 6 /2020

Annexure A

Monetary Thresholds

For simplicity, the following table does not include the thresholds which apply to FTA country or region investors. These are investors from the United States of America, New Zealand, Chile, Japan, the Republic of Korea, China, Singapore, Peru, a country (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago on 8 March 2018, is in force (CPTPP) (as at 1 January 2020, the CPTPP is in force for: Canada, Japan, Mexico, New Zealand, Singapore and Vietnam), and the region of Hong Kong, China.

Non-land proposals

Investor	*Action*	*Threshold – more than:*
Investors	Business acquisitions (all sectors)	$275 million
	Australian media business (For investments into an Australian media business, a holding of at least five per cent requires notification and prior approval regardless of the value of investment.)	$0
	Agribusinesses	$60 million
Foreign government investors	All direct interests in an Australian entity or Australian business	$0
	Starting a new Australian business	$0

Land proposals

Investor	*Action*	*Threshold - more than:*
All investors	Residential land	$0
	Vacant commercial land	$0
	Agricultural land	$15 million (cumulative)
	Developed commercial land	$275 million
		Low threshold land $60 million (Includes mines and critical infrastructure (for example, an airport or port).
	Mining and production tenements	$0

Foreign government investors	Any interest in land	$0

Annexure B

Fees

Fees for commercial land and entities and businesses			
Investment	**Consideration for the acquisition is $10million or less**	**Consideration for the acquisition is above $10million and not more than $1billion**	**Consideration for the acquisition is above $1billion**
Commercial land (vacant and developed) Actions relating to entities and businesses which include the following actions: • Acquiring an interest in securities in an entity or issuing securities in an entity • A foreign government investor acquiring a direct interest in an Australian entity or Australian business • Acquiring a direct interest in an Australian entity or Australian business that is an agribusiness • Acquiring interests in assets of an Australian business or a direct interest in an Australian business that is an agribusiness	$2,000	$26,200	$105,200

Fees for agricultural land			
Investment	**Consideration for the acquisition is $2million or less**	**Consideration for the acquisition is above $2million and not more than $10million**	**Consideration for the acquisition is above $10million**
Agricultural land	$2,000	$26,200	$105,200

Fees for mining, production or exploration tenements	
Acquiring an interest in a mining or production tenement	$26,200
A foreign government investor acquiring a legal or equitable interest in a mining, production or exploration tenement	$10,400
A foreign government investor acquiring an interest of at least 10 per cent in securities in a mining, production or exploration entity	$10,400

Other fees related to businesses and entities not covered above	
Entering into an agreement relating to the affairs of an entity and under which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the entity (or of an associate of such a foreign person)	$10,400
Altering a constituent document of an entity as a result of which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the entity (or of an associate of such a foreign person)	$10,400

The Hon Alan Tudge MP

Minister for Population, Cities and Urban Infrastructure

Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Ref No: MS20-001231

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Ms Henderson Sarah

Thank you for your correspondence of 17 June 2020 to Minister Dutton, requesting further information on the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020.

I have attached my response to the Parliamentary Joint Committee on Human Rights' Scrutiny Report 7 of 2020 as requested.

Yours sincerely

Alan Tudge

14/ 7/ 2020

The Hon Alan Tudge MP
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Parliamentary Joint Committee on Human Rights
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

Prohibiting items in immigration detention

Compatibility of the measure with the rights to security of the person, privacy, protection of the family, and freedom of expression to privacy

Committee comment

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].

…

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:
    - 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.

Response

There are two potential circumstances under which a thing may be made a prohibited thing:

1. Possession of a thing is prohibited by law in a place or places in Australia. In this circumstance, it is appropriate that a thing be made a prohibited thing in relation to all detainees.
2. Possession or use of a thing in an IDF might be a risk to the health, safety or security of persons in the facility, or the order of the facility. In this circumstance, the focus is solely on the potential risk that a thing might be, regardless of who may possess it. Again, at this stage, it is appropriate that a thing that satisfies these criteria is a prohibited thing in relation to all detainees.

The Bill does not prohibit the possession of goods by detainees or in detention centres. The Bill only creates the category of goods that are prohibited things, which can then, in the exercise of discretion, be searched for and seized by authorised officers. Therefore, there is no prohibition on the possession of prohibited things that applies to all detainees. In the exercise of discretionary search and seizure powers, the focus will be on whether the possession of such a thing by an individual detainee poses any risk.

While the measures on their face provide officers with the discretion to search for prohibited items on persons regardless of the risk posed, the exercise of these powers by officers will be guided by the Department's operational policy framework. This framework provides detailed guidance on the powers available to officers under the Migration Act, how and when those powers should be utilised, and record keeping and reporting requirements.

The Minister will have the power to direct officers to seize certain prohibited items from all detainees, which will override the exercise of the discretion by authorised officers. However, it is expected that this power will only be exercised in relation to the most serious circumstances, for example in relation to child abuse material, where there is no question that it is appropriate that such material should be seized from all detainees.

Implementation of all relevant legislative provisions by authorised officers is undertaken in accordance with the APS Code of Conduct, the Secretary's Professional Standards Direction and key guiding principles in detention, that include:

- detainees will be treated fairly and reasonably within the law and conditions of detention will ensure the inherent dignity of the human person,
- such actions must be conducted for a lawful purpose,
- only officers who have completed relevant training and are lawfully authorised are permitted to exercise search, screening and seizure powers.

Facilities and Detention Service Provider employees are required to deliver services in a way which is consistent with the APS Code of Conduct.

In addition to the power for the Minister to make an instrument setting out when a prohibited item must be seized, officers will be provided, as they are now, with operational policy

guidance on when it is appropriate for detainees to be searched. The policy would provide, for example, that detainees should be screened and searched when they first enter the facility or when returning to the facility after an offsite escort, and screened after attending the visitor's area. The operational policy would provide the framework within which officers exercise their discretionary screening and search powers. Officers would consider the policy guidance when deciding whether to carry out a screening or search on a particular detainee. It is intended that this operational policy will be made publicly available.

Things can be made prohibited things through a legislative instrument if the Minister is satisfied that possession of the thing is prohibited by law in a place or places in Australia, or the Minister is satisfied that possession or use of the thing in an immigration detention facility might pose a risk to the health, safety and security of persons within the facility, or to the order of the facility. A decision by the Minister to seek to make an item a prohibited thing will be informed by an intelligence and risk-based briefing. This briefing may include information about threats, risk assessments, recommendations from external scrutiny agencies and internal review findings.

Initially, prohibited things may include mobile phones, SIM cards, internet capable devices, controlled drugs and prescription medication not in the possession of the person to whom it is prescribed as well as other things that are unlawful to possess. For example, child abuse material.

Access to Communication

The Department is not proposing the introduction of a blanket ban on mobile phones in detention. It is proposing to recommend to the Minister to direct officers to seize mobile phones from certain categories of people in certain circumstances, while providing officers with the discretion to search and seize for mobile phones in other circumstances. Detainees who are not using their mobile phones for criminal activities or activities that affect the health, safety and security of staff, detainees and the facility would be able to retain their mobile phones under this proposed policy approach.

The immigration detention visitor program was ceased on 24 March 2020 in response to COVID-19. These measures are not permanent and will continually be reviewed in line with advice from the Communicable Diseases Network Australia, the Medical Officer of the Commonwealth and the broader Commonwealth response.

Detainees will continue to have access to communication with those in the community. During the time COVID-19 measures are in place each detainee will receive a $20 phone credit each week to support ongoing contact with family and community groups via their personal devices. This will continue until the measures are lifted for the visits program.

Detainees are allowed to have contact with family and friends, which supports their resilience and mental health. As such, the Department is committed to ensuring detainees have access to a variety of communication avenues to maintain contact with their support networks and legal representation.

Communication forms include:

- landline phones (24/7 without monitoring with the only limitation being that a private interview room may not always be available)
    - access to landline phones is on a first come first served basis for all centres including Alternative places of Detention (APODs)
- internet (there is always an officer monitoring the room to maintain safety but the monitoring of access and usage is limited to the use of filters to block specific categories such as pornography, terrorism and gambling related websites)

    - access to the internet is available 24/7 for all centres including APODs (except for one centre due to the infrastructure limitations where it is available from 6am – 12midnight)
- fax (Serco staff send when requested)
- post services (services available upon request during office hours)

Migration agents and legal representatives will also continue to be able to contact their clients with the use of audio-visual equipment and private rooms for phone calls in facilities subject to availability.

Detainees are not required to lodge a request to use the landline phones, fax or post facilities. The booking system to access the internet is straightforward and there are no delays in this process.

Ordinarily, the processing times for applications to visit a detainee in an immigration detention facility are:

- up to five business days for personal visits
- one business day for visits by legal representatives, agents or consular officials.

The monitoring of internet facilities occurs so as to ensure detainee use of the internet is appropriate and acceptable and does not breach Australian law or impact the integrity of ICT services. A software solution will be deployed across the departmentally provided computer network that allows for specific web sites and content to be blocked based on particular categories (such as pornography, terrorism and gambling).

Family, friends, legal representatives and advocates can contact detainees directly via the immigration detention facility. The Facilities and Detention Service Provider is contractually obliged to ensure that provisions are made for detainees to have access to incoming phone calls at any time and to notify detainees of any calls received for them when the detainee is not available to receive the call themselves.

Some immigration detention facilities allow external phone calls direct to accommodation area telephones at any time of the day or night. Other facilities call-divert to a staffed control room after 8pm and if the call is not an emergency, a message is provided to the detainee the following morning.

The Facilities and Detention Service Provider is able to access information relating to the location of detainees in order to notify of incoming phone calls, however this information is unable to be given out over the phone in order to protect the privacy and safety of detainees.

An Individual Allowance Program is in place within detention facilities, allowing detainees to earn up to 60 points per week (one point equals one dollar).

Detainees can use these points to ‘purchase’ phone cards for international and mobile calls, and postage stamps, all of which are charged at standard rates. Detainees can also purchase their own phone credit online if they have their own funds.

Landline to landline calls and the use of internet and fax facilities are all free of charge.

Detainees are also afforded a variety of communication channels in private settings within immigration detention facilities, such as:

- Private booths within accommodation areas for landline phone access.
- Private rooms for computer, phone and internet use can also be accessed, under appropriate supervision, as required.
- Faxes received for detainees are treated with the strictest confidence.
- Private interview rooms can also be used for detainees to meet with legal representatives, agents or any other meeting of a professional nature.
- All received mail addressed to a detainee is screened using x-ray technology and is provided unopened once daily.

In the context of removal under s198 of the Act, requests by removees to access legal assistance during their removal will be facilitated until such time as it is no longer reasonably practicable to do so. What is reasonable will depend on the circumstances including what is happening operationally and whether facilities to access legal assistance are readily available having regard to the particular operational environment. Removees are generally provided seven days notification of their scheduled removal date. This is to provide time for them to access legal assistance and make any other arrangements prior to their departure.

Search and Seizure Powers

Compatibility of the measure with prohibition against torture, cruel, inhuman and degrading treatment or punishment, and right to humane treatment in detention

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

Committee comment
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 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].

…

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.

…

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.

Response

Current provisions provide an authorised person who conducts a search under subsections 252(1) and 252AA(1) shall not use more force, or subject a person to greater indignity, than is reasonably necessary to conduct the search or screening procedure. The existing statutory protections in the Migration Act in relation to when and how a strip search is conducted will not be altered.

Strip searches must be carried out in accordance with the rules set out under section 252B of the Migration Act.

All persons in immigration detention have the right to lodge complaints while they are in detention. Detainees are made aware that they are able to complain without hindrance or fear of reprisal, with several avenues of complaint and redress including:

- written complaints addressed to Serco, International Health and Medical Services or the Australian Border Force (ABF)
- directly with the Department through the Global Feedback Unit on 133 177 or through the Department’s website
- direct communication with external agencies such as the Australian Human Rights Commission, the Commonwealth Ombudsman or the Australian Red Cross.

Reasonable suspicion that a detainee has a prohibited thing and that a strip search is necessary to recover the thing, and authority from the Secretary, ABF Commissioner or an SES Band 3 officer (or from a magistrate for detainees over 10 but under 18) is still required for a strip search to be conducted. A child less than 10 years must not be strip searched.

The Government has made significant efforts to ensure children are no longer in immigration detention. The Government is of the view that the amended search and seizure powers, with their associated internal and external oversight mechanisms are compatible with the rights of the child, in particular articles 16 and 37 of the Convention on the Rights of the Child. The amended search and seizure powers seek to reduce the risk to the health, safety and security of persons in the facility, or the order of the facility, and complements the strip search powers currently in the Migration Act.

While the power to strip search a person between 10 and 18 years of age remains, the search can only occur following authorisation by a Magistrate. A strip search must not be conducted on a minor under the age of 10 years. It is clearly stated in departmental operating procedures that strip searches are a measure of last resort, should be applied only when other less intrusive measures have proven inconclusive or insufficient, and detainees must always be treated with the utmost respect and dignity when being strip searched. Other less intrusive measures include:

- screening procedures - such as walk-through devices, hand-held scanners or x-rays
- searching - such as a pat down search.

Strip searches must be carried out in accordance with the rules set out under section 252B of the Migration Act which include that a strip search:

- Must not be conducted on a detainee who is under 10
- Must be conducted in the presence of an adult or person representing the detainee's interests, if the detainee is between the ages of 10 and 18 or is incapable of managing his or her affairs.

Amended section 252B(1)(j) of the Migration Act includes the rule that strip searches:

- must not involve the removal of more items of clothing, or more visual inspection, than the authorised officer conducting the search believes on reasonable grounds to be necessary to determine whether there is on the detainee, in the detainee's clothing or in a thing in the detainee's possession any of the following things:
    - a weapon or escape aid;
    - a prohibited thing.

The Department has also developed 'The Child Safeguarding Framework' (the framework) which provides the blueprint for how the Department will continue to build and strengthen its policies, processes and systems to protect children in the delivery of all relevant departmental programmes. This reinforces the requirement to consider 'the best interests of the child' as a primary consideration in decision-making processes that affect minors.

The framework clearly establishes the Department's expectations of staff and contracted service providers, who engage, interact and work with children. It outlines high-level actions and strategies that the Department and our contracted service providers will take to provide a safe environment for children and their families within the existing legislative and policy parameters, including in detention environments. The policy requires that a departmental officer or contracted service provider must immediately report a child-related incident to their supervisor and the Department's Child Wellbeing Branch, in accordance with local operating procedures and within the relevant departmental system.

The Bill does not amend the current powers relating to strip searches other than to extend them to prohibited things.

Officers authorised to carry out strip searches of detainees will be subject to satisfying training and qualification requirements in the following areas:

- civil rights and liberties
- cultural awareness
- the grounds for conducting a strip search
- the pre-conditions for a strip search
- the role of officers involved in conducting a strip search
- the procedures for conducting a strip search
- the procedures relating to items retained during a strip search.

Certification and training records relating to statutory powers are entered into the Learning Management System when an authorised officer has successfully completed a training course on Detention and Search powers. This allows for tracking officers exercising strip search powers to ensure they have current pre-requisite qualifications. As part of the training, officers are required to successfully complete an online course and assessment, undertake practical (role play) assessments and be assessed as competent by a Workplace Assessor. Officers are required to undergo Detention and Search re-certification every two years.

Under section 5 of the Migration Act to be an authorised officer a person must be authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of the relevant provision. This authorisation process ensures that an appropriate level of control is applied to determine who is an authorised officer. Only persons who possess the specified skills, training or experience necessary to perform the duties required under the relevant provisions of the Migration Act will be appointed as authorised officers.

Subsection 252BB provides that an authorised officer may be assisted by other persons in exercising powers or performing functions or duties for the purposes of a search under section 252BA or in relation to seizing and retention of things found in the course of a screening process or search under sections 252C, 252CA and 252CB if that assistance is necessary and reasonable. The assistant must exercise these powers in accordance with any directions given by the authorised officer. By including the wording ‘necessary and reasonable’ this restricts the use of officers’ assistants to situations where such assistance is necessary to ensure the authorised officer can carry out their powers, functions or duties. Examples of where the use of an assistant may be necessary and reasonable include the search of the whole facility, where numerous officers are necessary in order for the search to be conducted, or where a locksmith is required on a one-off basis to unlock a door within an Immigration Detention Facility in order to facilitate a search of that premises. The Bill does not require that an “authorised officer’s assistant” be appointed – they will be deployed as and when assistance is necessary.

An assistant cannot be used under subsection 252BA(4) when an authorised officer is using a dog to conduct a search of an immigration detention facility.

Currently, a suspicion on reasonable grounds is required to carry out a strip search on a detainee, or to request a visitor to remove outer clothing, open a bag, or leave an item in a specified place, and this will not change under the amendments to be made by the Bill.

The authorised officer is not required to have any level of suspicion before carrying out a search or screening procedure, under the current provisions in relation to weapons and escape aids. Under the proposed amendments this will remain the case and include items that are prohibited things.

A requirement to suspect would greatly limit the use of the search powers. For example, it would not allow all detainees as they first enter a detention facility to be searched or screened for prohibited things. This could only be done where the officer suspected that the person has such an item in their possession.

While the measures on their face provide officers with the discretion to search for prohibited items on persons regardless of the risk posed, the exercise of these powers by officers will be guided by the Department's operational policy framework. This framework provides detailed guidance on the powers available to officers under the Migration Act, how and when those powers should be utilised, and record keeping and reporting requirements.

The Minister will have the power to direct officers to seize certain prohibited items from all detainees, which will override the exercise of the discretion by authorised officers. However, it is expected that this power will only be exercised in relation to the most serious circumstances, for example in relation to child abuse material, where there is no question that it is appropriate that such material should be seized from all detainees.