Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 9 of 2020

18 August 2020

ISSN 2204-6356 (Print)
ISSN 2204-6364 (Online)

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This report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 9 of 2020*; [2020] AUPJCHR 114.

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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Committee information

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

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.[2]

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

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

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

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

2 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

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

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in *Guidance Note 1*, a copy of which is available on the committee's website.[3]

3 See *Guidance Note 1 – Drafting Statements of Compatibility*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

Chapter 1

Concluded matters

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

1.2 Correspondence relating to these matters is available on the committee's website.[1]

Australian Security Intelligence Organisation Amendment Bill 2020[2]

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

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

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Security Intelligence Organisation Amendment Bill 2020, *Report 9 of 2020*; [2020] AUPJCHR 115.

	people attending questioning including parents, and the ability for a police officer to retain any dangerous items and communication devices found; • prevent contact with specific lawyers; • allow a prescribed authority to appoint a lawyer for the subject of a questioning warrant in certain circumstances; and • permit the removal of a lawyer (and a minor's representative) from questioning where they are unduly disruptive.
Portfolio	Home Affairs
Introduced	House of Representatives, 13 May 2020
Rights	Liberty; freedom of movement; humane treatment in detention; privacy; fair trial; rights of the child; freedom of expression; rights of persons with disability
Status	Concluded examination

1.3 The committee requested a response from the minister in relation to the bill in *Report 7 of 2020*.[3]

ASIO compulsory questioning framework

1.4 Schedule 1 of the bill seeks to repeal and replace the Australian Security Intelligence Organisation's (ASIO) compulsory questioning framework, including amending the provisions related to questioning warrants, and abolishing questioning and detention warrants.[4]

1.5 The Director-General may apply to the Attorney-General for a questioning warrant in order to question a person about certain matters. For adults the warrant may be issued in relation to matters which relate to protecting Australia from espionage,[5] acts of foreign interference,[6] and politically motivated violence[7] (which would include acts of terrorism, as well as financing terrorism and offences relating

3 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020), pp. 32-68.

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

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

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

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

to control orders, preventative detention orders and continuing detention orders).[8] For children aged between 14 to 18 years of age, a warrant may be issued in relation to matters that relate to the protection of Australia from politically motivated violence. The Attorney-General may issue a warrant in relation to an adult where they are satisfied that:

- the person is at least 18 years old;
- there are reasonable grounds for believing that a warrant will substantially assist in the collection of intelligence that is important in relation to an adult questioning matter; and
- having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.[9]

1.6 Different criteria apply in relation to the issuing of a minor questioning warrant, as set out below at paragraph [1.124].

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

1.8 The bill includes a range of offence provisions regarding a failure to answer questions or the provision of false or misleading information. Information obtained during questions would be barred from being used in evidence against a subject,

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

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

although any evidence derived from such information could be used against a subject for a related offence.

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

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

1.10 A questioning warrant authorises ASIO to request that a subject give information, or produce a record or other thing, that is, or may be, relevant to intelligence that is important in relation to an adult questioning matter.[10] ASIO may also request that the subject give information, or produce records or things including: the subject matter of any charge or confiscation proceeding, or imminent charge or confiscation proceeding, against the subject.[11] Further, a warrant may authorise a police officer to search the subject of a warrant and seize a record or thing which they reasonably believe is relevant to the collection of intelligence that is important in relation a questioning matter.[12] ASIO is further authorised to remove and retain items which have been produced by the subject.[13]

1.11 By compelling a person to provide information, or produce a thing or record; permitting the search of a person; permitting a police officer to enter premises in order to apprehend a person; and prohibiting a subject from overseas travel in some circumstances, these measures engage and may limit the right to privacy. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[14] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life. A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. Further, the right to privacy also includes the right to personal autonomy and physical integrity. It is important to note that the right may be permissibly limited, where it pursues a legitimate objective, is rationally connected to that objective, and proportionate.

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

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

12 Schedule 1, Part 1, item 10, proposed subsection 34BE(3).

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

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

1.12 The initial analysis considered that further information was required to assess the compatibility of these measures with the right to privacy, and in particular:

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

1.13 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

1.14 The committee noted that this measure engages and may limit the right to privacy (which may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate). The committee considered that these powers seek to achieve the legitimate objective of ensuring ASIO can gather information in relation to national security.

1.15 In order to fully assess the compatibility of this measure with the right to privacy, the committee sought the minister's advice as to the matters set out at paragraph [1.12].

Minister's response[15]

1.16 The minister advised:

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.[16] This would include an express power to vary or revoke a questioning warrant, and the ability to authorise the subject's apprehension.[17] 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.[18]

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.

15 The minister's response to the committee's inquiries was received on 9 July 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

16 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, sections 34BA and 34BB.

17 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, sections 34BG(1) and 34BE(2).

18 PJCIS report on the operation, effectiveness and implications of Division 3 of Part III of the ASIO Act, [3.123] – [3.124].

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.[19] 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.[20] 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.[21]

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.[22]

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

19 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BD.

20 See definition of adult questioning matter, Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, section 34A.

21 See definition of minor questioning matter, Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, section 34A.

22 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, subsection 34GD(4).

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,[23] 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.[24] 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.[25]

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.[26]

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

23 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, section 34JB.

24 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, section 34DM.

25 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, subsection 34GD(3)(b).

26 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, section 34HC.

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
    - 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,[27] 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.

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.[28] 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;
- give a copy of the report to the Attorney-General, and if required, the Prime Minister.[29]

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

27 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.

28 *Inspector-General of Intelligence and Security Act 1986*, section 22.

29 *Inspector-General of Intelligence and Security Act 1986*, section 24.

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.[30] 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.[31] 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.[32]

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.

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

30 United Nations Human Rights Committee, *General Comment No 16 at paragraph 7: Article 17 (Right to Privacy)*, [4].

31 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].

32 United Nations Human Rights Committee, *General Comment No 16 at paragraph 7: Article 17 (Right to Privacy)*.

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.

Concluding comments

International human rights legal advice

Right to privacy

1.17 Further information was sought with respect to a number of matters, which are relevant to an assessment of the proportionality of these measures.

The role of the Attorney-General

1.18 In relation to whether it is appropriate that the Attorney-General should have sole responsibility for issuing a questioning warrant, the minister noted that the Attorney-General currently issues all other ASIO special power warrants, and this provides ministerial oversight of the intended use of intrusive powers, and establishes ministerial accountability. The minister stated that this is appropriate noting that the Attorney-General is the first law officer of the Commonwealth and is responsible for the rule of law and oversight of intelligence agencies.

1.19 Based on the information provided by the minister, it remains unclear how providing for the issue of a warrant solely by the Attorney-General would establish ministerial accountability in a manner in which the current framework does not. The compulsory questioning framework currently provides that any request for a warrant must be provided first to the Attorney-General for consideration, and then subsequently to an issuing authority (being a judge).[33] This provides both ministerial *and* judicial accountability, as well as judicial oversight. The proposed amendment to procedures by which a questioning warrant may be issued would, in fact, reduce the level of scrutiny and accountability of such warrants by removing judicial oversight at the point of a warrant request. The Inspector-General of Intelligence and Security

33 *Australian Security Intelligence Organisation Act 1979*, section 34E.

raised this concern in 2017, when they advised that the United Kingdom, Canada, the United States and New Zealand have judicial or quasi-judicial authorisation for coercive powers including telecommunications interception, stating that: 'These changes reflect concerns in these countries that there be better protection of human rights. ASIO's 'streamlining' proposal does not give weight to these concerns'.[34]

1.20 Enabling a minister, rather than judicial officer, to issue a warrant which will likely have a significant impact on a person's rights, raises particular concerns. The European Court of Human Rights has observed that the rule of law 'implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure'.[35] The court further stated that, in the context of surveillance measures by the state, measures may be necessary for the protection of the democratic state, but in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.[36] Further, the court stated that whatever system of surveillance is adopted, it must be accompanied by adequate and effective guarantees against abuse, having regard to all the circumstances of the case, such as: the nature, scope and duration of the possible measures; the grounds required for ordering such measures; the authorities competent to permit, carry out and supervise such measures; and the kind of remedy provided by the law.[37] These proposed provisions, which would enable the issue of a compulsory questioning warrant, and enliven a range of coercive measures against a person, would appear to be analogous to such a system of surveillance.

1.21 The minister noted that the efficient and timely execution of a questioning warrant is a relevant consideration, and this is likely to be the case. However it is not clear from the information provided that the current two-stage authorisation process has resulted in any detriment to either the execution of a questioning warrant, or to

34 Inspector-General of Intelligence and Security, Supplementary Submission no 2 to the Parliamentary Joint Committee on Intelligence and Security, *Review of ASIO's questioning and detention powers* (2017), p. 6.

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

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

37 *Klass and Others v Germany*, European Court of Human Rights, Application no. 5029/71, (6 September 1978), [50].

national security more generally.[38] Having regard to the coercive powers which would be triggered by the issue of a questioning warrant, it remains unclear that the proposed sole power for the Attorney-General to issue a questioning warrant without judicial oversight would be accompanied by sufficient safeguards such that it would constitute a proportionate limitation on the right to privacy.

Refusal to answer questioning or produce records or things

1.22 The minister stated that the bill does not provide a warrant subject with a 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, and that the subject will be committing an offence should they fail to comply with such a request. The minister has stated that enabling the subject to refuse to answer questioning may undermine the compulsory questioning process, and a questioning warrant may only authorise ASIO to ask a person to provide such information or things where they are, or may be, relevant to intelligence that is important in relation to either an adult or minor questioning matter. The minister further stated that the relevance of a particular line of questioning may not be apparent to the subject. In this respect, it is also relevant that pursuant to proposed section 34GD, a person may only be guilty of the offence of failure to provide information where such information was requested in accordance with the warrant (that is, where the information was, in fact, relevant).[39]

1.23 However, it is noted that the defendant would bear the evidential burden of raising evidence that they did not, in fact, possess the relevant information or thing.[40] In addition, the scope of information which may be relevant to an adult or minor questioning matter would appear to be broad. For adults, a warrant may be issued in relation to matters which relate to protecting Australia from espionage,[41] acts of foreign interference,[42] and politically motivated violence[43] (which would include acts of terrorism, as well as financing terrorism and offences relating to

38 In this regard, it is also relevant that questioning warrants have been used very rarely. Between 2004 and 2017, just 16 questioning warrants and no questioning and detention warrants were issued by ASIO. No compulsory questioning warrants were issued between 2010 and 2017. See, Parliamentary Joint Committee on Intelligence and Security, *Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (2018).

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

40 Schedule 1, Part 1 ,item 10, proposed subsection 34GD(4).

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

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

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

control orders, preventative detention orders and continuing detention orders).[44] For children aged between 14 to 18 years, a warrant may be issued in relation to matters that relate to the protection of Australia from politically motivated violence. The IGIS recently noted that this proposed expansion of matters in relation to which a warrant may be issued would involve matters which do not necessarily raise the same security risks:

> One of the key things that IGIS considers when looking at the propriety of ASIO operations is that the exercise of a power should be proportionate to the gravity of the threat posed, the probability of its occurrence, as well as the imminence of the threat. The threat of an imminent major terrorist attack in Australia is at the top of the current scale of potential threats and would justify the use of the most intrusive powers. Other threats to Australia, including from espionage and foreign interference, can also be serious but this does not mean that there is no hierarchy of threats…[I]t does not follow that questioning and questioning and detention warrants should always be available for every aspect of the definition of security.[45]

1.24 This indicates that not all the acts identified in the proposed expanded grounds on which an adult questioning warrant could be issued may raise the same level of concern with respect to an immediate or otherwise serious risk of harm to persons, or to national security. Further, the minister advised that the bill would authorise ASIO to ask a person to provide such information or things where they are, *or may be*, relevant to intelligence *that is important in relation to* either an adult or minor questioning matter. This would appear to apply a generous scope to the permissible matters in relation to which ASIO may ask questions. This raises concerns as to the proportionality of any limitation on the right of a person to privacy.

1.25 The minister noted that where a warrant subject believes that information is outside the scope of the warrant, they can complain to the IGIS, who may be present during questioning, and who may raise any concerns about the process. The minister stated that, in such instances, the prescribed authority may direct that the questioning by a person exercising authority under the warrant may be suspended to allow the concern to be addressed. This may serve as a valuable safeguard in terms

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

45 IGIS submission 1.2 to the 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), pp. 2-3.

of independent oversight of the compulsory questioning powers. However, the presence of the IGIS at the questioning is not guaranteed, and it is relevant that the IGIS has recently advised the Parliamentary Joint Committee on Intelligence and Security that it will only have the capacity to provide oversight of ASIO's compulsory questioning framework if these powers continue to be used very rarely, otherwise this capacity will need to be reviewed.[46] Further, the IGIS has only recommendatory power, and in this context it would appear that an exercise of such oversight would, in the immediate sense, trigger only a further discretionary exercise of power by the prescribed authority to suspend questioning until they are satisfied that the IGIS's concern has been satisfactorily addressed.[47] While the bill would require that the prescribed authority must 'consider' the IGIS's concern,[48] it is not clear what factors, if any, they would be required to weigh up in exercising that discretion. Consequently, the value of this oversight by IGIS may have limited value as a safeguard in practice in all instances.

The ASIO Guidelines

1.26 The minister advised that, pursuant to the *Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its functioning of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence)* (the ASIO Guidelines), compulsory questioning 'would almost never be the first option for obtaining intelligence'. Rather, ASIO would seek to conduct a voluntary interview in preference to a questioning warrant.

1.27 The minister noted that ASIO may consider requesting a questioning warrant where: other methods of gathering the intelligence are unlikely to be effective; there is an urgent need; ASIO assesses that the person may be more willing to divulge information under compulsion; the person is likely to reveal the fact or content of ASIO's interest in third parties if not for the secrecy provisions; and ASIO assesses that a person would refuse a voluntary interview, or they have in fact refused such an interview. Hence, it would appear that the ASIO Guidelines may serve as a safeguard with respect to the decision to rely on ASIO's compulsory questioning powers. However, it is relevant that IGIS has advised the Parliamentary

46 See, Inspector-General of Intelligence and Security, Submission to the Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Security Intelligence Organisation Bill 2020, 3 July 2020.

47 Schedule 1, Part 1 ,item 10, proposed section 34DM.

48 Schedule 1, Part 1 ,item 10, proposed subsection 34DM(3).

Joint Committee on Intelligence and Security on a number of occasions that these guidelines should be updated to take into account these new intrusive powers.[49]

1.28 The minister has stated that ASIO is bound by the ASIO Guidelines and that the IGIS assesses ASIO's compliance with them through inspections, and complaints-handling. Where IGIS has inquired into a matter, it must prepare a report setting out conclusions and recommendations. If the IGIS considers that those have not resulted in appropriate action they may discuss the matter with the responsible minister and provide the Attorney-General (and potentially the Prime Minister) with a copy of a report about the matter. This independent oversight may have the capacity to serve as a useful safeguard with respect to enforcement of the ASIO Guidelines in practice, where the IGIS has inquired into a particular matter. However, it would not appear that such a report is prepared where the IGIS is merely raising a concern with respect to the execution of a questioning warrant.

Bodily searches and entry to and search of property

1.29 Information was also sought as to the manner in which measures providing for physical searches, and the entry to and search of properties, would be compatible with the right to privacy.

1.30 The minister noted that proposed section 34CC would enable a police officer to conduct an ordinary or frisk search of a subject who has been apprehended, and that a police officer could also request that a person be screened at a place of questioning. The minister provided advice as to the necessity of such powers, including that these would ensure the safety of police officers, and the integrity of a questioning warrant, which would appear likely to constitute legitimate objectives, and providing for such searches would appear to be rationally connected to those objectives.

1.31 In relation to whether the powers contain sufficient safeguards so as to be proportionate,[50] it would appear that such a bodily searches, and entry to premises, may only occur in specific circumstances (where a warrant authorises this, or following a representation made by the warrant subject). This assists in an assessment of the proportionality of the measures, and consideration of any arbitrariness in their proposed application.

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49 See, Inspector-General of Intelligence and Security, submissions to the Parliamentary Joint Committee on Intelligence and Security: review of the mandatory data retention regime (Submission 36), p. 12; Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Submission 28), p. 5; Telecommunications Legislation Amendment (International Production Orders) Bill 2020, (Submission 27), p. 10; and Australian Security Intelligence Organisation Bill 2020 (Submission 32), p. 19.

50 See, for example, *Yklymova v Turkmenistan*, Human Rights Committee, Communication No. 1460/06 (20 July 2009) in which the committee held that the search of a person's home and confiscation of various personal items without legal grounds constituted an arbitrary interference with their privacy.

1.32 As to the conduct of bodily searches, the United Nations Human Rights Committee has emphasised that personal and body searches must be accompanied by effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched, and that persons subject to body searches should only be examined by persons of the same sex.[51] The minister advised that an ordinary or frisk search of a subject must be conducted by a police officer of the same sex, if practicable, and may only be conducted using as much force as is reasonable and necessary. Further, proposed section 34D would not authorise the use of any force where a person is being searched as part of a screening at the location of questioning, only the power to refuse entry for failure to comply with a request to submit to screening. The minister further advised that the power to enter premises to apprehend a warrant subject would only be authorised on limited grounds, which would appear to provide safeguards against arbitrary interferences with a person's privacy and home.

1.33 With respect to external safeguards, the minister noted that a person who has been apprehended must be informed of their rights. The minister advised that the IGIS may be present at a search or screening, and that a subject may make a complaint to the Commonwealth Ombudsman, or a State or Territory complaints agency, and may seek a judicial remedy with respect to the same matters. The minister also noted that in the exercise of an entry and apprehension power, police officers would be permitted to use only force which is reasonable and necessary in the circumstances, and are bound by their own guidelines with respect to the use of force.[52] These may serve as safeguards by providing for independent oversight of the exercise of such powers, albeit *after* a potentially impermissible intrusion into a person's privacy. In addition, as noted at paragraph [1.25], IGIS has cautioned that it will only have the capacity to provide oversight of ASIO's compulsory questioning framework if these powers continue to be used very rarely.

Additional safeguards for vulnerable warrant subjects

1.34 Further information was sought as to whether any additional safeguards would protect vulnerable warrant subjects, including children and persons with disability. The minister noted that pursuant to the *Commissioner's Order on Operational Safety*, an AFP appointee must not handcuff a child or young person unless they believe on reasonable grounds that it is essential to safely transport

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

52 The Australian Federal Police (AFP), for example, is bound by the *Commissioner's Order on Operational Safety*. The order sets out, inter alia, the AFP's operational safety policy, which provides high level guidance as to the use of force by an AFP officer. Elements of this order are publicly available pursuant to a freedom of information request. See, https://www.afp.gov.au/sites/default/files/PDF/IPS/18122019-CommissionersOrderonOperationalSafetyCO3.pdf [Accessed 16 July 2020].

them. This would appear to serve as an additional safeguard with respect to the physical integrity of children, however only during their transportation where they have been apprehended for questioning. The AFP Order appears to be silent as to any similar limitations on the use of force with respect to persons with a suspected or apparent disability, and it is not clear that any similar restriction on handcuffing would apply to a person with disability in relation to state and territory police.

1.35 The minister also highlighted protections within the bill itself, including the requirement that a warrant subject be treated with humanity and with respect for human dignity.[53] The minister stated that this will ensure that the physical privacy and bodily integrity of warrant subjects are maintained to the extent it is possible to do so. However, it is not clear from this information what specific protection this proposed general obligation would provide to vulnerable warrant subjects.

1.36 The minister advised that additional safeguards will be included in a statement of procedures made under proposed section 34AF, and stated that ASIO's policies and procedures governing the conduct of compulsory questioning are in the process of being updated and will continue to address ASIO's engagement with vulnerable subjects. The minister noted that an existing statement of procedures establishes a number of specific requirements with respect to transporting, detaining and questioning a person. To the extent that the proposed new statement of procedures would reflect that existing statement, these procedures may therefore offer some additional protections to vulnerable warrant subjects. However, it remains unclear as to what specific protections they would offer.

1.37 With respect to oversight of these powers, the minister noted that the IGIS may be present at the search or screening of a person, and that a warrant subject can complain to the Commonwealth Ombudsman or a State or territory complaints agency in relation to the conduct of any search or screening procedure. As noted above at paragraphs [1.25] and [1.32], the independent oversight provided by the IGIS may have the capacity to serve as a valuable safeguard. However, the bill does not require that an IGIS representative must be present at any of these stages, only that IGIS *may* be present.

Concluding remarks

1.38 By compelling a person to provide information, or produce a thing or record; permitting the search of a person; permitting a police officer to enter premises in order to apprehend a person; and prohibiting a subject from overseas travel in some circumstances, these measures engage and may limit the right to privacy. This right may be permissibly limited, where it pursues a legitimate objective, is rationally connected to that objective, and proportionate. As noted in the initial analysis, the questioning powers, and associated powers to apprehend persons subject to a questioning warrant, seek to achieve the objective of ensuring ASIO can gather

53 Pursuant to proposed section 34AG.

information in relation to national security.[54] This would appear to be a legitimate objective for the purposes of international human rights law and questioning a person about such matters would appear to be rationally connected to that objective. As to whether the measure is proportionate, as set out above, while there are a number of safeguards that apply, it remains unclear whether such safeguards are sufficient such that the measure would, in all instances, constitute a proportionate limitation on the right to privacy (including the rights of persons with disabilities to privacy).

Committee view

1.39 The committee thanks the minister for this response. The committee notes that the bill provides for the apprehension of subjects; would require a subject to attend questioning and provide information, and/or produce records or things; and provides for the search of a person and entry to premises.

1.40 The committee notes that the ASIO Act currently provides for two types of warrants under which ASIO may – subject to specified safeguards – exercise powers of compulsory questioning, being: (a) a questioning warrant which enables ASIO to require a specified person to appear before a prescribed authority for questioning at a specified time which may be up to 24 hours or 48 hours if using an interpreter and (b) a questioning and detention warrant which allows a person to be taken into custody immediately by police and detained for up to 168 hours for questioning by a prescribed authority.

1.41 However, currently ASIO is only able to use questioning and detention powers to investigate terrorism offences, which has limited ASIO's capacity to investigate a range of steadily worsening security challenges such as in relation to espionage and foreign interference. The bill repeals ASIO's current detention powers and retains a broader compulsory questioning power.

1.42 The committee considers that these measures engage and limit the right to privacy. This right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.43 The committee considers that these powers seek to achieve the legitimate objective of ensuring ASIO can gather information in relation to national security. The committee notes the minister's extensive advice as to the safeguards present in relation to a number of these measures, which helps to protect the right to privacy. However, the committee considers that, as drafted, questions remain as to whether such safeguards are sufficient such that the measure would, in all instances, constitute a proportionate limitation on the right to privacy.

1.44 The committee notes both the minister's response and the legal advice, and considers that measures which provide the Attorney-General with the right to

54 See, statement of compatibility, p. 13.

issue questioning warrants including orally in person, or by telephone or other means of communication where the delay caused by making a written request may be prejudicial to national security, are proportionate given the importance of ASIO being able to respond quickly to time-critical threats, particularly given that additional safeguards apply to oral warrants including the notification requirements to the IGIS.

1.45 As the minister makes clear, the committee recognises that the Attorney-General must be satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence and that, 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. ASIO's compliance with the Guidelines, including in the making of requests for questioning warrants, is subject to the independent oversight of the IGIS.

1.46 The committee considers that the proportionality of these measures would be assisted if the bill were amended to provide that:

- **in requesting a warrant, the Director-General must include any information known as to any vulnerabilities particular to the proposed warrant subject (including any cognitive, intellectual or other developmental disability);[55] and**
- **in considering whether to issue a warrant, the issuing authority must consider any vulnerabilities of the warrant subject of which they have been advised, including any disability, and consider imposing any conditions on the service and execution of the warrant with respect to such disability or vulnerability.[56]**

1.47 In addition, the proportionality of these proposed measures may be assisted if the ASIO Guidelines were updated to provide specific guidance with respect to ASIO's questioning powers.

1.48 Further, the committee recommends that the statement of compatibility be updated to reflect the engagement and limitation of the right to privacy with respect to bodily searches, and entry to and search of premises.

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

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55 Amendment to Schedule 1, Part 1, item 10, proposed subsection 34B(4).

56 Amendment to Schedule 1, Part 1, item 10, proposed sections 34BA, 34BB, 34BD and 34BE. For example, a warrant may authorise that an adult warrant subject be apprehended but not be handcuffed, or that they not be transported in the absence of a specified support person.

Apprehension of a person subject to a warrant

1.50 A warrant may require the subject to appear before a prescribed authority at a designated date and time,[57] or to appear immediately where the Attorney-General is satisfied that it is reasonable and necessary in the circumstances.[58] It may remain in force for no more than 28 days,[59] although it may be revoked earlier, or varied,[60] and subsequent questioning warrants may be issued.

1.51 A police officer may apprehend the subject of a warrant if this is authorised in the warrant, in order to bring the person before a prescribed authority for questioning under the warrant.[61] In doing so, the police officer may enter premises, search the person and use such force as is necessary and reasonable.[62]

Summary of initial assessment

Preliminary international human rights legal advice

Right to liberty and freedom of movement

1.52 By providing for the physical apprehension of an individual in relation to a questioning warrant the bill engages and may limit the rights to liberty and freedom of movement. The right to freedom of movement includes the right to freely move within a country.[63] The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[64] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty.

1.53 The initial analysis considered that further information was 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

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

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

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

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

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

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

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

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

for the apprehension of a person, be issued by the Attorney-General, rather than a judicial officer.

1.54 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

1.55 The committee noted that these measures engage and may limit the rights to freedom of movement and liberty. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considered that these powers seek to achieve the legitimate objective of protecting the integrity of questioning and thereby protecting national security interests.

1.56 In order to fully assess the compatibility of this measure with the rights to freedom of movement and liberty, the committee sought the minister's advice as to the matters set out at paragraphs [1.53].

Minister's response

1.57 The minister advised:

> 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'.

Concluding comments

International human rights legal advice

Right to liberty and freedom of movement

1.58 As noted in the initial analysis, the statement of compatibility provides that apprehension of a warrant subject will only be for the minimum time possible,[65] as a police officer can only apprehend in order to 'immediately' bring the subject of the warrant before the prescribed authority.[66]

1.59 The bill would authorise apprehension where: the warrant itself authorises apprehension; the warrant requires a person's immediate appearance and the person makes a representation indicating that they intend to not appear (or to alert a person involved in the activity, or otherwise destroy, damage or alter a record or thing); or where the person has failed to appear.[67] The explanatory memorandum states that the period of apprehension will end when the subject is before the prescribed authority for questioning, and that practically speaking, a police office will

65 Statement of compatibility, p. 8.

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

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

not be able to apprehend a warrant subject where questioning will not be ready to begin when the subject appears before a prescribed authority.[68]

1.60 The ASIO guidelines require that, when ASIO is collecting information, its methods for doing so must be proportionate to the gravity of the threat posed and the probability of its occurrence; there should be as little intrusion into a person's privacy as possible; and the least intrusive techniques of information gathering should be used before resorting to more intrusive techniques.[69] However, noting that these guidelines provide high-level guidance with respect to the exercise of a wide range of powers by ASIO, it is not clear that they would provide specific safeguard value in terms of regulating the power to apprehend a warrant subject.

1.61 The statement of compatibility also notes that the subject of a questioning warrant is permitted to contact the IGIS or the Commonwealth Ombudsman to complain about their treatment.[70] As discussed at paragraph [1.32], the capacity for the IGIS to be present, and to consider any complaint made to it, has the capacity to serve as a useful safeguard. Further, the capacity to raise a complaint with a complaints body about a concern would also appear to provide independent oversight, albeit after a person's freedom of movement, and potentially their right to liberty, had been limited.

1.62 It appears that the apprehension of a warrant subject may only be authorised in strictly defined circumstances, and that a person may only be apprehended in order to immediately take them to the place of questioning. Further, it would appear that the ASIO Guidelines, and the external oversight mechanisms, have the capacity to provide significant safeguard value with respect to the use of this apprehension power in practice. However, as set out above at paragraph [1.18] to [1.21], the proposed capacity for the Attorney-General to issue a warrant and to authorise the apprehension of a person, rather than or without the oversight of a judicial officer, raises particular concerns as to whether the proposed apprehension power permissibly limits the rights to liberty and freedom of movement.

Committee view

1.63 The committee thanks the minister for this response. The committee notes that the bill provides for the physical apprehension of certain persons subject to questioning warrants.

1.64 The committee notes that this measure engages and limits the rights to freedom of movement and liberty. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. As noted in the initial analysis, the committee considers that these powers seek to

68 Explanatory memorandum, p. 54.

69 Statement of compatibility, pp. 10-11.

70 Statement of compatibility, p. 11.

achieve the legitimate objective of protecting the integrity of questioning and thereby protecting national security interests.

1.65 The committee notes that the apprehension of a warrant subject may only be authorised in strictly defined circumstances, and that a person may only be apprehended in order to immediately convey them to the place of questioning. Further, the committee notes that the independent oversight provided by the Inspector-General of Intelligence and Security has significant safeguard value, and notes that a warrant subject may make a complaint about their treatment during apprehension to an independent body.

1.66 The committee notes both the minister's response and the legal advice, and notes that the warrant may be issued by the Attorney-General rather than a judicial officer, but as stated above at paragraphs [1.44] to [1.45], it considers that these measures are proportionate and, further, that they are consistent with other special power warrants which may be exercised by the Attorney-General.

Questioning warrants

1.67 The subject of a warrant may be questioned for a 'permitted questioning time' of up to 24 hours,[71] or 40 hours where an interpreter is being used. This 'permitted questioning period' is not calculated in terms of a continuous period from the point of attendance for questioning. It includes only the periods of time during which questioning is taking place, excluding time taken to undertake activities including contacting a lawyer, changing recording equipment, or receiving medical attention.[72]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to liberty and freedom of movement

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

Rights of persons with disabilities

1.68 The execution of a questioning warrant necessitates that a subject appear before a prescribed authority for questioning for up to 24 hours (and 40 hours where an interpreter is used). It is unclear whether a subject may elect to leave a questioning session, noting that a person may be apprehended in order to appear for questioning and it would be an offence for a person to fail to give information or

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

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

produce records.[73] It is also not clear if a person subject to such questioning can suspend the questioning after a certain period of time (i.e. to go home to sleep and eat meals), or if the person is required to stay until the questioning has ended.[74] If the person is effectively prohibited from leaving until the questioning is complete, this measure would engage and may limit the rights to freedom of movement and liberty. In addition, the compulsory questioning of subjects under warrant may also engage the prohibition on torture, cruel, inhuman or degrading treatment or punishment and the right to humane treatment in detention.

1.69 Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment (including under article 7 of the International Covenant on Civil and Political Rights (ICCPR)).[75] The prohibition on torture, cruel, inhuman and degrading treatment or punishment is absolute and may never be subject to any limitations. Article 10 of the ICCPR, which guarantees a right to humane treatment in detention, complements article 7 such that there is a positive obligation on Australia to take actions to prevent the inhumane treatment of detained persons.[76] The UN Human Rights Committee has indicated that United Nations standards applicable to the treatment of persons deprived of their liberty are relevant to the interpretation of articles 7 and 10 of the ICCPR.[77]

1.70 All people deprived of their liberty in any form of state detention have the right to be treated with humanity and dignity.[78] This is a positive obligation, which requires that a person who is detained may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.[79] The right provides extra protection for persons in detention who are particularly vulnerable as they have been deprived of their liberty.

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

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

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

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

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

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

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

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

1.72 The initial analysis considered that further information was required to assess the compatibility of these measures with the rights to freedom of movement, liberty, the prohibition on torture, cruel, inhuman or degrading treatment, the right to humane treatment in detention and the rights of persons with disabilities, in particular:

- the compatibility of the process of questioning a person pursuant to a questioning warrant with the right to liberty and the right to freedom of movement;
- the maximum total period of time (if any) (including a 'permitted questioning period', 'extended permitted questioning period', and all other periods of time) during which a subject may be questioned pursuant to a questioning warrant on a single occasion;
- whether a subject can leave a questioning session of their own volition at any point, or whether they may be prevented from leaving the session, and whether force may be used to prevent them from leaving;
- whether questioning pursuant to one questioning warrant may be spread across multiple occasions, including in cases where the permitted questioning time has been extended;
- whether, if a questioning session extends late into the evening, and a subject is not going to be released, they will be provided with adequate facilities in which to sleep, eat and shower in privacy;
- whether a subject must be provided with food and regular drinks when they appear for questioning, and be provided with breaks where required to attend to religious duties;
- what other safeguards and procedures will be instituted to protect the health and welfare of persons subject to a questioning warrant while they are appearing before a prescribed authority;
- whether a subject may complain to the IGIS or the Commonwealth Ombudsman about their treatment during questioning or apprehension, and seek a remedy, while that period of questioning 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.

1.73 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

1.74 The committee noted that if a person is effectively prohibited from leaving until the questioning is complete, this measure would engage and may limit the rights to freedom of movement and liberty. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.75 In addition, the committee considered compulsory questioning of subjects under warrant may also engage the right to humane treatment in detention. In order to assess the compatibility of these measures with these rights, the committee sought the minister's advice as to the matters set out at paragraphs [1.72].

Minister's response

1.76 The minister advised:

> *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*
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> 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.[80] 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.[81] 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.[82] 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.[83] A questioning warrant may remain in force for a period of no longer than 28 days.[84]

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.

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

80 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BD(2)(b).

81 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, ss 34F-34FA.

82 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34DJ.

83 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34DK.

84 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BF(4).

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.[85] 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).[86]

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

85 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, Subdivision C.

86 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34GD.

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

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 questioning 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;[87]
- 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;[88]
- 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;[89]
- 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;[90] and
- a questioning subject will not commit an offence under the secrecy provisions when making permitted disclosures, which include

87 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BH(2)(g) and 34DC(1)(i).

88 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34CB(2).

89 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34CB(2)(c).

90 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34DI.

disclosures for the purpose of making a complaint to the IGIS, the Commonwealth Ombudsman, or a complaints agency.[91]

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:

- 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

91 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34GF(5).

- 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.

<u>Impact of questioning threshold</u>

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,[92] 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.

92 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34AG.

> 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.

Concluding comments

International human rights legal advice

Right to liberty and freedom of movement

1.77 Further information was sought in order to establish whether the compulsory questioning warrant regime engages the rights to liberty and freedom of movement.

1.78 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty, and applies to all forms of deprivations of liberty. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. The right to liberty may not be engaged by mere restrictions on liberty of movement, such as a prohibition on travelling freely within a country.[93] However, a restriction on a person's movement may be to such a degree and intensity that it would constitute a 'deprivation' of liberty, particularly if an element of coercion is present.[94] The European Court of Human Rights has further guided that:

> In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5…the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.[95]

1.79 That is, while there may be no deprivation of liberty if a single feature of an individual's situation is taken on its own, the combination of measures considered

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93 See, *Celepli v Sweden*, UN Human Rights Committee, Communication No. 456/1991 (2 August 1994).

94 United Nations Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999) [7]; see also United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/22.44 (2012) [55] and [57]; *Foka v Turkey*, European Court of Human Rights Application No.28940/95, Judgment (2008) [78]; *Gillan and Quinton v United Kingdom*, European Court of Human Rights Application No.4158/05, Judgment (2010) [54]-[57]; *Austin v United Kingdom*, European Court of Human Rights Application Nos. 39692/09, 40713/09 and 41008/09, Grand Chamber (2012) [57]; *Gahramanov v Azerbaijan*, European Court of Human Rights Application No.26291/06, Judgment (2013) [38]-[45].

95 *Amuur v. France,* European Court of Human Rights, Application Nos. 17/1995/523/609, (1996), [42]; and *Guzzardi v. Italy*, European Court of Human Rights, Application no. 7367/76, (1980), [92].

together may have that result.[96] Further, the European Court of Human Rights has relevantly observed that the right to liberty still exists where a person may have voluntarily given themselves up to be taken into custody.[97]

1.80 The minister advised that a warrant subject would be physically able to leave a place where questioning is taking place at any time (subject to any limitation on them leaving the country, and any directions by the prescribed authority), and the ASIO officers present would not have authority to prevent them. However, in so leaving, the warrant subject may be committing a serious criminal offence under proposed section 34GD. The prescribed authority would be obligated to explain the effect of proposed section 34GD when the warrant subject first appears for questioning,[98] thereby placing the warrant subject on notice of the potential ramifications of them leaving the place of questioning.

1.81 In addition to these matters, it is relevant that:

- a warrant may require a person's immediate appearance, and may authorise their physical apprehension;
- although a warrant subject may be questioned for a total of 24 hours (or 40 hours where an interpreter is used), the bill does not establish a maximum period of time during which a person may be questioned on a single occasion;
- the prescribed authority can set breaks during questioning, and is required to provide breaks for the provision of legal advice, and at the conclusion of four hours of continuous questioning. These breaks may last, as the minster advised, from minutes to days, and it is not clear whether a person could leave the place of questioning during these breaks without committing an offence; and
- while questioning is taking place the warrant subject would be subjected to scrutiny, and their communications with their lawyer (and any other representative) would be constrained.

1.82 While a warrant subject would not be physically barred from leaving a place of questioning, it cannot be said that they would be 'at liberty', or free to leave without facing potentially serious criminal consequences. That is, their attendance in compliance with a questioning warrant may be more analogous to being held in police custody following an arrest, than to voluntarily visiting a police station and

96 *Guzzardi v. Italy*, European Court of Human Rights, Application no. 7367/76, (1980), [95].

97 *De Wilde, Ooms and Versyp v Belgium*, European Court of Human Rights, (Application no. 2832/66; 2835/66; 2899/66) 18 June 1971, [65].

98 Schedule 1, Part 1, item 10, proposed subsection 34DC(1)(f).

being free to leave without facing a criminal consequence.[99] It would appear, therefore, that the conduct of questioning pursuant to a warrant may engage and limit the right to liberty.[100] In addition, the conduct of questioning would also clearly engage and limit a warrant subject's right to freedom of movement. For a limitation on these rights to be permissible, such limitation must be shown to be reasonable, necessary and proportionate.

1.83 The minister advised that a questioning warrant achieves the legitimate objective of ensuring that ASIO has the capability to collect intelligence in relation to serious threats to Australia's security. Collecting such intelligence would appear to constitute a legitimate objective for the purposes of international human rights law, and a questioning warrant would appear to be rationally connected to that objective.

1.84 With respect to proportionality, the minister advised that the bill does not prescribe time limits for questioning an adult on a single occasion. Rather, it provides that the prescribed authority may set breaks between periods of questioning by giving directions for the subject's further appearance.[101] Consequently, it appears that there would be no maximum period of time during which a warrant subject could be questioned on a single occasion. Noting that the bill would require that continuous periods of questioning be separated by breaks, this suggests that a maximum questioning period of up to 24 hours for an adult could in fact take place over a far longer continuous period of time. Where a subject requires the use of an interpreter, providing for an extension of questioning by up to 40 hours, this continuous period of time would potentially be even longer. Further, it would appear that depending on the length of a break, the warrant subject may be, practically speaking, unable to leave the place of questioning.

1.85 This lack of clarity as to how long a warrant subject could be required to be in attendance for questioning on one occasion raises concerns as to the proportionality of these proposed measures. The bill does not specify how long an adult may be questioned, but the minister has advised that the Statement of Procedures will specify that a person must not be questioned for more than four continuous hours without being offered a 30-minute break. However, no information has been provided as to how long breaks may occur where the person is still required to be present for further questioning, and how long one occasion of questioning

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

100 This view was echoed by the Human Rights and Equal Opportunities Commission in its submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD in 2005. See, HREOC Submission No. 95, *Review of Division 3 Part III of the ASIO Act 1979 (Cth)*, pp. 9-10.

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

(being one period of attendance at the place of questioning) could permissibly last. These are relevant considerations noting that, practically speaking, a warrant subject would not be at liberty to leave a questioning session of their own volition without potentially facing serious criminal charges. Consequently, it is not clear that the proposed questioning power would constitute a proportionate limitation on the right to liberty, or the right to freedom of movement.

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

1.86 The minister advised that it is possible that critical operational requirements would necessitate continued questioning that would result in delays to opportunities to sleep. Further, the minister advised that the bill does not prescribe whether a subject must be provided with food and regular drinks when they appear, or be provided with breaks to attend to religious duties. The minister stated that such matters will be addressed in the statement of procedures which will be created under proposed section 34AF, noting that the current statement of procedures requires that subjects must have access to fresh drinking water and clean toilet and sanitary facilities at all times during questioning. However, this is relevant only to the extent that these requirements will be mirrored by a future statement of procedure. Further, the minister stated that, by providing that attendance to religious duties does not constitute 'questioning time', under proposed subsection 34DL(b)(vii), the bill acknowledges that such breaks are likely to occur. This does not, however, necessitate the provision of such breaks.

1.87 The minister also advised that, as a general principle, the prescribed authority would be required to ensure that warrant subjects have adequate opportunities to sleep, eat, rest, and shower, consistent with the requirement in proposed section 34AG that a warrant subject be treated humanely. This general requirement may serve as a valuable safeguard to protect a warrant subject from inhumane treatment. However, if, as the minister has advised, these types of specific requirements will apply in practice, and would also be provided for in a statement of procedures, it is unclear why they are not set out in the bill itself.

1.88 With respect to external oversight, the minister confirmed that a warrant subject can complain to the IGIS or Commonwealth Ombudsman about their treatment at any time during questioning or apprehension, and seek a remedy while that period of questioning is ongoing. They must be notified of this ability; cannot be prevented from contacting these agencies, or a complaints agency in relation to the conduct of state or territory police; and will not commit a secrecy offence under the bill where making such a permitted disclosure. These may serve as valuable safeguards, ensuring independent external oversight of a warrant subject's treatment while being questioned. The IGIS has the capacity to review not merely the legality of ASIO's conduct, but also its propriety and consistency with human

rights.[102] However, as noted above at paragraphs [1.37] and [1.61], there may be practical limitations in the IGIS's capacity to comprehensively review conduct associated with questioning warrants, and there is no requirement in the bill that the IGIS *must* be present during questioning.

1.89 With respect to a warrant subject's capacity to contact a lawyer and seek a remedy in relation to their treatment during questioning, the minister advised that it is intended that regulations which would be made under the bill to limit access to information by lawyers would mirror existing restrictions.[103] That is, access to security information may only be given to a lawyer if the lawyer has a security clearance in relation to the information and the Secretary of the Department of Home Affairs is satisfied that giving the lawyer access to the information would not be prejudicial to the interests of security.[104] Where information is provided, it may be subject to any conditions which the secretary considers appropriate.[105] This may have the practical effect that a person's capacity to obtain legal advice and seek a remedy in relation to their treatment may be constrained, as a lawyer may be required to have a security clearance, or otherwise seek the consent of the secretary, in order to act for them.

1.90 Ultimately, if questioning were to occur in accordance with all the safeguards set out in the minister's response, it would be likely that the measures would not be incompatible with the prohibition against degrading treatment or the right to humane treatment in detention. However, it is noted that much of these safeguards are left to the discretion of the prescribed authority or will be left to be set out in the statement of procedures (which may, or may not be, made under proposed section 34AF). Where a measure may limit a human right, discretionary safeguards alone may not be sufficient as these are less stringent than the protection of statutory processes.

Rights of persons with disabilities

1.91 Further information was also sought as to the manner in which persons with cognitive, intellectual or other developmental disabilities who would be subject to a questioning warrant would be protected.

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102 See, *Inspector-General of Intelligence and Security Act 1986*, section 4.

103 See, existing limitations on access to information by lawyers in the Australian Security Intelligence Organisation Regulations 2016, sections 7-8.

104 Section 8 of the Australian Security Intelligence Organisation Regulations 2016 currently provide that access to security information may be given to a lawyer only if they have an appropriate security clearance *or* the Secretary of the Department is satisfied that giving them access to the information would not be prejudicial in the interests of justice. By comparison, the minister's response states that both of these requirements would need to be met under these proposed measures. It is not clear which would, in fact, be required.

105 Australian Security Intelligence Organisation Regulations 2016, subsection 8(3).

1.92 The minister highlighted that, in order for the Attorney-General to issue a questioning warrant, there must be 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, Australia from espionage, politically motivated violence, or acts of foreign interference; and that having regard to other methods of collecting intelligence that are likely to be as effective, it must be reasonable in all the circumstances for the warrant to be issued. The minister advised that it is unlikely ASIO would seek to obtain a questioning warrant in relation to a person who does not have legal capacity, and stated that the fact of a person's disability would be a relevant consideration in determining whether to issue a warrant. Although this is relevant to the proportionality of the measure, the capacity of this questioning threshold to serve as a safeguard with respect to persons with disability is unclear. Foremost, the relevance of a person's disability to a decision to issue a warrant would turn on knowledge of such a disability. Further, cognitive, intellectual or other developmental disabilities are varied, and can manifest themselves in ways which are not immediately apparent, including as: memory difficulties; limited concentration; susceptibility to suggestive questions from authority figures; and a lack of understanding as to legal rights.[106] A person who has an intellectual disability would not necessarily be unable to answer questions put to them by the prescribed authority. In fact, they may be highly susceptible to questions from authority figures. This raises questions as to the value of this advice in terms of a safeguard for persons with disabilities.

1.93 The minister further advised that where a warrant subject does in fact have a cognitive, intellectual or other developmental disability, safeguards which would apply generally pursuant to the proposed compulsory questioning framework would protect them. The minister highlighted, for example, that the prescribed authority would have the discretion to make a direction that the warrant subject can contact a family member, guardian, advocate and/or other specialist disability support worker to advise them that a warrant had been issued against them. However, it would appear that such a direction could only be made once the person has appeared before the prescribed authority for questioning,[107] which would appear to offer no additional support to a person with disability from the point at which a warrant had been served on them until the point at which they appear for questioning. Further, this discretionary power would also rely on the capacity of the prescribed authority to accurately assess whether a person may have a disability, and the prescribed authority is not required to turn their mind to whether the warrant subject may have a disability, nor to whether they need access to a lawyer who is able to communicate with them.

106 See, for example, NSW Law Reform Commission, *Report 80 (1996) People with an intellectual disability and the criminal justice system*, [4.6].

107 Schedule 1, Part 1, item 10, proposed section 34DE.

1.94 The minister further advised that the requirement that a warrant subject must be treated with humanity (under proposed section 34AG) would ensure that questioning is conducted in an appropriate manner having regard to the nature of a person's disability, and noted that the existing statement of procedures requires that subjects are not questioned in a manner that is unfair or oppressive in the circumstances. The minister stated that this may involve providing a warrant subject with the opportunity to contact, and have present, a specialist disability support worker. This may serve as a safeguard, but this remains discretionary and it is unclear what specific support might be provided to a person with disability to enable them to make such contact. Further, even where such a warrant subject were authorised to contact a specialist worker about the warrant, it is not clear what capacity such a worker would have to provide support or advocacy during questioning.[108]

1.95 The minister also highlighted the independent oversight provided by the IGIS as an additional safeguard to protect persons with disability. The IGIS may indeed serve as a useful safeguard to protect warrant subjects who have a cognitive, intellectual or other developmental disability. However, the capacity of an IGIS representative to offer additional protection with respect to a warrant subject with such a disability would likewise turn on their capacity to identify such a suspected disability.

1.96 The potential efficacy of the protections the minister has identified may turn on the capacity of a person involved in administering or executing a warrant to identify a disability and respond appropriately. It is relevant, therefore, that the bill does not require decision-makers to have any particular expertise with respect to identifying disability, noting that intellectual disabilities can be extremely varied. Further, while the modifications and adjustments which the minister has identified may, in practice, provide warrant subjects with disability with some additional level of protection, they are not apparent on the face of the bill itself. The provisions within the bill which the minister has highlighted are intended to have general application, and do not provide specific protection to people with disability or some other vulnerability. Consequently, there remain risks that as applied in practice, the provisions in the bill may impermissibly limit the rights of people with disabilities, including their right to be free from exploitation.[109]

Concluding comments

1.97 The conduct of questioning itself engages and appears to limit the rights to liberty and freedom of movement, and may have a particular impact on people with disability, having regard to the particular rights of such persons to be free from exploitation. While the process of questioning would appear to be directed towards

108 The significant limitations proposed to be placed on the role of lawyers and minor's representatives under proposed subdivision F are relevant in this regard.

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

the legitimate objective of ensuring that ASIO has the capability to collect intelligence in relation to serious threats to Australia's security, there is some risk that in practice the measure may be used in a way that would impermissibly limit the right to freedom of movement, the right to liberty and the rights of persons with disability.

Committee view

1.98 The committee thanks the minister for this response. The committee notes that the bill provides that a person subject to a questioning warrant must attend for questioning for periods of up to 24 hours (and 40 hours where an interpreter is used).

1.99 The committee considers that the compulsory questioning of subjects under warrant engages the right to humane treatment in detention. The committee notes that the bill explicitly requires that a warrant subject must be treated with humanity, and may not be subjected to torture or other cruel, inhuman or degrading treatment or punishment. The committee considers that this would serve as a valuable safeguard, and notes the minister's advice that a range of other measures would protect warrant subjects, including specific provisions which have or will be made under a statement of procedures. The committee also notes that, in supervising questioning, a prescribed authority may make directions to provide for breaks in questioning. The statement of procedures specifies that a person must not be questioned for more than four continuous hours without being offered a 30 minute break. The statement of procedures also provides that warrant subjects must have access to fresh drinking water and clean toilet and sanitary facilities at all times during questioning. The committee considers that if questioning were to occur in accordance with all the safeguards set out in the minister's response, it would be likely that the measures would be compatible with the prohibition against degrading treatment and the right to humane treatment in detention.

1.100 The committee also notes that a warrant subject may not be physically prevented from leaving a questioning session, however if they do leave they may risk being charged with a serious criminal offence under the bill. The committee considers, therefore, that these measures may limit the right to freedom of movement and the right to liberty. The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considers that the compulsory questioning powers seek to, and would be effective to, achieve the legitimate objective of ensuring that ASIO can gather information in relation to national security.

1.101 The committee notes that it remains unclear how long a warrant subject could be required to be in attendance for questioning on a single occasion. The oversight of the questioning process by the prescribed authority which has the power to issue directions in relation to proceedings under a warrant, and the

warrant subject's right in relation to complaining to the IGIS constitute important safeguards.

1.102 The committee notes that persons with a cognitive, intellectual or other developmental disability may require specific protections if subjected to a questioning warrant, in order to ensure the protection of their human rights, including those in the Convention on the Rights of Persons with Disabilities.

1.103 The committee notes the legal advice that there is some risk that in practice the measure may be used in a way that would impermissibly limit the rights of persons with disability, and considers that the proportionality of the questioning power would be assisted if the bill were amended to provide:

- **that where a warrant subject has, or is suspected to have, a cognitive, intellectual or other developmental disability, the prescribed authority must consider making a direction that the person be represented by a lawyer who is able to adequately assist someone with that particular disability;[110]**
- **that the Director-General must make a statement of procedures, rather than simply allowing such a statement to be made, and these must include specific protections where a warrant subject has, or is suspected to have, a cognitive, intellectual or other developmental disability.[111]**

1.104 Finally, the committee recommends that the statement of compatibility be amended to reflect that the conduct of questioning itself under a questioning warrant engages and limits the right to liberty, and to freedom of movement.

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

Prohibition on persons subject to a warrant leaving Australia

1.106 The bill seeks to make it an offence for a person who is the subject of a questioning warrant to leave Australia without the written permission of the Director-General,[112] and provides that such a person may be required to surrender their travel documents.[113] In addition, a person in relation to whom a warrant has been requested (but not yet issued) may be required to surrender their travel documents, and may be prohibited from leaving Australia.[114] Failure to comply with

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

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

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

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

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

any of these requirements is an offence punishable by five years' imprisonment. A questioning warrant remains in force for 28 days, but a new warrant may be made at the end of this period.[115]

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of movement and protection of the family

1.107 In limiting the ability of a person who is the subject of a warrant (which may or may not have been issued) to leave Australia, this measure engages and limits the right to freedom of movement. The right to freedom of movement includes the right to leave any country.[116] The right to leave a country encompasses both the legal right and practical ability to leave a country, and therefore it applies not just to departure for permanent emigration but also for the purpose of travelling abroad. As international travel requires the use of passports, the right to freedom of movement encompasses the right to obtain necessary travel documents, such as a passport.[117]

1.108 In restricting the ability of people to leave the country, for persons with family members overseas, this may also engage and limit the right to protection of the family. The right to respect for the family requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.[118] An important element of protection of the family is to ensure family members are not involuntarily separated from one another.

1.109 The initial analysis considered that further information was required as to the compatibility of this measure with the rights to freedom of movement and protection of the family, in particular:

- noting that questioning warrants may be issued by the Attorney-General orally in urgent circumstances, why is it necessary to apply the requirements for permission to travel to a person to whom a questioning warrant has not yet been issued;
- what are the likely circumstances in which the Director-General may give permission to travel and what considerations will be relevant to the Director-General's decision;
- what are the likely conditions that the Director-General may impose on any permission to travel; and

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

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

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

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

- will the Director-General consider the right to protection of the family in making such directions; and
- whether there is independent oversight of the Director-General's power to require that a person in relation to whom a warrant has been requested not leave the country.

1.110 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

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

1.112 In order to assess the compatibility of this measure with rights to freedom of movement and protection of the family, the committee sought the minister's advice as to the matters set out at paragraphs [1.109].

Minister's response

1.113 The minister advised:

> *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.

Concluding comments

International human rights legal advice

Rights to freedom of movement and protection of the family

1.114 The minister has advised that a requirement for a person to surrender their passport for the duration of a questioning warrant, and the prohibition on leaving Australia without the Director-General's written approval, are directed to the legitimate objective of ensuring that a questioning warrant is not frustrated by a warrant subject leaving Australia. The minister stated that a questioning warrant is likely to be issued in relation to a person who is not voluntarily cooperating with ASIO, meaning that their flight risk would be high. Further, the minister noted that

the matters in relation to which a warrant may be issued (including matters related to foreign interference and politically motivated violence) similarly give rise to significant security risks. It would appear likely that seeking to ensure that a questioning warrant is not frustrated by a person leaving the Australian jurisdiction would be a legitimate objective, and that preventing a warrant subject from leaving Australia while a warrant is in force would be effective to achieve that objective.

1.115 With respect to safeguards where travel documents have been surrendered, the minister highlighted the threshold for when a requirement to surrender travel documents may be issued (including that the Director-General must believe on reasonable grounds that the person may leave Australia), and the statutory obligation to return any surrendered travel documents to a person as soon as practicable where a warrant request has been refused, or where the warrant duration has ended. It would appear likely that the requirement that the Director-General must have a reasonable belief that the person may leave Australia would constitute a useful safeguard in terms of this power being used. It is also relevant that the bill contains express provisions that any surrendered documents must be returned to warrant subjects. However, it remains unclear why it is necessary to prohibit persons from travelling overseas who are not yet warrant subjects, noting that questioning warrants may be issued by the Attorney-General orally in urgent circumstances (such as where a person may be a flight risk).

1.116 The minister also noted that warrant subjects may seek an exception to the prohibition on leaving Australia, and that the Director-General's decision-making in this regard would be subject to the independent oversight of the IGIS. The minister stated that the bill deliberately does not prescribe the circumstances in which the Director-General may give permission to travel, as any such decision would depend on the operational and security circumstances specific to the matter in question, and that the Director-General would consider all factors known to them which would be relevant to the decision to grant permission to travel, including the right to protection of the family. However the minister advised that whether questioning was required urgently to obtain critical intelligence, and whether the person would be at risk of not returning to Australia would be key considerations in making this decision. Given the threshold requirements for issuing a questioning warrant discussed in paragraph [1.26], and the minister's advice that a questioning warrant is likely to be issued where a person is not voluntarily cooperating with ASIO and so is at high risk of flight, it would appear that there may be very limited circumstances in which this exception would be utilised. It is also relevant, however, that a questioning warrant may only be issued for a maximum period of 28 days.[119] This would limit the period of time during which a person could be prevented from overseas travel. However, it is also noted that the prohibition on travel may continue to last even where the total

119 Schedule 1, Part 1, item 10, proposed subsection 34BF(4).

permitted questioning period pursuant to a questioning warrant has been exhausted, as the warrant appears to only cease to be in force at the end of 28 days.[120]

1.117 The minister further advised that any conditions imposed on overseas travel would depend on the operational circumstances of the matter, and may include: requirements to make regular contact with ASIO, to stay within specified areas, or not to contact specified persons. The examples which the minister has provided would not appear to necessitate excessively onerous restrictions on a person's movement, or their capacity to conduct private business overseas, and may constitute proportionate limitations on the right to freedom of movement and the right to protection of the family (although it is noted that the bill does not establish any restrictions on the nature and number of conditions which could be imposed on any permission to travel).

1.118 The prohibition on overseas travel (subject to exceptions), and the additional power to require a warrant subject to surrender their travel documents would appear to be accompanied by several safeguards which may be effective to ensure that these powers are proportionate to the objective sought to be achieved, although some questions remain as noted above.

Committee view

1.119 The committee thanks the minister for this response. The committee notes that the bill would make it an offence for the subject of a questioning warrant to leave Australia without the written permission of the Director-General, and that such a person may be required to surrender their travel documents.

1.120 The committee considers that these measures engage and limit the rights to freedom of movement and protection of the family. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considers that these powers seek to achieve the legitimate objective of ensuring that a questioning warrant is not frustrated by the subject of the warrant leaving Australia before or during questioning. Recognising that there will be instances when matters under investigation are time critical and urgent, this includes the power to prohibit travel once a warrant has been requested. The committee considers that this measure is accompanied by several safeguards which may be effective to ensure that any limitation on the rights to freedom of movement and protection of the family is proportionate to the objective sought to be achieved.

1.121 The committee notes the minister's response and the legal advice, and considers that the proportionality of these measures may be further assisted if the bill were amended to provide that where a warrant subject seeks the permission of the Director-General to leave Australia, the Director-General must consider the

120 Schedule 1, Part 1, item 10, proposed subsection 34BF(4).

person's right to protection of the family, having regard to any representations made by the warrant subject as to their need to travel.[121]

1.122 The committee recommends that consideration be given to updating the statement of compatibility to reflect that these measures engage and limit the rights to freedom of movement and protection of the family.

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

Questioning warrants for minors aged 14 and over

1.124 The bill would also enable ASIO to obtain a warrant in order to question a minor (aged between 14 and 18 years) about a 'minor questioning matter', being matters related to politically motivated violence.[122] The Attorney-General may issue a warrant where they are satisfied that:

- the person is at least 14 years old;[123]
- there are reasonable grounds for believing that the person has likely engaged in, is likely engaged in, or is likely to engage in activities prejudicial to the protection of Australia from politically motivated violence;
- there are reasonable grounds for believing that a warrant will substantially assist in the collection of intelligence that is important in relation to a minor questioning matter; and
- having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.[124]

Summary of initial assessment

Preliminary international human rights legal advice

Rights of the child

1.125 This proposed extension of the compulsory questioning warrant regime to children engages and may limit the same human rights noted in relation to adult questioning warrants, set at above at paragraphs [1.10] to [1.109]. Under the proposed warrant regime, children could be:

121 Amendment to Schedule 1, Part 1, item 10, proposed subsections 34GA(2) and 34GC(2).

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

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

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

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

1.126 As such, questions arise as to the compatibility of the proposed questioning warrant regime with the rights of children to liberty,[125] freedom of movement,[126] the prohibition against torture and cruel, inhuman and degrading treatment[127] and humane treatment in detention,[128] and privacy.[129]

1.127 Children have special rights under human rights law taking into account their particular vulnerabilities.[130] Both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[131] The detention of a child, for example, should only be used as a measure of last resort, and for the shortest appropriate period of time.[132] Further, every child deprived of liberty has the right to maintain contact with their family, and this should only be limited in exceptional circumstances and in a manner which is clearly described in law and not be left to the discretion of authorities.[133]

1.128 In addition, Australia is required to ensure that, in all actions concerning children, the best interests of the child shall be a primary consideration.[134] That is, a child's best interests are not just one consideration to be taken into account among other considerations. The initial analysis considered that further information was required in order to assess the compatibility of the proposed measures with the rights of the child, in particular:

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

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

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

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

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

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

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

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

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

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

- 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.

1.129 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

1.130 The committee noted that the bill engages and may limit the rights of the child. Most of the rights of the child may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.131 In order to assess the compatibility of this measure with the rights of the child, the committee sought the minister's advice as to the matters set out at paragraph [1.128].

Minister's response

1.132 The minister advised:

> *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.[135]

135 Australian Security Intelligence Organisation Act 1979, s 34ZE(4)(a).

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.[136] 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.[137] 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.[138] 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.[139]

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.[140]

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 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

136 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BB(1)(b).

137 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BC

138 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].

139 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BB(2).

140 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-teenagerislamist- bomb-hampshire-old-bailey-latest-a9574226.html).

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.[141] 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.[142] 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.[143] In certain circumstances, the subject's lawyer may act as the minor's representative where a non-lawyer representative is not present at questioning.[144]

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

141 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34F(1)(b).

142 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34FD.

143 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34FD(3).

144 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, ss 34F(1), 34FD and 34FG.

practicable in the circumstances, is acceptable to the subject and the prescribed authority.[145]

A prescribed authority may also direct that a questioning subject be permitted to contact their parent, guardian and/or family member.[146]

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.

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.[147] In considering the

145 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34AA.

146 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34DE.

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.

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.[148]

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

147 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BB(2).

148 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34BD(2)(b).

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).[149] 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);[150]
- 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;[151]

149 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34FD.

150 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34FD(2).

151 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34FD(3).

- 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;[152] or
- 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.[153]

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.[154] 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.[155]

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.[156]

152 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34FD(4).

153 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34FG.

154 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34GF(6

155 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34GF(10).

156 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34GF(5)(f).

Concluding comments

International human rights legal advice

Rights of the child

Issuing of a warrant

1.133 The minister provided information as to what evidence establishes that there is a pressing and substantial need to lower the age for the issuing of a questioning warrant to children aged 14 years from 16 years and over, which is the current age threshold.[157] The minister stated that ASIO is concerned that vulnerable young people are exposed to extremist material on the internet, including via online forums and through sophisticated messaging. The minister further advised that ASIO's ability to compulsorily question minors engaged in activities prejudicial to security could also provide information about the intent of adult leaders in terrorist organisations, including by overcoming efforts by terrorist leaders to conceal their identity through encryption technology. The minister also stated that a questioning warrant would enable ASIO to hold warrant subjects accountable for dishonest answers.

1.134 Obtaining intelligence from minors to combat a potential politically motivated attack could constitute a legitimate objective for the purposes of international human rights law. However, in order for it to do so, it must be necessary and address an area of public or social concern that is pressing and substantial enough to warrant limiting a right. This requires the provision of empirical evidence to establish that a pressing and substantial concern does, in fact, exist. The minister advised that minors have been involved in the planning and preparation of politically motivated violence, including terrorism. With respect to such minors aged under 16 years, the minister noted the 2015 case of a NSW police employee being murdered by a 15 year old. The minister also outlined several cases of minors aged between 16 and 18 being engaged in terrorist related activities in Australia. The minister advised that since 2003, when the compulsory questioning powers were first introduced, one of seven terrorist attacks conducted in Australia were carried out by a young person, and three of 18 disrupted plots involved minors. While the minister's response appears to have established there are risks posed by minors engaged in politically motivated violence, it is noted that of the cases referred to in Australia, only one concerned a minor aged under 16 (which is the current threshold). As such, some questions remain as to whether the threshold of a 'pressing and substantial concern' has been met. This also raises questions as to whether there is a rational connection between the measures and the objective of preventing politically motivated attacks.

157 *Australian Security Intelligence Organisation Act 1979*, subsection 34ZE(1) provides that a warrant issued under Division 3 of the Act has no effect if the person specified in it is under 16 years of age.

1.135 In relation to proportionality, the minister stated that a number of safeguards are included in the framework where minors are being questioned, in particular, that a minor could only be questioned where they *themselves* were the subject of a politically motivated violence investigation, thereby establishing a narrower scope than the matters in relation to which an adult questioning warrant may be sought. However, in light of this, it is unclear why such a young person would not instead be prosecuted through the criminal law system for a related offence, and intelligence gathered via such an investigation, rather than through use of a compulsory questioning warrant.

1.136 The minister also advised that the Attorney-General will be required to consider the best interests of the child when deciding whether to issue a warrant, taking into account a range of matters to the extent that they are known to the them. The minister advises that such factors must be considered alongside a legitimate security need to issue and execute a questioning warrant against a child, and that the best interests of the child is to 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'. However, under the Convention on the Rights of the Child the best interests of the child is a 'primary' consideration, as compared with other considerations—it is not just one primary consideration among other equally primary considerations. The UN Committee on the Rights of the Child has explained that:

> the expression 'primary consideration' [in article 3(1) of the Convention on the Rights of the Child] means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child.[158]

1.137 It follows that it may be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child. Further, balancing the elements in the best interests assessment, should be carried out with full respect for all the rights contained in the Convention[159] and in giving full effect to the child's best interests the 'universal, indivisible, interdependent and interrelated nature of children's rights', should be borne in mind.[160]

1.138 The minister further advised that where a minor has been given notice of a warrant, they can contact a 'minor's representative' at any time. This may be their

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

159 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [32].

160 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [16(a)] and [82].

parent or guardian, or another person who is able to represent their interests, and is acceptable to the subject themselves and to the prescribed authority. The minister stated that there is no requirement in the bill for a parent, guardian or other family member to always be notified that a warrant has been issued in relation to the child to ensure that: the minor can choose their own representative; that information about ASIO operations does not become public; and to ensure that other individuals involved in an activity prejudicial to security are not 'tipped-off'. There may also be circumstances in which a child is required for immediate appearance, and is questioned only in the presence of a lawyer (who may be acting as both the lawyer *and* minor's representative), including where that lawyer had been appointed to act for them.[161] Consequently, it is not clear that the bill adequately provides for the presence of a third person before a child is questioned, such that a child being questioned will be assured of the presence of a third person who can advocate for, or otherwise support, their interests.

1.139 Further, the minister advised that a child would be bound by the secrecy offences in proposed section 34GF with respect to disclosing to their family that a warrant had been issued in relation to them, and would only be permitted to disclose to a person that a warrant had been issued in relation to them where:

(a) that family member was their 'minor's representative';

(b) the family member was their sibling;[162] or

(c) the prescribed authority has directed that the subject, or their lawyer, or their minor's representative was permitted to contact and disclose information to a specified person.

1.140 A child would, therefore, appear to be significantly constrained in their ability to speak about a compulsory questioning warrant having been issued against them. It is not clear that a discretionary power by a prescribed authority to direct that a child can disclose information to another specified person would be a sufficient safeguard to protect the interests of the child. In addition, it is unclear why a child should be permitted to disclose information about a warrant to their sibling, but not to their parents unless either their parent is their minor's representative, or where the prescribed authority has directed that they may.

1.141 Consequently, it would appear the provisions relating to the issue of a minor questioning warrant engage and may impermissibly limit a number of rights belonging to children. As noted in the initial analysis, children have special rights under human rights law taking into account their particular vulnerabilities.[163] Both international human rights law and Australian criminal law recognise that children

161 Schedule 1, Part 1, item 10, proposed section 34FD.

162 See, Schedule 1, Part 1, item 10, proposed subsection 34GF(5)(f)(iii).

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

have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[164]

Conduct of questioning

1.142 The minister stated that where a minor appears for questioning, they can request that a minor's representative be present, and where no immediate appearance is required, questioning may be deferred to enable such a person to be present. However, the minister further advised that a lawyer can also serve as a minor's representative in a number of circumstances. The minister listed a number of circumstances where the prescribed authority *must* direct that the subject may be questioned in the absence of a minor's representative (meaning that only a lawyer would be present). These include where a warrant requires immediate appearance and a lawyer is present; when time has passed and a minor's representative has not yet appeared; where the subject chooses not to have a minor's representative; or where the minor's representative has been removed for unduly disrupting questioning.[165] It would appear, therefore, that there are a significant number of circumstances in which a minor could be questioned in the absence of a minor's representative. Consequently, the value of provisions for the presence of a minor's representative as a safeguard where a child is the subject of compulsory questioning, would appear to be limited.

1.143 With respect to the conduct of questioning, the minister advised that a child may be kept for questioning for the same period of time as an adult, although the prescribed authority must ensure that questioning only occurs for continuous periods of two hours or less, before the child is given a break. Consequently, the same concerns raised in relation to questioning under adult questioning warrants, at paragraphs [1.78] to [1.85], remain with respect to the questioning of children. It does not appear that any maximum period of time during which one occasion of questioning may occur is established. With respect to safeguards specific to the questioning of minors, the minister advised that the age and competence of a minor would be a relevant factor for a prescribed authority in any decision to defer questioning, or excuse the subject from further questioning. However, proposed section 34DE does not establish any matters to which the prescribed authority must have regard in making directions while a subject is before them for questioning. The minister also noted that the existing statement of procedures related to compulsory questioning requires that any period of questioning take place under conditions which take full account of a subject's particular needs and any special requirements having regard to the subject's age. To the extent that any new statements of procedure would reflect this requirement, this may serve as a useful safeguard to

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

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

protect the interests of children subject to questioning warrants. However, it is not clear why such requirements are not set out in the bill itself.

1.144 The minister further advised that a prescribed authority may direct that a subject be permitted to contact and disclose specified information to a specified person, which may include their family members.[166] In making such a direction, the prescribed authority would be required to take into account the person's family, and any submissions made by the person or by ASIO.[167] This may serve as a valuable safeguard to ensure that a young person who is subject to a compulsory questioning warrant is able to discuss the matter with a trusted adult, however it would appear that such a direction could only be made once the young person had appeared before the prescribed authority for questioning. Further, while the bill provides that the prescribed authority 'may' make such a direction of their own initiative, or following an application by, or on behalf of, the person to whom the permission relates, there is no requirement that such a direction be made and no specific exemption in relation to children.[168] As noted at paragraph [1.140], a minor could permissibly disclose to their sibling that a warrant had been issued in relation to them.[169] However, any safeguard value for a child to be permitted to disclose matters related to a warrant with their siblings may be limited, including where their siblings are themselves minors. Consequently, it is not clear that the measures providing for the conduct of compulsory questioning with respect to a child are accompanied by sufficient safeguards such that they constitute a proportionate and permissible limitation on the rights of the child.

Concluding remarks

1.145 Children have special rights under human rights law taking into account their particular vulnerabilities.[170] The proposed expanded compulsory questioning power with respect to children aged 14 years and over limits the rights of the child. From the information provided by the minister, some questions remain as to whether this limitation on rights meets the threshold of a 'pressing and substantial concern' such as to establish a legitimate objective. Further, the proposed measures do not appear to be accompanied by sufficient safeguards such that they would constitute a proportionate limitation on the rights of the child, including the obligation to consider the best interests of the child and their rights to liberty, freedom of movement, humane treatment in detention, and privacy.

166 Schedule 1, Part 1, item 10, proposed subsections 34GF(5)(e) and 34GF(6) would enable the prescribed authority to direct that a subject, their lawyer or a minor's representative may disclose specified information to a specified person.

167 Schedule 1, Part 1, item 10, proposed subsections 34GF(10).

168 Schedule 1, Part 1, item 10, proposed subsection 34GF(7).

169 Schedule 1, Part 1, item 10, proposed subsection 34GF(5)(f).

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

Committee view

1.146 The committee thanks the minister for this response. The committee notes that the bill would extend the compulsory questioning regime to children aged 14 years and over.

1.147 The committee considers that these measures engage and limit the rights of the child. Most of these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.148 The committee considers that obtaining intelligence from minors to combat a potential politically motivated attack, including a terrorist attack, could constitute a legitimate objective for the purposes of international human rights law. The committee notes the minister's advice as to the changing age profile of young people involved in politically motivated violence and is satisfied that there is a proper basis to demonstrate a pressing and substantial concern in relation to the need to question children aged under 16.

1.149 The committee appreciates that special rights apply to children under international human rights law. It considers that the presence of a minor's representative during the questioning process is an important safeguard. However, the committee considers that the proposed measures appear to be accompanied by sufficient safeguards which include:

- **(a) in deciding whether to issue a warrant in relation to a minor, the Attorney-General will be required to consider the best interests of the minor;**
- **(b) a requirement that a lawyer be present at all times during questioning and a mechanism for a parent or other appropriate representative to be present;**
- **(c) that a questioning warrant may only be issued in relation to a minor where they are the target of an investigation in relation to politically motivated violence;**
- **(d) the requirement on a prescribed authority to explain additional matters to a minor;**
- **(e) that questioning of a minor under a questioning warrant may only occur in shorter periods of two hours or less, and must be separated by breaks as directed by the prescribed authority.**

1.150 The committee notes the minister's response and the legal advice, and considers that the proportionality of these measures would be assisted if the bill were amended to require that a minor may only be questioned in the presence of both a lawyer *and* a minor's representative, and that if the minor has not themselves provided such a representative, or does not wish to nominate such a

person, an independent minor's representative must be appointed for them (for example, a children's commissioner or specialist children's worker).[171]

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

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

1.152 A person subject to a questioning warrant is required to give any information or produce any record or other things requested by ASIO.[172] Failure to comply would be a criminal offence, subject to up to five years imprisonment. As well as being issued in relation to a person not charged with an offence, a questioning warrant may be issued 'post-charge', that is, after a subject has been charged with a related offence which is yet to be resolved, or in cases where such a charge is imminent.[173] A person subject to a warrant is not excused from providing information or producing a record or thing on the basis that it may incriminate them.[174] Although anything said or produced by them is not generally admissible in criminal proceedings against them (which provides a 'use immunity'),[175] this immunity does not extend to information derived from questioning materials (meaning there is no 'derivative use immunity').

1.153 The bill also provides that specified entities,[176] which have an existing authority to lawfully use or disclose questioning material, may lawfully disclose that material to a prosecutor of the subject pursuant to a court order, where a court is satisfied that the disclosure is in the interests of justice.[177]

171 Amendment to Schedule 1, Part 1, item 10, proposed section 34FD

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

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

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

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

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

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

Summary of initial assessment

Preliminary international human rights legal advice

Right to a fair trial

1.154 Abrogating the privilege against self-incrimination, allowing information derived from the questioning to be used against the person in evidence, and allowing the information to be provided to the prosecution in certain circumstances, engages and appears to limit the right to a fair trial.[178] The right to a fair trial provides that in the determination of any criminal charge against a person, that person shall be entitled to certain minimum guarantees, including that they must not be compelled to testify against themselves.[179] This right may be permissibly limited, but only where a limitation seeks to achieve a legitimate objective, is rationally connected to that objective, and is proportionate.

1.155 The initial analysis considered that further information was required in order to assess whether these measures are compatible with the right to a fair trial, in particular:

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

1.156 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

1.157 The committee considered that this measure engages and may limit the right of a person not to be compelled to testify against themselves. This aspect of the right to a fair trial may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. In order to assess the compatibility of this measure with the right to a fair trial, the committee sought the minister's advice as to the matters set out at paragraph [1.155].

Minister's response

1.158 The minister advised:

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

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

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 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'.[180]

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:[181]

- 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-

180 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.

181 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34EB(1).

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,[182] 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.

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.[183]

182 Explanatory Memorandum to the Australian Security Intelligence Organisation Amendment Bill 2020 at [47].

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

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.

Concluding comments

International human rights legal advice

Right to a fair trial

1.159 The minister advised that proposed section 34E of the bill, which could authorise the use and disclosure of derivative material, is consistent with equivalent provisions in other legislation, and is based on the 'principle of legality', which requires that a statutory intention to abrogate or restrict a fundamental freedom must be expressed clearly.[184] The minister stated that permitting the disclosure of derivative material to prosecutors is necessary to achieve the legitimate aim of protecting Australia's national security interests. Protecting national security interests constitutes a legitimate objective for the purposes of international human rights law. However, in relation to why there is no derivative use immunity, so that information derived from the questioning process can be shared with prosecutors, the minister advised that a derivative use immunity could undermine attempts to criminally prosecute a subject by requiring the prosecution to prove the provenance of each piece of evidence before it could be admitted, and resulting in pre-trial arguments. It is not clear that overcoming an evidentiary challenge in the process of prosecuting a person for a criminal offence would constitute a legitimate objective, and justify limiting the right to a fair trial.

1.160 In relation to 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, the minister advised that rapid technological advances hamper ASIO's technical tools and result in potential intelligence gaps, rendering human intelligence vital to overcome these challenges. The minister advised that the ability to disclose such material to prosecutors will assist in preventing significant harm. However, it remains unclear how the disclosure of such materials to prosecutors, would be effective to prevent harm to persons in the Australian community, or to Australia's national security. The

184 See, *X7 v Australian Crime Commission* (2013) 248 CLR 92, at [153] per Kiefel J.

compulsory questioning process itself would appear to be designed to frustrate and prevent efforts to engage in activities which would cause harm to persons in Australia, or which would threaten Australia's national security. Any subsequent criminal prosecution of a person for associated activities would appear to constitute a related but distinct matter.

1.161 With respect to the proportionality of the measure, the minister advised that several safeguards minimise the impact that derivative material has on the effectiveness of a person's ability to claim the privilege against self-incrimination. That is, derivative material will be admissible in a prosecution of a warrant subject, but may only be provided to a prosecutor if the disclosure relates to material obtained before the person was charged, or derived from questioning that occurred before they were charged. If it relates to material derived from questioning undertaken after a person was charged, the court would need to make an order allowing this where satisfied that the disclosure is required in the interests of justice.[185]

1.162 The minister also noted that proposed section 34EC would preserve the court's power to make any orders necessary to ensure the fair trial of a subject. The power of the court to ensure the fair trial of a person subject to questioning may operate as an effective safeguard. However, in some instances it may be that the court would consider that the interests of justice outweighs the accused's right not to incriminate themselves. In addition, the court would only need to authorise such disclosure where it relates to information obtained from a person after they have been charged. Any information obtained before the person was charged can be disclosed to prosecutors without the need for a court order.[186] This raises concerns that a person could be required to give specific information under a questioning warrant which, even though the person may be charged the next day, could be used against them in any prosecution (noting that proposed subsection 34EE(2) provides that the fact that material in question is questioning material or derivative material would not prevent it from being admissible in evidence against the subject in a criminal proceeding).[187]

1.163 In addition, proposed subsection 34DF(1) would provide that a prescribed authority must direct, in writing, that questioning material not be used or disclosed, or may only be used or disclosed in specified ways, if they are satisfied that failure to give such a direction would reasonably be expected to prejudice the fair trial of the subject. Such a direction would only be required where the subject has been charged with a related offence, or such a charge is imminent (that is, where questioning is

185 Schedule 1, Part 1, item 10, proposed subsection 34EB(1).

186 Schedule 1, Part 1, item 10, proposed subsection 34EB(1).

187 Schedule 1, Part 1, item 10.

taking place post-charge).[188] The minister advised that the bill does not prescribe specific factors which a prescribed authority must take into account in considering such matters, to ensure that they can exercise 'the full range of their discretion' in considering the right to a fair trial. However, it is not clear what expertise a prescribed authority may have in assessing a person's right to a fair trial.[189] Consequently, this discretion may have limited safeguard value in practice.

Concluding remarks

1.164 Abrogating the privilege against self-incrimination, allowing information derived from the questioning to be used against the person in evidence, and allowing the information to be provided to the prosecution in certain circumstances, engages and appears to limit the right to a fair trial.[190] The absence of a derivative use immunity could have significant and broad-reaching implications for a person's right not to be compelled to testify against themselves. A warrant subject may be required to answer questions about a specific matter and while that answer itself cannot be used in evidence against the person, the information could be used to find other evidence against the person which could be used against them in a prosecution.[191] This may have the practical effect that the subject had been compelled to testify against and incriminate themselves with respect to related criminal proceedings.

1.165 From the information provided, it is not clear that the onward disclosure of materials derived as a result of compulsory questioning to prosecutors (as compared to investigators), would be effective to prevent harm to persons in the Australian community, or to Australia's national security. It is also not clear that sufficient safeguards would operate such that this limitation on the privilege against self-incrimination may be considered proportionate. In particular, the absence of a derivative use immunity[192] raises questions as to the efficacy of safeguards regarding the right to a fair trial, and in particular, the right not to incriminate oneself.

Committee view

1.166 The committee thanks the minister for this response. The committee notes that the bill would make it an offence for a person not to give information or

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

189 Schedule 1, Part 1, item 10, proposed subsection 34AAD(1)(c).

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

191 A warrant subject could be charged with a serious criminal offence for failure to answer questions pursuant to the warrant. The UN Human Rights Committee has relevantly directed that in considering any abrogation of the privilege against self-incrimination, regard should be had to any form of compulsion used to compel a person to testify against themselves. See, UN Human Rights Committee, *General Comment No. 13: Article 14 (Administration of justice)* (1984) [14].

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

produce a record or other things if required to do so under a questioning warrant, even if that person had been charged with a related offence. It removes the common law privilege against self-incrimination, while providing some immunities, and would allow certain material derived from such questioning to be shared with prosecutors.

1.167 The committee considers that these measures engage and appear to limit the right to a fair trial, in particular the right not to incriminate oneself. This aspect of the right may be permissibly limited, where the limitation seeks to achieve a legitimate objective (such as the prevention of, or prosecution relating to, a catastrophic terrorist attack), is rationally connected to that objective, and is proportionate.

1.168 The committee notes the minister's advice that 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. The minister refers to the bill's explanatory memorandum which states that:

> **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.[193]**

1.169 The committee notes the minister's advice that proposed section 34E of the bill would specifically authorise the use and disclosure of questioning material to obtain other material (derivative material) in a manner which is consistent with the equivalent provisions in the *Australian Crime Commission Act 2002* and the *Law Enforcement Integrity Commissioner Act 2006* and subject to certain specified safeguards.

1.170 From the information provided, however, it is not clear that the onward disclosure of materials derived as a result of compulsory questioning to prosecutors (as compared to investigators), would be effective to prevent harm to persons in the Australian community, or to Australia's national security.

193 See minister's response and also statement of compatibility, p. 13.

1.171 Further, noting the minister's response and the legal advice, the committee considers that it is also not clear that sufficient safeguards would operate such that this limitation on the privilege against self-incrimination may be considered proportionate.

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

Restrictions on legal representatives

1.173 The bill provides that a warrant subject may contact a lawyer for legal advice regarding a questioning warrant, subject to limitations.[194] If the prescribed authority is satisfied that an adult subject has had a reasonable opportunity to contact a lawyer, and no lawyer is present during questioning, they may prevent the subject from contacting a lawyer at all.[195] Further, if a subject is questioned in the presence of a lawyer (including one who has been appointed for them), they may be prevented from contacting an alternative lawyer.[196]

1.174 A prescribed authority may also direct that the subject be prevented from contacting a particular lawyer if the prescribed authority is satisfied, on the basis of circumstances relating to the lawyer, that, if the subject were permitted to contact them: either a person involved in an activity prejudicial to security may be alerted that the activity is being investigated; or a record or other thing that the subject has been or may be requested to produce, in accordance with the warrant, may be destroyed, damaged or altered.[197]

1.175 In addition, the bill proposes that a lawyer's role during questioning would be restricted. A lawyer would not be permitted to intervene in questioning, or address the prescribed authority, except to request clarification of an ambiguous question, or to request a break in questioning in order to provide legal advice to the subject.[198] Further, if the prescribed authority considers the lawyer's conduct to be unduly disrupting the questioning of the subject, they may direct that the lawyer be removed from the place where the questioning is occurring.[199] Where a child is being

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

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

196 Explanatory memorandum, p. 82.

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

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

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

questioned, a minor's representative could likewise be removed for being unduly disruptive.[200]

1.176 In addition, the bill provides that regulations may be made that could prohibit or regulate access to certain information by lawyers acting for a person in connection with proceedings for a remedy relating to a questioning warrant or their treatment in connection with such a warrant.[201]

Summary of initial assessment

Preliminary international human rights legal advice

Right to a fair trial

1.177 In limiting the role of lawyers giving advice to the subjects of a questioning warrant, where a questioning warrant has been issued post-charge (or questioning takes place post-charge), this would appear to engage and limit the right to a fair trial, which provides that a person should be able to be represented by a lawyer of their choosing.[202] It also requires that lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.[203]

1.178 The initial analysis considered that further information was required in order to assess the compatibility of these proposed measures with the right to a fair trial, in particular:

- whether a subject with a vulnerability, such as limited English, or a cognitive or developmental disability, would be provided with additional opportunities to contact a lawyer even where they may have already had a reasonable opportunity to contact one on being given notice of the warrant;
- in what circumstances, and based on what factors, a prescribed authority may direct that a subject who already received legal assistance from one lawyer (including one appointed for them) may not contact a further lawyer;
- what information, and from what sources, could a prescribed authority use to become satisfied that a particular lawyer poses a risk and therefore cannot be chosen to represent the person;

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

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

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

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

- why is it necessary to restrict the lawyer's role during questioning to that of merely requesting if they can seek clarification of a question or request a break in order to advise their client;
- why the bill provides the prescribed authority with the unfettered power to refuse a lawyer's request to ask for clarification of an ambiguous question or for a break in order to advise their client;
- whether any additional safeguards would be implemented to ensure that where a subject is vulnerable (including in the case of children, persons with limited English skills, and persons with disabilities) a lawyer can provide them with a sufficient degree of advice;
- 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.

1.179 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

1.180 The committee noted that, in circumstances where questioning is taking place post-charge, this may engage and limit the right to a fair trial. This aspect of the right to a fair trial may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. In order to assess the compatibility of this measure with the right to a fair trial, the committee sought the minister's advice as to the matters set out at paragraph [1.178].

Minister's response

1.181 The minister advised:

> *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.[204] ASIO must also provide the subject with facilities to contact a lawyer of their choice.[205]

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 appointed by the prescribed authority, but the prescribed authority is satisfied the subject had a reasonable opportunity to contact another lawyer; or[206]
- there is no lawyer present during questioning, and the prescribed authority is satisfied the subject had a reasonable opportunity to contact a lawyer.[207]

204 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34F(1)(a).

205 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34FB(2)(b).

206 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34F(2).

207 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34F(3).

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.[208] 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 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

208 Ibid, s 34FF.

prescribed authority about the conduct of questioning, who must consider the IGIS's concern.[209]

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.

Concluding comments

International human rights legal advice

Right to a fair trial

Choice of lawyer

1.182 Further information was sought as to the power to prevent a warrant subject from contacting a specific lawyer, thereby limiting their potential choice of legal representation.[210] The minister advised that the bill does not prescribe the sources of information on which a prescribed authority may rely in determining whether a lawyer poses a risk, however the most likely sources would be intelligence collected by ASIO, the AFP or another police service. The minister stated that the decision to prevent contact with a lawyer must be based on circumstances related to that particular lawyer.

1.183 As noted in the initial analysis, a legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. Based on the information provided by the minister, it remains unclear that there is a pressing and substantial need for this proposed limitation on a person's choice of lawyer. That is, it is not clear that there have been instances where lawyers suspected of, or known to have, engaged in conduct which is related to that being investigated, have appeared to assist a warrant subject and the prescribed authority has been unable to bar them from

209 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 1, s 34DM.

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

doing so. In addition, as noted in the initial analysis, all lawyers are subject to strict ethical obligations, and to the disciplinary capacity of the Law Society or Bar Association in their jurisdictions. Were a legal practitioner proven to have engaged in the serious criminal offences outlined in proposed subsection 34F(4), it would appear unlikely that they would remain in legal practice.

1.184 With respect to safeguards, the minister noted that a warrant subject may complain to the IGIS about a direction that limits their choice of lawyer, and the IGIS could then raise these concerns with the prescribed authority. The independent oversight provided by the IGIS may serve as a valuable safeguard in this respect. However, the capacity of an IGIS representative to raise concerns in relation to any such direction may be limited, noting there is no requirement they be present during questioning, and the prescribed authority may direct that questioning can continue in the absence of a lawyer, and as such, any IGIS review of the appropriateness of excluding a specific lawyer may come after any questioning has concluded.

1.185 Consequently, it is not clear that the proposed ability to restrict a warrant subject's choice of lawyer would constitute a permissible limitation on the right of a person to a lawyer of their choosing.

Access to a lawyer

1.186 Further information was also sought as to the capacity for a prescribed authority to direct that a warrant subject may not contact a lawyer. The minister noted that the bill would establish exceptions to the right to have a lawyer present during questioning, as being where the prescribed authority is satisfied the subject had a reasonable opportunity to contact a lawyer, or a different lawyer.[211] The minister advised that these directions would ensure that the subject cannot disrupt questioning by making repeated requests to contact a lawyer where they already have one present, or have had a reasonable opportunity to contact one. The minister stated that, in making such a direction, the prescribed authority may take into consideration the urgency of the security matter, any delays already incurred to enable the subject to contact another lawyer, and the reasons given by the subject. However, as noted in the initial analysis, the bill does not provide that the prescribed authority may *only* make such a direction where not to do so would cause a delay that would frustrate the questioning process. In addition, the minister noted that the prescribed authority can direct that questioning be deferred to enable the subject to contact a lawyer.[212] This is relevant, however, the bill establishes no matters which the prescribed authority would be required to consider in making such a direction.

1.187 The minister advised that there are no specific provisions providing a warrant subject with a vulnerability or disability with additional opportunities to contact a

211 Schedule 1, Part 1, item 10, proposed section 34F.

212 See, Schedule 1, Part 1, item 10, proposed subsection 34DE(1)(d).

lawyer, as the bill already provides opportunity for the subject to contact a lawyer. The minister stated that any such vulnerability could be a relevant consideration when the prescribed authority considers whether an adult has had a reasonable opportunity to contact a lawyer. However, while proposed subsection 34FB would require that where a subject appears for questioning without a lawyer the prescribed authority *must* make a direction on the matter, this obligation would only be triggered where the warrant subject themselves requests that a lawyer be present. This would not appear to provide an appropriate level of protection for a vulnerable person with a limited capacity to understand the nature of the proceedings. While the minister noted that the prescribed authority can direct that questioning be deferred to enable the subject to contact a lawyer,[213] the bill does not establish any matters to which the prescribed authority must have regard in making such a direction. This may limit the value of this discretion as a safeguard.

1.188 In addition, the minister noted that the IGIS may be present at any questioning and could raise concerns about a person's opportunity to contact a lawyer. The independent oversight provided by IGIS may represent a valuable safeguard, however an IGIS official is not required to be present and were an IGIS official to raise a concern about a person's opportunity to contact a lawyer this would trigger only a discretionary power by the prescribed authority to make a direction that the person be provided with more of an opportunity to contact a lawyer.

The role of the lawyer

1.189 Further information was also sought as to the proposed restrictions on a lawyer's role during the questioning process. The minister stated that if a lawyer were allowed to 'unduly disrupt' questioning, this could jeopardise the timely gathering of information and prevent ASIO from collecting relevant information on national security matters. The minister advised that a lawyer would be limited to requesting clarification of an ambiguous question, or requesting a break in questioning in order to provide advice to the subject, and that during a break a lawyer may request an opportunity to address the prescribed authority in relation to a matter. The minister advised that these limitations reflect the nature of questioning proceedings which are designed to elicit information rather than evidence to be used in criminal proceedings against a person.

1.190 However, in appearing for questioning a warrant subject would face the risk of serious criminal charges for failure to provide information, as set out from paragraph [1.20]; and information derived from that questioning process could be used against them in criminal proceedings, as discussed from paragraph [1.154]. Consequently, the conduct of compulsory questioning under a warrant may affect a person's capacity to prepare a defence with respect to criminal charges, and could

213 See, Schedule 1, Part 1, item 10, proposed subsection 34DE(1)(d).

expose them to criminal charges arising out of a failure to cooperate with the compulsory questioning process. As a result, the questioning proceedings, while designed primarily to elicit information, may also give rise to evidence to be used in criminal proceedings against a person, thus engaging the right to a fair trial. As noted in the preliminary advice, the UN Human Rights Committee has explained that the right to a fair trial requires that lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.[214] Consequently, it would appear that serious concerns remain with respect to the proposed curtailment of a lawyer's capacity to speak to, speak for, or otherwise advise their client pursuant to a compulsory questioning process. In particular, it remains unclear as to what conduct would be deemed to reach the threshold of being 'unduly disruptive' for the purposes of proposed subsection 34FF(6), and expose the lawyer to a risk of being removed from the place of questioning.

1.191 With respect to safeguards, the minister stated that lawyers must be given reasonable breaks in questioning to advise the subject, and may themselves request the provision of such a break. Proposed subsection 34FF(2) does provide that the prescribed authority must provide a reasonable opportunity for the lawyer to advise the subject during breaks in questioning. However, this would appear to require that, during any breaks, a lawyer is provided with a reasonable opportunity to advise their client, not that a lawyer must be provided with such breaks in order to provide advice. Further, the bill would provide that if a lawyer were to request a break in questioning the prescribed authority must either approve or refuse the request. It does not provide any guidance as to the matters the prescribed authority must consider in making such a direction.

1.192 In terms of lawyers advising clients with a particular vulnerability, the minister advised that before conducting questioning, ASIO would take into account any situation of potential vulnerability, and that any particular requirement would form part of the conduct of the questioning. The value of such an assessment would appear to be limited, as it would not appear to offer any additional protection to a vulnerable warrant subject with respect to a lawyer's capacity to provide them with additional support during questioning. The minister also noted that the statement of procedures requires that subjects are not questioned in a manner which is 'unfair or oppressive' in the circumstances. Again, this may serve as a safeguard, however this restriction is not apparent on the face of the bill itself.

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

1.193 The minister advised that a lawyer could assist their client to make a complaint to the IGIS about their client's treatment. However, it would appear that this may only serve as a safeguard in the immediate sense were an IGIS representative to be present. Further, it does not appear that the lawyer themselves could directly raise a concern with an IGIS representative who was present, even where they suspected that their client had some disability or other vulnerability.

1.194 In addition, further information was sought as to why it is necessary to permit regulations to be made under proposed section 34FH, which would restrict a lawyer's access to information for proceedings relating to a warrant. The minister advised that such regulations are intended to ensure the protection of classified material. That is, they would not prohibit a lawyer from receiving access to information for proceedings, but ensure that such information must be handled appropriately. The minister advised that these regulations would require that a lawyer acting for a person in relation to a questioning warrant, or their treatment under such a warrant, must have an appropriate security clearance, and that the Secretary of the Department of Home Affairs be satisfied that providing the lawyer with access to the information would not be prejudicial to the interests of security. Were such regulations to be made in this manner, this could significantly curtail a person's ability to secure legal representation in order to seek a remedy relating to their treatment under a warrant, or related to the warrant itself. If, for example, the warrant subject could not afford private legal advice and sought advice from a Legal Aid service, or community legal service, it may be difficult to secure legal representation from a lawyer with such a security clearance. Further, while the bill provides that a warrant subject can apply to the Attorney-General for financial assistance in respect of an appearance for questioning, no such application can be made in relation to a complaint or a judicial remedy with respect to the warrant, or treatment under the warrant.[215]

Concluding remarks

1.195 It is not clear that the proposed ability to restrict a warrant subject's choice of lawyer would constitute a permissible limitation on the right to a fair trial, in particular the right to be represented by a lawyer of one's own choosing,[216] and the requirement for lawyers to be able to advise and to represent persons charged without restrictions, influence, pressure or undue interference from any quarter.[217] In particular, it is not clear that there is a pressing and substantial need for this

215 Schedule 1, Part 1, item 10, proposed subsection 34JE(7).

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

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

proposed limitation on a person's choice of lawyer, as no evidence has been provided that there are circumstances where lawyers suspected of, or known to have, engaged in conduct which is related to that being investigated, have appeared to assist a warrant subject and the prescribed authority has been unable to bar them from doing so. Further, it is not clear that the proposed provisions, which may restrict a person's access to a lawyer where they are being questioned, are accompanied by sufficient safeguards such that this would constitute a proportionate limitation on the right to a fair trial. Further, the proposed limitations on a lawyer's capacity to advise their client during the questioning process would not appear to be accompanied by sufficient safeguards such that this would constitute a proportionate limitation on the right to a fair trial.

Committee view

1.196 The committee thanks the minister for this response. The committee notes that the bill seeks to restrict the capacity of a subject to contact a lawyer of their choice, and limit the role of a lawyer during the questioning process.

1.197 The committee notes that this may engage and limit the right to a fair trial. This aspect of the right to a fair trial may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.198 The committee notes that under the existing questioning and detention framework, there is no explicit right for a subject to have a lawyer present for questioning. The bill provides additional rights in this respect in that at any time after the subject of a questioning warrant is given notice of the warrant, the subject may contact a lawyer to obtain legal advice in relation to the warrant. A minor must not be questioned in the absence of a lawyer and an adult may only be questioned without a lawyer present where the person voluntarily chooses to do so, or in accordance with a direction of the prescribed authority.

1.199 The committee appreciates that there may circumstances, in the interests of national security, where the subject should be restricted from choosing a particular lawyer; for instance, when such lawyer is suspected or known to be involved in criminal activity. The committee does not consider that this fundamentally impacts on the subject's right to engage counsel, one of the tenets of the right to a fair trial.

1.200 The committee appreciates there are major limitations on a lawyer's capacity to advise their client during the questioning process and this may give rise to concerns about whether this would constitute a proportionate limitation on the right to a fair trial. This must be balanced with the legitimate objective of the measures such as to prevent an imminent terrorist attack. The committee notes the minister's response and the legal advice, and considers that the proportionality of these measures would be assisted if the bill were amended to provide:

- **before the prescribed authority makes a direction under proposed subsection 34F(4) which limits a person's ability to contact a particular**

lawyer, they must provide the warrant subject with an opportunity to respond to any information in relation to which such a direction would be made, and take any such response into consideration;[218]

- **an adult with a cognitive disability must not be questioned in the absence of a lawyer;[219]**
- **if the prescribed authority is aware of, or reasonably suspects, that a warrant subject has a particular vulnerability, such as a cognitive disability, they must make a direction giving more time to contact a lawyer and any necessary assistance;[220] and**
- **that, where a prescribed authority is aware of, or reasonably suspects, that a warrant subject has a particular vulnerability, such as a cognitive disability, they may direct that a lawyer representing that subject may provide additional support (for example, by being able to directly address their client during questioning).[221]**

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

Secrecy and disclosure provisions

1.202 The bill provides that a subject who has been apprehended for questioning is not permitted to contact any person from the point of apprehension to the point of questioning, except in specified circumstances such as where they are contacting a lawyer in relation to the warrant.[222] Furthermore, were a person to disclose the fact that a questioning warrant had been issued, while the warrant was in force, this would be an offence punishable by five year's imprisonment.[223] It would also be an offence to disclose any operational information obtained pursuant to such a warrant for two years after the warrant ceases to be in force.[224]

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218 Amendment to Schedule 1, Part 1, item 10, proposed subsection 34F(4).

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

220 Amendment to Schedule 1, Part 1, item 10, proposed sections 34F and 34FB.

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

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

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

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

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of expression and rights of people with disabilities

1.203 These secrecy provisions, which limit the capacity of persons to communicate with others that they have been apprehended and questioned in relation to a warrant, or to discuss the fact that a warrant has been issued, engage and limit the right to freedom of expression. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, or through any other media of an individual's choice.[225] It may be permissibly limited for purposes including national security,[226] however, any limitation must seek to achieve a legitimate objective, be rationally connected to that objective, and be proportionate.

1.204 Further, it is not clear that subjects who are particularly vulnerable would be able to seek assistance in relation to the issue of a warrant, or after the fact. While children will be able to disclose to their parents, guardian or sibling that they are the subject of a warrant, there does not appear to be any provision for persons with disabilities (including those who have impaired mental capacity) to be able to contact an advocate or other specialist representative in relation to the warrant. Nor, as set out above, is there any provision in the bill that would allow a person with disability to be questioned only in the presence of such an additional non-lawyer representative. Such a limitation on a person's ability to contact other persons in relation to the warrant, to seek their help, may constitute a disproportionate limitation on the rights of persons with disability to freedom of expression.[227]

1.205 The initial analysis considered that further information was required to assess the compatibility of this measure with the right to freedom of expression, including the rights of persons with disabilities, in particular:

- when a person may be authorised to disclose information, and why the bill does not provide guidance as to the likely circumstances when permission may be given;
- why it is necessary to prohibit any disclosure relating to a questioning warrant, without any link to whether the disclosure could prejudice national security;
- why is it necessary to apply strict liability to elements of the offence and why is there no defence for innocent or innocuous disclosures;

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

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

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

- 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.

1.206 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

1.207 The committee noted that the secrecy provisions associated with the proposed compulsory questioning regime engages and may limit the right to freedom of expression. The committee noted that person's with disability may require additional capacity to disclose matters related to the issue of a warrant in order to seek assistance and advocacy, which may engage the rights of persons with disability.

1.208 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 sought the minister's advice as to the matters set out at paragraph [1.205].

Minister's response

1.209 The minister advised:

> *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.[228] 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.[229]

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 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.

228 *Commonwealth Guide to Framing Criminal Offences*, 25.

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

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.[230] 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.

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,

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

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.

Concluding comments

International human rights legal advice

Right to freedom of expression

Rights of persons with disability

1.210 The minister explained that two secrecy provisions would restrict the disclosure of information associated with a questioning warrant in two ways. During the maximum 28 day period during which a warrant is in force a person would be prevented from disclosing (without authorisation): operational information;[231] information which indicates the fact that a warrant has been issued; or a fact relating to the content, questioning or apprehension of a person in connection with the warrant.[232] During the two year period after a warrant ceases to be in force a person would be prevented from disclosing (without authorisation) operational information where that information was obtained as a direct or indirect result of the warrant being issued or executed.[233]

1.211 The minister acknowledged that the measure limits the right to freedom of expression, but stated that these provisions are accompanied by safeguards which ensure that they function in a proportionate manner. The minister noted that there are several circumstances in which a person would be permitted to disclose

231 'Operational information' means information indicating that ASIO has or had, a source of information or an operational capability, method or plan. See, Schedule 1, Part 1, item 10, proposed subsection 34GF(5).

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

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

information related to a questioning warrant.[234] These circumstances relate directly to obtaining legal advice in relation to the warrant, and making an external complaint about the warrant. The minister further stated that a person may be authorised by a prescribed authority to disclose information.[235] In deciding whether to give such permission, the prescribed authority must take into account the person's family and employment interests; the public interest; the risk to security if the permission were to be given; and any submissions made in relation to the matter. The prescribed authority may also consider any other matter.[236] The minister stated that this ensures that the rights of a warrant subject are maintained while appropriately protecting sensitive information. The minister further stated that the non-exhaustive list of matters which the prescribed authority must consider in making such a decision maximises the potential opportunities for disclosure. It would appear, however, that a blanket prohibition on the disclosure of information related to a warrant, subject to specified exceptions, would instead have the effect of minimising potential opportunities for disclosure.

1.212 Further information was also sought as to why it is necessary that proposed section 34GF should establish a blanket prohibition on any disclosure related to a questioning warrant (subject to exceptions), without requiring that there be a link to whether a disclosure could prejudice national security. The minister stated that knowledge of the mere fact that a warrant exists may present an operational risk and therefore prejudice national security by compromising ASIO's operations and methods. It is unclear, however, how this would correspond with the information provided by the minister (as to maximising opportunities for disclosure). Rather, it would appear that any request for permitted disclosure could be denied if it were to be accepted that knowledge of the mere fact that a warrant exists may present an operational risk. This is a significant consideration noting that breach of proposed section 34GF would be a criminal offence punishable by a maximum 5 years imprisonment.

1.213 Information was also sought as to why it is necessary to apply strict liability to elements of the secrecy offences in proposed section 34GF.[237] While these offences would not be restricted to persons associated with the questioning warrant

234 A person may disclose information to a lawyer in particular circumstances; to initiate legal proceedings relating to a remedy related to the questioning warrant; in making an application to the Attorney-General for financial assistance; or in making a complaint to the IGIS, Commonwealth Ombudsman or a state or territory complaint agency in relation to the warrant.

235 See, Schedule 1, Part 1, item 10, proposed subsection 34DE(1)(a), 34GF(5)(e) and 34GF(6).

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

237 The effect of applying strict liability to an element of an offence means that no fault element needs to be proven by the prosecution but the defence of mistake of fact is available to the defendant.

(the warrant subject, their lawyer, or another representative), and any person could be charged with a disclosure offence, strict liability would only apply where the warrant subject or their lawyer made a disclosure.[238]

1.214 The minister advised that strict liability would attach to two physical elements related to the disclosure offences:

(a) (in the case of an unauthorised disclosure during the maximum 28 day period during which a warrant is in force) the information indicates the fact that the warrant has been issued, or a fact relating to the content of the warrant or to the questioning or apprehension of the person in connection with the warrant; and/or the information is operational information; and

(b) (in the case of an unauthorised disclosure during the two years period after a warrant ceases to be in force) the information is operational information.

1.215 The minister stated that applying strict liability to physical elements of an offence may be justified where requiring proof of fault would undermine deterrence, and where there are legitimate grounds for penalising persons lacking 'fault' in respect of that element. The minister advised that the application of strict liability will ensure that a person cannot avoid criminal responsibility because they did not turn their mind to the nature of the information. The minister also noted that the warrant subject and their lawyer would be advised of the terms of the warrant at the point of service, and at the beginning and end of questioning, and that the lawyer would be able to advise the warrant subject about these matters also. The minister also posited that a lawyer should have an enhanced understanding of the gravity of harm associated with the disclosure of sensitive information. The minister further noted that the defence of mistake of fact would be available under section 6.1 of the *Criminal Code*. The committee had also sought information as to why is there no defence for innocent or innocuous disclosures, however, the minister's response did not address this other than to say that it would not be appropriate. It therefore remains unclear why there is no such defence available, noting the imposition on the right to freedom of expression posed by this offence.

1.216 In addition, further information was sought as to whether persons with disabilities would be able to disclose the fact that a warrant had been issued against them to a specialist worker such as an advocate. The minister stated that there is no need for a specific exemption in the bill, because a prescribed authority could make a direction that the subject may contact a specified person to advise them that a warrant had been issued against them. However, this would only provide a person with disability with any additional support from the point at which they had already appeared before the prescribed authority for questioning. The minister also stated

238 Schedule 1, Part 1, item 10, proposed subsection 34GF(3).

that where a person has an intellectual disability it would generally be appropriate to provide them with an opportunity to contact, and have present, a specialist disability support worker, as this would maximise the possibility of obtaining valuable intelligence from them and ensure any conditions specific to the subject could be managed. It is not clear, however, that this would provide persons with disability with a sufficient degree of protection, particularly if the impetus behind the exercise of such a discretion were to facilitate the gathering of intelligence from them, rather than to protect them. Further, should the general discretionary safeguard within the bill be capable of offering a person with disability additional support measures, and noting that such measures would generally be appropriate, it is unclear why such measures are not explicitly contained in the bill itself.

Concluding remarks

1.217 Consequently, it is not apparent from the information provided that the imposition of a blanket prohibition on the disclosure of information associated with a questioning warrant, qualified by a series of permitted disclosures, constitutes a proportionate limitation on the right to freedom of expression. Further, it is not apparent, from the information provided, that the bill would provide a warrant subject with a disability or some other vulnerability with a sufficient degree of additional support to ensure that they are able to disclose the fact that a warrant has been issued against them, and seek advice and support.

Committee view

1.218 The committee thanks the minister for this response. The committee notes that the secrecy provisions associated with the compulsory questioning regime engages and limits the right to freedom of expression. The committee notes that persons with disability may require additional capacity to disclose matters related to the issue of a warrant in order to seek assistance and advocacy, which may engage the rights of persons with disability.

1.219 The committee considers that the secrecy provisions seek to achieve the legitimate objective of ensuring the effectiveness of intelligence gathering operations, and to prevent the disclosure of information which could impact the integrity of the questioning process under the warrant and the effectiveness of long-running related investigations.

1.220 The committee considers the imposition of a blanket prohibition on the disclosure of information associated with a questioning warrant, qualified by a series of permitted disclosures as advised by the minister, constitutes a proportionate limitation on the right to freedom of expression. The committee considers, however, that it is not apparent, from the information provided, that the bill would provide a warrant subject with a cognitive disability with a sufficient degree of additional support with respect to the measure that they are not able to disclose the fact that a warrant has been issued against them.

1.221 The committee notes the minister's response and the legal advice, and considers the proportionality of these measures would be assisted if the bill were amended to provide that where the prescribed authority has knowledge that, or reasonably believes that, the warrant subject has a cognitive disability, they must consider making a direction enabling a warrant subject and/or their lawyer to disclose information related to the warrant (including the fact of the issue of the warrant itself) to specified persons, or to a class of persons for the purposes of providing the subject with a sufficient degree of additional support.[239]

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

ASIO internal authorisation for use of tracking devices

1.223 Schedule 2 of the bill seeks to amend ASIO's powers with respect to the use of tracking devices. The ASIO Act currently provides that surveillance devices may only be used pursuant to a warrant issued by the Attorney-General.[240] This bill would expand that power to provide that ASIO may instead obtain internal ASIO authorisation to use a tracking device[241] (or enhancement equipment)[242] to track[243] a person or object.[244]

1.224 An ASIO employee or ASIO affiliate may request that an authorising officer (being the Director-General or an SES-level ASIO worker)[245] authorise the use of a tracking device with respect to a particular person (the identity of whom does not need to be known), or an object or class of objects.[246] The authorising officer may provide such authorisation where they are satisfied that there are reasonable

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

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

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

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

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

244 Schedule 2, item 8.

245 Schedule 2, item 1, proposed section 22.

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

grounds for believing that: the use of a tracking device in relation to a person, (or on or in an object or an object of a particular class) will, or is likely to, substantially assist the collection of intelligence in respect of the security matter.[247] The authorisation may remain in place for a period which the authorising officer considers to be reasonable and necessary in the circumstances, but not more than 90 days.[248]

1.225 An internal authorisation may allow an ASIO employee or affiliate to: install, use or maintain one or more tracking devices, and 'enhanced equipment';[249] track a person (including putting tracking devices in or on any object used or worn, or likely to be used or worn, by the person); enter into or onto, or alter such an object; do anything reasonably necessary to conceal the fact that anything has been done in accordance with the authorisation; and/or do any other thing reasonably incidental to any of the other categories.[250] An authorisation issued in relation to an object or class of objects may authorise ASIO to do one or more of the same activities with respect to an object or class of objects.[251] Further, an authorisation also permits ASIO to recover a tracking device at any time while the authorisation is in force, or within 28 days of its ceasing to be in force.[252]

1.226 The bill provides that an internal authorisation may not authorise: something which would involve entering a premises without permission from the owner or occupier, or interference with the interior of a vehicle without the permission of the person in lawful possession of it; the remote installation of a tracking device or enhancement equipment; or the installation, use or maintenance of a tracking device, or enhancement equipment, to listen to, record, observe or monitor the words, sounds or signals communicated to or by a person; or the doing of anything by ASIO if, apart from section 26G, ASIO could not do the thing without being authorised by a warrant issued under section 25A.[253]

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

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

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

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

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

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

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

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

1.227 The proposed expansion of ASIO's surveillance powers with respect to the use of tracking devices engages and limits the right to privacy. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[254] A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy also includes the right to personal autonomy and physical integrity.

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

1.229 The initial analysis considered that further information was required in order to assess whether these measures constitute a proportionate limit on the right to privacy, in particular:

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

1.230 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

1.231 The committee noted that the measure engages and limits the right to privacy. The right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

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

1.232 The committee considered that this measure seeks to achieve the legitimate objective of protecting the Australian community from threats to national security. In order to fully assess the compatibility of this measure with the right to privacy, the committee sought the minister's advice as to the matters set out at paragraph [1.229].

Minister's response

1.233 The minister advised:

> *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.[255]
>
> 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;

255 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 2, s 26G.

- 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.[256]

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.[257] 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.[258]

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;

256 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 2, s 26K.

257 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 2, s 26R.

258 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 2, 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.[259]

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

259 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 2, s 26Q.

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.

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 anything 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.[260] 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

260 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 2, item 5.

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.[261] 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)'.[262] 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.

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

261 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 2, item 4.

262 Australian Security Intelligence Organisation Amendment Bill 2020, Schedule 2, item 2.

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.[263] 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.[264]

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.[265] The Guidelines also include a

263 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).

264 ASIO Guidelines, paragraph 9.1.

265 ASIO Guidelines, paragraph 10.4(b).

number of requirements relating to the collection, use, handling and disclosure of personal information.[266] 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 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.

Concluding comments

International human rights legal advice

Right to privacy

1.234 Further information was sought as to whether the use of tracking devices, subject only to internal ASIO authorisation, would constitute a proportionate limitation on the right to privacy, having regard to any safeguards which would operate. The minister provided further advice as to the scope of matters which an internal warrant may cover. The minister explained that the proposed updated definitions of the term 'tracking device' would be technologically neutral, non-exhaustive, and apply to both tangible things (including electronic and non-electronic devices, instruments, apparatus, equipment, substances or other things) and intangible things (for example, remote tracking). It would appear, therefore, that a range of surveillance activities could be internally authorised by ASIO pursuant to these proposed amendments. The definition of 'tracking device' seeks to cover a broad range of activities. Further, being non-exhaustive, it appears intended to be 'future-proofed', and thus able to encompass new technologies not currently contemplated. Consequently, the scope of potential activities which may

266 ASIO Guidelines, section 13.

be subject to internal authorisation is not clear, which raises questions as to proportionality.

1.235 The minister further noted that proposed section 26K would restrict tracking devices being internally authorised in terms of what they may do, and *how* they may be utilised. It would, for example, exclude from internal authorisation the listening to, or recording, observing or monitoring of the words, sounds or signals communicated to or by a person. In addition, section 26K would prohibit tracking devices from being internally authorised for use in specified ways, including excluding entry to premises or interference with the interior of a vehicle without permission. This may have some safeguard value, however it is not apparent that some activities which may be internally authorised (e.g. planting a tracking device on the outside of a car) would limit a person's right to privacy any less that an activity which must be authorised by the Attorney-General (e.g. planting a tracking device *inside* a person's car). Both activities have the same implications with respect to the tracking of a person's movements, and therefore on the right to privacy.

1.236 The threshold test that proposed subsection 26G(6) would establish for internally authorising the use of a tracking device is also a relevant consideration. The ASIO Act currently requires that in determining whether to issue a surveillance device warrant, the Attorney-General must be satisfied both that:

(a) the use by ASIO of a surveillance device in relation to that person will, or is likely to, assist ASIO in carrying out its function of obtaining intelligence relevant to security;[267] and

(b) the person is engaged in or is reasonably suspected by the Director‑General of being engaged in, or of being likely to engage in, activities prejudicial to security.[268]

1.237 By contrast, proposed subsection 26G(6) would require only that an authorising officer is satisfied that there are reasonable grounds for believing that the use of a tracking device in relation to a person (or object, or class of object) will, or is likely to, substantially assist in the collection of intelligence in respect of the security matter. It would appear, therefore, that the use of tracking devices could potentially be internally authorised in a far broader range of circumstances than the Attorney-General can currently issue a surveillance device warrant. This is a relevant consideration, noting that activities which may be internally authorised may have a similar level of impact on a person's privacy as activities which may only be authorised by the Attorney-General.

1.238 The minister also outlined several safeguards which would regulate the use of internally authorised warrants. The minister noted that internal authorisations

267 *Australian Security Intelligence Organisation Act 1979*, subsection 26(3)(a)(ii).

268 *Australian Security Intelligence Organisation Act 1979*, subsection 26(3)(a)(i).

may only be granted by senior personnel, being the Director-General of Security or Senior Executive Service (SES) employees or affiliates. Further, the minister noted that proposed section 26P would require that, where the Director-General or an SES officer became satisfied that the grounds for an internal authorisation had ceased, they must take such steps as necessary to ensure action under the authorisation is discontinued. These limits on the capacity to internally authorise activities may serve as a safeguard. However, the minister advised that the Attorney-General could not direct that activities which had been authorised internally may not proceed, as they will ordinarily only become aware through subsequent reporting that such a warrant had been authorised. It is not clear why the bill does not provide the Attorney-General with such oversight.

1.239 Further information was sought as to what specific guidance would be provided by the ASIO Guidelines[269]in this context. The minister noted that the guidelines require that, wherever possible, the least intrusive technique of information collection be used before more intrusive techniques, meaning that an internal authorisation in this context could only be used where less intrusive techniques have either been exhausted or are not reasonably available. The minister explained that, for example, a tracking device may be more likely to be considered where there is the potential for an imminent attack, and any loss of coverage could result in loss of an opportunity for authorities to disrupt a threat. It would appear, therefore, that the ASIO Guidelines may operate as a safeguard in relation to this, although it is not clear why such matters are not included in the bill itself. Further, it is relevant that the IGIS has advised the Parliamentary Joint Committee on Intelligence and Security on a number of occasions that these guidelines should be updated to take into account these new intrusive powers.[270]

1.240 With respect to oversight, the minister advised that the Director-General would be required to provide the Attorney-General with a written report within three months from when an internal authorisation ceases to be in force, including information as to the warrant itself, and details of the extent to which the authorisation assisted ASIO in carrying out its functions. This may operate as a useful safeguard, however, it is not clear why such a report should not be completed in a shorter period of time. This would provide both ASIO and the Attorney-General with

269 *Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its functioning of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence*

270 See, Inspector-General of Intelligence and Security, submissions to the Parliamentary Joint Committee on Intelligence and Security: review of the mandatory data retention regime (Submission 36), p. 12; Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Submission 28), p. 5; Telecommunications Legislation Amendment (International Production Orders) Bill 2020, (Submission 27), p. 10; and Australian Security Intelligence Organisation Bill 2020 (Submission 32), p. 19.

greater capacity to identify and address any concerns associated with the issue of internal authorisations in practice, before they may be repeated.

1.241 The minister further noted that the Director-General would be required to establish and maintain a register of requests for internal authorisations, and stated that, together with the reporting framework, this will facilitate effective oversight by the Attorney-General, as well as by the IGIS, which has broad powers to oversee ASIO's work and has full access to information held by ASIO. The requirement that the Director-General maintain a register of internal authorisation would appear to serve a useful safeguard and facilitate effective independent oversight of any internal authorisations.

1.242 As noted previously at paragraph [1.20], the European Court of Human Rights has explained that where a state is using a system of surveillance, it must be accompanied by adequate and effective guarantees against abuse, having regard to all the circumstances of the case, such as: the nature, scope and duration of the possible measures; the grounds required for ordering such measures; the authorities competent to permit, carry out and supervise such measures; and the kind of remedy provided by the law.[271] The court has indicated that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.[272] The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, has similarly advised the UN Human Rights Committee that:

> Strong independent oversight mandates must be established to review policies and practices, in order to ensure that there is strong oversight of the use of intrusive surveillance techniques and the processing of personal information. Therefore, there must be no secret surveillance system that is not under the review of an effective oversight body and all interferences must be authorized through an independent body.[273]

1.243 It is concerning, therefore, that these proposed measures would constrain even the supervisory capacity of the Attorney-General, providing only that they be advised on internal authorisations after the fact (within three months of the date that an internal authorisation has *ceased*), and would provide for limited 'post-fact' oversight by the IGIS.

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271 *Klass and Others v Germany*, European Court of Human Rights, application no. 5029/71, (6 September 1978), [50].

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

273 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Sheinin, UN Human Rights Council (28 December 2009) A/HRC/13/37 [62].

1.244 Consequently, it does not appear that the proposed internal authorisation scheme relating to the use of tracking devices would be sufficiently constrained or accompanied by adequate safeguards such that it would constitute a proportionate limitation on the right to privacy.

Committee view

1.245 The committee thanks the minister for this response. The committee notes that Schedule 2 of the bill would allow ASIO to provide internal authorisation for the deployment of tracking devices by ASIO. The committee notes that this measure engages and limits the right to privacy. The right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.246 The committee considers that this measure seeks to achieve the legitimate objective of protecting the Australian community from threats to national security. The committee notes the minister's advice as to a range of safeguards which would constrain ASIO's ability to internally authorise the use of tracking devices, and providing for the recording and oversight of, such authorisations.

1.247 However, the committee considers that, as drafted, the internal authorisation scheme relating to the use of tracking devices could include additional safeguards. The committee notes the minister's response and the legal advice, and considers that the proportionality of the measure would be assisted if the bill were amended to:

- **provide that an internal authorisation may only be issued orally in circumstances where there is a particular urgency;[274] and**
- **provide that the use of a tracking device pursuant to an internal authorisation must be reviewed by the Director-General within a specified timeframe.[275]**

1.248 In addition, the committee recommends that consideration be given to revising the ASIO Guidelines to provide more specific guidelines as to the use of any internal authorisation powers.

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

274 Amendment to Schedule 2, item 8, proposed subsection 26H.

275 Amendment to Schedule 2, item 8, proposed section 26J.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment Determination (No. 2) 2020 [F2020L00466][1]

Purpose	This instrument amends the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 to prevent or control the entry or spread of COVID-19 in Queensland, Western Australia, South Australia and the Northern Territory. The instrument commenced on 24 April 2020
Portfolio	Health
Authorising legislation	*Biosecurity Act 2015*
Disallowance	This instrument is exempt from disallowance (see subsection 477(2) of the *Biosecurity Act 2015*)
Rights	Life; health; freedom of movement; equality and non-discrimination
Status	Concluded examination

The committee requested a response from the minister in relation to the instrument in *Report 6 of 2020*.[2]

Controlling entry to certain remote communities

1.250 This instrument amends the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020,[3] which establishes that persons cannot enter designated areas except in specified circumstances, to prevent or control the entry

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment Determination (No. 2) 2020 [F2020L00466], *Report 9 of 2020*; [2020] AUPJCHR 116.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2020* (20 May 2020), pp. 2-4.

3 The Parliamentary Joint Committee on Human Rights considered this in *Report 5 of 2020* (29 April 2020), pp. 6-9 and *Report 7 of 2020* (17 June 2020), pp. 13-19.

or spread of COVID-19 in Queensland, Western Australia, South Australia and the Northern Territory.

1.251 The key changes are: to require a person entering a designated area to have not been in a foreign country, rather than outside Australian territory, in the 14 days immediately prior to entry; to add a new designated area in Queensland; to remove two designated areas in South Australia; and to exclude certain areas in the Northern Territory as designated areas.

1.252 This instrument is made under section 477(1) of the *Biosecurity Act 2015*, which provides that during a human biosecurity emergency period, the Health Minister may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory. A person who fails to comply with a requirement or direction may commit a criminal offence (imprisonment for maximum 5 years, or 300 penalty units).[4]

Summary of initial assessment

Preliminary international human rights legal advice

Life, health, freedom of movement, and equality and non-discrimination

1.253 As the measure is intended to prevent and manage the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear that the measure may promote the rights to life and health.[5] However, by restricting entry to these locations, and adding a new location as a designated area, the instrument may also limit the right to freedom of movement. Furthermore, the restrictions of entry would appear to apply to anyone who lives in the designated area, and would mean that they would need to be granted permission to re-enter their community subject to the requirements stipulated by the instruments, thereby potentially limiting their freedom of movement. It appears that these remote geographical areas may have a high proportion of Indigenous people living there, although this has not been specifically addressed in the explanatory materials. As such, the restrictions may have a disproportionate impact on Indigenous persons. Consequently, the measure may also engage the right to equality and

4 *Biosecurity Act 2015,* section 479.

5 Right to life: Iinternational Covenant on Civil and Political Rights, article 6. Right to health: Iinternational Covenant on Economic, Social and Cultural Rights, article 12.

non-discrimination,[6] which provides that everyone is entitled to enjoy their rights without distinction based on a personal attribute (for example, race).[7]

1.254 The initial analysis considered further information was required as to the compatibility of these measures with human rights, particularly the rights to freedom of movement, and equality and non-discrimination.

1.255 The full initial analysis is set out in *Report 6 of 2020*.

Committee's initial view

1.256 The committee considered that the measure, which is designed to prevent the spread of COVID-19, is likely to promote and protect the rights to life and health, noting that the right to life requires Australia to take positive measures to protect life and the right to health requires Australia to take steps to prevent, treat and control epidemic diseases. The committee noted that the measure may also limit the rights to freedom of movement and equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.257 The committee sought the minister's advice as to the compatibility of this measure with human rights, particularly the rights to freedom of movement and equality and non-discrimination.

Minister's response[8]

1.258 The minister advised:

> **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

6 International Covenant on Civil and Political Rights, articles 2 and 26. See also International Convention on the Elimination of All Forms of Racial Discrimination.

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

8 The minister's response to the committee's inquiries was received on 9 July 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

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.

Concluding comments

International human rights legal advice

1.259 The minister has advised that the original determination, and amendments made to it (including the instrument under consideration) 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. The minister's response notes that 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 minister acknowledges that the measures engage the right to life, right to freedom of movement, rights of equality and non-discrimination and right to health, but that any limitations on the rights of equality and non-discrimination and right to freedom of movement are reasonable, necessary and proportionate. The minister advises that the measures 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, and are proportionate given their application for a discrete period. The minister has also advised that a number of restrictions have been removed in certain areas in light of the measures put in place to manage the risks posed by COVID-19.

1.260 As stated in the initial analysis, these measures would appear to promote the rights to life and health.[9] The limitation on the right to freedom of movement seeks to achieve the legitimate objective of protecting health, particularly in areas where people may be at higher risk, and appears to be proportionate given the time limited nature of the measure. As these remote geographical locations include a high proportion of Indigenous people, the measure would appear to have a disproportionate effect on the basis of race, and therefore limits the right to equality and non-discrimination. Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[10] As already noted, this measure seeks to achieve the legitimate objective of protecting health amongst potentially more vulnerable groups, and is limited in time, with measures taken to remove restrictions where the risk has passed. In assessing the proportionality of the measure, it would have been useful if the minister's response had addressed whether any consultation had occurred with the remote communities affected and whether the people in those communities had agreed with the need for additional restrictions to be placed on those communities on health grounds. However, it is noted that there is some evidence that consultation with affected communities took

9 Right to life: Iinternational Covenant on Civil and Political Rights, article 6. Right to health: Iinternational Covenant on Economic, Social and Cultural Rights, article 12.

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

place when designating such locations.[11] Accordingly, any differential treatment would appear to be based on reasonable and objective criteria.

Committee view

1.261 The committee thanks the minister for this response. The committee notes that this instrument amends requirements designed to prevent or control the entry or spread of COVID-19 in designated remote communities in Australia, including establishing requirements for entry to these areas, for the duration of the period of emergency under the *Biosecurity Act 2015*.

1.262 The committee considers that the measures, which are designed to prevent the spread of COVID-19, promote and protect the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases. The committee further notes that the measures may limit the rights to freedom of movement and to equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.263 The committee considers that as the measure seeks to achieve the legitimate objective of protecting health, particularly in areas where people are arguably more vulnerable to COVID-19, and given the time limited nature of the measure, any limitation on the right to freedom of movement is permissible as a matter of international human rights law. In addition, the committee considers that any differential treatment of Indigenous people in these remote communities is based on reasonable and objective criteria, particularly noting the consultation that occurred with elders, leaders and peak organisations[12] in determining which areas would be subject to these additional restrictions.

1.264 The committee has concluded its examination of this instrument.

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11 See Australian Government, Factsheet: Remote community entry requirements in place under the Biosecurity Act 2015, 29 April 2020, which states: 'The designated areas covered under these arrangements have been requested by state and territory governments, in consultation with community leaders and key stakeholders'. Available at: https://www.health.gov.au/sites/default/files/documents/2020/04/remote-community-entry-requirements-in-place-under-the-biosecurity-act-2015_0.pdf

12 See the statement from the Minister for Indigenous Affairs, the Hon Ken Wyatt AM, MP who advised the Parliament on 14 May 2020 that the measure had been subject to consultation, stating 'So, right from the beginning, we worked with elders, leaders and peak organisations. Working with my colleague Greg Hunt, we used the Biosecurity Act to define secure areas for remote communities in order to isolate them from people bringing COVID-19 in. One of the best expressions I heard was from an elder who said, 'This thing has no songline, and we don't want to create a songline that brings death.', Minister for Indigenous Australians, House of Representatives, House Hansard, 14 May 2020, p. 3525.

Broadcasting Services (Transmitter Access) Regulations 2019 [F2019L01248][1]

Purpose	These regulations repeal and re-make the Broadcasting Services (Transmitter Access) Regulations 2001, while making amendments to Australian Competition and Consumer Commission arbitration proceedings. This includes making some offence provisions strict liability and reducing the corresponding penalties, removing the defence of 'reasonable excuse' in relation to witnesses, and enabling the Commission to make some decisions based on paper submissions only
Portfolio	Communications, Cyber Safety and the Arts
Authorising legislation	*Broadcasting Services Act 1992*
Right	Freedom of expression and assembly
Status	Concluded examination

1.265 The committee requested a response from the minister in relation to the regulations in *Report 1 of 2020*.[2]

'Insulting' or 'disturbing' an Australian Competition and Consumer Commission arbitration proceeding

1.266 These regulations deal with the arbitration of disputes by the Australian Competition and Consumer Commission (the ACCC) in relation to access to broadcasting transmission towers and designated associated facilities under various provisions in the *Broadcasting Services Act 1992* (the Act).

1.267 These regulations repeal and replace the Broadcasting Services (Transmitter Access) Regulations 2001, which were due to sunset. Under section 31 of the regulations, a person commits an offence if they:

- insult, disturb or use 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;
- interrupt an arbitration hearing; or

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Broadcasting Services (Transmitter Access) Regulations 2019 [F2019L01248], *Report 9 of 2020*; [2020] AUPJCHR 117.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 17-19.

- create a disturbance, or participate in creating or continuing a disturbance, in a place where an arbitration hearing is being conducted.

1.268 The penalty for this offence is 30 penalty units (currently $6,300).[3]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to freedom of expression and assembly

1.269 Prohibiting the use of 'insulting' language or communication, or the creation of a disturbance (which could include a lawful peaceful protest) in a place where an ACCC arbitration hearing is being held, engages and may limit the rights to freedom of expression and assembly.

1.270 The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[4] This right embraces expression that may be regarded as deeply offensive, subject to the provisions of article 19(3) and article 20 of the International Covenant on Civil and Political Rights (ICCPR).[5] The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public, even if it is disruptive.[6]

1.271 The initial analysis considered that further information was required in order to assess the compatibility of this measures with the rights to freedom of expression and assembly, and in particular:

- what is the objective of the measure;[7]
- are there are any less rights restrictive means of achieving this objective; and

3 A 'penalty unit' is defined as $210 (subject to indexation) under *Crimes Act 1914*, section 4AA.

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

5 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11]. Article 20 of the ICCPR provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

6 ICCPR, article 21; UN Human Rights Committee, *General Comment No 25: Article 25 (Participation in public affairs and the right to vote)* [8]. The Committee notes that citizens take part in the conduct of public affairs, including through the capacity to organise themselves.

7 Noting that under articles 19(3), 20 and 21(3) of the ICCPR any limitation on the rights to freedom of expression and assembly must be demonstrated to be necessary to 'protect the rights or reputations of others, national security, public order, or public health or morals' or to prohibit '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

- what safeguards are in place to protect the rights to freedom of expression and assembly.

1.272 The full initial analysis is set out in *Report 1 of 2020.*

Committee's initial view

1.273 The committee noted that this instrument engages and limits the rights to freedom of expression and assembly. The committee sought the minister's advice as to the compatibility of this measure with the rights to freedom of expression and assembly, and in particular the matters set out at paragraph [1.271].

Minister's response[8]

1.274 The minister advised:

> Section 31 supports the ACCC's power under section 13 of the Broadcasting Services (Transmitter Access) Regulations 2019 (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.
>
> 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

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

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 [an] 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.

Concluding comments

International human rights legal advice

1.275 The minister has advised that section 31, which prohibits the use of 'insulting' language or communication, or the creation of a disturbance in a place where an ACCC arbitration hearing is being held, is intended to ensure that public ACCC arbitration proceedings are conducted in an orderly, civil and appropriate manner. The minister has also advised that the identified behaviours would arguably not be accepted by any of the participants in the context of a statutory arbitration process.

1.276 The rights to freedom of expression and assembly may be subject to permissible limitations where they are demonstrated to be necessary to protect the rights or reputations of others, national security, public order, or public health or morals.[9] Such limitations must also be rationally connected and proportionate to such objectives.[10] Ensuring that ACCC proceedings are conducted in an orderly manner would likely constitute a legitimate objective for the purposes of international human rights law.

1.277 In relation to whether the limitation on the rights to freedom of expression and assembly is proportionate to the objective sought to be achieved, it is also necessary to consider if there are any less rights restrictive means of achieving the stated objective and what safeguards are in place to protect the rights to freedom of expression and assembly. The minister has advised that it was considered that there were not less rights restrictive means of achieving this objective, in light of the potential public disorder that could arise if there was no meaningful deterrent for insulting, disruptive behaviour or unreasonable disturbances. However, it is noted that section 31 makes it a criminal offence to insult an ACCC arbitrator, which is subject to 30 penalty units (currently $6,300). It is not clear why it is necessary, in order to achieve the objective that ACCC proceedings are conducted in an orderly and civil manner, to make this a criminal offence, rather than enabling the arbitrator to direct a person to leave who is disrupting proceedings. In addition, it is an offence to create or participate in a disturbance simply 'in a place where an arbitration

9 ICCPR, articles 19(3) and 21.

10 See, for example, *Leyla Sahin v Turkey,* European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

hearing is being conducted'. This is not linked to the disturbance actually disturbing the hearing. It would appear that, as this is currently drafted, a person participating in a peaceful protest on the street outside the building where the arbitration hearing is taking place, which does not in fact disturb the proceeding, could be liable to a criminal penalty (if they were reckless as to whether an arbitration proceeding was taking place).

1.278 In relation to safeguards, the minister has advised that the regulations aim to establish a high threshold, which ensures that inadvertent and accidental actions of people are not captured by the offence provisions, and ensures that the ACCC process maintains integrity and accountability. In this respect, it is relevant that, unlike the offences under sections 27-30, an offence under section 31 is not one of strict liability. This means that intention would be required to be proven with respect to particular conduct, or recklessness proven with respect to a circumstance or result.[11]However, the term 'insulting' could capture a very broad range of communications, including those related to peaceful and lawful protests, and would appear to encompass language which may itself be insulting, but which nevertheless does not impede the functioning of an ACCC arbitration proceeding. Aside from this assurance from the minister, it remains unclear what safeguards would operate in practice to ensure that this offence provision would only prohibit conduct which deliberately interferes with the integrity and accountability of ACCC processes, or which deliberately impedes proceedings themselves.

1.279 Consequently, it does not appear that making it an offence for a person to insult, disturb or use insulting language towards an ACCC member would constitute a proportionate limitation on the right to freedom of expression. In addition, it does not appear that making it an offence to create, or participate in, a disturbance 'in a place where an arbitration hearing is being conducted' would constitute a proportionate limitation on the right to freedom of assembly and freedom of expression.

Committee view

1.280 The committee notes that this instrument prohibits the use of insulting language and the creation of any disturbances in a place where an arbitration hearing of the Australian Competition and Consumer Commission is being held.

1.281 The committee thanks the minister for this response,[12] and notes his advice that the measure is intended to ensure that public ACCC arbitration proceedings are conducted in an orderly, civil and appropriate manner. The committee

11 See, *Criminal Code At 1995*, sections 5.1 and 5.6.

12 It is noted that the minister's response was received almost four months after it was first requested. The committee notes that the timeliness of ministerial responses is a key component of committee's dialogue function, and its capacity to assess the compatibility of legislation with human rights.

considers that ensuring that ACCC proceedings are conducted in an orderly manner is a legitimate objective for the purposes of international human rights law.

1.282 However, the committee notes that, as currently drafted, imposing a criminal penalty for insulting an ACCC member undertaking an arbitration proceeding, or for creating or participating in a disturbance near such a proceeding, does not appear to constitute a permissible limitation on the rights to freedom of expression and assembly. The committee considers that the proportionality of this measure would be assisted if the regulations were amended to:

- **clarify that section 31 is directed towards conduct which is intended to interrupt, disturb, impede or otherwise compromise the integrity of ACCC proceedings, and does not encompass insulting language which does not, by itself, interrupt or impede proceedings; and**
- **provide that a person does not commit an offence by exercising their right, by itself, to engage lawfully in advocacy, protest or dissent.**

1.283 The committee considers it would be appropriate if the statement of compatibility to the regulations were amended to acknowledge the engagement of the rights to freedoms of expression and assembly by this measure.

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

Coronavirus Economic Response Package Omnibus Bill 2020[1]

Purpose	This bill sought to amend a number of Acts to provide an economic response and deal with other matters relating to the coronavirus, and for related purposes
Portfolio	Treasury
Introduced	House of Representatives, 23 March 2020 *Received Royal Assent on 24 March 2020*
Rights	Adequate standard of living; social security; equality and non-discrimination
Status	Concluded examination

1.285 The committee requested a response from the minister in relation to the bill in *Report 5 of 2020*.[2]

Additional support for income recipients

1.286 Schedule 11 of the bill amends a number of Acts to provide a fortnightly supplement of $550 (or such other amount as determined by legislative instrument) for a period of six months beginning on 27 April 2020 for persons receiving certain social security payments, namely Jobseeker Payment; Youth Allowance (other); Sickness Allowance; Widow Allowance; Parenting Payment Single; Parenting Payment Partnered; Special Benefit; and Farm Household Allowance. The Minister for Families and Social Services may extend the supplement to other social security payments by legislative instrument.[3]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to an adequate standard of living, social security and equality and non-discrimination

1.287 Increasing the amount of social security payments for a number of recipients would appear to engage and promote the rights to an adequate standard of living and social security. The right to social security recognises the importance of

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Coronavirus Economic Response Package Omnibus Bill 2020, *Report 9 of 2020*; [2020] AUPJCHR 118.

2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 35-37.

3 Explanatory memorandum, p. 14 and statement of compatibility, p. 224.

adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.[4] The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[5]

1.288 However, the supplement does not apply to all social security payments. In particular, those on the Disability Support Pension and the Aged Pension do not appear to be eligible for the supplement. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights requires that the rights to an adequate standard of living and social security are able to be enjoyed without discrimination. The United Nations Committee on Economic, Social and Cultural Rights has stated that in the provision of social security:

> States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.
>
> […]
>
> Whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular […] people with disabilities [and] older persons.[6]

1.289 The initial analysis considered that further information was required as to the compatibility of Schedule 11 with the rights to an adequate standard of living, social security and equality and non-discrimination.

1.290 The full initial analysis is set out in *Report 5 of 2020.*

Committee's initial view

1.291 The committee considered that the measure, which is designed to provide additional financial assistance to Australians financially impacted by COVID-19, promotes the rights to an adequate standard of living and social security. The committee noted that as the supplement does not apply to all social security payments this may engage the right to equality and non-discrimination, with respect

4 International Covenant on Economic, Social and Cultural Rights, article 9; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008).

5 International Covenant on Economic, Social and Cultural Rights, article 11.

6 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security*, (2008), [22] and [31].

to the enjoyment of these rights. Notwithstanding, the committee noted there may be other social security benefits that may apply to these groups, but which are not the subject of this legislation. The rights to an adequate standard of living, social security, and equality and non-discrimination may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee sought the minister's advice as to the compatibility of this measure with the rights to an adequate standard of living, social security and equality and non-discrimination.

Minister's responses[7]

1.292 The minister initially advised:

> 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.

7 The minister's responses to the committee's inquiries were received on 21 May and 17 July 2020. This is an extract of the responses. The responses are available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

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.

1.293 On 1 July 2020 the committee sought further information from the minister as to what benefits are available to persons on a pension (including the disability support pension) compared to those receiving JobSeeker and related payments, and in particular:

- 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;
- 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;
- 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; and
- how much income those on a pension can earn compared to those on JobSeeker before their payments are reduced, and by what amounts.

1.294 The minister further advised:

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).

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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 (NOIA), 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.

Concluding comments

International human rights legal advice

1.295 The minister has advised that the $550 fortnightly Coronavirus Supplement is a temporary measure designed 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 minister notes that the supplement is in recognition of the depressed job market, which may make it more difficult for people to find new work in the short-term, which is why the supplement applies to people who are on payments where they are expected to participate in the labour market. In contrast, pensions are payable to those who are unable to support themselves through substantial paid employment.

1.296 Although not detailed in the minister's response, it would appear that those on a pension are currently now receiving less on a fortnightly basis than those

receiving JobSeeker payments.[8] International human rights law provides that the rights to social security and an adequate standard of living should be able to be enjoyed without discrimination.[9] This encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).[10] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[11]

1.297 From the minister's response it can be understood that people who are on JobSeeker (and related payments) are expected to look for work, and are usually paid at a lower rate than those on pensions in order to encourage them to look for work, and thereby participate in the workforce. However, the minister has advised that the depressed job market as a result of COVID-19 may make it more difficult for people who are, or become, unemployed to find new work in the coming few months. As such, paying persons on JobSeeker (and related payments) a lower amount during this time would not be effective to achieve the objective of getting them to participate in the workforce, given the difficulty in finding employment during this time. As such, the reason for the differential treatment between those on JobSeeker (and related payments) and those on pensions, is based on the need to temporarily focus the payment on those most affected by the depressed job market. In general terms, this may be capable of constituting a legitimate objective. However, to determine whether this justifies the measure from the perspective of international human rights law, it is necessary to consider the practical effect of the measure and the nature of the differential treatment which results from it. In this case, one practical effect of the measure is that those on pensions, including the disabled and elderly, may receive a lower social security payment than those who are on other payments (who are generally 'expected to participate in the labour market', but cannot currently do so due to the economic impact of the Coronavirus pandemic). In other words, there is differential treatment based on whether a person's inability to

8 The Services Australia website states that the maximum amount payable (including the pension and energy supplements) to a single person with no children receiving the Age Pension and the Disability Support Pension is $944.30 per fortnight, whereas the maximum amount payable to a single person with no children receiving the JobKeeper payment is $1,115.70 per fortnight (when the Coronavirus Supplement is applied). See https://www.servicesaustralia.gov.au/individuals/services/centrelink.

9 International Covenant on Economic, Social and Cultural Rights, article 2(2). See also International Covenant on Civil and Political Rights, article 26.

10 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989).

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

participate in the labour market is due to economic circumstances, on the one hand, or age, disability or some other personal attribute, on the other. This would not appear to constitute a reasonable and objective basis for such differential treatment.

1.298 Further, there are some people on pensions who also undertake paid employment (with their social security benefits progressively reduced according to their levels of income), including some on the disability support pension who are actively required to participate in the workforce.[12] If the objective of the measure is to focus the payment on those most affected by the depressed job market, it is unclear why persons receiving pensions who may also have been affected by job losses are not eligible for the increased payment.

1.299 In considering whether the measure is likely to be effective to achieve, and is proportionate to, the stated objective, it is necessary to consider the impact of the differential treatment on vulnerable groups, such as those with disability and the elderly. The minister details that, though people receiving a pension are ineligible for the Coronavirus Supplement, they are instead receiving two Economic Support Payments of $750 and that people receiving a pension payment that were also working, may be eligible for the JobKeeper Payment. Further, the minister's response states that some 565,000 age pensioners will benefit from the Australian Government's decision to reduce both the upper and lower social security deeming rates. The minister further adds that additional assistance is also available to pensioners to increase their economic security, including: subsidised prescription medicines under the Pharmaceutical Benefits Scheme; aged care; health care and related products; 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; and 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. However, as the minister has outlined in her further response, concessional healthcare cards may also be available to recipients of both Jobseeker payments and pensions, depending on a person's individual circumstances. The value of any such concession cards would depend on the person's circumstances. Further, the minister explained that any additional benefits which a person may derive from participation in the National Disability Insurance Scheme, or through the aged care system, are not dependent on the payment that a person is receiving.

12 Those under 35 years old, with no dependent children under six, and who have been assessed as able to work 8-14 hours a week, generally have participation requirements, including doing activities such as work experience or training. See Services Australia website: https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/how-manage-your-payment/participation-requirements.

1.300 The minister also advised that a single pensioner can earn up to $178 per fortnight before those payments begin to be reduced against earnings, whereas a person in receipt of Jobseeker may earn up to $106 per fortnight. This indicates that a pensioner may earn more per fortnight before those earnings will reduce their pension payments, although the difference would appear to be relatively marginal. The minister also outlined the different indexation rates applied to pensions and Jobseeker payments, explaining that the indexation process with respect to pensions ensure that pension rates are responsible to actual living costs. Given that base rates of Jobseeker are indexed twice a year in line with the Consumer Price Index, whereas pensions are indexed at a higher rate, it would appear that indexation may have the capacity to provide for a higher payment, depending on a recipient's individual circumstances.

1.301 These measures are relevant in assessing if those on pensions receive adequate levels of social security such that their right to an adequate standard of living is protected. However, the information provided by the minister does not preclude the possibility that the social security benefits received by those on pensions may currently be less than the social security benefits received by those on Jobseeker, albeit on a temporary basis. As such, concerns about differential enjoyment of the right to social security remain. This is particularly the case given that international human rights law imposes particular obligations on states to ensure that vulnerable groups, such as those with disability and the elderly, are not discriminated against directly or indirectly. In this context, the minister's response does not explain whether any investigation has been undertaken as to the impact that the COVID-19 pandemic may be having on persons with disability and the elderly. In particular, the minister's response has not demonstrated if consideration has been given to whether the cost of living has risen for those on pensions as a result of COVID-19 (for example, costs of health care, costs in accessing food, medicine or transport, or costs relating to mitigating exposure to COVID-19). Such consideration is necessary to ensure that the current social security arrangements do not, in practice, disadvantage those with a disability or the elderly.

1.302 While the right to social security may be progressively realised, this cannot be done in a discriminatory manner. This measure differentiates, in terms of social security, between those excluded from the labour market due to economic circumstances and those excluded from the labour market due to personal attributes such as age or disability, with the result that those on pensions, including the disabled and elderly, may receive a lower social security payment than those who are on other payments. It is not clear that there is a reasonable and objective justification for this difference in treatment. This is particularly so in light of the fact that the State has particular obligations to those in vulnerable groups, such as persons with disability and the elderly. As part of the obligation not to discriminate, it is necessary for the State to consider the impact of any policy changes on these groups. It has not been established that the government has considered the economic impact of the COVID-19 pandemic on persons with disability or the elderly.

As such, it is not clear that the differential treatment in the provision of social security benefits to those who are able to look for paid employment, compared to persons with disability or the elderly, is consistent with the obligation that the right to social security is enjoyed without discrimination.

Committee view

1.303 The committee thanks the minister for these responses. The committee notes that Schedule 11 of the bill provides a social security supplement for persons receiving certain social security payments, but this supplement does not apply to those receiving pensions, although pensioners are eligible for other temporary payments such as two payments of $750.

1.304 The committee considers that the measure, which is designed to provide additional financial assistance to Australians financially impacted by COVID-19, promotes the rights to an adequate standard of living and social security. The committee notes that as the supplement does not apply to all social security payments this also engages the right to equality and non-discrimination, with respect to the enjoyment of these rights. However, the committee notes the minister's advice that those receiving pensions are entitled to a wide range of additional economic benefits, that are not the subject of this legislation, and considers this is relevant in assessing the compatibility of the measure with the right to an adequate standard of living.

1.305 The committee further notes that as part of the obligation not to discriminate in the provision of social security benefits, it is necessary to consider the economic impact of COVID-19 on all groups in society, particularly vulnerable groups, such as persons with disability and the elderly. However, the committee notes that from 25 September 2020, the coronavirus supplement for those on JobSeeker will be reduced, meaning that the payments to which it attaches will no longer be paid at a higher rate than pensions, and as such there is no differential treatment that could be said to apply on the basis of age or disability.

1.306 The committee has concluded its examination of this bill.

Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435][1]

Purpose	This instrument amends the monetary threshold above which certain investments in Australia by foreign persons may require notification to the Treasurer for approval
Portfolio	Treasury
Authorising legislation	*Foreign Acquisitions and Takeovers Act 1975*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 12 May 2020). Notice of motion to disallow must be given by 12 August 2020 in the House of Representatives and the Senate[2]
Right	Equality and non-discrimination
Status	Concluded examination

1.307 The committee requested responses from the minister in relation to the instrument in *Report 5 of 2020*[3] and *Report 7 of 2020*.[4]

Reducing the monetary threshold for reporting investments by foreign persons

1.308 This instrument provides for a nil monetary threshold for actions taken by foreign persons in relation to entities, businesses and agricultural lands, and prescribes all kinds of land other than agricultural land as being land without a threshold value. This has the effect that all proposed foreign investments in relation to these actions and investments in Australia must be notified to the Treasurer for prior approval. The instrument repeals and replaces Part 4 of the Foreign Acquisitions and Takeovers Regulations 2015, which previously set out a number of different monetary thresholds in relation to which a proposed investment had to be

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435], *Report 9 of 2020*; [2020] AUPJCHR 119.

2 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2020* (29 April 2020), pp. 42-44.

4 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020), pp. 2-6.

notified to the Treasurer. The lowest previous monetary threshold was $15 million, in relation to agricultural land being acquired by a foreign person.[5]

Summary of initial and further assessment

Preliminary international human rights legal advice

Right to equality and non-discrimination

1.309 By reducing to nil the monetary threshold for notification to the Treasurer regarding proposed foreign investments in Australia, which only applies to proposed investments by foreign persons,[6] this measure may engage and limit the right to equality and non-discrimination.[7] This measure may indirectly discriminate against persons based on their nationality, as it only applies to persons not ordinarily resident in Australia.

1.310 The initial analysis considered that further information was required as to the compatibility of this measure with the right to equality and non-discrimination. The full initial analysis is set out in *Report 5 of 2020.*

1.311 On 18 May 2020 the Treasurer provided a response, which the committee considered in *Report 7 of 2020*. The committee requested further information as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- whether the changes made by this instrument apply to the purchase of any land at any value, including residential land, and if so, how is the measure rationally connected to the stated objective of protecting vulnerable businesses;
- what safeguards are in place to ensure that foreign persons are not disproportionately affected by this measure;
- what the application fees are that apply to foreign persons seeking to purchase property (including residential property) that apply as a result of the changes made by this instrument;
- what the timeframe is by which the Treasurer will make decisions regarding investments by foreign persons; and

5 Foreign Acquisitions and Takeovers Regulations 2015, subsection 52(4).

6 'Foreign person' is defined in section 5 of the *Foreign Acquisitions and Takeovers Act 1975* to include an individual not ordinarily resident in Australia.

7 Articles 2 and 26 of the International Covenant on Civil and Political Rights. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

- why these changes are made on an ongoing basis (noting that it has been stated to be in response to the COVID-19 pandemic).

Committee's initial views

1.312 The committee noted that the measure may engage and limit the right to equality and non-discrimination. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate. The committee sought the advice of the Treasurer as to the compatibility of this measure with the right to equality and non-discrimination. In seeking this further information, the committee was mindful that the Treasurer was required to act with great urgency and immediacy to safeguard the national interest by protecting assets more vulnerable to foreign acquisition by reason of the Coronavirus pandemic and that these assets may include residential property. The committee noted the legal advice with respect to these changes being made on an ongoing basis and noted that the government intended these measures to be temporary.

Treasurer's further response[8]

1.313 The Treasurer further advised:

> 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[9] 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

8 The Treasurer's further response to the committee's inquiries was received on 26 June 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

9 Annexure A can be accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports (under *Human rights scrutiny report 9 of 2020*, 'Responses from legislation proponents').

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.[10]

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 [to] 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.

10 Annexure B can be accessed at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports, (under *Human rights scrutiny report 9 of 2020*, 'Responses from legislation proponents').

> 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.

Concluding comments

International human rights legal advice

1.314 The Treasurer has clarified that the changes made by these regulations do not apply to the acquisition of residential land or vacant commercial land, but only to acquisitions of agricultural land, developed commercial land and developed commercial land considered to be sensitive, as well as interests in businesses and entities. The Treasurer had initially advised that given the nature of the activity regulated by the *Foreign Acquisitions and Takeovers Act 1975*, the extent of any incompatibility with the right to equality and non-discrimination is likely to be small, and is outweighed by the national interest and the objective of protecting vulnerable Australian businesses subjected to the pressure on the Australian economy due to the COVID-19 pandemic. The objective of protecting vulnerable Australian businesses from the intense pressure placed on them during the COVID-19 pandemic would appear to be capable of constituting a legitimate objective for the purposes of international human rights law, and noting the context in which these regulations apply, the measure appears to be rationally connected to this objective (that is, effective to achieve the objective).

1.315 The Treasurer has also advised that the regulations did not change the application fee payable by foreign persons seeking to purchase property, but that a partial fee waiver is in place for foreign investors who are foreign non-government investors purchasing developed commercial land. The Treasurer noted that the changes made by the regulations apply prospectively, and preserve the operation of agreements that were in place at the time of the announcement. The Treasurer has advised that these measures were made on an ongoing basis given the continuing uncertainty around the coronavirus and its ongoing impact on the economy and foreign investment. The Treasurer also advised that significant reforms to Australia's foreign investment review framework are scheduled to commence on 1 January 2021, and certain aspects of the temporary measures will be replaced by these reform measures and other aspects will return to pre-coronavirus settings.

1.316 Noting that the changes made by these regulations only apply to the acquisition of agricultural land, certain commercial land and interests in businesses and entities, that there are fee-waivers in place, and the reasons given as to why the measures are not time-limited (and noting the intention to soon replace these measures), any limitation on the right to equality and non-discrimination would appear to permissible as a matter of international human rights law.

Committee view

1.317 The committee thanks the Treasurer for this further response. The committee notes that the regulations amend the monetary threshold above which certain investments in Australia by foreign persons may require notification to the Treasurer for approval to nil. The committee considers this measure is designed to achieve the legitimate objective of safeguarding the national interest by protecting vulnerable businesses as COVID-19 puts intense pressure on the Australian economy and Australian businesses.

1.318 Noting that the changes only apply to the acquisitions of agricultural land, certain commercial land and interests in businesses and entities, that there are fee-waivers in place, and the reasons given as to why the measures are not time-limited (and noting the intention to soon replace these measures), the committee considers any limitation on the right to equality and non-discrimination would appear to permissible as a matter of international human rights law.

1.319 The committee has concluded its examination of the regulations.

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

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

1.320 The committee requested a response from the minister in relation to the bill in *Report 7 of 2020*.[2]

Prohibiting items in immigration detention

1.321 This bill seeks to amend the *Migration Act 1958* (the Migration Act) to regulate the possession of certain items in relation to immigration detention facilities and detainees (whether or not they are in an immigration detention facility). Proposed section 251A(2) would enable the minister to determine, by legislative instrument,[3] that an item is a 'prohibited thing'[4] if the minister is satisfied that:

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, *Report 9 of 2020*; [2020] AUPJCHR 120.

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020), pp. 69-86.

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

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

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

1.322 The bill includes examples of things that might be considered to pose a risk for the purposes of section 251(2)(b): mobile phones, SIM cards, computers and other electronic devices designed to be capable of being connected to the internet. The bill also provides that the power to make a thing a 'prohibited thing' (which officers are then generally authorised to search for and seize) applies to immigration detention facilities as well as other places approved by the minister as an alternative place of detention.[5]

Summary of initial assessment

Preliminary international human rights legal advice

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

1.323 Prohibiting the possession of certain things by detainees in immigration detention facilities and other places of detention, engages a number of human rights. The measure is designed to 'ensure that the Department can provide a safe and secure environment for staff, detainees and visitors in an immigration detention facility'.[6] As such, if the measure is able to achieve this objective it could promote the right to security of the person. The right to security of the person[7] requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation.

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

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

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

6 Explanatory memorandum, p. 2.

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

1.325 The bill states that the items that will be declared as 'prohibited things' will be set out in a legislative instrument. However, both the bill itself and the explanatory memorandum give examples of things that might be 'prohibited things', as being mobile phones, SIM cards and computers or other devices capable of being connected to the internet.[8] The explanatory memorandum also states that 'things' to be determined may include prescription and non-prescription medications as well as health care supplements, where the person in possession is not the person to whom they are prescribed.[9] Therefore, while the precise items to be prohibited remain to be determined by legislative instrument, by setting up the mechanism in which the minister may declare certain items to be prohibited, the bill engages and limits the right to privacy. In particular, prohibiting the possession of mobile phones may interfere with detainees' private life and their right to correspond with others without interference. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[10] A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.326 Additionally, for persons in detention, the degree of restriction on a person's right to privacy must be consistent with the standard of humane treatment of detained persons.[11] Article 10 of the International Covenant on Civil and Political Rights provides extra protection for persons in detention, who are particularly vulnerable as they have been deprived of their liberty, and imposes a positive duty on states to provide detainees with a minimum of services to satisfy basic needs, including means of communication and privacy.[12] Persons in detention have the right to correspond under necessary supervision with families and reputable friends on a regular basis.[13]

1.327 Further, as the bill and explanatory materials make it clear that the power to determine prohibited things will include mobile phones, SIM cards and computers and other devices capable of accessing the internet, it would appear the measure is likely to have an impact on the ability of detainees to be in regular contact with any family that is not detained with them. This may limit the right to respect for the

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

9 Explanatory memorandum, p. 8.

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

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

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

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

family, which requires the state not to arbitrarily or unlawfully interfere in family life.[14] It would also appear to limit the right to freedom of expression insofar as it would limit the ability of detainees to seek, receive and impart information. The right to freedom of expression includes the freedom to seek, receive, and impart information and ideas of all kinds, either orally, in writing or in print or through any other media of a person's choice.[15]

1.328 The initial analysis stated that in order to assess the compatibility of this measure with the rights to privacy, protection of the family, and freedom of expression, further information was 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

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

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

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.

1.329 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

1.330 The committee noted 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 considered it would likely promote the right to security of the person. However, the committee noted 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.

1.331 In order to assess the human rights compatibility of this measure, the committee sought the minister's advice as to the matters set out at paragraph [1.328].

Minister's response[16]

1.332 The minister advised:

> 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.

16 The minister's response to the committee's inquiries was received on 15 July 2020. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

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; and
- 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; and
- 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 s.198 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.

Concluding comments

International human rights legal advice

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

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

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

Prohibited thing would apply to all detainees, regardless of risk

1.334 The minister has stated that the bill does not itself prohibit the possession of prohibited things for all detainees, rather it allows for a category of goods to be prohibited things. The minister advises that while the measures on their face provide officers with the discretion to search for prohibited things on persons regardless of the risk posed by an individual detainee, 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'. As such, the minister advises that a departmental operational policy framework will provide guidance on how officers should exercise their powers under the legislation, and officers will also be required to act in accordance with the APS Code of Conduct. The minister also notes that while under the bill the minister would have the power to direct officers to seize certain prohibited items from all detainees, which would override the exercise of the discretion by authorised officers, 'it is expected' that this power would only be exercised in relation to 'the most serious circumstances'.

1.335 While to some extent it is relevant to the proportionality of the measure that there is currently no intention that officers will seize mobile phones from *all* detainees, it is clear that the legislation itself would allow this to occur. Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.[17] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

1.336 In relation to immigration detention, supervision of detainees' modes of communication must be understood in the context that detainees are not being detained while serving a term of imprisonment but rather are in administrative detention pending the processing of their application for a visa or their removal from Australia. As the bill is currently drafted, it would empower an authorised officer to search and seize any prohibited thing from *any* detainee regardless of whether or not they pose a risk. This would include, for example, persons detained while

17 See, for example, Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

awaiting determination of their refugee status, or those who have overstayed their visa and are detained prior to removal, who may not pose any risk of the kind described in the statement of compatibility. The minister has advised that it is intended that the departmental operational policy framework will be made publicly available, but there is no legislative requirement that it will be, nor does it appear that it would be subject to any form of parliamentary oversight. International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[18] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. It is not apparent that the bill, as currently drafted, would sufficiently clarify the scope of an authorised officer's discretion in the manner the minister has advised is intended.

1.337 In addition, laws that interfere with rights must specify in detail the precise circumstances in which such interferences may be permitted.[19] Proposed section 251A(2) enables the minister to make a legislative instrument that can determine that any 'thing' is prohibited in an immigration detention facility or for a detainee. The power can be exercised where the minister is satisfied that possession of the thing is prohibited by law or possession or use of the thing in the detention facility 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.[20] The bill provides that if a medication or health care supplement is determined to be prohibited, it will not be prohibited in relation to a particular person if it was prescribed or supplied for their individual use.[21] There is otherwise no limit on the type of 'things' that the minister may prescribe as being prohibited; the bill does not directly prohibit any thing, and the actual things that are to be prohibited are left to be determined by delegated legislation. The minister has advised that '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), and things that are unlawful to possess, such as child abuse material. The minister has advised that a decision to seek to make an item a prohibited thing will be informed by an intelligence and risk-based briefing, which may include information about threats, risk assessments, recommendations from external scrutiny agencies and internal review findings. However, it is noted that none of this is prescribed in the legislation itself as being required before a 'thing' is listed as a prohibited thing. The minister's response did not address the question of what 'things' could be said to pose a risk to the 'order' of

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

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

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

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

the facility, and what evidence the minister would need to have to satisfy themselves that a thing would reasonably result in any such risk.

Access to communication

1.338 If a determination is made prohibiting access to mobile phones and other electronic devices that connect to the internet, this could restrict detainees' ability to maintain contact with their family and friends, and to exercise their freedom of expression. The minister has advised that for those who will not have access to mobile phones, they will have 24 hour access to landline phones and the internet[22] and to fax and postal services. However, although telephone and internet use is made available to detainees, this may not provide a similar degree of privacy to the use of a personal mobile phone or device connected to the internet, which could be used in a private location. The minister has advised that a private interview room to use the telephone may not always be available and will be available on a first come first served basis for all centres, which suggests there could be delays in accessing landline phones. In addition, while private rooms for computer, phone and internet use can also be accessed, it is 'under appropriate supervision' with an officer monitoring rooms where internet is available and filters will be used to block specific categories of websites.

1.339 In addition, while the minister has advised that family, friends, legal representatives and advocates can contact detainees directly, and detainees are to be notified of any call, information as to the detainees whereabouts will not be given to the caller, and in some facilities those calls will go via a staffed control room after 8pm and if the call is not an emergency, a message is provided to the detainee the following morning rather than allowing the detainee to speak at that time. Further, while domestic landline to domestic landline calls, and internet access, is free, calls to mobile phones and international calls will be charged to the detainee. If the detainee does not have the funds available to make such a call they would need to earn points to 'purchase' phone cards through the Individual Allowance Program, with a cap of $60 available per week.

1.340 Concerns remain therefore in relation to the extent to which detainees may have access to communication with family overseas as a result of the implementation of this measure. In particular, mobile telephones may allow detainees to receive calls and messages free of charge, including from those overseas and those on mobile devices. In contrast, requiring detainees to purchase phone cards for international and mobile calls (where such calls are charged at standard rates) may involve considerably more expense for detainees. There may also be other practical difficulties which may limit or preclude contact with family members overseas, for example if the detainee has not earned sufficient points through the

22 Except, in relation to the internet, for one centre due to the infrastructure limitations where it is available from 6am – 12midnight.

Individual Allowance Program to purchase a phone card, or if the best time for family or friends overseas to contact the detainee is after 8pm and the detainee is in one of those facilities where only emergency calls will be connected after that time.

1.341 Whether the other alternative communication channels are sufficiently extensive and offer sufficient privacy to allow detainees to communicate with their families will depend on the extent of access available in a specific immigration detention centre. For example, where private rooms with phones are accessible to detainees, and that access is readily available (for example, there are a sufficient number of private rooms available so that detainees can access the rooms at short notice and with little wait time), that would assist with the proportionality of the measure in relation to the right to privacy and the right not to be subjected to arbitrary interference with family. However, if such facilities were limited or not readily available or accessible, it is unlikely that the availability of landline phones in private booths and in accommodation areas would overcome the significant impact on detainees' ability to privately communicate with their families, as such facilities do not offer the same level of privacy as the use of a mobile telephone which could be used at any time of day and in a private setting (such as in a detainee's room).

Opportunities to access representation and exercise freedom of expression

1.342 As noted in the initial analysis, mobile telephones have a range of functions that are not available on a landline phone, such as taking photos and videos that may also be used to exercise a detainee's right to freedom of expression (including in relation to documenting conditions of detention). As noted above, whether the alternative communication facilities are sufficiently extensive will depend on the extent of access available in a specific immigration detention centre. However, it is noted that the alternative communication facilities do not appear to provide an equivalent opportunity for individuals to be able to communicate (for example through writing, taking videos and photographs) on matters such as conditions of detention as that provided by mobile phones, computers and other electronic devices such as tablets. The minister's response did not address the questions of whether detainees will have other means to take photographs or videos within the detention facility and send such images to those outside the facility. Therefore, notwithstanding the alternative facilities available, serious concerns remain that the implementation of the measure may not be the least rights-restrictive way to achieve the stated objective of the measure.

1.343 In addition, as set out in the initial analysis, there are questions as to whether access to landline phones or the internet may be available at all times prior to a person's removal from Australia. Not having such access could potentially prevent a detainee from obtaining urgent injunctive relief in relation to their removal from Australia. The minister has advised that 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', which will depend on individual circumstances, including 'what is happening operationally' and whether facilities to access legal

assistance are readily available 'having regard to the particular operational environment'. Concerns therefore remain as to the proportionality of prohibiting things such as mobile phones in circumstances where a person may not have an equivalent and effective means of accessing legal advice and exercising their right to freedom of expression.

1.344 In conclusion, protecting the health, safety and security of people in immigration detention is likely to be a legitimate objective for the purposes of international human rights law, and prohibiting certain items that may enable criminal activity within the immigration detention network also appears to be rationally connected to that objective. However, it does not appear that giving the minister the power to prohibit any 'thing' that the minister is satisfied might be a risk to the health, safety or security of persons in the facility, or 'to the order of the facility', is proportionate to the objective sought to be achieved. In particular, there is no limit in the proposed legislation that would ensure that only detainees who pose a risk of such sort would be subject to the search and seizure powers. While it may be the intention not to apply these powers to low-risk detainees, there is no such safeguard in the legislation and no transparency as to what such operational policy guidance would look like. As such, the legislation itself would allow things such as mobile phones to be seized from detainees without any requirement that they pose any risk to the health, safety or security of persons in the facility or to the order of the facility. In addition, it does not appear that the alternative means of communication available to detainees who would no longer be able to access mobile phones and internet capable devices would sufficiently protect their right not to have their private and family life arbitrarily or unlawfully interfered with, and their right to freedom of expression. As such, the broad scope of the proposed power to declare items as 'prohibited things' (including mobile phones) means there is a significant risk that the powers could be exercised in a manner which is not compatible with the rights to privacy and freedom of expression and the right of detainees not to be subjected to arbitrary or unlawful interference with family.

Committee view

1.345 The committee thanks the minister for this response. The committee notes that this 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.

1.346 The committee considers 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 reiterates its consideration that this measure would likely promote the right to security of the person. However, the measure also appears to limit the rights to privacy, protection of the family and freedom of expression. The committee notes that these rights may be subject to

permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.347 The committee considers protecting the health, safety and security of people in immigration detention is a legitimate objective for the purposes of international human rights law, and prohibiting certain items that may enable criminal activity within the immigration detention network is rationally connected to that objective.

1.348 The committee notes that in order for a measure to be proportionate to the stated objective a measure must be sufficiently circumscribed and not be overly broad. The committee welcomes the minister's assurance that it is not the intention to impose a blanket ban on mobile phones in detention, and that officers would need to comply with departmental operational policy when exercising their discretion to search and seize for mobile phones. These may operate as important safeguards in practice.

1.349 The committee notes that the bill, as currently drafted, does not limit the powers in this way but gives a broad discretion for the minister to prohibit any 'thing' and for officers to search and seize any such thing from any detainee. However, the committee considers this measure is proportionate to the legitimate objectives of the bill, particularly in light of the changing face of the detainee population such that a much higher proportion of convicted criminals are currently in Australian detention centres awaiting deportation by reason of their convictions.

1.350 As submitted in the recent Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the bill,[23] mobile phones, SIM cards and internet-capable devices have been used to coordinate and facilitate escape efforts; to facilitate the movement of drugs and other contraband; to access child exploitation material; and to organise criminal activity. They have also been used by detainees to intimidate and threaten staff. There is evidence of illegal substance use and trafficking in immigration detention facilities to a degree that presents a serious health and safety risk to detainees, whether or not they are actively involved, as well as to officers and contracted service provider staff who may encounter unknown substances or have to deal with substance-affected detainees.

1.351 In reference to Border Force officers currently having limited powers to search detainees, the committee notes the submission of the Department of Home Affairs to the Senate inquiry into the bill which states in part: 'A convicted child sex offender who is looking at child abuse material on his phone in plain sight cannot

23 Department of Home Affairs, *Submission 69,* p.7, to the Senate Standing Committee on Legal and Constitutional Affairs, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 [Provisions].

have his phone removed'.[24] The committee considers that measures in the bill which remedy this current position are vital to the safety and lawful operation of detention centres.

1.352 The committee appreciates that significant infrastructure has been provided across the detention network to ensure that people have adequate access to various means of communication. The minister advises that landline phone, internet and facsimile services are available, including in private settings, for people to contact (and be contacted by) family members, legal representatives and migration agents, amongst others.

1.353 The committee notes the minister's response and the legal advice, and considers the proportionality of this measure would be assisted if the bill was supported by administrative arrangements which ensured that detainees have access to communication facilities that will reasonably meet their needs, and enable timely and, where appropriate, private contact with friends, family and legal services.

1.354 The committee also considers it would be appropriate if the statement of compatibility were amended to include the relevant information provided by the minister.

Search and seizure powers

1.355 The bill seeks to strengthen the search and seizure powers in the Migration Act to allow for searches, without a warrant, for a 'prohibited thing', as well as to continue to search for a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape.[25] This includes the ability to search a person, the person's clothing and any property under the immediate control of the person for a weapon or escape aid or 'prohibited thing' (even if the officer has no suspicion the detainee has such an item),[26] the ability to take and retain possession of such items if found pursuant to a search,[27] and the ability to conduct strip searches to search for such items.[28] There is also an amendment to the powers to search and screen persons entering the immigration detention facility (such as visitors), including a power to request persons visiting centres to remove outer clothing (such as a coat) if

24 Department of Home Affairs, *Submission 69,* p. 6, to the Senate Standing Committee on Legal and Constitutional Affairs, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 [Provisions].

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

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

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

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

an officer suspects a person has a weapon or escape aid or a prohibited thing in his or her possession, and to leave the prohibited thing in a place specified by the officer while visiting the immigration detention facility.[29] The bill also proposes to allow for 'other persons' to assist authorised officers in carrying out their search of an immigration detention facility.[30] Such a person would have most of the same powers as an authorised officer (including the power to strip search detainees), subject to any directions given by the authorised officer.[31]

1.356 The bill would also give the minister the power to make a legislative instrument which could direct authorised officers to seize prohibited items from certain classes of persons; to seize specified things; seize things in relation to specified immigration detention facilities (or all facilities); and could specify any circumstances that would apply to the direction.[32] This legislative instrument would not be subject to disallowance by the Parliament.[33]

1.357 A further search power introduced by the bill is the power for an authorised officer, without a warrant, to conduct a search of an immigration detention facility including accommodation areas, common areas, detainees' personal effects, detainees' rooms, and storage areas.[34] In conducting such a search, an authorised officer 'must not use force against a person or property, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search'.[35]

Summary of initial assessment

Preliminary international human rights legal advice

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

1.358 By providing authorised officers, and their assistants, with the power to conduct strip searches to find out whether there is a 'prohibited thing' or weapon or escape device hidden on a detainee,[36] or to use force to search them,[37] the bill may

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

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

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

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

33 Noting that the Legislation (Exemptions and Other Matters) Regulation 2015, section 10, item 20, provides that any instrument (other than regulations) made under Part 1, 2 or 9 of the *Migration Act 1958* are not subject to disallowance. This bill seeks to make amendments to Part 2 of the *Migration Act 1958*.

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

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

36 Schedule 1, items 11-14.

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

engage the prohibition against torture, cruel, inhuman and degrading treatment or punishment. Article 7 of the International Covenant on Civil and Political Rights provides that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[38] This is an absolute right, and no limitation on this right is permissible under international human rights law. The aim of article 7 is to protect both the dignity and the physical and mental integrity of the individual.[39]

1.359 The amended search and seizure powers may also engage the right to humane treatment of persons in detention,[40] which provides that all people deprived of their liberty must be treated with humanity and dignity. It applies to everyone in any form of state detention, including immigration detention, and to privately run detention centres where they are administered under the law and authority of the state. The right provides extra protection for persons in detention, who are particularly vulnerable as they have been deprived of their liberty. This right complements the prohibition on torture, cruel, inhuman and degrading treatment or punishment,[41] such that there is a positive obligation on Australia to take actions to prevent the inhumane treatment of detained persons.[42]

1.360 The UN Human Rights Committee has indicated that United Nations standards applicable to the treatment of persons deprived of their liberty are relevant to the interpretation of articles 7 and 10 of the International Covenant on Civil and Political Rights.[43] In this respect, the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) state that intrusive searches (including strip searches) should be undertaken only if absolutely necessary, that prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches, and that intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner.[44] Further, the European Court of Human Rights (ECHR) has found that strip searching of detainees may violate the prohibition on torture and cruel, inhuman or degrading treatment or punishment where it involves an element of suffering or humiliation going beyond

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

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

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

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

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

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

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

what is inevitable for persons in detention.[45] While the court accepted that strip-searches may be necessary on occasion to ensure prison security or to prevent disorder or crime, the court emphasised that prisoners must be detained in conditions which are compatible with respect for their human dignity.[46] While the jurisprudence of the ECHR is not binding on Australia, the views of the court in relation to the prohibition on torture, cruel, inhuman or degrading treatment or punishment may be instructive in determining the scope of Australia's human rights obligations.

1.361 The initial analysis stated that 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 was required; in particular:

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

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

1.362 The statement of compatibility states that enabling the search and seizure of items that are prohibited in immigration detention facilities will improve the health and safety of detainees and others in the facility.[47] As such, if the measure is able to achieve this objective it could promote the right to security of the person. The right to security of the person[48] requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation.

1.363 However, the screening of detainees,[49] conducting strip searches of detainees,[50] and searches of immigration detention facilities[51] also engage and limit

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

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

47 Statement of compatibility, p. 38.

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

49 Schedule 1, item 8.

the right to privacy. For persons in detention, the degree of restriction on a person's right to privacy must be consistent with the standard of humane treatment of detained persons.[52]

1.364 The right to privacy extends to protecting a person's bodily integrity. Bodily searches, and in particular strip searches, are an invasive procedure and may violate a person's legitimate expectation of privacy. The amendments to allow searches of persons, including strip searches, to seize prohibited items therefore engage and limit the right to bodily integrity. The UN Human Rights Committee has emphasised that personal and body searches must be accompanied by effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched, and further that persons subject to body searches should only be examined by persons of the same sex.[53]

1.365 While the Migration Act prohibits strip searches of children under the age of 10,[54] children detained in immigration facilities between the ages of 10 and 18 may be subject to the search and seizure powers, including strip searches, under specified conditions.[55] In this respect, a number of Australia's obligations under the Convention on the Rights of the Child (CRC) are engaged. In particular, the amended search and seizure powers may engage article 16 of the CRC, which provides that no child shall be subject to arbitrary or unlawful interference with his or her privacy. The bill may also engage article 37 of the CRC which provides (relevantly) that children must not be subjected to torture or other cruel, inhuman or degrading treatment or punishment,[56] and that every child deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.[57]

1.366 The initial analysis stated that 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 was required, in particular:

50 Schedule 1, items 11-14.

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

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

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

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

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

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

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

- 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.

1.367 The full initial analysis is set out in *Report 7 of 2020*.

Committee's initial view

1.368 The committee noted 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 considered it would likely promote the right to security of the person.

1.369 However, the committee noted 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.

1.370 In order to assess the human rights compatibility of this measure, the committee sought the minister's advice as to the matters set out at paragraphs [1.361] and [1.366].

Minister's response

1.371 The minister advised:

> 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; and
- 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; and
- 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; and
- 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; or
    - 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 ground 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; and
- 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.

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.

Concluding comments

International human rights legal advice

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

1.372 As noted in the initial analysis, the safeguards contained in section 252A of the Migration Act indicate that there is some oversight over the conduct of strip searches. However, the current power to conduct strip searches is limited to circumstances where there are reasonable grounds to suspect a detainee may have hidden in his or her clothing a weapon or other thing capable of being used to inflict bodily injury or to help the detainee escape from detention.[58] The amendments will extend this power to where an officer suspects on reasonable grounds that a person may have hidden on the person a 'prohibited thing', including a mobile telephone.[59] Given the broad power of the minister to declare an item a 'prohibited thing' (as discussed above), this considerably expands the bases on which strip searches can be conducted, which raises questions as to whether the expanded powers are consistent with the requirement under international human rights law that strip searches only be conducted when absolutely necessary. In relation to this, the minister has advised that reasonable suspicion that a detainee has a prohibited thing and that a strip search is necessary to recover the thing is required for a strip search to be conducted. The minister has also advised that it is part of 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.[60] These policies could operate in practice to help ensure strip searches are conducted only where absolutely necessary. However, as noted earlier, where a measure limits a human right, discretionary or administrative

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

59 Schedule 1, item 14.

60 Although the minister's response referred to these procedures in the context of the strip search of children and it is not clear if these procedures apply to all detainees or only children.

safeguards alone may not be sufficient for the purpose of establishing a permissible limitation under international human rights law. This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time. It is not clear why such protections are not contained in the legislation itself. In fact, as a matter of law, proposed subsection 251B(5) provides that strip searches may be conducted irrespective of whether a search or screening procedure is conducted under sections 252 and 252AA[61] (which are less intrusive).

1.373 In relation to 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, the minister has advised that persons in immigration detention have the right to lodge complaints while they are in detention, to the department or its contractors or to the Australian Human Rights Commission, the Commonwealth Ombudsman or the Australian Red Cross. These internal and external mechanisms offer a degree of oversight and access to review for persons subject to the new search and seizure powers or use of force provisions in the bill. It is noted, however, that these mechanisms may not be sufficient for the purpose of ensuring compliance with the prohibition on degrading treatment, particularly where the oversight mechanisms are internal and discretionary or administrative, and taken in the context of the broadened power to conduct strip searches or use force in the proposed law. The UN Human Rights Committee has held that complaints against maltreatment must be investigated promptly and impartially by competent authorities,[62] that compensation must be available to victims of such treatment, and any perpetrators of such treatment be appropriately punished.[63] It is unclear that the policies meet these standards. This raises a further concern that there may not be adequate protection of the right to an effective remedy for violations of human rights.

1.374 In relation to what training and qualifications authorised officers require in order to exercise these powers, the minister has advised that only persons who have satisfied certain training and qualification requirements will be appointed as an authorised officer and those conducting strip searches will need to have undergone specific training. Depending on the adequacy of this training, this may assist in ensuring the persons using these powers possess sufficient knowledge and understanding to ensure strip searches and force are used only where it is absolutely necessary. However, it is noted that there is nothing in the legislation to require that authorised officers only be appointed where they possess the necessary skills, knowledge or experience. In addition, authorised officers may have 'assistants' who

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

62 *Kalamiotis v Cyprus,* UNHRC No. 1486/06 [7.3].

63 See *Guridi v Spain,* CAT 212/02 [6.6]-[6.8].

also have the power to enter and to exercise most of the same functions and duties as are conferred on the authorised officer, including the power to conduct strip searches. The minister has advised that the bill restricts the use of officers' assistants to situations where such assistance is reasonably necessary to ensure the authorised officer can carry out their powers, functions or duties. The minister has given examples of where the use of an assistant may be necessary and reasonable, including where there is a need to search the whole facility and numerous officers are necessary in order for the search to be conducted. In such circumstances it does not appear that such persons would require any particular training to conduct such a search. While it may be that it would not be reasonable or necessary to allow an assistant to strip search a person or use force against a person, this is not excluded by the legislation. Given the personal impact on a person subject to a strip search or force, it is concerning there is the possibility under the bill as drafted that an assistant, with no training in the exercise of strip searches or the use of force, could be empowered to conduct such a search or use such powers.

1.375 In the absence of legislative protections within the Migration Act for effective oversight of the search and seizure powers and the use of force (including compensation for any mistreatment), there is some risk that in practice the exercise of the proposed powers may not comply with the prohibition on degrading treatment or may constitute inhumane treatment of persons in detention.

Rights to privacy and bodily integrity, and children's rights

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

1.377 As set out above at paragraphs [1.334] to [1.336], it does not appear to be proportionate to allow for the prohibition of items in immigration detention, and thus the power to search for and seize such items, for *all* detainees (whether in the facility or not), regardless of the level of risk they may pose. The level of risk posed by persons detained due to the exercise of the minister's character-ground visa cancellation powers is likely to be very different to that posed by people seeking to be recognised as refugees or a tourist having overstayed their visa.

1.378 Also as set out above at paragraph [1.372], in relation to the power to strip search to locate and seize a 'prohibited thing', there is no legislative requirement that requires alternative and less-intrusive methods of searching for prohibited items prior to conducting a strip search. While the minister has advised this matter is set out in policy, it is not set out in the legislation itself which raises concerns as to whether this aspect of the bill is the least rights restrictive option available.

1.379 It is also noted that the bill would enable authorised officers and their assistants to conduct searches (except strip searches) without the need for any suspicion that a detainee has in their possession any such item.[64] This could enable searches to occur at any time, regardless of any assessment of whether a detainee has such a thing on their body, in their clothing or in their property. While the ability to search for 'prohibited things' does not apply to detainees who are living in residential detention,[65] the search and seizure powers would allow an authorised officer to search such residences, without any need for suspicion, to try to find evidence of any 'document or other thing' that may be evidence for grounds for cancelling the person's visa.[66] In response to this, the minister advised that the exercise of these powers by officers will be guided by the Department's operational policy framework, which sets out how and when those powers should be used. The minister also noted that while 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, it is 'expected' that this power will only be exercised in relation to the most serious circumstances. However, as noted earlier, operational policies, may not be sufficient for the purpose of establishing a permissible limitation under international human rights law, as they are less stringent than the protection of statutory processes and can be amended or removed at any time. It is also not clear what limitations on officers' powers are contained in such operational policy. It therefore remains unclear why it is necessary and appropriate that such warrantless powers should apply, including to those living in residential detention, without any need for the officer to have formed a reasonable suspicion that the persons possess such items, or that the minister can make such a direction in relation to all prohibited things.

1.380 In relation to searches of children, and the compatibility of the measure with the rights of the child, the minister has advised that there are a number of safeguards included in the Migration Act (such as the requirement that the strip search of a child may only occur by power of a magistrate) and in departmental policies that are designed to protect the rights of children in detention who may be subject to the proposed search and seizure powers and proposed use of force powers. In particular, the minister advises that the department has developed 'The Child Safeguarding Framework' which sets out how it will build and strengthen its policies, processes and systems to provide a safe environment for children and their families within the existing legislative and policy parameters, including in detention environments. However, it is again noted that a number of the safeguards, in particular the requirement that the best interests of the child be a key consideration

64 Schedule 1, item 19, proposed subsection 252BA(3).

in decision-making processes and the requirement that strip searches be undertaken as a measure of last resort, are contained in a departmental framework rather than in legislation. As noted earlier, departmental policies and procedures are less stringent than legislation insofar as such policies can be removed, revoked or amended at any time, and are not subject to the same levels of scrutiny as if the safeguards were enshrined in legislation.

1.381 In conclusion, while the Migration Act contains a number of safeguards, concerns remain that a number of the circumstances that limit the exercise of power (such as the requirement that strip searches be a measure of last resort), are only addressed as matters of departmental policy rather than as a safeguard in the legislation. In addition, the bill would allow for searches for prohibited things without the need for the authorised officer to have formed a reasonable suspicion that the persons in question possess such items. It would also empower the minister to direct officers to seize any prohibited thing from all detainees, and while it is stated that it is intended this will only relate to serious matters such as child abuse material, there is no such limitation on the power itself. In the absence of such legislative protections within the Migration Act for effective oversight of the search and seizure powers and the use of force, the measure risks being an arbitrary interference with the right to privacy (including the right to bodily integrity) and with the rights of the child.

Committee view

1.382 The committee thanks the minister for this response. 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).

1.383 As noted above, 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.

1.384 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 also 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.

1.385 The committee notes that the *Migration Act 1958* includes a number of important safeguards such as that the strip search of a child must be authorised by a magistrate and that reasonable suspicion is required to conduct any strip search. The committee considers, however, that the power to conduct an ordinary search

for a prohibited thing without the need for an authorised officer to have formed a reasonable suspicion is proportionate to the legitimate objective of the bill. The committee appreciates the minister's advice that, in practice, authorised officers must undertake specific training before they are able to exercise strip search and use of force powers and welcomes the minister's advice that the exercise of these powers by officers will be guided by the Department's operational policy framework. These may operate as important safeguards in practice. However, the committee notes that the bill, as currently drafted does not require such training, or require that strip searches be used as a last resort or require officers to have formed any suspicion before undertaking general searches.

1.386 As such, the committee considers that given the limited legislative protection within the *Migration Act 1958* for effective oversight of the search and seizure powers, there is some risk that in practice the exercise of the proposed powers may not comply with the prohibition on degrading treatment or the right to humane treatment of persons in detention. In the absence of legislative limits within the *Migration Act 1958*, the committee considers the measure risks arbitrarily interfering with the right to privacy (including the right to bodily integrity) and with the rights of the child. The committee notes the minister's response and the legal advice, and considers the compatibility of this measure may be assisted if the bill were amended to:

- **require that strip searches are only used as a measure of last resort and are used only when other less intrusive measures have proven inconclusive or insufficient;**
- **require authorised officers to be trained in the use of force and how to conduct strip searches; and**
- **include the additional safeguards governing the use of force and search and seizure powers in relation to children that are currently included in departmental policy and the Child Safeguarding Framework.**

1.387 The committee also considers it would be appropriate if the statement of compatibility were amended to include the relevant information provided by the minister.

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

National Museum of Australia Regulations 2019 [F2019L01273][1]

Purpose	This instrument repeals and remakes the National Museum of Australia Regulations 2000 with some changes to provide for the Director of the Museum to appoint authorised officers, to give powers to authorised officers, and to provide for persons or groups of persons who are prohibited from entering Museum premises to apply to the Administrative Appeals Tribunal for review of that decision
Portfolio	Communications, Cyber Safety and the Arts
Authorising legislation	National Museum of Australia Act 1980
Rights	Freedom of expression; freedom of assembly; privacy
Status	Concluded examination

1.389 The committee requested a response from the minister in relation to the regulations in *Report 1 of 2020*.[2]

Removal from Museum

1.390 Section 14 of the National Museum of Australia Regulations 2019 (the regulations) empowers an authorised officer[3] to direct a person to leave the National Museum of Australia (the Museum) for a range of reasons, including where they reasonably believe the person is 'likely to cause offence' to staff or members of the public. Section 15 allows an authorised officer to apprehend a person where they refuse to comply with a direction made under section 14 and to use such force as is reasonably necessary to either remove the person from Museum premises or to hold them until they can be taken into the custody of police.[4]

1.391 Section 13 of the regulations further empowers an authorised officer to prohibit entry to a person or group of persons under certain circumstances, including where the officer has reasonable grounds for believing that:

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Museum of Australia Regulations 2019 [F2019L01273], *Report 9 of 2020*; [2020] AUPJCHR 121.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2020* (5 February 2020), pp. 38-43.

3 An 'authorised officer' is a person appointed by the Director under section 12 of the regulations.

4 Subsections 15(2) and 15(3).

- the person has, under sections 14 or 15, been directed to leave, or removed from, Museum premises on one or more occasions; or
- the conduct of the person or group on or in Museum premises will cause, or is likely to cause, offence to staff or members of the public.

Summary of initial assessment

Preliminary international human rights legal advice

Right to freedom of expression and assembly

1.392 By empowering an authorised officer to direct a person to leave the Museum, or to prohibit their entry, where the officer reasonably believes the person is 'likely to cause offence' to staff or members of the public, the regulations engage and limit the rights to freedom of expression and freedom of assembly. These rights are further engaged by the fact that the authorised officer is empowered to apprehend a person who refuses to comply with such a direction, and to either remove that person from Museum premises or hold them until they can be taken into the custody of police.

1.393 The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[5] This right embraces expression that may be regarded as deeply offensive, subject to the provisions of article 19(3) and article 20 of the International Covenant on Civil and Political Rights (ICCPR).[6] The right to freedom of assembly protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.[7]

1.394 The initial analysis considered that more information was required in order to assess the compatibility of this measure with the rights to freedom of expression and assembly, and in particular:

- what is the objective underlying the power granted to authorised officers under sections 13 to 15 of the regulations;[8]

5 International Covenant on Civil and Political Rights (ICCPR), article 19.

6 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11]. Article 20 of the ICCPR provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

7 ICCPR, article 21.

8 Noting that under articles 19(3), 20 and 21(3) of the International Covenant on Civil and Political Rights any limitation on the rights to freedom of expression and assembly must be demonstrated to be necessary to 'protect the rights or reputations of others, national security, public order, or public health or morals' or to prohibit '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

- whether there are less rights restrictive means of achieving this objective, noting the likely impact on the rights to freedom of expression and assembly; and
- whether there are any safeguards to protect the rights to freedom of expression and assembly in relation to the exercise of these powers.

1.395 The full initial analysis is set out in *Report 1 of 2020.*

Committee's initial view

1.396 The committee noted the legal advice that this measure engages and limits the rights to freedom of expression and freedom of assembly. The committee sought the minister's advice as to the compatibility of this measure with the rights to freedom of expression and assembly, and in particular the matters set out at paragraph [1.394].

Minister's response[9]

1.397 The minister advised:

> 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 – s.13 (prohibiting entry) and s.14 (directions to leave), and the Australian National Maritime Museum Regulations 2018 – s.14 (prohibiting entry), s.15 (directions to leave) and s.16 (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 s.14 or s.15;
> - section 14 (directions to leave) - provides that in certain circumstances, an authorised officer may direct a person or a group

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

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 (s.14(2)(a)) and direct a person/s to provide them with personal information (s.14(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 s.13. The AAT appeal mechanism in s.32 does not reference s.14 or s.15.

This is because s.13 states that a decision to prohibit entry may be triggered by previous exercise of the powers under s.14 or s.15. Should a person or persons be prohibited from entering Museum premises – including after previously being directed to leave under s.14 or previously being apprehended under s.15, 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 s.32. This provides another important safeguard to the exercise of the power.

Concluding comments

International human rights legal advice

1.398 The minister has advised that sections 13 to 15 will protect the safety of staff, the public and Museum material, including by: enabling the officer to prohibit entry to a person; direct a person or group of persons to leave; and apprehend a person and hold them in custody. The rights to freedom of expression and assembly may be permissibly limited where a restriction is necessary for respect of the rights or reputations of others; or the protection of national security or of public order, or of public health or morals.[10] The protection of public order and safety is a legitimate objective for the purposes of international human rights law, and these measures appear to be rationally connected to such an objective, where a direction to leave Museum premises relates to an authorised officer having 'reasonable grounds for believing that public safety or the safety of staff members is, or may be, endangered.' However, it is less clear whether a direction to leave Museum premises on the grounds that a 'person or group on or in Museum premises is likely to *cause offence* to members of the public or staff members',[11] is rationally connected to the objective of protecting public order or safety.

1.399 With respect to the proportionality of these measures, it is relevant that section 32 provides a right of appeal to the Administrative Appeals Tribunal in relation to any decision of an authorised officer under section 13 to prohibit entry onto or into Museum premises. Access to merits review is an important safeguard. As the minister notes, there is no right to merits review in relation to an exercise of power under sections 14 or 15 of the regulations (to remove a person or group of persons from, or to direct them to leave, Museum premises). The minister states, however, that because a right of review exists in relation to an exercise of power under section 13, which may be subsequently relied on through use of a power under sections 14 or 15, this has the practical effect that the same series of actions are able to be contested through exercise of the review right. The minister has also advised that authorised officers are provided with training as to the types of

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

11 Section 14(1)(b) of the regulations (emphasis added).

circumstances which must exist in order for them to utilise these powers, which assists in an assessment of any risk of powers being exercised beyond the circumstances provided for by these measures.

1.400 However, questions remain as to the scope of potential conduct which may be encompassed by sections 13-15, and whether there are less rights restrictive means of achieving the stated objective, and whether there are sufficient safeguards to protect the rights to freedom of expression and assembly. Empowering an authorised officer to direct a person to leave the Museum, or to prohibit their entry, where the officer reasonably believes the person is 'likely to cause offence' to staff or members of the public, appears to encompass a very broad range of conduct. It remains unclear whether, for example, people could be prevented from peacefully protesting a museum exhibit, including by being directed to leave land outside a Museum building which is under the Museum's control.[12] It is also noted there is no time limit on how long a person who has been directed to leave the Museum may be excluded from the Museum. Section 13 provides that if a person or group has previously been directed to leave the Museum, or has been removed from the Museum, they may be prohibited from entering, regardless of when that direction or removal took place.

1.401 Consequently, it is not clear that empowering an authorised officer to direct a person to leave the Museum, or to prohibit their entry, where the officer reasonably believes the person is 'likely to cause offence' to staff or members of the public, constitutes a proportionate limitation on the rights to freedom of expression and assembly.

Committee view

1.402 The committee thanks the minister for this response.[13] The committee notes the instrument empowers an authorised officer to direct a person to leave, or prohibit entry to, the National Museum of Australia where they reasonably believe a person is 'likely to cause offence' to staff or members of the public.

1.403 The committee considers that empowering Museum staff to protect public order and safety is a legitimate objective for the purposes of international human rights law. However, the committee considers that empowering an authorised officer to direct a person to leave the Museum, or to prohibit their entry, where the officer reasonably believes the person is 'likely to cause offence' to staff or

12 Noting the definition of 'Museum premises' and 'Museum land', it would appear that this could include land outside the Museum itself. See, National Museum of Australia Regulations [F2019L01273], section 5.

13 It is noted that the minister's response was received almost four months after it was first requested. The committee notes that the timeliness of ministerial responses is a key component of committee's dialogue function, and its capacity to assess the compatibility of legislation with human rights.

members of the public, could capture a broad range of conduct, and as such, may not constitute a proportionate limitation on the rights to freedom of expression and assembly.

1.404 The committee considers that the proportionality of these measures would be assisted were the regulations amended to provide the exercise of a person's right to engage lawfully in advocacy, protest or dissent is not, by itself, to be regarded as likely to cause offence.

1.405 The committee considers it would be appropriate if the statement of compatibility to the regulations were amended to acknowledge the engagement of the rights to freedoms of expression and assembly by this measure.

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

Taking photographs and collecting personal information

1.407 Subsection 14(2) of the regulations empowers an authorised officer to take a photograph of a person subject to a direction to leave museum premises, and to direct that person to provide their name and residential address to the authorised officer.

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

1.408 By empowering an authorised officer to take a person's photograph and to direct them to provide their personal information, such as their name and residential address, this measure engages and limits the right to privacy. This is particularly the case if such information were to be displayed in a manner that might damage a person's reputation. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[14] The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[15]

1.409 The initial analysis considered that further information was required as to the compatibility of this measure with the right to privacy, and in particular:

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

15 See, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, UN Human Rights Committee*, General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

- what is the objective underlying the power granted to an authorised officer under section 14(2) of the regulations to take a photograph of a person who is subject to a direction to leave museum premises, and to direct that person to provide their name and residential address;
- whether there are less rights restrictive means of achieving this objective, noting the potential impact on the right to privacy; and
- whether there are any safeguards to protect the right to privacy, such as protocols around the handling, disclosure and destruction of any personal information that might be collected.

1.410 The full initial analysis is set out in *Report 1 of 2020.*

Committee's initial view

1.411 The committee noted the advice that this measure engages and limits the right to privacy. The committee therefore sought the minister's advice as to the compatibility of this measure with the right to privacy,[16] and in particular the matters set out at paragraph [1.409].

Minister's response

1.412 The minister advised:

> 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

16 The committee's consideration of the compatibility of a measure which limits a right is assisted if the response explicitly addresses the limitation criteria set out in the committee's Guidance Note 1, pp. 2-3.

> 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.

Concluding comments

International human rights legal advice

1.413 As the minister has noted, a replacement explanatory statement in relation to these regulations was registered on 12 February 2020. It provides the following further information with respect to the powers to take photographs and direct a person to provide information to an authorised officer:

> Collection of name and residential address information provides secondary verification of a person's identity should there be any doubt. The combination of a photograph and name and address information ensures that subsequent authorised officers are able to accurately identify a person or group of persons that have been directed to leave the Museum premises under section 14, for the purposes of paragraph 13(1)(a) which provides for an authorised officer to prohibit entry. Being able to collect personal information in such circumstances facilitates a safe and secure environment for Museum staff and visitors, and helps protect the Museum's collections and exhibits from potential damage, theft or loss.
>
> The Museum is subject to the *Privacy Act 1988* (Cth) (Privacy Act) and all personal information collected by the Museum must be dealt with according to the Australian Privacy Principles (APPs), which are set out in Schedule 1 to the Privacy Act (https://www.oaic.gov.au/privacy/australian-privacy-principles/). Personal information collected in accordance with subsection 14(2) of the Regulations would be used and managed in accordance with the APPs. This includes any image or personal information collected by an authorised officer in exercising their powers under the Regulations.[17]

1.414 This additional information indicates that the power to direct a person to provide their name and residential address is to ensure that a person can be accurately identified for the purposes of facilitating a direction to leave, or prohibition on entry to, the Museum. It states that being able to collect personal information in such circumstances facilitates a safe and secure environment for Museum staff and visitors, and helps protect the Museum's collections and exhibits from potential damage, theft or loss. This likely constitutes a legitimate objective for the purposes of international human rights law, and if such data is likely to assist in facilitating this objective it would appear to be rationally connected to this objective.

17 Replacement explanatory statement, p. 12.

1.415 As to whether the measures are proportionate, the revised explanatory statement indicates that the collection of such information would only take place where there is any doubt as to a person's identity (although this limitation is not apparent in the regulations themselves). In this respect, the advice that authorised officers will receive training as to the use of these and other powers, may serve as a useful safeguard. The revised explanatory statement also provides that personal information collected by the Museum will be subject to the operation of the *Privacy Act 1988*. The *Privacy Act 1988* includes limits on the use or disclosure of personal information; requires reasonable steps to be taken to protect the information from misuse, interference and loss and unauthorised access, modification or disclosure; and provides that information must be destroyed or de-identified once it is no longer required for the purpose for which it was collected.[18]

1.416 On the basis of this additional information, it appears that granting an authorised officer the power to take a photograph of a person who is subject to a direction to leave museum premises, and to direct that person to provide their name and residential address, may constitute a permissible limitation on the right to privacy. However, noting the concerns set out with respect to the breath of conduct captured by section 14, as set out at paragraphs [1.398] to [1.401], this may turn on the manner in which these powers are exercised in practice.

Committee view

1.417 The committee thanks the minister for this response.[19] The committee notes that the regulations empower an authorised officer to take a person's photograph and direct them to provide their personal information, such as their name and residential address.

1.418 The committee considers that granting an authorised officer the power to take a photograph of a person who is subject to a direction to leave museum premises, and to direct that person to provide their name and residential address, may constitute a permissible limitation on the right to privacy. However, given the committee's concerns with respect to the breath of conduct captured by section 14, as set out at in the committee view at paragraph [1.403], the committee recommends that consideration be given to ongoing monitoring of the manner in which these powers are exercised in practice.

18 See Australian Privacy Principles, in particular APP 6 and 11.

19 It is noted that the minister's response was received almost four months after it was first requested. The committee notes that the timeliness of ministerial responses is a key component of committee's dialogue function, and its capacity to assess the compatibility of legislation with human rights.

1.419 The committee has otherwise concluded its examination of this matter.

Senator the Hon Sarah Henderson

Chair

Dissenting Report by Labor and Greens members[1]

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

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

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

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

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

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

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

Australian Security Intelligence Organisation Amendment Bill 2020

1.5 This bill seeks to repeal and replace the Australian Security Intelligence Organisation's (ASIO) compulsory questioning framework, including amending the provisions related to questioning warrants, and abolishing questioning and detention warrants.

ASIO compulsory questioning framework

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

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

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

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

(a) a compulsory questioning warrant must not be authorised unless a current or former member of the judiciary has approved the issuance of such a warrant;[3] and

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

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

Apprehension of a person subject to a warrant

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

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

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

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

Questioning warrants

1.14 The subject of a warrant may be questioned for a 'permitted questioning time' of up to 24 hours,[6] or 40 hours where an interpreter is being used. This 'permitted questioning period' is not calculated in terms of a continuous period from the point of attendance for questioning. It includes only the periods of time during which questioning is taking place, excluding time taken to undertake activities including contacting a lawyer, changing recording equipment, or receiving medical attention.[7] The bill provides that the subject of a questioning warrant would commit

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

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

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

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

a criminal offence if they fail to give any information or produce any record or thing requested of them.[8]

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

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

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

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

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

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

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

(a) a maximum duration of time during which a warrant subject may be required to be in attendance at a place of questioning on one occasion;[11]

(b) specific requirements with respect to the conduct of the questioning itself (including establishing that warrant subjects be provided with food, water and toilet facilities);

(c) that when the period of time in which a warrant subject is required to be in attendance at a place of questioning exceeds a certain period (for example, 14 hours), that they be allowed to leave to go home to sleep (without risking criminal prosecution), or if an issuing authority considers that would likely prejudice the investigation, that the person be provided with adequate sleeping and washing facilities;[12] and

(d) that an IGIS official must be present during any questioning and if the IGIS raises any concern about the conduct of questioning, or a warrant subject's treatment during questioning, the prescribed authority must suspend questioning in order to consider that concern (rather than this being discretionary).[13]

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

Prohibition on persons subject to a warrant leaving Australia

1.20 The bill seeks to make it an offence for a person who is the subject of a questioning warrant to leave Australia without the written permission of the Director-General, and provides that such a person may be required to surrender their travel documents. In addition, a person in relation to whom a warrant has been requested (but not yet issued) may be required to surrender their travel documents, and may be prohibited from leaving Australia.

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

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

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

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

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

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

(a) the prohibition on travel only applies after a warrant has been issued (rather than once the warrant has been requested);[14] and

(b) where the total permitted questioning period pursuant to a questioning warrant has been exhausted, the warrant ceases to be in force.[15]

Questioning warrants for minors aged 14 and over

1.23 The bill would also enable ASIO to obtain a warrant in order to question a minor (aged between 14 and 18 years) about a 'minor questioning matter', being matters related to politically motivated violence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) establish a reasonable maximum period of time during which a child may be required to attend for questioning on one single occasion;[22] and

(f) require the prescribed authority to consider the best interests of the child as the primary consideration, as well as the child's age and competence, in determining whether to make any direction related to the execution of a minor questioning warrant.[23]

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

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

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

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

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

Restrictions on legal representatives

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) that specific information as to the meaning of 'unduly disrupt' be included for the purposes of proposed subsection 34FF(6);[30]

(d) that a prescribed authority must provide a lawyer and warrant subject with reasonable breaks, during which they must provide a reasonable opportunity for the lawyer to advise the client;[31]

(e) that if a lawyer or warrant subject requests a break, and the prescribed authority refuses the request, they must provide reasons for their decision;[32] and

(f) that proposed section 34FH set out the basis on which a lawyer's access to information for proceedings related to a warrant may be prohibited or limited.[33]

Secrecy and disclosure provisions

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

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

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

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

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

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

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

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

(a) a defence for a person to make such a disclosure when the disclosure occurred without any intention to jeopardise security or where the disclosure was innocuous and would not reasonably be likely to jeopardise security;[34] and

(b) that the prescribed authority must, during the questioning process, consider whether to make a direction enabling a warrant subject and/or their lawyer to disclose information related to the warrant (including the fact of the issue of the warrant itself) to specified persons (for example, family members or employers).[35]

ASIO internal authorisation for use of tracking devices

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

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

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

(a) clarify the definition of a 'tracking device';[36]

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

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

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

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

suspected of being engaged in, or of being likely to engage in, activities prejudicial to security;[37]

(c) provide that the Director-General must give the Attorney-General a written report where an internal authorisation has been given within one month from the day on which the authorisation has been made;[38] **and**

(d) provide that the IGIS must be notified on each occasion that ASIO has internally authorised that a tracking device may be used.[39]

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

1.44 This bill seeks to amend the *Migration Act 1958* (the Migration Act) to regulate the possession of certain items in relation to immigration detention facilities and detainees (whether or not they are in an immigration detention facility), and strengthen the search and seizure powers in the Migration Act to allow for searches, without a warrant, for a 'prohibited thing', as well as to continue to search for a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape.

Prohibiting items in immigration detention

1.45 The dissenting members agree that protecting the health, safety and security of people in immigration detention is likely to be a legitimate objective for the purposes of international human rights law, and prohibiting certain items that may enable criminal activity within the immigration detention network also appears to be rationally connected to that objective.

1.46 However, the dissenting members consider that it does not appear that giving the minister the power to prohibit any 'thing' that the minister is satisfied might be a risk to the health, safety or security of persons in the facility, or 'to the order of the facility', is proportionate to the objective sought to be achieved. There is no limit in the proposed legislation that would ensure that only detainees who pose a risk of such sort would be subject to the search and seizure powers. While it may be the intention not to apply these powers to low-risk detainees, there is no such safeguard in the legislation and no transparency as to what such operational policy guidance would look like. As such, the legislation itself would allow things such as mobile phones to be seized from detainees without any requirement that they pose

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

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

39 Amendment to Schedule 2new Subdivision DA.

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

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

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

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

Search and seizure powers

1.49 The bill seeks to strengthen the search and seizure powers in the Migration Act to allow for searches, without a warrant, for a 'prohibited thing', as well as to continue to search for a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape. This includes the ability to search a person, the person's clothing and any property under the immediate control of the person for a weapon or escape aid or 'prohibited thing' (even if the officer has no suspicion the detainee has such an item), the ability to take and retain possession of such items if found pursuant to a search, and the ability to conduct strip searches to search for such items.

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

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

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

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

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

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

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

Graham Perrett MP
Deputy Chair
Member for Moreton

Steve Georganas MP
Member for Adelaide

Senator Nita Green
Senator for Queensland

Senator Pat Dodson
Senator for Western Australia

Senator Nick McKim
Senator for Tasmania