

Chapter 1¹

New and continuing matters

1.1 In this chapter the committee has examined the following bill and legislative instruments for compatibility with human rights:

- National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021, previously deferred in *Report 15 of 2021*; and
- legislative instruments registered on the Federal Register of Legislation between 14 November to 19 December 2021.²

1.2 The committee has determined not to comment on the legislative instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

1.3 The committee comments on the following bill seeking a response from the relevant minister.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, *New and continuing matters, Report 1 of 2022*; [2022] AUPJCHR 2.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

Bills

National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021¹

<p>Purpose</p>	<p>This bill seeks to implement recommendations of the <i>Comprehensive Review of the Legal Framework of the National Intelligence Community</i> and other measures</p> <p>Schedule 1 would enable the Australian Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and Australian Geospatial Intelligence Organisation (AGO) to immediately undertake activities to produce intelligence where there is, or is likely to be, an imminent risk to the safety of an Australian person</p> <p>Schedule 2 would enable ASIS, ASD and AGO to seek ministerial authorisations to produce intelligence on a class of Australian persons who are, or are likely to be, involved with a listed terrorist organisation</p> <p>Schedule 3 would enable ASD and AGO to seek ministerial authorisation to undertake activities to produce intelligence on an Australian person or a class of Australian persons where they are assisting the Australian Defence Force (ADF) in support of military operations</p> <p>Schedule 4 would insert new provisions to:</p> <ul style="list-style-type: none"> - limit the requirement for ASIS, ASD and AGO to obtain ministerial authorisation to produce intelligence on an Australian person to circumstances where the agencies seek to use covert and intrusive methods, which include methods for which ASIO would require a warrant to conduct inside Australia; and - make explicit the long-standing requirement for ASIS, ASD and AGO to seek ministerial authorisation before requesting a foreign partner agency to produce intelligence on an Australian person <p>Schedule 5 seeks to enhance the ability of ASIS to cooperate with ASIO in Australia when undertaking less intrusive activities to collect intelligence on Australian persons relevant to ASIO's</p>
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1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021, *Report 1 of 2022*; [2022] AUPJCHR 3.

<p>Portfolio</p> <p>Introduced</p>	<p>functions, without ministerial authorisation</p> <p>Schedule 6 would amend section 13 of the <i>Intelligence Services Act 2001</i> to provide that, for the purposes of carrying out its non-intelligence functions, AGO is not required to seek ministerial approval for cooperation with authorities of other countries</p> <p>Schedule 7 would require the Office of National Intelligence (ONI) to obtain Director-General approval when undertaking cooperation with public international organisations</p> <p>Schedule 8 would extend the period for passport and foreign travel document suspension or surrender from 14 to 28 days, to provide ASIO with more time to prepare a security assessment</p> <p>Schedule 9 would extend the immunity provisions provided to staff members and agents of ASIS and AGO for computer-related acts done outside Australia, in the proper performance of those agencies' functions, to acts which inadvertently affect a computer or device located inside Australia</p> <p>Schedule 10 would require the Defence Intelligence Organisation (DIO) to have legally binding privacy rules, require ASIS, ASD, AGO and DIO to make their privacy rules publicly available, and update ONI's privacy rules provisions so that they apply to intelligence about an Australian person under ONI's analytical functions</p> <p>Schedule 11 seeks to include ASD in the Assumed Identities scheme contained in the <i>Crimes Act 1914</i></p> <p>Schedule 12 seeks to clarify the meaning of an 'authority of another country' in the <i>Intelligence Services Act 2001</i></p> <p>Schedule 13 would permit the Director-General of Security to approve a class of persons to exercise the authority conferred by an ASIO warrant in the <i>Telecommunications (Interception and Access) Act 1979</i>; clarify the permissible scope of classes under section 12 of that Act and under section 24 of the <i>Australian Security Intelligence Organisation Act 1979</i>; and introduce additional record-keeping requirements regarding persons exercising the authority conferred by all relevant ASIO warrants and relevant device recovery provisions</p> <p>Schedule 14 seeks to make technical amendments related to the <i>Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018</i></p> <p>Home Affairs</p> <p>House of Representatives, 25 November 2021</p>
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Rights	Privacy; equality and non-discrimination; right to life; freedom of movement; effective remedy
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Background

1.4 This bill seeks to implement recommendations of the 2020 Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review) led by Dennis Richardson AC, amendments recommended by the 2017 Independent Intelligence Review, and other measures to address issues facing the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate (ASD), the Australian Geospatial-Intelligence Organisation (AGO), the Defence Intelligence Organisation (DIO) and the Office of National Intelligence (ONI).

Ministerial authorisations by class (Schedules 2 and 3)

1.5 Schedule 2 of the bill seeks to amend the *Intelligence Services Act 2001* (Intelligence Services Act) to introduce a new counter-terrorism class ministerial authorisation. Currently, the Australian Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and the Australian Geospatial Intelligence Organisation (AGO) (together, the Intelligence Services agencies) are required to get ministerial authorisation before producing intelligence on an Australian person in a foreign country.² Schedule 2 seeks to extend this to a 'class' of Australian persons, so that the Intelligence Services agencies could expeditiously produce intelligence on one or more members of a class of Australian persons who are, or are likely to be, involved with a listed terrorist organisation.³

1.6 The amendments provide for non-exhaustive circumstances in which a person is taken to be involved with a listed terrorist organisation.⁴ This includes where a person directs, or participates in, the activities of the organisation; recruits a person to join, or participate in the activities of, the organisation; provides training to, receives training from, or participates in training with, the organisation; is a member of the organisation; provides financial or other support to the organisation; or advocates for, or on behalf of, the organisation.⁵

2 In addition to receiving agreement from the Attorney-General. If conducting activities onshore, a warrant is required.

3 Schedule 2, items 2 and 3.

4 'Listed terrorist organisation' has the same meaning as in subsection 100.1(1) of the Criminal Code, which means an organisation that is specified by the regulations for the purposes of paragraph (b) of the definition of 'terrorist organisation' in section 102.1 of the Criminal Code.

5 Schedule 2, item 2, proposed subsection 9(1AAB).

1.7 The amendments also provide for additional requirements for class authorisations, including requirements that a list is kept that identifies each Australian in relation to whom the agency intends to undertake activities under the authorisation, and requirements regarding oversight by the Inspector-General of Intelligence and Security (IGIS), and reporting of activities to the minister within three months of the authorisation.⁶

1.8 Schedule 3 also seeks to amend the Intelligence Services Act to provide that all Intelligence Services agencies can obtain an authorisation to produce intelligence on one or more members of a class of Australian persons when providing assistance to the Australian Defence Force in support of military operations.⁷ Currently, only ASIS has this power.⁸ These class ministerial authorisations are subject to the same additional requirements outlined at paragraph [1.7].

1.9 The committee has previously commented on class ministerial authorisations in relation to ASIS providing assistance to the Australian Defence Force (ADF) in the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.⁹

Preliminary international human rights legal advice

Rights to privacy and equality and non-discrimination

1.10 Australia's obligations under the International Covenant on Civil and Political Rights apply in respect of its acts undertaken in the exercise of its jurisdiction to anyone within its power or effective control, even if the acts occur outside its own territory.¹⁰ The ministerial authorisation scheme, in respect of Intelligence Services agencies, appears to apply primarily to Australians living offshore. However, the statement of compatibility states that the amendments may permit the production of intelligence on a person in Australia's territory or subject to Australia's effective control.¹¹ Therefore, to the extent that the class ministerial authorisations provided for in Schedules 2 and 3 apply to those under Australia's effective control, Australia's international human rights obligations would apply.

1.11 In that context, allowing the Intelligence Services agencies to produce intelligence on one or more members of a class of Australian persons engages and

6 Schedule 2, items 12 and 13.

7 Schedule 3, item 1.

8 *Intelligence Services Act 2001*, subparagraph 8(1)(a)(ia).

9 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament* (13 May 2015), pp. 137-162.

10 United Nations Human Rights Committee, *General Comment No.31: The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136 [107]-[111].

11 Statement of compatibility, p. 16.

limits the right to privacy. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.¹² This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.¹³ The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. Further, to the extent that the class ministerial authorisations could discriminate against individuals based on their religion, race or ethnicity, the measure also engages and may limit the right to equality and non-discrimination.¹⁴ This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.¹⁵ The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).¹⁶ Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.¹⁷ 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.

1.12 In relation to whether the class authorisations relating to counter-terrorism pursue a legitimate objective, the statement of compatibility states that this

12 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

13 The UN Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. *General Comment No. 16: Article 17* (1988).

14 International Covenant on Civil and Political Rights, articles 2 and 26.

15 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

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

17 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. 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'.

amendment 'pursues the legitimate objectives of protecting the lives and security of Australians, mitigating any imminent and significant risks to their safety, and addressing national security risks to Australia'.¹⁸ In relation to the class authorisations for activities in support of the ADF, the statement of compatibility states that this amendment pursues 'the legitimate objective of protecting Australia's national security, the safety of Australians and the security of ADF personnel'. Protecting national security constitutes a legitimate objective for the purpose of international human rights law, and the measure may be rationally connected to (that is, effective to achieve) this objective.

1.13 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed and whether it is accompanied by sufficient safeguards. Another relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review.

1.14 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.¹⁹ This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. Schedule 2 of the bill requires that the minister must be *satisfied* that the class of Australian persons is, or is likely to be, involved with a listed terrorist organisation before giving an authorisation. However, while the amendments set out some circumstances in which someone may be considered to be involved with a listed terrorist organisation, this is a non-exhaustive list. As such, the minister has a broad discretion to include anyone in a class where the minister is satisfied they are 'involved', or 'likely to be involved' with the organisation. It is not clear on what basis the minister would make such an assessment. For example, could all members of the family of a person who has advocated on behalf of a terrorist organisation be subject to a class authorisation on the basis that it is likely they too would be involved, because of their family connection. It is not clear why the circumstances set out in proposed subsection 9(1AAB) (see paragraph [1.6]) are non-exhaustive, noting that the range of listed circumstances would appear to capture any involvement in a listed terrorist organisation. The class ministerial authorisation power under Schedule 3 may similarly capture a broad range of individuals, noting such authorisations do not require actual knowledge that an individual is under suspicion; the individual need only be part of a particular class.

18 Statement of Compatibility, p. 16.

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

1.15 There is also a risk that, given an individual's religion, race or ethnicity, they may be more likely to be considered to be involved with a listed terrorist organisation and captured under a class authorisation. It is not clear why the circumstances of involvement in a listed terrorist organisation in Schedule 2 cannot be more narrowly defined. It is also not clear whether this measure may indirectly discriminate against individuals from particular religions, races or ethnicities, noting there is no need for evidence against an individual to be included in a class authorisation.

1.16 While the bill provides that the minister must also obtain the agreement of the Attorney-General before giving an authorisation,²⁰ the Comprehensive Review clarifies that this role is not an additional 'check and balance' but is designed to provide visibility of proposed operational activities that relate to a threat to security.²¹ In practice therefore it appears that the agreement of the Attorney-General does not operate as a safeguard on the minister's power.

1.17 The bill includes some safeguards that go to the proportionality of the measure. The statement of compatibility clarifies that any 'intelligence information' collected under the class ministerial authorisation is subject to the agencies' privacy rules.²² Further, as is currently the case with individual ministerial authorisations, a class ministerial authorisation must specify how long it is in effect and must not exceed six months.²³ In addition, any renewal of an authorisation must not exceed six months.²⁴

1.18 Proposed section 10AA would also introduce several requirements in relation to all class ministerial authorisations.²⁵ Each agency head would be required to keep a list identifying each Australian in relation to whom the agency intends to undertake activities under the authorisation; explain why the agency believes the person is a member of the class; and include any other information that the agency head considers appropriate.²⁶ Where the Attorney-General's agreement was obtained, the agency head must provide a copy of the list and written notice to the Director-General of Security.²⁷ The agency head must also ensure the list is available for

20 Schedule 2, item 3, proposed paragraph 9(1AAA)(b).

21 Mr Dennis Richardson AC, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2020, volume 1, [8.105] and [8.106].

22 Statement of compatibility, p. 17.

23 *Intelligence Services Act 2001*, subsection 9(4).

24 *Intelligence Services Act 2001*, subsection 10(1A).

25 Schedule 2, item 12, proposed section 10AA.

26 Schedule 2, item 12, proposed subsection 10AA(2).

27 Schedule 2, item 12, proposed subsection 10AA(3).

inspection on request by the Inspector-General of Intelligence and Security (IGIS).²⁸ Additionally, a report in respect of the activity would be required to be given to the minister no later than three months following the authorisation ceasing to have effect or being renewed, and the report must be accompanied with a statement identifying every Australian person who was included on the list during the period the authorisation was in effect.²⁹ The statement of compatibility further explains that an Australian person who may wish to object or make a complaint relating to the production of intelligence on them may refer the matter to IGIS, and IGIS may choose to conduct an inquiry into the actions of an intelligence agency and could recommend to the responsible minister that the person receive compensation.³⁰ The oversight functions of IGIS may serve as a useful safeguard to help ensure future compliance with the legislation, however, given that the production of intelligence is designed to be sought covertly, it is unclear how an applicant could practically seek review of a decision of which they are unaware.³¹ Further, the requirements in proposed section 10AA relate to requirements after the authorisation has been given and do not provide any safeguards relating to the granting of the authorisation or its exercise, and therefore appear to provide more of a record-keeping and oversight function. Thus, while there are some oversight and review mechanisms, it is not clear if these are sufficient to protect the right to privacy and equality and non-discrimination of those who could be captured under a broad definition of 'involvement with a terrorist organisation'.

Right to life

1.19 The statement of compatibility states that the right to life is engaged by the amendments in Schedule 3 as they will apply to ASD and AGO's activities for the purposes of assisting the Australian Defence Force in support of military operations. It states '[i]ntelligence activities by those agencies may contribute to ADF action that results in loss of life'.³² The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;

28 Schedule 2, item 12, proposed subsection 10AA(4).

29 Schedule 2, item 13, proposed subsection 10A(3).

30 Statement of compatibility, pp. 17-18.

31 In this way, the right to an effective remedy would also appear to be engaged. See International Covenant on Civil and Political Rights, article 2(3).

32 Statement of compatibility, p. 19. For the right to life see International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

- it imposes an obligation on the state to protect people from being killed by others or identified risks,³³ and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

1.20 International human rights law requires that force be used as a matter of last resort and the use of deadly force can be lawful only if it is strictly necessary and proportionate, aimed at preventing an immediate threat to life and there is no other means of preventing the threat from materialising.

1.21 The statement of compatibility explains that the objective of the measure is to protect 'Australia's national security, the safety of Australians and the security of ADF personnel'.³⁴ While national security is a legitimate objective for the purposes of international human rights law, it is unclear whether the measure is a proportionate limit on the right to life.

1.22 The bill provides that ASD and AGO are able to obtain a class authorisation to produce intelligence on one or more members of a class of Australian persons when providing assistance to the ADF in support of military operations. 'Military operations' are not defined in the Intelligence Services Act and could therefore include a wide range of operations. It would appear that the ADF may engage in a range of activities that may lead to the loss of life as a result of intelligence provided by ASD and AGO, and which may also include militarily targeting Australians and other persons overseas. This is also acknowledged in the statement of compatibility where it states that 'intelligence activities by those agencies may contribute to ADF action that results in loss of life'³⁵ and additionally, the Comprehensive Review states that 'in most circumstances the Government is able to authorise the same intelligence activities offshore against Australians that those agencies undertake against non-Australians—including, in very rare circumstances, the production of intelligence that would enable targeting for lethal action in accordance with the laws of armed conflict'.³⁶

1.23 The statement of compatibility states that the amendments may result in the ADF receiving additional, more detailed and timelier intelligence relating to military operations, and to this extent 'may promote the right to life as they are likely to enhance the ability of the ADF to make fully-informed decisions about the necessity

33 International Covenant on Civil and Political Rights, article 6. The right should not be understood in a restrictive manner: UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* (1982) [5].

34 Statement of compatibility, p. 21.

35 Statement of compatibility, p. 19.

36 Mr Dennis Richardson AC, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2020, volume 1, [10.3].

and proportionality of its activities'.³⁷ It also states it may promote the right to life by enhancing the ability to identify threats to ADF personnel and others 'enabling the ADF to pursue opportunities to lessen that threat'.³⁸ The statement of compatibility lists what it states are the safeguards that apply to this measure:

- the intelligence agencies must not do anything that is not necessary for the proper performance of their functions;
- the IGIS has the power to examine the legality and propriety of action taken by intelligence agencies in support of the ADF, and should it choose to conduct an inquiry it has strong coercive powers;
- in defining a class of persons, the responsible minister must be satisfied that the intelligence produced on that class would be relevant to the conduct of the particular military operation; and
- the requirements in proposed section 10AA would apply, relating to keeping lists on the class of persons subject to the authorisation (see above at paragraph [1.18]).

1.24 However, while these measures may offer some oversight, it is not clear that this would be sufficient to ensure the measure is proportionate. It would appear that as long as the minister considers the collection of intelligence on a class of persons would be relevant to the conduct of a specific military operation, and this related to the proper performance of the ASD and AGO's functions, intelligence on Australians could be shared with the ADF, even in circumstances where this could lead to a loss of life. While it may be that such intelligence sharing may promote the right to life by ensuring more targeted operations, it would also appear likely it could be used to limit the right to life. As noted above, the requirements in proposed section 10AA apply after the authorisation has been given and does not provide any safeguards relating to the granting of the authorisation or its exercise. Similarly, IGIS acts after the authorisation is made and the intelligence shared. Further, 'military operations' is not defined in the Intelligence Services Act and as class authorisations may capture a broad group of individuals, it is not clear what class of persons would be defined to support such an operation and why the legislation is not more specific about who could be included in the class.

1.25 In order to assess the compatibility of the measure with the rights to privacy, equality and non-discrimination and life, further information is required as to:

- (a) in what circumstances would a class authorisation apply to those within Australia or subject to Australia's effective control;

37 Statement of compatibility, p. 19.

38 Statement of compatibility, p. 19.

- (b) the basis on which the minister would be able to be satisfied that a class of Australian persons are 'involved', or 'likely to be involved' with a listed terrorist organisation (other than the non-exhaustive circumstances set out in proposed subclause 9(1AAB)). For example, could all Australian members of the family of a person who has advocated on behalf of a terrorist organisation be subject to a class authorisation on the basis that it is likely that they too would be involved, because of their family connection;
- (c) noting that proposed subsection 9(1AAB) sets out a range of circumstances in which a person is taken to be involved in a listed terrorist organisation, why is it necessary that this be a non-exhaustive list;
- (d) whether the measures may disproportionately affect people who adhere to a particular religion, or from particular racial or ethnic backgrounds, and if so, whether this differential treatment is based on reasonable and objective criteria;
- (e) what safeguards are in place to ensure individuals who do not have any actual involvement in a terrorist organisation or in activities relevant to military operations are not part of a class authorisation;
- (f) how can an individual seek a remedy for any unlawful interference with their privacy if they are part of a class authorisation; and
- (g) what class of persons would be defined to support a military operation and why the legislation is not more specific about who could be included in such a class.

Committee view

1.26 The committee notes that Schedule 2 of the bill seeks to enable the Australian Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and the Australian Geospatial Intelligence Organisation (AGO) to seek ministerial authorisation to produce intelligence on a class of Australian persons who are, or are likely to be, involved with a listed terrorist organisation. The committee notes that Schedule 3 seeks to enable ASD and AGO to seek ministerial authorisation to undertake activities to produce intelligence on an Australian person or a class of Australian persons where they are assisting the Australian Defence Force (ADF) in support of military operations.

1.27 The committee notes that these measures may engage and limit the rights to privacy, equality and non-discrimination and life. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.28 The committee considers that the measures seek to achieve the legitimate objective of protecting national security and notes that they implement

recommendations made by the *Comprehensive Review of the Legal Framework of the National Intelligence Community*. However, the broad scope of class ministerial authorisations raises questions as to the proportionality of these measures.

1.29 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of Schedules 2 and 3, and as such seeks the minister's advice as to the matters set out at paragraph [1.25].

ASIS cooperating with ASIO within Australia (Schedule 5)

1.30 Currently, section 13B of the Intelligence Services Act provides that if ASIO has notified ASIS that it requires the production of intelligence on Australians, ASIS may support ASIO in the performance of its functions by carrying out an activity to produce such intelligence, but only if the activity will be undertaken outside Australia.³⁹ Section 13D also provides that if ASIO could not undertake the activity in at least one state or territory without it being authorised by warrant, this division does not allow ASIS to undertake the activity.⁴⁰ Schedule 5 seeks to amend section 13B to remove the requirement that ASIS undertake the activity outside Australia.⁴¹ The effect of this would be that ASIS could help ASIO, if requested, to produce intelligence on Australians inside Australia.

Preliminary international human rights legal advice

Right to privacy

1.31 Amending the basis on which ASIS can produce intelligence on Australians to include those within Australia engages and limits the right to privacy. The activities that ASIS could do in support of ASIO are likely to relate to less intrusive activities than those which would require a warrant: noting that section 13D provides that ASIS cannot undertake such acts in circumstances where ASIO would need to obtain a warrant (such as the use of tracking devices, listening devices and the interception of telecommunications). However, this power would still enable the collection of personal information, albeit obtained through less intrusive means, which limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly

39 *Intelligence Services Act 2001*, section 13B.

40 *Intelligence Services Act 2001*, section 13D.

41 See item 1 of Schedule 5. It is also noted that if the proposed amendment in item 2 of Schedule 5 was to be made there would also appear to be a need to make a consequential amendment to section 13B(7) of the *Intelligence Services Act 2001*, to change the reference from 'paragraph (3)(a)' to paragraph (3)(b)'.

the storing, use and sharing of such information.⁴² It also includes the right to control the dissemination of information about one's private life.

1.32 The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.33 In relation to the objective of the measure, the statement of compatibility states that it is 'necessary to enhance cooperation and integration between agencies' and the current geographic limit 'restricts cooperation that is essential to maximising the likelihood of Australia's success in thwarting attacks and defeating other threats to security'.⁴³ It also goes on to say that the government considers there is an increasing operational need to improve cooperation between agencies as Australia's security environment becomes more complex, and as domestic and foreign sources of security threats have become less mutually exclusive.⁴⁴ Improving cooperation and integration between national security agencies in order to protect the security of Australia is, in general, likely to be a legitimate objective. However, in order to demonstrate that the measure pursues a legitimate objective for the purposes of international human rights law, it is necessary to provide a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern. In this respect, it is noted that the Comprehensive Review recommended that section 13B should not be extended to apply to ASIS's onshore activities.⁴⁵ This was on the following basis:

Section 13B exists to enable ASIS to support ASIO in the performance of ASIO's functions. There is insufficient evidence before the Review to demonstrate the operational need for such a supporting role onshore in the same way as it is needed offshore. The Review considers that any issues with the 13B regime can be mitigated by focusing on collaboration, understanding and working relationships between ASIO and ASIS staff, at all levels.⁴⁶

1.34 Noting that the Comprehensive Review considered that it was not necessary for ASIS to be empowered to provide assistance in producing intelligence on Australians in Australia, further information is required to demonstrate that this measure is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right to privacy.

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

43 Statement of compatibility, p. 25.

44 Statement of compatibility, p. 26.

45 Mr Dennis Richardson AC, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2020, volume 2, recommendation 57.

46 Mr Dennis Richardson AC, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2020, volume 2, [22.65].

1.35 In relation to whether the measure is proportionate to the objective sought to be achieved, the statement of compatibility sets out the following safeguards:⁴⁷

- the Director-General of ASIS must be satisfied that there are satisfactory arrangements in place to ensure that the activities are only to be performed by ASIS in support of ASIO's functions;⁴⁸
- ASIO must issue ASIS with a written notice stating that it requires the production of intelligence on the Australian person, or class of Australian persons before relying on this framework. In giving such a notice, ASIO must comply with certain requirements, including that: the obtaining of intelligence must be relevant to 'security'; the exercise of the right to lawful advocacy, protest or dissent shall not, by itself, be regarded as prejudicial to security; and the Director-General of Security continues to have special responsibility to take all reasonable steps to ensure that the work of ASIO is limited to what is necessary for the purpose of the discharge of its functions and is kept free from any influences or considerations not relevant to its functions;⁴⁹
- if ASIO could not undertake a particular act in at least one state or territory without it being authorised by a special powers warrant or telecommunication interception warrant, then ASIS may not undertake that act without ministerial authorisation;⁵⁰ and
- all notices provided to ASIS must be kept by ASIS and made available for inspection on request by the Inspector-General of Intelligence and Security, and a written report must be given to ASIS' responsible Minister in respect of the relevant activities.⁵¹

1.36 These are important safeguards and likely assist with the proportionality of the measure. Nevertheless, while the measure will allow ASIS to support ASIO in its functions, it is not clear what specifically this measure will authorise ASIS to be able to do and how intrusive this may be to an individual's privacy.

1.37 In order to assess the compatibility of the measure with the right to privacy, further information is required as to:

- (a) what is the pressing and substantial public or social concern that the measure is seeking to address (noting the Comprehensive Review recommended against introducing this measure); and

47 Statement of compatibility, pp. 26-27.

48 *Intelligence Services Act 2001*, section 13E.

49 *Australian Security Intelligence Organisation Act 1979*, section 20.

50 *Intelligence Services Act 2001*, section 13D and statement of compatibility, p. 27.

51 *Intelligence Services Act 2001*, subsections 13F(3) and (4).

- (b) what specifically would this measure authorise ASIS to do (including examples as to the type of information that may be gathered).

Committee view

1.38 The committee notes that Schedule 5 seeks to amend section 13B of the Intelligence Services Act to remove the requirement that ASIS may produce intelligence on an Australian person or a class of Australian persons to support ASIO in the performance of its functions only for activities undertaken outside Australia. The effect of this would be that ASIS could help ASIO, if requested, to produce intelligence on those inside Australia.

1.39 The committee notes the measure may engage and limit the right to privacy. The committee notes that the right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.40 The committee considers that while the objective of improving cooperation and integration between national security agencies in order to protect the security of Australia may constitute a legitimate objective for the purposes of international human rights law, questions remain as to whether there exists a pressing and substantial concern to be addressed, noting that the *Comprehensive Review of the Legal Framework of the National Intelligence Community* recommended not implementing this measure. Questions also remain as to whether the measure is a proportionate limitation on the right to privacy.

1.41 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of Schedule 5, and as such seeks the minister's advice as to the matters set out at paragraph [1.37].

Extension of period for suspension of travel documents (Schedule 8)

1.42 Schedule 8 of the bill seeks to amend the *Australian Passports Act 2005* and the *Foreign Passports (Law Enforcement and Security) Act 2005* to extend the period of time for which an Australian or foreign travel document may be suspended from 14 days to 28 days. The Director-General of Security can request the minister to make an order to suspend a person's travel documents if the Director-General suspects, on reasonable grounds, that the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country.⁵² The effect of this is to prevent a person from travelling while a security assessment considering cancellation or long-term surrender of their travel documents can be

52 *Australian Passports Act 2005*, section 22A; *Foreign Passports (Law Enforcement and Security) Act 2005*, section 15A.

undertaken. As is currently the case, a suspension cannot be extended, and any further request to suspend a person's travel documents must be based on new information.⁵³

Preliminary international human rights legal advice

Rights to freedom of movement, privacy and effective remedy

1.43 The suspension of a person's travel documents, such that they cannot travel overseas, engages and limits the right to freedom of movement and right to privacy. The right to freedom of movement includes the right to leave any country and the right to enter one's own country.⁵⁴ This 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.⁵⁵ The right to leave a country may only be restricted in particular circumstances, including where it is necessary to achieve the objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order.⁵⁶ Measures that limit the right to leave a country must also be rationally connected and proportionate to these legitimate objectives.

1.44 The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.⁵⁷ This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.⁵⁸ 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 rights to freedom of movement and privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

53 *Australian Passports Act 2005*, subsection 22A(3); *Foreign Passports (Law Enforcement and Security) Act 2005*, subsection 15A(2).

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

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

56 International Covenant on Civil and Political Rights, article 12(3).

57 UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

58 The UN Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. *General Comment No. 16: Article 17* (1988).

1.45 Where an individual's travel documents are suspended in a manner that unlawfully limits the right to freedom of movement and privacy, and where a person has suffered loss in relation to this, the measure may also engage the right to an effective remedy, as it is not clear that a person can seek compensation for any loss suffered by not being able to travel during this period. The right to an effective remedy requires access to an effective remedy for violations of human rights.⁵⁹ This may take a variety of forms, such as prosecutions of suspected perpetrators or compensation to victims of abuse. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.⁶⁰

1.46 In relation to whether the measure pursues a legitimate objective, the statement of compatibility states that the extension of the time period is to 'to achieve the national security objective of taking proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas who may be planning to engage in activities of security concern'.⁶¹ As to why it is necessary to increase the time period of the suspension from 14 to 28 days, the statement of compatibility states that 'operational experience' has demonstrated that 14 days can be insufficient time to resolve all investigative activities and prepare a security assessment in order to consider whether permanent action is appropriate. It states that on a number of occasions the first time a person has come to ASIO's attention has been as they are preparing to travel to an overseas conflict zone, meaning it is necessary to take action in a very short timeframe.⁶² Protecting Australia's national security is a legitimate objective for the purposes of international human rights law. Temporarily suspending the travel documents of individuals who may leave Australia to engage in conduct that might prejudice Australia's security appears to be rationally connected to that objective.

1.47 In order to be a permissible limitation on the rights to freedom of movement and privacy, the measure must also be proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed, whether it is accompanied by sufficient safeguards, and whether any less rights restrictive alternatives could achieve the same stated objective. Another relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review.

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

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

61 Statement of compatibility, p. 31.

62 Statement of compatibility, p. 31.

1.48 The extension of time from 14 days to 28 days is justified in the statement of compatibility on the grounds that 'operational experience has demonstrated that 14 days can be insufficient time to resolve all appropriate investigative activities and prepare a subsequent security assessment'.⁶³ Given the significant limitation the measure poses on the right to freedom of movement and privacy however, it is not clear why such a substantial time extension is warranted in order to address this issue and whether this is the least rights restrictive approach. As noted in the statement of compatibility, in 2014 the Independent National Security Legislation Monitor proposed a 7-day timeframe,⁶⁴ and the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, which introduced the power to suspend travel documents, introduced a 14-day suspension.⁶⁵ It is noted that the Comprehensive Review did not consider this issue. It is not clear why 28 days is considered an appropriate period of time or whether other less rights-restrictive approaches have been considered. In particular, if operational experience has demonstrated that 14 days 'can be insufficient' it is not clear why it is necessary to double it to 28 days in all instances. No information has been provided as to why the period could not remain at 14 days with the possibility of one further extension should it prove necessary in the specific individual circumstances.

1.49 Further, in doubling the time by which travel documents can be suspended, it is also necessary to consider if the existing regime allowing for such a suspension is proportionate. In relation to whether the measure is sufficiently circumscribed and only as extensive as strictly necessary, the Director-General of Security can make a request to the minister for the suspension where they suspect, on reasonable grounds, that a person *may* leave Australia to engage in conduct that *might* prejudice the security of Australia or a foreign country. On receiving such a request, the minister has the discretion to suspend the person's travel documents. This is in contrast to the higher threshold for a request to cancel or long-term surrender a person's travel documents, where the Director-General of Security must first suspect that a person *would* be likely to engage in conduct that might prejudice the security of Australia or a foreign country.⁶⁶ The statement of compatibility notes that the 'temporary nature of the passport suspension is commensurate with the lower threshold for the making of a request for suspension or temporary surrender'.⁶⁷ However, it is not clear that the temporary nature of a suspension warrants a lower

63 Statement of compatibility, p. 31.

64 Statement of compatibility, p. 32.

65 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014) p. 140.

66 *Australian Passports Act 2005*, section 14; *Foreign Passports (Law Enforcement and Security) Act 2005*, paragraph 15(1)(a).

67 Statement of compatibility, p. 30.

threshold, particularly noting that a period of 28 days is a substantial period of time in which to suspend a person's travel documents.

1.50 In relation to whether the measure is accompanied by sufficient safeguards, the statement of compatibility notes that the request must come from the Director-General of Security, the minister has discretion as to whether to order suspension or surrender, and the prohibition on 'rolling' or consecutive orders remains.⁶⁸ These are important safeguards and likely assist with the proportionality of the measure.

1.51 However, whereas cancellation or long-term surrender of travel documents is subject to merits review through the Administrative Appeals Tribunal,⁶⁹ there is no provision for review for a decision to suspend travel documents. The statement of compatibility does not explain why merits review is not available for a decision to suspend travel documents. Given the proposed longer period of time in which travel documents can be suspended, it is not clear why it is not considered necessary for merits review to be available in relation to such a decision.

1.52 Further, the statement of compatibility does not give any indication of whether there is any remedy available for individuals who have had their travel documents suspended and where it is found that there is no need to cancel or long-term surrender their documents. This violation of the individual's right to freedom of movement and right to privacy could feasibly result in financial loss for the individual. It is not clear whether there is any form of compensation or remedy available if these rights were unlawfully limited.

1.53 In order to assess the compatibility of the measure with the rights to freedom of movement, privacy and effective remedy further information is required as to:

- (a) why 28 days is considered an appropriate period of time and whether other less rights-restrictive approaches have been considered, for example retaining 14 days but with the possibility of one extension where it is demonstrated it is necessary to have further time;
- (b) why it is considered necessary for the Director-General of Security to be able to make a request to the minister where they suspect, on reasonable grounds, that a person *may* leave Australia to engage in particular conduct rather than *would* be likely to engage in particular conduct, given the substantial travel document suspension period of 28 days;
- (c) why merits review of a decision to suspend travel documents is not available; and

68 Statement of compatibility, p. 32.

69 *Australian Passports Act 2005*, sections 48 and 50; *Foreign Passports (Law Enforcement and Security) Act 2005*, section 23.

- (d) whether any effective remedy (such as compensation) is available for individuals who have had their travel documents suspended for 28 days where it is assessed that their travel documents should not have been suspended.

Committee view

1.54 The committee notes that Schedule 8 of the bill seeks to amend the *Australian Passports Act 2005* and the *Foreign Passports (Law Enforcement and Security) Act 2005* to extend the period of time for which an Australian or foreign travel document may be suspended from 14 days to 28 days.

1.55 The committee notes that the measure engages and limits the right to freedom of movement and the right to privacy. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The measure may engage the right to an effective remedy.

1.56 The committee considers that the measure seeks to achieve the legitimate objective of protecting national security and is rationally connected to that objective. However, the committee considers that it is not clear whether the measure is a proportionate limitation on the rights to freedom of movement and privacy.

1.57 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of Schedule 8, and as such seeks the minister's advice as to the matters set out at paragraph [1.53].

