Chapter 2

Concluded matters

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

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

Bills

Electoral Legislation Amendment (Candidate Eligibility) Bill 2021[2]

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* to streamline the candidate qualification checklist relating to eligibility under section 44 of the Constitution and clarify when a response to a question is mandatory
Portfolio	Finance
Introduced	House of Representatives, 25 November 2021
Rights	Privacy; right to take part in public affairs

2.3 The committee requested a response from the minister in relation to the bill in *Report 15 of 2021*.[3]

Collection and publication of information relating to a person's eligibility for election

2.4 The bill seeks to amend the *Commonwealth Electoral Act 1918* to streamline the questions on the candidate qualification checklist and clarify which questions are mandatory. The qualification checklist relates to a candidate's eligibility to be elected

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, Electoral Legislation Amendment (Candidate Eligibility) Bill 2021, *Report 2 of 2022*; [2022] AUPJCHR 18.

3 Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021), pp. 12-16.

under section 44 of the Constitution.[4] Not completing the mandatory questions will result in the nomination being rejected by the Australian Electoral Commission, however, a question will be considered to have been responded to as long as it is not left blank.[5] The completed qualification checklist is published, along with any supporting documents provided by the candidate, on the website of the Australian Electoral Commission (AEC).[6]

2.5 The new qualification checklist requests largely the same information as the current checklist but includes some new mandatory questions regarding the candidate's date of birth, place of birth, citizenship at time of birth, and date of naturalisation if they are not an Australian citizen by birth. Like the current qualification checklist, it also includes other matters relevant to the candidate's eligibility for election (for example, their criminal history). The qualification checklist also includes questions concerning the birthplace and citizenship of the candidate's biological and adoptive parents and grandparents, and current and former spouses.[7]

2.6 The committee previously considered the Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018, which introduced the candidate qualification checklist, in *Report 1 of 2019* and *Report 2 of 2019*.[8]

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy and right to take part in public affairs

2.7 Requiring candidates seeking nomination for election to complete the qualification checklist, which requires personal information about the individual and their family members and supporting documents, to be publicly disclosed, engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[9] It also includes the right to control the dissemination of information about one's private life.

2.8 The requirements relating to the qualification checklist and supporting documents also engage and may limit the right to take part in public affairs by imposing additional eligibility requirements on persons nominating for election for

4 Completing the qualification checklist does not guarantee eligibility under section 44 as this is a matter for the High Court sitting as the Court of Disputed Returns.

5 Proposed subsection 170(1AA).

6 Proposed Schedule 1 (Form DB).

7 See proposed Schedule 1 (Form DB), in particular questions 2 to 4.

8 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 24-28 and *Report 2 of 2019* (2 April 2019) pp. 97-100.

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

public office. The right to take part in public affairs guarantees the right of citizens to stand for public office, and requires that any administrative and legal requirements imposed on persons standing for office be reasonable and non-discriminatory.[10] Requiring personal information about candidates, family members and current and former spouses to be publicly disclosed may deter potential candidates from applying to stand for public office.

2.9 The rights to privacy and to take part in public affairs 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. In order to be proportionate, a limitation should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.

2.10 Further information is required in order to assess the compatibility of this measure with the right to privacy and the right to take part in public affairs, and in particular:

(a) how requiring the publishing of the qualification checklist and supporting documentation would be effective to achieve (that is, rationally connected to) the stated objectives;

(b) how the Electoral Commissioner would determine in which circumstances they would omit, redact or delete information;

(c) how the privacy of third parties whose personal information may be publicly disclosed is to be considered in determining what to publish;

(d) whether third parties have any avenue, whether it is contained in law or policy, to prevent, correct or remove information being published about them; and

(e) whether the measure is the least rights-restrictive means of achieving the stated objectives, including whether publishing the qualifications checklist and supporting documentation is strictly necessary.

Committee's initial view

2.11 The committee noted that the measure engages and limits the right to privacy and the right to take part in public affairs. The committee considered that the measure seeks to achieve the legitimate objective of improving transparency and confidence in the eligibility of political candidates. However, the committee noted that questions remained as to whether the publishing of the qualification checklist and supporting documentation is rationally connected to (that is, effective to achieve) this objective,

10 UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [15].

and whether the measure is proportionate, and sought the minister's advice as to the matters set out at paragraph [2.10].

2.12 The full initial analysis is set out in *Report 15 of 2021*.

Minister's response[11]

2.13 The minister advised:

> ***a) How requiring the publishing of the qualification checklist and supporting documentation would be effective to achieve (that is, rationally connected to) the stated objectives***
>
> The Bill does not change the existing publication requirements for the Qualification Checklist and Supporting Documents, or the application of the Australian Privacy Principles to the information provided in the Qualification Checklist.
>
> Requiring the Qualification Checklist to continue to be published supports the aim of the Bill of minimising the risk of a recurrence of the disqualification issues that arose in the 45th Parliament and to maintain public confidence in the electoral process by ensuring transparency and accountability with respect to candidates' eligibility for election to Parliament.
>
> Although the Qualification Checklist itself does not guarantee that candidates who are duly nominated under the Electoral Act are qualified to be chosen or sit under section 44 of the Constitution, it puts the section 44 requirements front of mind for candidates and voters (including those who might have standing to lodge a petition disputing the election of a candidate on the basis of ineligibility) by requiring candidates to demonstrate to themselves, and the Australian people, that they are eligible to sit in Parliament.
>
> ***b) How the Electoral Commissioner would determine in which circumstances they would omit, redact or delete information?***
>
> The Electoral Act contains existing safeguards to mitigate against the risk of publishing personal information obtained without consent. The Bill does not change the Electoral Commissioner's existing discretion to omit, redact or delete information from the Qualification Checklist or supporting document.
>
> In accordance with subsection 170B(6) of the Electoral Act, the Electoral Commissioner may omit, redact or delete, from a document published or to be published under section 181A, any information that the Electoral

11 The minister's response to the committee's inquiries was received on 16 February 2022. 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.

Commissioner is satisfied on reasonable grounds is unreasonable, unacceptable, inappropriate or offensive. Additionally, the Electoral Commissioner may decide not to publish a document or remove a document published under section 181A of the Electoral Act, if the Electoral Commissioner is satisfied on reasonable grounds that the publication of the document is unreasonable, unacceptable, inappropriate or offensive.

The AEC publishes a *'Nomination Guide for Candidates'* which includes guidance to candidates on completing the Qualification Checklist, publication requirements and omitting, redacting or deleting information from additional documents. What information is omitted, redacted or deleted remains a matter for the Electoral Commissioner.

A circumstance, for example, where this may occur would be if the Electoral Commissioner becomes aware that an address included in a document to be published or already published is that of a silent elector without consent, then the Electoral Commissioner must omit or delete that address (subsections 170B(4)-(5) of the Electoral Act). Another circumstance, for example, was that during the 2019 Federal Election, the Electoral Commissioner made the decision to redact certain document identification numbers such as passport and birth certificate numbers.

c) and d) how the privacy of third parties whose personal information may be publicly disclosed is to be considered in determining what to publish; and whether third parties have any avenue, whether it is contained in law or policy, to prevent, correct or remove information being published about them?

Section 170B of the Electoral Act allows prospective candidates to redact, omit or delete any information in a supporting document that they do not wish published. This provides prospective candidates the opportunity to safeguard their privacy as well as that of their family members. As such, prospective candidates have the opportunity to have information concerning third parties redacted should that information not relate to the eligibility of their candidacy under section 44.

The Bill does not amend section 181C(2) of the Electoral Act which provides that Australian Privacy Principles 3, 5, 6, 10 and 13 do not apply to personal information in the Qualification Checklist or an additional document published under section 181A of the Electoral Act or delivered to Parliament for tabling under section 181B of the Electoral Act.

e) whether the measure is the least rights-restrictive means of achieving the stated objectives, including whether publishing the qualifications checklist and supporting documentation is strictly necessary.

The requirement for the checklist to be completed and published was implemented for the 2019 Federal Election. Following the election, there were no successful challenges to eligibility on the basis of s.44 issues. There is a strong public interest in knowing that a candidate is qualified to sit in

Parliament. The publication of the Qualification Checklist increases transparency in the candidacy process by allowing members of the public to have confidence that their elected representatives are eligible to sit in Parliament. The Bill facilitates increased transparency of the eligibility of candidates nominating for election as recommended by JSCEM, and reduces the risk of parliamentarians being found ineligible during their term, while containing measures for the omission and redaction of personal information by candidates and the Electoral Commissioner prior to publication, using a streamlined form.

Concluding comments

International human rights legal advice

Rights to privacy and right to take part in public affairs

2.14 The minister's response states that the bill does not change the existing publication requirements or the application of the Australian Privacy Principles to the information provided in the qualification checklist. However, it is noted that the bill remakes in its entirety the form that sets out the requirements of the checklist and sets out which questions are mandatory. As such, in specifying in this bill what information is required on the checklist the committee is required to scrutinise these requirements for compatibility with human rights. Further, it is noted that the committee was not able to conclude on the compatibility of the existing publication requirements as the committee did not receive a response to its inquiries prior to the dissolution of the last Parliament.[12]

2.15 As stated in the initial analysis, seeking to achieve transparency and confidence in the eligibility of political candidates is likely to be a legitimate objective for the purposes of international human rights law. Requiring candidates to disclose personal information relevant to their eligibility may be rationally connected to (that is, effective to achieve) this objective. In this regard, the minister advised that publishing the qualification checklist and supporting documentation supports the aims of minimising the risk of disqualification and maintaining public confidence in the electoral process by ensuring transparency and accountability. While having a qualification checklist, as administered by the Australian Electoral Commission, would appear to be sufficient to minimise the risk of the disqualification of candidates, it is arguable that publishing the list is rationally connected to the objective of transparency and public confidence in the eligibility of candidates.

2.16 In determining whether the measure is proportionate to the objective sought to be achieved, it is necessary to consider whether the measure is accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective. In relation to the Electoral Commissioner's power to omit,

12 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 24-28 and *Report 2 of 2019* (2 April 2019) pp. 97-100.

redact or delete a document the minister advised that 'what information is omitted, redacted or deleted remains a matter for the Electoral Commissioner'. Examples of when the Commissioner might exercise this power may be where the document referred to an address of a silent elector or to redact certain document identification numbers such as passport and birth certificate numbers. As stated in the initial analysis, the adequacy of this power as a safeguard to avoid arbitrary interference with the right to privacy relies on the discretion of the Electoral Commissioner. Where a measure limits a human right, discretionary safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.[13] This is because discretionary safeguards are less stringent than the protection of statutory processes.

2.17 The minister reiterated the ability of candidates to redact, omit or delete any information in a supporting document that they do not wish published, giving them an opportunity to safeguard their privacy as well as that of their family members. However, as stated in the initial analysis, the ability of candidates to redact, omit or delete any information only pertains to *additional* documents supplied and only to information not required by the qualification checklist. The option to omit, redact or delete information is also not available to other individuals even where the information or additional documentation relates to their personal details. For instance, a candidate's parents or grandparents, or current or former spouses have no choice in whether their personal information is made publicly available under the qualification checklist scheme.

2.18 The minister confirmed that a number of Australian Privacy Principles do not apply in relation to personal information in the qualification checklist or within an additional published document. It therefore appears that the consent and knowledge of third parties is not required, and nor is there any ability for third parties to correct or remove published information. The minister did not address the question of whether parents, grandparents and current and former spouses of candidates have any avenue to prevent information being published about them or to correct or remove information once published, and as such it would appear they do not.

2.19 Finally, it remains unclear why it is strictly necessary to publish the checklist on a public website, rather than have the information available to the Australian Electoral Commission. It would appear that the objective of ensuring eligibility, and public confidence in the system, could be achieved by the less rights-restrictive measure of requiring candidates to provide the checklist and supporting documents to the Electoral Commissioner and empowering the Electoral Commissioner to confirm, on the basis of the information provided, that the candidate appears eligible for election.

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

2.20 In conclusion, while the measure seeks to achieve the legitimate objective of achieving transparency and confidence in the eligibility of political candidates, and the measure may be rationally connected to this objective, it appears that there are insufficient safeguards, and a less rights restrictive way to achieve the stated objective. As such, there is a significant risk that the private lives of a political candidate, but more particularly their family members, may be arbitrarily interfered with by this measure. There is also some risk that some potential candidates may be deterred by the impact on their private life, and that of their family members, by the publication of all information in the checklist which may impermissibly limit the right to take part in public affairs.

Committee view

2.21 The committee thanks the minister for this response. The committee notes the bill seeks to amend the *Commonwealth Electoral Act 1918* to streamline the candidate qualification checklist relating to eligibility under section 44 of the Constitution and to clarify when a response to a question is mandatory. In doing so, this bill remakes the qualification checklist in its entirety.

2.22 The committee notes that requiring candidates seeking nomination for election to complete the qualification checklist, which requires personal information about the individual, their family members and supporting documents to be publicly disclosed, engages and limits the right to privacy and the right to take part in public affairs. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.23 The committee considers that the measure seeks to achieve the legitimate objective of improving transparency and confidence in the eligibility of political candidates, and is rationally connected to this objective. However, noting that the applicable safeguards are discretionary and not set out in law, the committee is concerned the measure may not be proportionate. As such, the committee considers there is a significant risk that the measure may arbitrarily interfere with the right to privacy (particularly of candidates' family members) and there is some risk it may impermissibly limit the right to take part in public affairs.

Suggested action

2.24 The committee considers that the proportionality of the measure may be assisted were the bill amended to:

(a) require the Electoral Commissioner to consider the impact on privacy of publishing all information in the checklist, or obtain the consent of third parties (such as candidates' family members, including ex-spouses) who may not be aware that their personal information is being published;

(b) require the Electoral Commissioner to redact the addresses of any silent electors and redact identification numbers such as passport and birth certificate numbers;

(c) set out a process whereby a person (not just the candidate) can request the Electoral Commissioner to redact certain personal information on both the form and the supporting documentation, and allow for merits review of the Commissioner's decision.

1.90 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021[1]

Purpose	This bill seeks to implement recommendations of the *Comprehensive Review of the Legal Framework of the National Intelligence Community* and other measures 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 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 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 Schedule 4 would insert new provisions to: - 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 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 functions, without ministerial authorisation

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 2 of 2022*; [2022] AUPJCHR 19.

	Schedule 6 would amend section 13 of the *Intelligence Services Act 2001* 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 Schedule 7 would require the Office of National Intelligence (ONI) to obtain Director-General approval when undertaking cooperation with public international organisations 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 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 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 Schedule 11 seeks to include ASD in the Assumed Identities scheme contained in the *Crimes Act 1914* Schedule 12 seeks to clarify the meaning of an 'authority of another country' in the *Intelligence Services Act 2001* 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 *Telecommunications (Interception and Access) Act 1979*; clarify the permissible scope of classes under section 12 of that Act and under section 24 of the *Australian Security Intelligence Organisation Act 1979*; and introduce additional record-keeping requirements regarding persons exercising the authority conferred by all relevant ASIO warrants and relevant device recovery provisions Schedule 14 seeks to make technical amendments related to the *Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018*
Portfolio	Home Affairs
Introduced	House of Representatives, 25 November 2021

Rights	Privacy; equality and non-discrimination; right to life; freedom of movement; effective remedy

2.26 The committee requested a response from the minister in relation to the bill in *Report 1 of 2022*.[2]

Background

2.27 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)

2.28 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 ASIS, ASD and AGO (together, the Intelligence Services agencies) are required to get ministerial authorisation before producing intelligence on an Australian person in a foreign country.[3] 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.[4]

2.29 The amendments provide for non-exhaustive circumstances in which a person is taken to be involved with a listed terrorist organisation.[5] 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

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2022* (9 February 2022), pp. 2-22.

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

4 Schedule 2, items 2 and 3.

5 '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.

organisation; provides financial or other support to the organisation; or advocates for, or on behalf of, the organisation.[6]

2.30 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.[7]

2.31 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.[8] Currently, only ASIS has this power.[9] These class ministerial authorisations are subject to the same additional requirements outlined at paragraph [2.30].

2.32 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.[10]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to privacy and equality and non-discrimination

2.33 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.[11] 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

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

7 Schedule 2, items 12 and 13.

8 Schedule 3, item 1.

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

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

11 UN 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].

control.[12] 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.

2.34 In that context, allowing the Intelligence Services agencies to produce intelligence on one or more members of a class of Australian persons 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.[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.

2.35 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.

12 Statement of compatibility, p. 16.

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

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'.

2.36 In relation to whether the class authorisations relating to counter-terrorism pursue a legitimate objective, the statement of compatibility states that this 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. However, questions remain as to whether the measure is proportionate to the objective sought to be achieved.

Right to life

2.37 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'.[19] The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks;[20] and
- it requires the state to undertake an effective and proper investigation into all deaths where the state is involved.

2.38 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.

2.39 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'.[21] While national security is a legitimate objective for the purposes of

18 Statement of Compatibility, p. 16.

19 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.

20 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].

21 Statement of compatibility, p. 21.

international human rights law, it is unclear whether the measure is a proportionate limit on the right to life.

2.40 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;

(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's initial view

2.41 The committee noted that these measures may engage and limit the rights to privacy, equality and non-discrimination and life. The committee considered that the measures seek to achieve the legitimate objective of protecting national security and noted 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, and the committee sought the minister's advice as to the matters set out at paragraph [2.40].

2.42 The full initial analysis is set out in *Report 1 of 2022*.

Minister's response[22]

2.43 The minister advised:

> Schedule 2 to the Bill amends the ministerial authorisation framework in section 9 of the *Intelligence Services Act 2001* (IS Act) to introduce a counter terrorism class ministerial authorisation. Schedule 3 to the Bill amends section 8 of the IS Act to enable ASD and AGO to obtain a class ministerial authorisation for activities in support of the Australian Defence Force.
>
> **(a) in what circumstances would a class authorisation apply to those within Australia or subject to Australia's effective control**
>
> IS Act agencies have a function to obtain intelligence about the capabilities, intentions or activities of people or organisations outside Australia. The collection of such intelligence is not bound by geography. It may, on occasion, be able to be collected inside Australia. This could include collecting intelligence on an Australian person, if authorised by the Minister. However, the intelligence collected, even if collected within Australia, must ultimately be about the capabilities, intentions or activities of people or organisations who are outside Australia.
>
> A ministerial authorisation does not authorise AGO, ASD or ASIS to break, or be immune from, Australian law. In Australia, ASIO is the only intelligence agency that can seek a warrant, or obtain an authorisation, to collect intelligence that would otherwise be unlawful. In addition, under the reforms introduced by the *Foreign Intelligence Legislation Amendment Act 2021*, ASIO may only seek a warrant to collect foreign intelligence on an Australian citizen or Australian resident if the Director-General reasonably suspects that the person is acting for, or on behalf of, a foreign power. Previously, ASIO could not seek a warrant to collect foreign intelligence on an Australian citizen or permanent resident in any circumstances.
>
> AGO also has functions to collect national security intelligence and defence intelligence. These particular functions are not bound by the limitation that the intelligence must be about the capabilities, intentions or activities of people or organisations who are outside Australia. The new class authorisations could be used by AGO to obtain defence geospatial intelligence (s6B(1)(b) of the IS Act) or to collect national security geospatial intelligence (s6B(1)(c) of the IS Act) inside or outside Australia so long as all of the requirements in the IS Act are met.

22 The minister's response to the committee's inquiries was received on 3 March 2022. 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.

It is not possible to be more specific about the circumstances in which intelligence may be collected in Australia. It would be dependent on operational circumstances, and the movements of individuals who may be covered by the class authorisation in and out of Australia. However, set out below is a hypothetical case study that provides an illustration of the operation of the class authorisation.

Hypothetical Case Study

ASD is producing intelligence on an Australian person located overseas under a ministerial authorisation. The person is a member of a listed terrorist organisation – Islamic State. The Australian person orders three Islamic State members to conduct an attack. The Islamic State members are of unknown nationality but are presumed to be Australian.

Currently, ASD would not be able to target communications of the unknown persons to confirm their nationalities, identities or intentions without seeking individual ministerial authorisations on all three. The grounds and justification for seeking the three additional ministerial authorisations would be very similar to the grounds on which the existing ministerial authorisation was given for ASD to produce intelligence on the initial person, namely that the person is, or is likely involved in activities that are or are likely to be a threat to security, given their membership of a listed terrorist organisation. Ministerial authorisations on individuals take time to acquire and time may be of the essence where intelligence suggests that terrorist activity may be imminent. The current requirement to seek individual authorisations may result in delayed opportunities for security and law enforcement agencies to disrupt an attack.

Under the proposed amendments, all four persons will be covered under a class authorisation, as they are persons 'involved with a listed terrorist organisation' (Islamic State), enabling ASD to produce intelligence on the newly identified associates as soon as they come to ASD's attention to ensure security and law enforcement agencies are best positioned to help disrupt an attack.

The class authorisation would not of itself permit ASD to produce intelligence on Australians in Australia using covert and intrusive capabilities, as such activities in Australia require an ASIO warrant.

(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

Under proposed subsection 9(1AAB) of the IS Act, a person will be taken to be involved with a listed terrorist organisation if the 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 (within the meaning of subsection 102.1(1) of the *Criminal Code Act 1995*)
- provides financial or other support to the organisation, or advocates for, or on behalf of, the organisation.

The family members of a person who advocated on behalf of a terrorist organisation would not be covered by a class authorisation merely because of their family connection. Being related to, or friends with, a person who is involved with a listed terrorist organisation does not mean those relatives or friends are involved merely by virtue of their familial relationship. Rather, to be covered, those individuals themselves would have to be personally involved to be included in the class. For example, if one of those family members provided financial or other support to the organisation, then they could be included in the class.

There is no minimum threshold for the degree to which a person must be 'involved with' a listed terrorist organisation. It is appropriate that the IS Act agencies be permitted to obtain a ministerial authorisation in order to investigate intelligence, leads, tip-offs, or indications that a person may be providing a small amount of support to a listed terrorist organisation.

For example, there is no minimum amount of financial support or the level of non-financial support that a person must provide before they can be considered to be 'involved with' a listed terrorist organisation. This ensures agencies can produce intelligence on individuals whose involvement may have only just started and may yet be minor, but could nonetheless result in valuable intelligence. What is material to a smaller terrorist organisation may not be material to a larger organisation, resulting in a threshold that would in practice operate differently for different organisations.

The concept of 'support' does not capture mere sympathy for the general aims or ideology of an organisation. Some examples of activities that would be captured under the concept of providing 'support' include logistical support, or the provision of weapons to the organisation. The degree of support provided by an individual is a factor to which an agency would have regard when considering whether the individual is a member of a class approved by the Minister. In doing so, IS Act agencies would consider whether the actions they intend to take are proportionate to the level of involvement of the individual with the listed terrorist organisation.

The Inspector-General of Intelligence and Security (IGIS) has oversight of ASIS, AGO and ASD and can review the legality and propriety of their actions.

(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

Proposed subsection 9(1AAB) is a non-exhaustive list of activities that may constitute involvement with a terrorist organisation. A non-exhaustive definition allows ministers greater flexibility in determining the scope of a particular class authorisation. Certain activities, although seemingly innocuous in isolation, may be valuable pieces of a larger overall intelligence picture. This is particularly true where methodologies employed by terrorists have become more discreet than in the past and methods for obfuscation of activities more sophisticated.

Setting out an exhaustive definition of what it means to be 'involved with' a terrorist organisation could prevent agencies from collecting valuable intelligence. It could also lead to the need for further amendments to legislation to introduce new grounds in response to emerging threats and future operational needs.

(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

The measures in Schedules 2 and 3 to the Bill are not targeted at people of any particular religion, or racial or ethnic background. The measures in the Bill allow class authorisations based on a person's involvement with a listed terrorist organisation, or in support of military operations of the Australian Defence Force (ADF), where currently only individual authorisations can be granted. They do not enable IS Act agencies to target particular groups of persons on the basis of their religion, race or ethnicity. The changes also do not introduce new powers for the IS Act agencies.

There are safeguards in the authorisation process to preclude inappropriate use and targeting of the authorisations. For example, before giving an authorisation, the responsible minister must be satisfied of the following preconditions:

- that any activities done in reliance on the authorisation will be necessary for the proper performance of a function of the agency, and that there are satisfactory arrangements in place to ensure that nothing will be done beyond what is necessary for the proper performance of a function of the agency, and
- that there are satisfactory arrangements in place to ensure that the nature and consequences of acts done in reliance on the authorisation will be reasonable, having regard to the purposes for which they are carried out.

For the counter-terrorism class authorisation, the Minister must also be satisfied that the class of Australian persons is, or is likely to be, involved

with a listed terrorist organisation. The Minister must also obtain the Attorney General's agreement to the authorisation. The involvement of the Attorney-General provides visibility to both the Attorney-General and ASIO of proposed operational activities that relate to a threat to security.

For the class authorisations to support the ADF, the Minister must also be satisfied that the Minister for Defence has requested the assistance, and that the class of Australian persons is, or is likely to be, involved in at least one of a list of activities set out in subsection 9(1A) of the IS Act (set out in full in response to paragraph (g) below).

Each of these safeguards ensure the class authorisations must be based on legitimate criteria relating to the person's activities, not on a person's particular religion or racial or ethnic background.

As noted below, significant safeguards will also be in place to ensure that agencies use of the new class authorisations is appropriate.

(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

All class ministerial authorisations issued under the IS Act will be subject to the new safeguards introduced in the new section 10AA by Schedule 2.

Agency heads will be required to:

- ensure a list is kept that:
  - identifies each Australian on whom activities are being undertaken under the class authorisation;
  - gives an explanation of the reasons why that person is a member of the class, and
  - includes any other information the agency head considers appropriate
- provide the list to the Director-General of Security; and
- make the list available to the IGIS for inspection.

The requirement to maintain a list of all persons in a class was recommended by the Comprehensive review of the legal framework of the National Intelligence Community (the Comprehensive Review) as an oversight mechanism. It is intended to facilitate IGIS oversight and will ensure that agencies are accountable for their activities.

Further, where the Attorney-General's agreement is obtained in relation to a relevant class authorisation, the agency head must ensure that the Director-General of Security is provided with a copy of the list and written notice when any additional Australian person is added to the list. This ensures the Director-General also has visibility of each new person covered by a class authorisation, when the authorisation concerns activities that are, or likely to be, a threat to security.

Agencies are also required to report to the Minister on the activities under the class authorisation, to ensure that agencies are accountable for their activities.

IS Act agencies' use of class authorisations, like their other activities, will be subject to IGIS oversight. IGIS has the power to examine the legality, propriety and consistency with human rights of any action taken by intelligence agencies in the performance of these functions, including how and who they determine to be members of the class.

Together, these safeguards will provide sufficient ministerial and IGIS oversight over these class authorisations to ensure individuals who do not have any actual involvement in a terrorist organisation or in activities relevant 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

An individual is unlikely to ever be aware of whether they were the subject of a class authorisation. This is consistent with the position relating to existing class and individual ministerial authorisations under the IS Act, which relate to the use of covert and intrusive capabilities. It would not be appropriate to disclose details of an IS Act agency's operations to the target of those operations, due to the potential prejudice it would cause to national security and the safety of Australians.

This is why, however, IS Act agency activities are subject to oversight by the IGIS, and why the IGIS has such extensive oversight and investigatory powers. The IGIS is an independent statutory office holder mandated to review the activities of Australia's intelligence agencies for legality, propriety and consistency with human rights.

Should the IGIS choose to conduct an inquiry into the actions of an intelligence agency, it has strong compulsory powers, similar to those of a royal commission, including powers to compel the production of information and documents, enter premises occupied or used by a Commonwealth agency, issue notices to persons to appear before the IGIS to answer questions relevant to the inquiry, and to administer an oath or affirmation when taking such evidence. If, at the conclusion of an inquiry, the IGIS is satisfied that the person has been adversely affected by action taken by a Commonwealth agency and should receive compensation, paragraph 22(2)(b) of the Inspector- General of Intelligence and Security 1986 requires the IGIS to recommend to the responsible Minister that the person receive compensation.

(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

Under existing section 9(1A) of the IS Act, before the responsible minister may give a class ministerial authorisation for activities undertaken in support of the ADF's military operations, the minister must be satisfied that

the Australian person, or the class of Australian persons, is, or is likely to be, involved in one or more of the following activities:

- activities that present a significant risk to a person's safety;
- acting for, or on behalf of, a foreign power;
- activities that are, or are likely to be, a threat to security;
- activities that pose a risk, or are likely to pose a risk, to the operational security of ASIS;
- activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List;
- activities related to a contravention, or an alleged contravention, by a person of a UN sanction enforcement law;
- committing a serious crime by moving money, goods or people;
- committing a serious crime by using or transferring intellectual property; and
- committing a serious crime by transmitting data or signals by means of guided and/or unguided electromagnetic energy.

If the Australian person, or the class of Australian persons, is, or is likely to be, involved in an activity or activities that are, or are likely to be, a threat to security, both ministerial authorisation and the Attorney-General's agreement is required.

This currently applies to class authorisations for ASIS in support of the ADF's military operations. Schedule 3 of the Bill will extend these class authorisations to ASD and AGO on identical terms. An individual cannot be covered by the class authorisation proposed in Schedule 3 unless one of the above grounds is satisfied.

The ability for ASD and AGO to obtain a class authorisation for activities in support of the ADF's military operations will complement their existing ability to obtain individual ministerial authorisations for the same activities under s 9(1A) of the IS Act.

It is ultimately the role of the responsible minister, under principles of ministerial accountability, to make decisions about the precise parameters of any class authorisation they issue, within the terms of existing subsection 9(1A) as set out above. The definition of the class would be based on the advice on the IS Act agency that sought the class authorisation. That advice, in turn, would depend on the specific operational needs and why the intelligence sought is required.

Concluding comments

International human rights legal advice

Rights to privacy, equality and non-discrimination and life

2.44 In relation to when a class ministerial authorisation could apply to those within Australia, the minister advised that intelligence may be able to be collected inside Australia, as long as it relates to the capabilities, intentions or activities of people or organisations outside Australia, or to obtain certain geospatial intelligence by the AGO. It therefore appears there may be circumstances when the rights to privacy and equality and non-discrimination of persons within Australia could be limited by these class authorisations.

2.45 In relation to the breadth of the minister's power to make a class authorisation, the minister advised that there is no minimum threshold for the degree to which a person must be considered to be 'involved' with a listed terrorist organisation. The minister advised that ministerial authorisations may be used to investigate intelligence, leads, tip-offs or indications that a person may be providing a small amount of support to a listed terrorist organisation, and that there is no minimum amount of support that a person must provide before they can be considered to be 'involved'. The minister advised that the family members of someone involved in a listed terrorist organisation would not be covered merely because of their family connection. However, as there is no minimum amount of support required to be provided, and as class authorisations would be granted at an early investigatory phase, there would appear to be some risk that a class of persons such as those who live with a terrorist member and provide support (for example, driving them to a meeting with the listed terrorist organisation or providing dinner to members of the terrorist organisation), could be considered to be likely to provide financial or other support to the organisation. Without a higher threshold to determine if they are providing material support to the terrorist organisation, it would appear likely that in practice, those closest to members of a listed terrorist organisation may be under suspicion.

2.46 The minister advised that the degree of individual support provided would be a factor 'to which an agency would have regard when considering whether the individual is a member of a class approved by the Minister' and in doing so the agency would consider 'whether the actions they intend to take are proportionate to the level of involvement of the individual with the listed terrorist organisation'. However, it is noted that consideration of the proportionality of the actions taken by the intelligence security agency to the level of an individual's likely actual involvement does not appear to be a statutory or clear administrative requirement. Unlike ministerial guidelines which apply to ASIO requiring its actions to be proportionate to the gravity of the

threat posed,[23] it does not appear that such guidelines apply to ASIS, AGO or ASD: which publicly only have privacy rules setting out how data, already obtained, should be treated.[24]

2.47 Without such safeguards within the legislation, or at least in binding guidelines, there would appear to be some risk that the measures may disproportionately affect family members or friends of those involved in terrorist organisations and could disproportionately affect people of particular religions or racial backgrounds (for example, Muslim Australians located in certain countries). The minister's response stated that the measures are not targeted at people of any particular background. However, indirect discrimination occurs where a measure that is neutral at face value or without any intent to discriminate disproportionally affects people with a particular attribute. Without further safeguards around who the minister may subject to a class authorisation, there appears to be some risk that the measure could indirectly discriminate against such persons.

2.48 It is also concerning that the list of circumstances in which someone may be considered to be involved with a listed terrorist organisation is non-exhaustive. The range of listed circumstances in proposed subsection 9(1AAB) are already broad, capturing anyone who directs, or participates in, the activities of a terrorist organisation; is involved with recruitment or training of such an organisation; is a member of the organisation; provides financial or other support to the organisation; or advocates for the organisation.[25] The minister advised that a non-exhaustive definition gives greater flexibility and setting out an exhaustive definition could prevent agencies from collecting valuable intelligence and lead to the need for further amendments to introduce new grounds in response to emerging threats and future operational needs. However, if further grounds cannot be elucidated now it is questionable as to whether providing a non-exhaustive list is the least rights restrictive way of achieving the stated objective, noting that future amendments could be made should such grounds be identified in the future. A less rights restrictive approach, while retaining this flexibility should this be necessary, could be to set out an exhaustive list of when a person is taken to be involved with a terrorist organisation and include the power for further grounds to be added via a disallowable legislative instrument.

2.49 The bill would also enable ASD and AGO to obtain a class authorisation to produce intelligence on members of a class of Australian persons when providing assistance to the ADF in support of military operations. 'Military operations' are not

23 Minister's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its functions and the exercise of its powers, August 2020.

24 See Rules to Protect the Privacy of Australians (as applicable to the Australian Secret Intelligence Service, the Australian Signals Directorate and the Australian Geospatial-Intelligence Organisation).

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

defined in the Intelligence Services Act. In relation to who could be included in such a class authorisation, the minister advised that the minister may make an authorisation if satisfied that the person, or class of persons, is, or is likely to be, involved in a number of activities, such as activities presenting a significant risk to safety or security, or the commission of certain serious crimes. The minister advised that it is ultimately the role of the responsible minister to make decisions about the precise parameters of any class authorisation they issue, within the terms of the legislation, and that the definition of the class would depend on specific operational needs.

2.50 As noted in the initial analysis, the bill does include some safeguards that go to the proportionality of the measures. The minister has listed these noting that agency heads will ensure a list is kept of everyone to whom an authorisation applies (which must be made available to the IGIS and Director-General of Security); agencies must report to the minister on their activities under the authorisation; and the use of authorisations is subject to IGIS oversight. Further, it is noted that any 'intelligence information' collected under the class ministerial authorisation is subject to the agencies' privacy rules;[26] the authorisation must specify how long it is in effect and must not exceed six months;[27] and any renewal of an authorisation must not exceed six months.[28] These safeguards assist with the proportionality of the measure. However, much of these apply after the authorisation has been given and do not provide any safeguard relating to the granting of the authorisation or its exercise, and therefore appear to provide more of a record-keeping and oversight function.

2.51 It is also clear that a person whose rights to privacy and equality and non-discrimination may have been affected would be unlikely to have access to an effective remedy since, as the minister has advised, they would be unlikely to ever be aware they were the subject of a class authorisation. Any oversight therefore would rely on IGIS exercising its functions and choosing to conduct an inquiry into the actions of an intelligence agency (noting that the effectiveness of this as an oversight mechanism may be heavily subject to the staffing levels and workload of IGIS).

2.52 In conclusion, 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.[29] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. While there are some oversight and review mechanisms in the ministerial class authorisation powers, these do not appear to be sufficient to protect

26 Statement of compatibility, p. 17.

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

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

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

the rights to privacy and equality and non-discrimination of those who could be captured under the broad definition of 'involvement with a terrorist organisation'. As such, there is a risk that enabling class authorisations for those suspected of involvement with a terrorist organisation would arbitrarily limit the right to privacy and may impermissibly result in indirect discrimination. Further, in relation to expanding class ministerial authorisations when providing assistance to the ADF in support of military operations, some questions remain as to the proportionality of this measure and therefore its compatibility with the rights to privacy and equality and non-discrimination as well as potentially the right to life (if intelligence gained under such an authorisation was shared with the ADF and used in determining the application of lethal force).

Committee view

2.53 The committee thanks the minister for this response. 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. In addition, 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.

2.54 The committee notes that these measures may engage and limit the rights to privacy and equality and non-discrimination, and in relation to Schedule 3, the right to life (if intelligence is used by the ADF to impose lethal force). These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.55 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*.

2.56 However, the committee notes that the broad scope of class ministerial authorisations raise questions as to the proportionality of these measures. In particular, the ability to designate a class of persons who are likely to be 'involved in terrorism' does not appear to be sufficiently circumscribed, as the list of likely involvement is overly broad and non-exhaustive. As such, while there are some oversight and review mechanisms in the ministerial class authorisation power, the committee considers these do not appear to be sufficient and as such there is a risk that enabling class authorisations for those suspected of involvement with a terrorist organisation would arbitrarily limit the right to privacy and may impermissibly result in indirect discrimination. Further, the committee considers some questions remain as to the proportionality of expanding class ministerial

authorisations when providing assistance to the ADF in support of military operations.

Suggested action

2.57 The committee considers the proportionality of these measures may be assisted were:

(a) proposed subsection 9(1AAB) of the bill amended to provide:

(i) an exhaustive list of circumstances in which a person is taken to be involved with a listed terrorist organisation, and if considered necessary, to include a power for further circumstances to be set out in a disallowable legislative instrument (rather than leaving this to ministerial discretion); and

(ii) that the provision of financial or other support to, or advocacy for or on behalf of, a listed terrorist organisation relates to support or advocacy that is material to that organisation's engagement in, or capacity to engage in, terrorism-related activity; and

(b) guidelines developed in relation to ASIS, ASD and AGO as to how they are to exercise their powers under a class authorisation, which includes requiring consideration as to whether any actions taken against an individual are proportionate to their suspected level of involvement with a listed terrorist organisation, or with activities relevant to military operations.

2.58 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

ASIS cooperating with ASIO within Australia (Schedule 5)

2.60 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.[30] Section 13D also provides that if ASIO could not undertake the activity in at least one state or territory without it being authorised by a warrant, this division does not allow ASIS to undertake the activity.[31] Schedule 5 seeks to amend section 13B to remove the requirement that ASIS undertake the activity outside Australia.[32] The effect of this would be that ASIS could help ASIO, if requested, to produce intelligence on Australians inside Australia.

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.61 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 the storing, use and sharing of such information.[33] It also includes the right to control the dissemination of information about one's private life.

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

2.63 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

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

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

32 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)'.

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

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

Committee's initial view

2.64 The committee noted the measure may engage and limit the right to privacy. The committee considered 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. The committee considered questions also remain as to whether the measure is a proportionate limitation on the right to privacy, and sought the minister's advice as to the matters set out at paragraph [2.63].

2.65 The full initial analysis is set out in *Report 1 of 2022*.

Minister's response

2.66 The minister advised:

(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)

Schedule 5 to the Bill implements recommendation 18(b) of the 2017 Independent Intelligence Review with respect to ASIS.

The amendments in Schedule 5 will enhance cooperation between the agencies in support of ASIO's functions and enable ASIO to better protect Australia and Australians from threats to their security. Currently, ASIS has the ability to undertake less intrusive activities without ministerial authorisation to assist ASIO outside Australia but not inside Australia. While this tool works well for activities that are purely offshore, it leads to situations where important intelligence collection activities must be stopped because of the geographical limit in the legislation. For example, ASIS must currently direct an agent overseas not to contact possible sources in Australia for information, even if those contacts might have key information relevant to ASIO's functions – such as the location or intention of an Australian foreign fighter based overseas.

While the Comprehensive Review recommended against changes to the cooperation regime its primary concern was that ASIS should continue to require a written notice from ASIO that ASIS's assistance is required. The Comprehensive Review described its key concern as follows:

> 22.64 Expanding section 13B to apply to ASIS's activities onshore could increase the instances in which ASIS undertakes activities without prior request [emphasis added], relying on a reasonable belief that it is not practicable in the circumstances for ASIO to make the request of ASIS. In our view, it would only be

appropriate in exceptional circumstances for ASIS to operate onshore without prior request from ASIO, and such circumstances were not put to the Review.

The Comprehensive Review did not explicitly consider whether onshore cooperation should be permitted in circumstances where a written notice would be mandatory.

Consistent with the Government response, the reforms included in the Bill address this concern by ensuring that ASIS cannot act unilaterally. The proposed amendments will always require ASIS to have a written notice from ASIO that ASIS's assistance is required onshore. The urgent circumstances exemption for offshore activities, which permits ASIS to act without written notice from ASIO where it cannot be practicably obtained in the circumstances, does not apply to onshore activities. Further, as noted below, there are substantial restrictions on ASIS's potential activities in Australia.

The IGIS will continue to provide oversight for ASIS's and ASIO's activities undertaken under a section 13B cooperation arrangement. ASIS is also required to report to the Minister for Foreign Affairs on any activities under section 13B of the IS Act each financial year.

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

It would not be appropriate to comment on the specific operational activities ASIS might undertake under this measure as it may prejudice Australia's national security.

However, ASIS can only undertake less intrusive activities under this framework (activities for which ASIO would not require a warrant) to produce intelligence on Australian persons. The amendments do not allow ASIS to do anything in Australia that ASIO would require a warrant to do, or anything that would otherwise break the law. For example, in general terms, ASIS could task an agent to obtain information, but could not intercept a person's communications as this would require a warrant.

ASIS will always require a ministerial authorisation or a written notice from ASIO to undertake activities to produce intelligence on an Australian person inside Australia. The urgent circumstances exemption for offshore activities, which permits ASIS to act without written notice from ASIO where it cannot be practicably obtained in the circumstances, does not apply to onshore activities.

ASIS must also comply with its privacy rules, in accordance with section 15 of the IS Act. Any intelligence produced on an Australian person can only be retained and communicated in accordance with these privacy rules.

Concluding comments

International human rights legal advice

Right to privacy

2.67 In relation to the objective of the measure, the initial analysis found that improving cooperation and integration between national security agencies 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, the Comprehensive Review recommended that section 13B should not be extended to apply to ASIS's onshore activities, as there was insufficient evidence to demonstrate the operational need for this.[34]

2.68 In response to the question what is the pressing and substantial public or social concern that the measure is seeking to address, the minister advised that currently ASIS's important intelligence activities must be stopped if the intelligence is located in Australia. The minister advised that the change to section 13B was recommended by the 2017 Independent Intelligence Review, and while the minister acknowledged that the 2020 Comprehensive Review did not recommend these changes, the minister stated that the Comprehensive Review's primary concern was that ASIS should continue to require a written notice from ASIO that ASIS's assistance is required, and this bill requires this.

2.69 However, with respect, it would appear that the Comprehensive Review's concerns were broader than this. The report of the Comprehensive Review stated that agency submissions varied on the question of whether the geographic limitation restricted cooperation and 'it was apparent that the practical benefits of making the change would be limited'. It went on to explain that the requirement in section 13B to involve other agencies in operational activity 'should be viewed as a mechanism to achieve optimal results and an enabler to operational activity, rather than an example of an unnecessary legislative restriction'. It concluded that there was insufficient evidence to demonstrate the operational need for such a change and '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'.[35]

2.70 The minister's response did not explain why a focus on improving cooperation between ASIS and ASIO would not be effective to achieve the aims of this reform. While the minister's response states that ASIS's intelligence collection activities must

34 Mr Dennis Richardson AC, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2020, volume 2, recommendation 57 and [22.65].

35 Mr Dennis Richardson AC, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2020, volume 2, [22.61]–[22.65].

stop if they are to be in Australia, it does not explain why it is not practical for ASIO to continue those activities should they be located in Australia (which presumably occurs under the current law). Noting that the Comprehensive Review recently concluded such a power was not necessary, and that the minister's response has not provided any further evidence of the pressing and substantial public or social concern that the measure is seeking to address, it is not possible to conclude that the measure seeks to address a legitimate objective for the purposes of international human rights law.

2.71 Further, in relation to whether the measure is proportionate to the objective sought to be achieved, the statement of compatibility sets out a number of important safeguards which likely assist with the proportionality of the measure, as set out in the initial analysis. However, as it was unclear what specifically this measure will authorise ASIS to be able to do and how intrusive this may be to an individual's privacy, further information was sought. The minister was unable to comment on the operational activities ASIS might undertake under the measure as it may prejudice national security, only stating that it would be less intrusive activities to produce intelligence on Australian persons. As such, it remains unclear what impact this measure would have on the right to privacy and whether the accompanying safeguards would therefore be adequate in the circumstances.

2.72 As it has not been established that there is a pressing and substantial concern that would require ASIS to collect intelligence on Australians within Australia (noting this role can already be performed by ASIO), and that it remains unclear how intrusive such activities may be, these amendments would appear to risk arbitrarily limiting the right to privacy.

Committee view

2.73 The committee thanks the minister for this response. 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.

2.74 The committee notes the measure engages and limits 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.

2.75 While the committee considers improving cooperation and integration between national security agencies to protect the security of Australia is, in general, a legitimate objective, the committee notes that the *Comprehensive Review of the Legal Framework of the National Intelligence Community* recommended that ASIS should *not* have the power to produce intelligence on Australians within Australia – a role performed by ASIO. The committee notes that the minister's response did not explain why a focus on improving cooperation between ASIS and ASIO, as suggested

by the Comprehensive Review, would not be effective to achieve the aims of this reform.

2.76 The committee considers that as it has not been established that there is a pressing and substantial concern that would require ASIS to collect intelligence on Australians within Australia, and that it remains unclear how intrusive such activities may be, these amendments would appear to risk arbitrarily limiting the right to privacy.

Suggested action

2.77 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

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

2.79 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.[36] 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 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.[37]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to freedom of movement, privacy and effective remedy

2.80 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.

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

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

The right to freedom of movement includes the right to leave any country and the right to enter one's own country.[38] 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.[39] 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.[40] Measures that limit the right to leave a country must also be rationally connected and proportionate to these legitimate objectives.

2.81 The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[41] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[42] 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.

2.82 Where an individual's travel documents are suspended in a manner that unlawfully limits the rights 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.[43] 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

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

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

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

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

42 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).

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

nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[44]

2.83 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'.[45] 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.[46] 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.

2.84 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.

2.85 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

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

45 Statement of compatibility, p. 31.

46 Statement of compatibility, p. 31.

(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's initial view

2.86 The committee noted that the measure engages and limits the rights to freedom of movement and privacy and may engage the right to an effective remedy. The committee considered that the measure seeks to achieve the legitimate objective of protecting national security and is rationally connected to that objective. However, the committee required further information in relation to the proportionality of the measure and sought the minister's advice as to the matters set out at paragraph [2.85].

2.87 The full initial analysis is set out in *Report 1 of 2022*.

Minister's response

2.88 The minister advised:

(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

ASIO's operational experience has demonstrated the current 14-day suspension period is not sufficient in all cases for ASIO to undertake all necessary and appropriate investigative steps, before preparing a security assessment, including:

- comprehensively reviewing its intelligence holdings on the person
- planning and undertaking intelligence collection activities, including activities that require the Director-General of Security to request warrants from the Attorney-General
- requesting information from Australian and foreign partner agencies
- assessing all such information, to produce a detailed intelligence case, and
- where possible, interviewing the person to put ASIO's concerns to them and assessing their answers.

Given the gravity of the decision to permanently cancel a person's Australian passport or foreign travel document, it is critical that ASIO has sufficient time to undertake all necessary and appropriate investigative steps, so that the decision to cancel is both procedurally fair and based on accurate and sufficient information.

The reform will allow the time required for assessments to be made, particularly in more complex cases, including where the subject was previously unknown to ASIO.

Providing for a 14-day suspension, with the possibility of an extension, could result in further delays to the security assessment process. It would not be possible to determine whether an extension would be required until towards the end of the initial 14-day period. By that point, it may not be practical to secure a further ministerial decision on an extension within a timeframe that would allow ASIO to continue its investigative activities.

The risks involved in having to return a person's travel documents before an assessment could be completed, should an extension not be granted in time, would represent a disproportionate impact on security compared to the temporary limitation on the freedom of movement resulting from an additional, initial 14 days' suspension under the proposed framework. It could potentially require the return of a person's travel documents, enabling them to travel, before the level of threat they pose to national security could be sufficiently quantified.

(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

The Bill does not change the existing threshold for the Director-General of Security to make a request to the Minister to suspend a person's travel documents. That threshold is contained in the *Australian Passports Act 2005* (Passports Act) and the *Foreign Passports (Law Enforcement and Security) Act 2005* (Foreign Passports Act).

The existing threshold in the Passports Act and the Foreign Passports Act permit the Director-General of Security to request a suspension where sufficient information is available to provide the Director-General with a suspicion that there may be a risk of travel to engage in conduct that might prejudice the security of Australia or a foreign country. On suspension of a travel document, ASIO can then undertake all necessary investigative steps to inform a security assessment. The security assessment itself then provides an assessment as to the level of risk involved, including an assessment of whether a person would be likely to engage in the relevant conduct overseas.

The Director-General of Security may then request that a person be refused an Australian passport, that their existing Australian passport be cancelled or that their foreign travel documents be subject to long-term surrender, if the Director-General of Security suspects on reasonable grounds that:

- the person would be likely to engage in conduct that might (among other things) prejudice the security of Australia or a foreign country, endanger the health or physical safety of other persons, or interfere with the rights or freedoms of other persons, and

- the person's Australian or foreign travel document should be refused, cancelled or surrendered in order to prevent the person from engaging in the conduct.

The purpose of the 'may' threshold for suspensions is to enable ASIO to undertake precisely the work necessary to determine whether a person would be likely to engage in the relevant conduct, to inform a higher threshold decision on cancellation or long-term surrender. Changing the threshold for seeking a suspension could establish a burden sufficiently high as to prevent the Director-General from being able to seek a suspension unless a security assessment had already been undertaken. This would defeat the purpose of the suspension power. It would also, potentially, put the Government in a position where it knows there is a risk that someone may engage in prejudicial activities, but nonetheless is powerless to suspend their travel documents temporarily while the matter is investigated further. This in turn could risk both Australia's national security and that of foreign countries.

(c) why merits review of a decision to suspend travel documents is not available;

The Bill does not amend the current position under which decisions relating to temporary suspension or surrender are not merits reviewable.

Decisions relating to temporary suspension or surrender are not merits reviewable or reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). Review of security related matters may compromise the operations of security agencies and defeat the national security purpose of the mechanisms. This is particularly so given that, in the majority of cases of temporary action, further investigations and operational activity are ongoing. Review at this stage risks exposing ongoing operational activity and may prevent ASIO from finalising its security assessment.

The Administrative Review Council previously stated that it is appropriate to restrict merits review for decisions of a law enforcement nature, as this could jeopardise the investigation of possible breaches and subsequent enforcement of the law.[47] The Council also indicated that exceptions may be appropriate for decisions that involve the consideration of issues of the highest consequence to the Government such as those concerning national security. Given this restriction is in relation to decisions relating to national security, where there is an imminent risk of harm to the community or individuals, it is justifiable to restrict the availability of merits review, as this would clearly not be in the public interest.

47 Administrative Review Council (1999), *What decisions should be subject to merit review?* [4.31].

Instead of providing for merits review, the framework[48] prohibits rolling suspensions or temporary surrenders. Any subsequent request for suspension or temporary surrender of a travel document can only be made on the basis of information that ASIO has obtained after the previous suspension or surrender has expired.

Importantly, a permanent cancellation decision resulting from a security assessment conducted during the temporary suspension period is merits reviewable.

(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

Should an Australian person be adversely affected by an action taken by an intelligence agency against that person, they may make a complaint to the IGIS. The IGIS is an independent statutory office holder mandated to review the activities of Australia's intelligence agencies for legality, propriety and consistency with human rights.

Should the IGIS choose to conduct an inquiry into the actions of an intelligence agency, it has strong compulsory powers, similar to those of a royal commission, including powers to compel the production of information and documents, enter premises occupied or used by a Commonwealth agency, issue notices to persons to appear before the IGIS to answer questions relevant to the inquiry, and to administer an oath or affirmation when taking such evidence. At the conclusion of the inquiry, paragraph 22(2)(b) of the *Inspector-General of Intelligence and Security Act 1986* requires the IGIS to prepare a report setting out conclusions and recommendation to the responsible Minister that the person receive compensation, if the IGIS is satisfied that the person has been adversely affected by action taken by a Commonwealth agency and should receive compensation.

The Scheme for Compensation for Detriment caused by Defective Administration provides a mechanism for non-corporate Commonwealth entities to compensate persons who have experienced detriment as a result of the entity's defective actions or inaction.

Section 65 of the *Public Governance, Performance and Accountability Act 2013* allows the making of discretionary 'act of grace' payments if the decision-maker considers there are special circumstances and the making of the payment is appropriate.

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

Concluding comments

International human rights legal advice

Rights to freedom of movement, privacy and effective remedy

2.89 In considering the proposal to double the period of time for which travel documents can be suspended, it is necessary to consider if the existing process to suspend constitutes a proportionate limit on the rights to freedom of movement and private life. 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.[49] The minister advised that the purpose of the 'may' threshold for suspensions is to enable ASIO to undertake the work necessary to determine whether a person would be likely to engage in the relevant conduct, so that once the travel document is suspended on this basis of a suspicion, ASIO can then undertake all the necessary investigative steps to inform a security assessment. On the basis of this advice, it is clear that this low threshold allows ASIO to suspend a person's travel documents on the basis of a mere suspicion. This is a relevant factor in considering the proportionality of doubling the period that the travel document may be suspended.

2.90 Further, the minister advised that merits review of this suspension decision is not appropriate as this may compromise the operations of security agencies and may prevent ASIO from finalising its security assessment. However, the fact a permanent cancellation decision is merits reviewable – suggesting any compromise to the operations of security agencies can be managed by the Administrative Review Tribunal process (via the Security Appeals division) – raises questions as to why this could not apply to reviews of suspensions. The lack of merits review is also relevant in considering the proportionality of the measure.

2.91 Finally, in relation to why doubling the period to 28 days is appropriate, the minister advised the current 14 days 'is not sufficient in all cases' for ASIO to undertake all investigative steps to ensure that any decision to permanently cancel a passport or travel document is both procedurally fair and based on accurate and sufficient information. In relation 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, the minister advised that this could result in further delays to the

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

security assessment process. The minister advised that it would not be possible to determine whether an extension was required until close to the end of the 14 days and at that point it may not be practical to secure a further decision on an extension in time for ASIO to continue its investigations. However, given the initial request for a suspension can be made in a time-critical way (for example, when the person is at the airport about to fly), it is not clear why an extension request, asked for some days before the extension expires, would not be possible. It is also not clear why this would result in further delays to the security assessment process, noting that other staff within ASIO could presumably assist with the application process to allow the investigative staff to continue their investigations.

2.92 It is noted that when this measure was first recommended in 2014 the Independent National Security Legislation Monitor proposed setting a strict timeframe, noting it 'may be that an initial period of 48 hours, followed by extensions of up to 48 hours at a time for a maximum period of seven days may be appropriate'.[50] Yet, when the power was introduced it provided for a 14 days suspension.[51] This bill now proposes doubling that again to 28 days. It is argued that the lower threshold and lack of review for the suspension of travel documents is appropriate given the temporary nature of the power. However, this argument becomes increasingly doubtful when the period of time by which travel documents may be suspended continues to expand. Noting the significant limitation the measure poses on the rights to freedom of movement and a private life, the inadequate safeguards that apply to the making of the order, and the availability of a less rights restrictive alternative to doubling the period of the suspension, it appears that this measure would be incompatible with the rights to freedom of movement and a private life.

2.93 In relation to whether there is any remedy available for individuals who have had their travel documents unnecessarily suspended, the minister advised that an Australian person adversely affected may make a complaint to the IGIS, and should the IGIS choose to conduct an inquiry, it could recommend the person receive compensation. The minister also advised that the Scheme for Compensation for Detriment caused by Defective Administration provides a mechanism for non-corporate Commonwealth entities to compensate persons who have experienced detriment as a result of the entity's defective actions or inactions, and there is a separate power for discretionary 'act of grace' payments to be made if there are special circumstances and the making of the payment is considered appropriate. These mechanisms may result in a person whose travel documents were inappropriately suspended being able to access an effective remedy. However, it is noted that these mechanisms are entirely discretionary and given the low threshold on which travel

50 Brett Waker SC, Independent National Security Legislation Monitor, *Annual Report*, (28 March 2014) p. 48.

51 *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, Schedule 1, items 11–26.

documents may legitimately be suspended it is unlikely that an affected person would meet the criteria for compensation. As a result, there is some risk that a person whose rights to freedom of movement and a private life were violated would not have access to an effective remedy.

Committee view

2.94 The committee thanks the minister for this response. 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.

2.95 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 also engages the right to an effective remedy.

2.96 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 notes that the time period for the suspension of travel documents was originally proposed by the Independent National Security Monitor to be 48 hours (and no more than 7 days). It was originally legislated for 14 days and this bill proposes doubling that to 28 days. The committee considers that while it may be proportionate to set a lower threshold (of suspicion that a person may leave Australia to engage in conduct that *might* prejudice security) and restrict access to merits review when suspending a travel document for a strictly time limited period, this does not appear proportionate when suspending travel documents for 28 days. The committee also considers there is a less rights restrictive alternative that could be available, namely keeping the current 14 day period and enabling one extension in individual cases if demonstrated to be strictly necessary.

2.97 Noting the significant limitation the measure poses on the rights to freedom of movement and a private life, the limited safeguards that apply to the making of the order, and the availability of a less rights restrictive alternative to doubling the period of the suspension, the committee considers this measure, as currently drafted, would be incompatible with the rights to freedom of movement and a private life. The committee also considers there is some risk that a person whose rights to freedom of movement and a private life were violated by the suspension of their travel document, would not have access to an effective remedy.

Suggested action

2.98 The proportionality of this measure may be assisted were the bill amended to provide that the period of time for suspension of a travel document remain

14 days, but allow for one extension of this period if it is demonstrated this is necessary for operational reasons.

2.99 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

Legislative instruments

Defence (Prohibited Substances) Determination 2021 [F2021L01452][65]

Purpose	This legislative instrument revises the types of substances for which members of the Australian Defence Force may be tested
Portfolio	Defence
Authorising legislation	*Defence Act 1903*
Last day to disallow	15 sitting days after tabling (tabled in the House on 25 October 2021 and in the Senate on 22 November 2021)
Rights	Work; privacy; equality and non-discrimination

2.101 The committee requested a response from the minister in relation to the legislative instrument in *Report 13 of 2021*.[66]

Drug testing of Australian Defence Force members

2.102 Part VIIIA of the *Defence Act 1903* (the Act) provides for the drug testing of Australian Defence Force (ADF) members. It provides that the Chief of the Defence Force (the Chief) may, by legislative instrument, determine that a substance, or a substance included in a class of substances, is prohibited.[67] A defence member or defence civilian[68] (an ADF member) can be tested for the presence of any prohibited substance,[69] and if they test positive the Chief must invite them to give a written statement of reasons as to why their service should not be terminated.[70] The Chief

65 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence (Prohibited Substances) Determination 2021 [F2021L01452], *Report 1 of 2022*; [2022] AUPJCHR 20.

66 Parliamentary Joint Committee on Human Rights, *Report 13 of 2021* (10 November 2021), pp. 27-31.

67 *Defence Act 1903*, section 93B.

68 *Defence Act 1903*, section 93 defines 'defence civilian' as having the same meaning as in the *Defence Force Discipline Act 1982*. Section 3 of the *Defence Force Discipline Act 1982* defines 'defence civilian' as meaning a person (other than a defence member) who with the authority of an authorized officer, accompanies a part of the Defence Force that is outside Australia, or on operations against the enemy, and has consented to subject themselves to Defence Force discipline.

69 *Defence Act 1903*, section 94.

70 *Defence Act 1903*, section 100.

'must' terminate the person's service if they do not give such a statement within the period specified in the notice, or having considered the statement, the Chief is of the opinion that the service should be terminated.[71]

2.103 This determination specifies the substances that are prohibited under this regime. It lists nine specific types of drugs, but also lists substances in eight classes under the World Anti-Doping Code International Standard Prohibited List 2021 (World Anti-Doping list) and substances listed in three schedules in the 2021 Poisons Standard. The classes of drugs specified under the World Anti-Doping list are broad and the list states that these include:

(a) anabolic agents: which may be found in medications used for the treatment of e.g. male hypogonadism;

(b) peptide hormones, growth factors, related substances, and mimetics: which may be found in medications used for the treatment of e.g. anaemia, male hypogonadism and growth hormone deficiency;

(c) hormone and metabolic modulators: which may be found in medications used for the treatment of e.g. breast cancer, diabetes, infertility (female) and polycystic ovarian syndrome;

(d) stimulants: which may be found in medications used for the treatment of e.g. anaphylaxis, attention deficit hyperactivity disorders (ADHD) and cold and influenza symptoms;

(e) narcotics: which may be found in medications used for the treatment of e.g. pain, including from musculoskeletal injuries; and

(f) glucocorticoids: which may be found in medications used for the treatment of e.g. allergy, anaphylaxis, asthma and inflammatory bowel disease.[72]

2.104 In addition, Schedules 4, 8 and 9 of the 2021 Poisons Standard[73] are included in the determination to be prohibited substances. These schedules include a long list of prescription-only medication, controlled substances and prohibited substances.

71 *Defence Act 1903*, section 101.

72 World Anti-Doping Code International Standard Prohibited List 2021, p. 2.

73 The determination specifies in section 5 that 'Poisons Standard mean the Poisons Standard June 2021, as in force on 1 June 2021', although it is noted that this standard is no longer in force, as it appears it has been replaced by the Poisons Standard October 2021 [F2021L01345].

Summary of initial assessment

Preliminary international human rights legal advice

Rights to work, privacy and equality and non-discrimination

2.105 Determining a broad list of substances that can lead to the termination of an ADF member's service, unless they can provide sufficient reasons not to have their service terminated, engages and limits the right to work. The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[74] This right must be made available in a non-discriminatory way.[75]

2.106 Further, requiring ADF members to provide reasons for why they have taken a particular prohibited substance, which may require them to specify particular medical conditions they are receiving treatment for, engages and limits the right to a private life. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home, which includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[76] A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

2.107 The rights to work and a private life may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.108 In addition, as ADF members with certain attributes or medical conditions may be more likely to be required to take prohibited substances (e.g. people with intersex variations and those people transitioning genders are more likely to undergo hormone replacement therapy, and females are more likely to be receiving treatment for polycystic ovarian syndrome), the measure also engages the right to equality and non-discrimination,[77] including the rights of persons with disability.[78] The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and

74 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

75 International Covenant on Economic, Social and Cultural Rights, articles 6 and 2(1).

76 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).

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

78 See the Convention on the Rights of Persons with Disability.

entitled without discrimination to equal and non-discriminatory protection of the law.[79] 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).[80] 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, such as sex, gender or disability.[81] 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.[82]

2.109 Further information is required in order to assess the compatibility of this measure with the rights to work, a private life, and equality and non-discrimination, in particular:

(a) what is the legitimate objective sought to be achieved by prohibiting the substances in this determination;

(b) why it is considered necessary to include a broad list of prohibited substances, including banned substances developed in the context of sport; and

(c) what, if any, safeguards exist to ensure that any limitation on rights is proportionate, particularly for persons with ongoing medical conditions. In particular, where a person has a medical condition that requires the taking of any of these prohibited substances, what level of detail are they required to provide to their employer as to why they are taking this substance and whether they are required to explain this each time the substance is detected.

79 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.

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

81 *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'.

82 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].

Committee's initial view

2.110 The committee noted that determining a broad list of substances that can lead to the termination of an ADF member's service, unless they can provide sufficient reasons not to have their service terminated, engages and limits the right to work and the right to privacy. The committee further noted that the measure may have a disproportionate effect on ADF members with certain attributes or medical conditions who may be more likely to be required to take prohibited substances, and so may limit the right to equality and non-discrimination. The committee noted that the statement of compatibility does not recognise that any human rights are engaged and sought the minister's advice as to the matters set out at paragraph [2.109].

2.111 The full initial analysis is set out in *Report 13 of 2021*.

Minister's response[83]

2.112 The minister advised:

> ***What is the legitimate objective sought to be achieved by prohibiting the substances in the Defence (Prohibited Substances) Determination 2021?***
>
> The objective of the Determination is to provide an administrative function for the operation of Part VIIIA under the *Defence Act 1903* ie to list the drugs that are prohibited and that could adversely affect an individuals, health, ability to perform their duties and/or compromise the persons and Defences' ability to meet their obligations under the Work Health and Safety Act 2011.
>
> The provisions in Part VIIIA of the *Defence Act 1903* which authorise the Determination provide a balance in protecting the safety and welfare of members and the public, noting the nature and requirements of military duty, as well as the ADF's and Australia's reputation in having a disciplined military force.
>
> ***Why it is considered necessary to include a broad list of prohibited substances, including banned substances developed in the context of sport?***
>
> The CDF Determination regarding prohibited substances is based on both the World Anti-Doping Agency Prohibited List and the Therapeutic Goods Administration (TGA) Poisons Standard. Both of these lists are formulated based on subject matter expert analysis which has been peer reviewed by Australian government entities such as the National Measurement Institute, Sports Integrity Australia and the TGA. As such these lists of prohibited

83 The minister's response to the committee's inquiries was received on 8 February 2022. 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.

substances are regularly updated to address the new prohibited substances available within the ever-evolving illicit drug market and reviews by the TGA.

Note that these lists are mitigated by the fact that the substances or drug types listed in them are only prohibited if they have not been prescribed, administered to them or taken for a legitimate health issue and that a positive test result can be declared negative based on the information provided by the member or medical officer.

Defence is aware that the World Anti-Doping Agency (WADA) Prohibited List has been developed for a different purpose and to that end their lists are divided into in and out of competition. However, the Defence approach is that any substance within those lists that would meet Defence's definition of a prohibited substance (ie one that would impact Defence and member's safety, discipline, morale, security or reputation) are included in the Defence Determination (Prohibited Substances) 2012.

The use of these selected sections/schedules out of the WADA Prohibited List 2021 and the 2021 TGA Poisons Standard is appropriate as:

a. these documents are also used by other Australian Government agencies drug testing programs (e.g. the Sports Integrity Australia);

b. it allows Defence to capture new and evolving substances that would otherwise require a new CDF Determination to do so (e.g. WADA Schedule 0–Non-approved substances);

c. they allow for the testing for and identification of more prohibited substances than those listed in:

    i. AS/NZS: 4308:2008 – Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine (which only sets out laboratory procedures and cut-off testing ranges for the screening of drugs in urine for amphetamine type substances, benzodiazepines, cannabis metabolites, cocaine metabolites and opiates);

    ii. AS/NZS: 4760:2019 – Procedure for specimen collection and the detection and quantification of drugs in oral fluid (which only sets out laboratory procedures and cut-off concentration testing ranges for amphetamine-type substances, cannabinoids, cocaine and metabolites, opiates and oxycodone), and

    iii. the Society of Hair Testing guidelines (which only lists the cut-off levels concentration testing ranges for amphetamines, cannabinoids, cocaine, opiates methadone and buprenorphine).

d. they are monitored and reviewed by experts in the field of substance misuse and peer reviewed and approved within the world scientific toxicology and medical community, and they provides the scientific names for a number of prohibited substances (e.g. 1 Epiandrosterone (3β-hydroxy-5α-androst- 1-ene-17-one)) which can help a member

identify a prohibited substance when checking the ingredients listed on the label of a supplement or medication that they are thinking of taking.

Note that it is common that prohibited substance testing policies of organisations do not list every individual substance that they consider to be a prohibited substance. Rather, the policies generally state that substances which belong to a category of drugs are prohibited; for example:

a. the Department of Home Affairs defines a prohibited drug as a cocaine, heroin, cannabis, methamphetamines, amphetamines, MDMA (also known as ecstacy), border-controlled performance and image enhancing drugs. In addition to these substances, the Secretary or the Australian Boarder [sic] Force Commissioner may prescribe other drugs, within an instrument, that meet the Department of Home Affairs definition of a prohibited drug; and

b. the NSW Police Force defines a prohibited substance as any drug that is listed in Schedule One of the *Drug Misuse and Trafficking Act 1985.* Although this schedule lists a large number of prohibited substances it also contains the caveat that a prohibited drug is also any substance that is an analogue of a drug prescribed in the Schedule.

What, if any, safeguards exist to ensure that any limitation on rights is proportionate, particularly for persons with ongoing medical conditions?

Testing procedures are in place to ensure personal privacy during the collection process at prescribed by section 95 of the *Defence Act 1903,* and personal information including personnel information regarding medical and or psychiatric conditions and treatment is managed in accordance with the *Privacy Act 1988*, Australian Privacy Principles, Permitted General Situations and the Defence Privacy Policy.

Prior to testing Defence personnel are informed in writing:

a. The purpose of the prohibited substance test.

b. That they have the right to privacy and that they may request a chaperone, however, the inability for the testing staff to provide a chaperone who meets their particular requirements will not excuse individuals from testing and they will be required to provide the requested sample(s) at that time.

c. That they have the right to not inform test staff of any medication(s), supplements, food or drinks that they may be taking for a legitimate reason which could result in a positive test result.

d. That the disclosure of their test results is authorised for purposes which are:

    i. necessary for administration of testing - including disclosure to authorised laboratories where required;

    ii. necessary to carry out any administrative or personnel management action following the testing - which may include

disclosure to Commanders and personnel agencies necessary for management and recording of the test results;

iii. de-identified results - for statistical purposes;

iv. necessary for the purposes of medical treatment or rehabilitation – following consultation with the person concerned; or

v. otherwise necessary to carry out the functions specified in the *Defence Act 1903*, other legislation or MILPERSMAN Part 4, Chapter 3.

If in the course of participating in the Australian Defence Force Prohibited Substance Testing Program information is obtained that leads to a suspicion of a criminal offence having been committed, information relevant to that offence may be disclosed to the Australian Federal Police, or the relevant State or Territory police force.

What level of detail are Defence personnel required to provide to Defence as to why they are taking this substance?

Defence personnel are not required to provide personal health information to the testing staff as part of the testing process, and at the time of testing Defence personnel are not compelled to inform test staff of any medication(s), supplements, food or drinks that they have taken. However, they are warned that failing to provide relevant information or providing misleading information when required may result in action being taken against them that would otherwise have been avoided.

Should the person return a laboratory confirmed positive prohibited substance test result the person is requested to provide a statement of reason to the decision maker. Reasons may include that a medication was administered, prescribed or recommended by a Defence medical or health practitioner. This information is managed in accordance with the *Privacy Act 1988* and the Defence Privacy Policy.

Termination of service for prohibited substance use is not automatic, the decision on whether an ADF member is retained is based on procedural fairness where the individual circumstances of the case, the member's written statement and other factors such as performance history, perceived likelihood of re-offending and organisational needs are taken into consideration.

In those instances where the delegate decides that the ADF member is to be retained in the Service, the individual will be informed of any conditions under which they are to be retained, such as ongoing targeted testing, the requirement to undertake a rehabilitation program or additional administrative sanctions. As Defence recognises that a positive test result can be very stressful for ADF members, Defence provides administrative and welfare support (e.g. by Australian Defence Force medical officers, Defence psychologists, Defence chaplains, and through Defence Member and Family Support and Open Arms counsellors) to those affected.

Where there is a positive laboratory confirmed result, the ADF member's medical records are reviewed by a medical officer who can declare that the positive test result is related to legitimate use of a medication for treatment of a particular health condition and is consistent with the therapeutic use of that substance. Certain foods, such as poppy seeds, can also lead to a positive test, and this would also be considered by a Defence medical officer, in the case of a positive test result.

Are Defence personnel tested required to explain this each time the substance is detected?

No. Defence personnel are provided the opportunity to inform test staff of any medication(s), supplements, food or drinks that they have taken as part of the testing process each time a test is undertaken. If the Defence person has noted a medication administered, prescribed or recommended by a Defence medical or health practitioner on their testing form, a medical officer may review the medical record each time a positive result is returned, as individual circumstances may change over time. Where it has been determined by the reviewing medical officer that the result was due to the directions or recommendations of a Defence medical or health practitioner, no further explanation will be required by the Defence person.

Concluding comments

International human rights legal advice

Rights to work, privacy and equality and non-discrimination

2.113 In relation to the objective of prohibiting a broad range of drugs, the minister advised that the listed drugs are those that could adversely affect an individual's health, ability to perform their duties and/or compromise work health and safety obligations. The minister advised that this provides a balance 'in protecting the safety and welfare of members and the public, noting the nature and requirements of military duty, as well as the ADF's and Australia's reputation in having a disciplined military force'. Protecting safety and welfare and having a disciplined military force are likely to constitute legitimate objectives for the purposes of international human rights law. However, under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. In this case, while it would appear that prohibiting illicit drugs would likely be effective to achieve the objective of maintaining discipline and protecting safety and health, no information has been provided as to how prohibiting all of the drugs in the World Anti-Doping Code would be effective to achieve this objective. As such, it has not been established that listing all of these drugs is rationally connected to the stated objective.

2.114 Further, 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; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

2.115 As to whether the measure is sufficiently circumscribed, and why it is necessary to include a broad list of prohibited substances, including banned substances developed in the context of sport, the minister advised these lists are formulated based on subject matter expert analysis and that all drugs in the list, if not taken for a legitimate health reason, could impact Defence and member's safety, discipline, morale, security or reputation. The minister also advised that these lists are used by other Australian government agencies drug testing programs (such as Sports Integrity Australia); allow evolving substances to be automatically included without the need for a new determination; allow for the testing of more prohibited substances than in other standards; and are monitored and reviewed by experts and provide the scientific names for a number of prohibited substances. However, these reasons mostly appear to relate to the convenience of referring to existing external lists instead of specifying the drugs in the determination itself, rather than providing an explanation as to why drugs prohibited in a sporting context are required to be prohibited in a defence force context. It remains unclear if the listed drugs are considered likely to enhance an ADF member's physical performance (and if so, what the concern is in this context), affect their performance, or how the listed drugs would interfere with military discipline, morale, security or reputation. It would appear that there may be a less rights restrictive way to achieve the stated objective, by specifically considering each drug and its likely effect on health, safety and discipline, and only listing it once it is clear it meets these criteria.

2.116 As a result of the broad listing of a wide range of drugs, ADF members with specific medical conditions requiring certain medications are likely to need to disclose this to their employer. As the minister has advised, the list of substances or drugs are only prohibited if they have not been prescribed, administered or taken for a legitimate health issue. While the minister advises that ADF members are not required to tell the person carrying out the test about any medications they take, if they do not, and a positive prohibited substance test result is returned, the person is requested to provide a statement of reason to the decision maker (with failure to do so leading to termination of their employment). If a reviewing medical officer considers the positive testing result was 'due to the directions or recommendations of a Defence medical or health practitioner', no further explanation will be required. This suggests that only medication taken on the recommendation of a Defence medical or health practitioner will not be subject to further questioning. Medication prescribed outside of this arrangement would appear to require an ADF member to provide a statement of reasons for why they are taking it in order to ensure continued employment by the ADF. Noting the breadth of drugs captured by the listing, including, for example, medication to deal with hypogonadism or infertility, it would appear there may be circumstances where an ADF member would be required, in order to keep their

employment, to disclose personal health conditions to their employer that they may otherwise wish to keep private.

2.117 In conclusion, while the measure seeks to achieve the legitimate objectives of protecting safety and welfare and having a disciplined military force, and while prohibiting illicit substances would appear to be rationally connected to (that is, effective to achieve) that objective, it is not clear that prohibiting all of the drugs listed in the World Anti-Doping list or Poisons Standard would be effective to meet this objective. Further, as a result of the breadth of the drugs listed, this measure would appear to require ADF members to disclose a wide range of medical or health conditions to their employer in order to prevent termination of their employment. If only the drugs that are considered to specifically affect health, safety or discipline were listed this would lessen this requirement, and this would appear to be a less rights restrictive way to achieve the stated aim. As currently drafted, it would appear that the breadth of the listing of prohibited substances risks impermissibly limiting an ADF member's rights to work, a private life and equality and non-discrimination.

Committee view

2.118 The committee thanks the minister for this response. The committee notes this determination provides that the Chief of the Defence Force (the Chief) may, by legislative instrument, determine that a substance is prohibited. If an Australian Defence Force member tests positive for a prohibited substance, the Chief must invite them to give a written statement of reasons as to why their service should not be terminated. The committee notes that the determination specifies the substances that are prohibited, which includes nine specific types of drugs, but also lists substances in eight classes under the World Anti-Doping Code International Standard Prohibited List 2021 and substances listed in three schedules in the 2021 Poisons Standard.

2.119 The committee notes that determining a broad list of substances that can lead to the termination of an ADF member's service, unless they can provide sufficient reasons not to have their service terminated, engages and limits the rights to work and a private life. The committee further notes that the measure may have a disproportionate effect on ADF members with certain attributes or medical conditions who may be more likely to be required to take prohibited substances, and so may limit the right to equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.120 The committee considers the measure seeks to achieve the legitimate objectives of protecting safety and welfare and having a disciplined military force. It also considers that prohibiting illicit substances and likely other specific substances of concern, would be effective to achieve that objective. However, it is not clear that prohibiting all of the hundreds of drugs listed in the World Anti-Doping list or Poisons Standard would be effective to meet this objective. Further, as a result of the

breadth of the drugs listed, this measure would appear to require ADF members to disclose a wide range of medical or health conditions to their employer in order to prevent termination of their employment. The committee considers that if only the drugs that are considered to specifically affect health, safety or discipline were listed this would lessen this requirement, and this would appear to be a less rights restrictive way to achieve the stated aim. The committee considers that, as currently drafted, the breadth of the listing of prohibited substances risks impermissibly limiting an ADF member's rights to work, a private life and equality and non-discrimination.

Suggested action

2.121 The committee considers that the compatibility of the measure may be assisted were:

(a) each substance contained in the World Anti-Doping Code and the Poisons Standards specifically considered to determine if it is necessary to be prohibited in order to protect the health of an ADF member or their ability to perform their duties, the ADF's work health and safety obligations or the need for a disciplined military force; and

(b) the determination amended to reflect the outcomes of that review.

2.122 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

Dr Anne Webster MP

Chair