Ministerial responses — Report 2 of 2022[1]

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THE HON BEN MORTON MP
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MINISTER FOR THE PUBLIC SERVICE
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Reference: MC21-004281

Dr Anne Webster MP
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By email: human.rights@aph.gov.au

Dear Dr Webster

Thank you for your correspondence dated 8 December 2021 requesting further information regarding human rights issues in relation to the *Electoral Legislation Amendment (Candidate Eligibility) Bill 2021* (the Bill).

The Government introduced the Bill in the House of Representatives on 25 November 2021 to amend Part XIV relating to nominations, and Form DB of Schedule 1 of the *Commonwealth Electoral Act 1918* (Electoral Act). The Bill aims to increase transparency by requiring candidates to support their claims that they are qualified to sit in parliament under section 44 of the Constitution to minimise the risk of a recurrence of the disqualification issues that arose in the 45th Parliament.

The Qualification Checklist was implemented for the 2019 Federal Election following the 17 senators and members of the House of Representatives who were disqualified or resigned from Parliament due to disqualifying factors under Section 44 of the Constitution. This Bill simplifies and streamlines the Qualification Checklist, and implements the recommendations of the Joint Standing Committee on Election Matters (JSCEM) report into the conduct of the 2019 election.

In relation to the further information requested on five particular points, I make the following comments.

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 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 s44 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.

Thank you again for writing. I trust that this information will assist you in finalising your consideration of the Bill.

Yours sincerely

BEN MORTON

16 / 2 / 2022

THE HON KAREN ANDREWS MP
MINISTER FOR HOME AFFAIRS

Ref No: MS22-000235

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Dear Dr Webster

Thank you for your correspondence of 10 February 2022 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), regarding the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021 (the Bill).

The Bill implements the Government response to a number of recommendations of the *Comprehensive Review of the Legal Framework of the National Intelligence Community* (the Comprehensive Review). The measures in the Bill improve the legislative framework governing the National Intelligence Community by addressing key operational challenges facing the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate, the Australian Geospatial-Intelligence Organisation, the Defence Intelligence Organisation and the Office of National Intelligence.

In Parliamentary Joint Committee on Human Rights Report 1 of 2022, the Committee requested further information about human rights issues in relation to the Bill, including the necessity of the measures and whether the measures are proportionate.

My response for the Committee's consideration is attached and addresses why, in the view of the Department, the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. More specifically, the response:

- provides information in relation to class authorisations in Schedules 2 and 3 as to the scope of authorisations and applicable safeguards, which ensure the authorisations are appropriately limited;

- addresses the necessity for Schedule 5, which enables ASIS and ASIO to cooperate onshore, to remedy a critical operational gap and clarifies the Comprehensive Review's commentary on the ability of ASIS and ASIO to cooperate; and
- provides justification and further detail relating to the proposed 28-day passport suspension period in Schedule 8.

To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving legitimate objectives, for the reasons set out in the response.

I appreciate the extension until 4 March 2022 in which to provide the response.

Yours sincerely

KAREN ANDREWS

3 / 3 / 2022

Response to the Parliamentary Joint Committee on Human Rights

Report 1 of 2022 – National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021

In Report 1 of 2022, the Parliamentary Joint Committee on Human Rights (the **Committee**) sought further information from the Minister in relation to the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021 (the **Bill**).

The Bill improves the legislative framework governing the National Intelligence Community by addressing key operational challenges facing the Australian Secret Intelligence Service (**ASIS**), the Australian Signals Directorate (**ASD**), the Australian Geospatial Intelligence Organisation (**AGO**) (collectively, **IS Act agencies**), the Australian Security Intelligence Organisation (**ASIO**), the Defence Intelligence Organisation (**DIO**) and the Office of National Intelligence (**ONI**).

Ministerial authorisations by class (Schedules 2 and 3)

Committee request for information

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.

Minister's response

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.

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; and

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.

ASIS cooperating with ASIO within Australia (Schedule 5)

Committee request for information

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

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

Minister's response

(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

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 measures 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.

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

Committee request for information

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

(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.

Minister's response

(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; and

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.[1] 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.

Instead of providing for merits review, the framework[2] 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.

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[1] Administrative Review Council (1999), *What decisions should be subject to merit review?* [4.31].
[2] Subsection 22A(3) *Australian Passports Act 2005* ; subsection 15A(2) *Foreign Passports (Law Enforcement and Security) Act 2005*.

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.

Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Department of Defence

December 2021

The Parliamentary Joint Committee on Human Rights report 13 of 2021 includes a request for information about human rights issues in relation to the following legislation:

Defence (Prohibited Substances) Determination 2021 [F2021L01452]

The following responses are provided.

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 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 substances. 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 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.