Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 2 of 2022

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Committee information

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

The committee assesses legislation for compatibility with the human rights set out in seven international treaties to which Australia is a party.[1] The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.[2]

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks to enhance understanding of, and respect for, human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

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1 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

2 See the committee's *Guide to Human Rights*. See also the committee's guidance notes, in particular *Guidance Note 1 – Drafting Statements of Compatibility*.

Chapter 1[1]

New and continuing matters

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

- bills introduced into the Parliament between 8 and 17 February 2022;
- legislative instruments registered on the Federal Register of Legislation between 20 December 2021 and 15 March 2022.[2]

1.2 Bills and legislative instruments from this period that the committee has determined not to comment on are set out at the end of the chapter.

1.3 The committee comments on the following bills and legislative instruments, and in some instances, seeks a response or further information from the relevant minister.

Advice only comments

1.4 The following bills and legislative instruments raise human rights concerns that are substantively similar or related to measures the committee has previously reported on, and the committee reiterates the views as set out in those reports in relation to these bills and instruments:

Bills

- Crimes Legislation Amendment (Ransomware Action Plan) Bill 2022:

  see the previous comments in Report 10 of 2021;[3]

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 2 of 2022*; [2022] AUPJCHR 8.

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

3 Parliamentary Joint Committee on Human Rights, *Report 10 of 2021* (25 August 2021) pp. 91–102.

- Education Legislation Amendment (2022 Measures No. 1) Bill 2022, Schedule 1, Part 1:

  see the previous comments in Report 10 of 2020;[4] and

- Electoral Legislation Amendment (Voter Identification) Bill 2022:

  see the previous comments in Report 14 of 2021.[5]

Legislative instruments

- Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021 [F2021L01855]; Legislation (Deferral of Sunsetting Autonomous Sanctions Instruments) Certificate 2022 [F2022L00101];[6] Autonomous Sanctions Amendment (Russia) Regulations 2022 [F2022L00180]; and Autonomous Sanctions Amendment (Myanmar) Regulations 2022 [F2022L00246]:

  see the previous comments in Report 15 of 2021;[7]

- Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Regulations 2021 [F2021L01842]:

  see the previous comments in Report 13 of 2020;[8] and

- Crimes (Major Airports—Cairns Airport) Determination 2022 [F2022L00196]:

  see the previous comments in Report 4 of 2019;[9]

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4 Parliamentary Joint Committee on Human Rights, *Report 10 of 2020* (26 August 2020) pp. 11–19.

5 Parliamentary Joint Committee on Human Rights, *Report 14 of 2021* (24 November 2021) pp. 19–33.

6 This legislative instrument extends the operation of another legislative instruments that raises human rights concerns (and as such, the instrument extending its operation raises similar human rights concerns).

7 Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021) pp. 2–11.

8 Parliamentary Joint Committee on Human Rights, *Report 13 of 2020* (13 November 2020) pp. 19–62.

9 Parliamentary Joint Committee on Human Rights, *Report 4 of 2019* (10 September 2019) pp. 18–20.

Bills

Appropriation Bills 2021-2022[1]

Purpose	These bills propose appropriations from the Consolidated Revenue Fund for services[2]
Portfolio	Finance
Introduced	House of Representatives, 9 February 2022
Rights	Multiple rights

Appropriation of money

1.5 These bills seek to appropriate money from the Consolidated Revenue Fund for a range of services. The portfolios, budget outcomes and entities for which these appropriations would be made are set out in the schedules to each bill.[3]

International human rights legal advice

Multiple rights

1.6 Proposed government expenditure to give effect to particular policies may engage and limit, or promote, a range of human rights, including civil and political rights and economic, social and cultural rights (such as the rights to housing, health, education and social security).[4] The rights of people with disability, children and women may also be engaged where policies have a particular impact on vulnerable groups.[5]

1.7 Australia has obligations to respect, protect and fulfil human rights, including the specific obligations to progressively realise economic, social and cultural rights

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Appropriation Bills 2021-2022, *Report 2 of 2022*; [2022] AUPJCHR 9.

2 Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022; Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022; Appropriation Bill (No. 3) 2021-2022 and Appropriation Bill (No. 4) 2021-2022.

3 Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022, Schedule 1; Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022, Schedule 1; Appropriation Bill (No. 3) 2021-2022, Schedule 1 and Appropriation Bill (No. 4) 2021-2022, Schedules 1 and 2.

4 Under the International Covenant on Civil and Political Rights and the International covenant on Economic, Social and Cultural Rights.

5 Under the Convention on the Rights of Persons with Disabilities; Convention on the Rights of the Child; and Convention on the Elimination of All Forms of Discrimination against Women.

using the maximum of resources available; and a corresponding duty to refrain from taking retrogressive measures (or backwards steps) in relation to the realisation of these rights.[6] Economic, social and cultural rights may be particularly affected by appropriation bills, because any increase in funding would likely promote such rights, and any reduction in funding for measures which realise such rights, such as specific health and education services, may be considered to be retrogressive with respect to the attainment of such rights and, accordingly, must be justified for the purposes of international human rights law.

1.8 The statements of compatibility accompanying these bills do not identify that any rights are engaged by the bills, and state that the High Court has emphasised that because appropriation Acts do not ordinarily confer authority to engage in executive action, they do not ordinarily confer legal authority to spend, and as such, do not engage human rights.[7] However, because appropriations are the means by which the appropriation of money from the Consolidated Revenue Fund is authorised, they are a significant step in the process of funding public services. The fact that the High Court has stated that appropriations Acts do not create rights or duties as a matter of Australian law, does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law. As the committee has consistently stated since 2013,[8] the appropriation of funds facilitates the taking of actions which may affect both the progressive realisation of, and failure to fulfil, Australia's obligations under international human rights law. Appropriations may, therefore, engage human rights for the purposes of international law, because reduced appropriations for particular areas may be regarded as retrogressive – a type of limitation on rights.

6 See, International Covenant on Economic, Social and Cultural Rights.

7 Statements of compatibility, p. 4.

8 Parliamentary Joint Committee on Human Rights, *Report 3 of 2013* (13 March 2013) pp. 65-67; *Report 7 of 2013* (5 June 2013) pp. 21-27; *Report 3/44* (4 March 2014) pp. 3-6; *Report 8/44* (24 June 2014) pp. 5-8; *Report 20/44* (18 March 2015) pp. 5-10; *Report 23/44* (18 June 2015) pp. 13-17; *Report 34/44* (23 February 2016) p. 2; *Report 9 of 2016* (22 November 2016) pp. 30-33; *Report 2 of 2017* (21 March 2017) pp. 44-46; *Report 5 of 2017* (14 June 2017) pp. 42-44; *Report 3 of 2018* (27 March 2018) pp. 97-100; *Report 5 of 2018* (19 June 2018) pp. 49-52; *Report 2 of 2019* (2 April 2019) pp. 106-111; *Report 4 of 2019* (10 September 2019) pp. 11-17; *Report 3 of 2020* (2 April 2020) pp. 15-18; *Report 12 of 2020* (15 October 2020) pp. 20-23; *Report 7 of 2021* (16 June 2021) pp. 11-15.

1.9 There is international guidance about reporting on the human rights compatibility of public budgeting measures.[9] For example, the Committee on the Rights of the Child has advised that countries must show how the public budget-related measures they have chosen to take result in improvements in children's rights,[10] and has provided detailed guidance as to implementation of the rights of the child, which 'requires close attention to all four stages of the public budget process: planning, enacting, executing and follow-up'.[11] It has also advised that countries should 'prepare their budget-related statements and proposals in such a way as to enable effective comparisons and monitoring of budgets relating to children'.[12]

1.10 Without an assessment of human rights compatibility of appropriations bills, it is difficult to assess whether Australia is promoting human rights and realising its human rights obligations. For example, a retrogressive measure in an individual bill may not, in fact, be retrogressive when understood within the budgetary context as a whole. Further, where appropriation measures may engage and limit human rights, an assessment of the human rights compatibility of the measure would provide an explanation as to whether that limitation would be permissible under international human rights law.

1.11 Considering that appropriations may engage human rights for the purposes of international law, in order to assess such bills for compatibility with human rights the statements of compatibility accompanying such bills should include an assessment of the budget measures contained in the bill, including an assessment of:

9 See, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017); South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016); Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014); Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (UNIFEM, 2006); and Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney*, Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

10 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [24].

11 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [26].

12 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [81].

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);[13]
- the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (including women, First Nations Peoples, people with disability and children);[14] and
- key individual measures which engage human rights, including a brief assessment of their human rights compatibility.

1.12 In relation to the impact of spending or reduction in spending on vulnerable groups, relevant considerations may include:

- whether there are any specific budget measures that may disproportionately impact on particular groups (either directly or indirectly); and
- whether there are any budget measures or trends in spending over time that seek to fulfil the right to equality and non-discrimination for particular groups.[15]

Committee view

1.13 The committee notes that these bills seek to appropriate money from the Consolidated Revenue Fund for services. The committee considers that proposed government expenditure to give effect to particular policies may engage and promote, or limit, a range of human rights.

1.14 The committee acknowledges that appropriations bills may present particular difficulties given their technical and high-level nature, and as they generally include appropriations for a wide range of programs and activities across many portfolios. As such, it may not be appropriate to assess human rights compatibility for each individual measure. However, the committee considers that

13 This could include an assessment of any trends indicating the progressive realisation of rights using the maximum of resources available; any increase in funding over time in real terms; any trends that increase expenditure in a way which would benefit vulnerable groups; and any trends that result in a reduction in the allocation of funding which may impact on the realisation of human rights and, if so, an analysis of whether this would be permissible under international human rights law.

14 Spending, or reduction of spending, may have disproportionate impacts on such groups and accordingly may engage the right to equality and non-discrimination.

15 There are a range of resources to assist in the preparation of human rights assessments of budgets. See, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017); South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016); Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014); Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW* (2006); Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility, namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups.

1.15 The committee considers that statements of compatibility for future appropriations bills should contain an assessment of human rights compatibility which meets the standards outlined in the committee's *Guidance Note 1* and addresses the matters set out at paragraphs [1.11] and [1.12].

1.16 The committee draws this matter to the attention of the minister and the Parliament.

Criminal Code Amendment (Firearms Trafficking) Bill 2022[1]

Purpose	This bill seeks to amend the *Criminal Code Act 1995* to: • double the maximum penalty for existing firearms trafficking offences from 10 years imprisonment and/or a fine of 2,500 penalty units to 20 years imprisonment and/or a fine of 5,000 penalty units; • introduce new aggravated offences for trafficking 50 or more firearms or firearm parts (or a combination of firearms and firearm parts such that the sum total is 50) within a six month period, punishable by a maximum penalty of imprisonment for life and/or a fine of 7,500 penalty units; and • introduce mandatory minimum penalties of at least 5 years' imprisonment for these offences for adult offenders, while giving courts the discretion to reduce this minimum penalty if the offender pleads guilty to the offence and/or co-operates with law enforcement agencies
Portfolio	Home Affairs
Introduced	House of Representatives, 16 February 2022
Rights	Liberty; fair trial

Mandatory minimum jail sentences

1.17 The Criminal Code currently sets out a number of offences relating to the disposal and acquisition of firearms and international firearms trafficking.[2] This bill seeks to require that a court must impose a sentence of imprisonment of at least five years on a person aged over 18 years who is convicted of these offences.[3] A court would only be able to reduce a sentence of imprisonment by a set amount to take into account a guilty plea or cooperation with police.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Criminal Code Amendment (Firearms Trafficking) Bill 2022, *Report 2 of 2022*; [2022] AUPJCHR 10.

2 *Criminal Code Act 1995*, Schedule 1, Divisions 360 and 361.

3 Schedule 1, item 8, proposed section 360.3A and item 10, proposed section 361.5.

4 Schedule 1, item 8, proposed subsection 360.3A(3) and item 10, proposed subsection 361.5(3).

1.18 Proposals to introduce mandatory minimum sentences for firearms offences have been proposed for a number of years, and previously commented on by this committee.[5]

International human rights legal advice

Rights to liberty and fair trial

1.19 Mandatory minimum sentences of imprisonment engage the right to be free from arbitrary detention. Article 9 of the International Covenant on Civil and Political Rights protects the right to liberty, including the right not to be arbitrarily detained. The United Nations (UN) Human Rights Committee has stated that 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability.[6] In order for detention not to be considered arbitrary in international human rights law it must be reasonable, necessary and proportionate in the individual case. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy). As mandatory sentencing removes judicial discretion to take into account all of the relevant circumstances of a particular case, it may lead to the imposition of disproportionate or unduly harsh sentences of imprisonment.

1.20 The proposed mandatory minimum sentencing provisions also engage and limit article 14(5) of the International Covenant on Civil and Political Rights, which protects the right to have a sentence reviewed by a higher tribunal (right to a fair trial). This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence. A previous UN Special Rapporteur on the Independence of Judges and Lawyers has observed in relation to article 14(5) and mandatory minimum sentences:

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5 Mandatory minimum sentences for firearms offences were originally introduced in the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014; see Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) pp. 9-19, *Fifteenth Report of the 44th Parliament* (14 November 2014) pp. 24-34, and *Nineteenth Report of the 44th Parliament* (3 March 2015) pp. 101-107. The measures were then reintroduced in the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015; see *Twenty-second Report of the 44th Parliament* (13 May 2015) pp. 35-39; and *Twenty-fourth Report of the 44th Parliament* (24 June 2015) pp. 74-76. They were again reintroduced in the Criminal Code Amendment (Firearms Trafficking) Bill 2015; see *Thirty-third Report of the 44th Parliament* (2 February 2016) p. 3 and again in the Criminal Code Amendment (Firearms Trafficking) Bill 2016, see *Report 8 of 2016* (9 November 2016) pp. 29-32.

6 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of person)* (2014) [12]. It is noted that the UN Human Rights Committee has held that mandatory minimum sentences will not *per se* be incompatible with the right to be free from arbitrary detention, see *Nasir v Australia*, UN Human Rights Committee Communication No 2229/2012 (2016) [7.7].

> This right of appeal, which is again part of the requirement of a fair trial under international standards, is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellate court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards.[7]

1.21 In general, the rights to liberty and a fair trial may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.22 The statement of compatibility states that the measure seeks to achieve the legitimate objective of 'ensuring the courts are able to hand down sentences to convicted firearms trafficking offenders that reflect the seriousness of their offending'.[8] It goes on to note the harms of firearms trafficking and the impact on the community and argues that the introduction of a mandatory minimum penalty 'reflect[s] the gravity of supplying firearms and firearm parts to the illicit market'.[9] In general terms, ensuring courts can hand down appropriate sentences reflecting the gravity of the offence is capable of constituting a legitimate objective for the purposes of international human rights law. However, in order to establish whether this is a legitimate objective in a particular case, it needs to be established that there is a pressing and substantial concern which gives rise to the need for the specific measure. The statement of compatibility does not address why setting the maximum sentence, but leaving the actual sentence imposed, based on individual circumstances, to the discretion of the court, would be insufficient to achieve the stated objective. Additionally, no evidence has been provided of any sentences that have been imposed for firearms offences that did not adequately reflect the seriousness of the offence. As such, it has not been established that introducing mandatory minimum sentences for firearms offences seeks to address a pressing and substantial concern such that it is necessary to warrant limiting the rights to liberty and a fair trial.

1.23 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 accompanied by sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective. In this respect, the statement of compatibility states that the amendments do not apply to children, thereby preserving judicial discretion in cases involving minors. It also states that the measure does not impose a minimum non-parole period for offenders, and that the mandatory minimum

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7 Dato' Param Cumaraswamy 'Mandatory Sentencing: the individual and Social Costs', *Australian Journal of Human Rights*, vol. 7, no. 2, 2001, pp. 7–20.

8 Statement of compatibility, p. 4.

9 Statement of compatibility, p. 4.

sentence 'is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'.[10] It is also noted that a court may reduce the sentence of imprisonment by 25 per cent to take into account a guilty plea or cooperation with police.

1.24 The fact that there is no minimum non-parole period, and some discretion is retained by the court in relation to some aspects of sentencing, assists with the proportionality of the measure. However, it is noted that the court's discretion is significantly limited, and it would not appear that the court would be able to fully take into account the particular circumstances of the offence and the offender in determining an appropriate sentence. It is also noted that the non-parole period for a sentence of imprisonment is discretionary, and a prisoner will not automatically be entitled to be released from detention once the non-parole period has passed. Further, as noted above in relation to whether the measure addresses a pressing and substantial concern, it is not clear that judicial discretion in sentencing cannot achieve the objective of ensuring sentences reflect the gravity of the offence. As such, it also appears there may be a less rights restrictive way of achieving the stated objective – namely, increasing the applicable penalty for the offences (which this bill also seeks to do) and leaving it to the courts to impose a sentence that fits the circumstances of the relevant case.

1.25 The imposition of a mandatory minimum sentence risks not being reasonable, necessary and proportionate in the individual case. In particular, it has not been established that the imposition of mandatory minimum sentences for firearms offences meets a pressing and substantial need such that it is appropriate to limit the rights to liberty and fair trial. Accordingly, there is a risk that the measure may operate in individual cases in a manner which is incompatible with the right to be free from arbitrary detention and the right to have a sentence reviewed by a higher tribunal.

Committee view

1.26 The committee notes this bill seeks to require that courts must impose a mandatory minimum five-year sentence for adults convicted of firearms offences.

1.27 The committee has previously considered the compatibility of mandatory minimum sentences with the right not to be arbitrarily detained and the right to a fair trial.[11] In order for detention not to be considered arbitrary in international human rights law it must be reasonable, necessary and proportionate in the individual case. The right to a fair trial also protects the right to have a sentence reviewed by a higher tribunal. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

10 Statement of compatibility, p. 4.

11 See also Parliamentary Joint Committee on Human Rights, *Guidance Note 2: Offence provisions, civil penalties and human rights*.

1.28 The committee considers that ensuring that courts can hand down appropriate sentences reflecting the gravity of firearms offences, in general terms, is a legitimate objective. However, the statement of compatibility does not set out any evidence of sentences for firearms offences that have not adequately reflected the gravity of the offence. The committee notes that this bill also seeks to double the applicable penalty for firearms trafficking offences and it is not clear why increasing the applicable penalty, and then allowing the court the discretion to impose an appropriate sentence in the individual circumstances of a case, would not be sufficient to achieve the stated objective. Further in relation to the proportionality of the measure, it is not clear that there are sufficient safeguards or no less rights restrictive ways to achieve the stated objective.

1.29 Accordingly, the committee considers there is a risk that these proposed mandatory minimum sentences may operate in individual cases in a manner which would be incompatible with the right to be free from arbitrary detention and the right to have a sentence reviewed by a higher tribunal.

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

Electoral Legislation Amendment (Foreign Influences and Offences) Bill 2022[1]

Purpose	This bill, now Act, amends the *Commonwealth Electoral Act 1918* to extend the ban on foreign donations to also prohibit foreign persons and entities from fundraising or directly incurring electoral expenditure, and from authorising electoral material The bill, now Act, also increases the penalty for misleading voters in relation to the casting of their vote
Portfolio	Finance
Introduced	Senate, 9 February 2022 *Received Royal Assent 17 February 2022*
Rights	Privacy; freedom of expression; freedom of association; equality and non-discrimination

Prohibition on foreign campaigners engaging in certain electoral conduct

1.31 This bill, which is now an Act, extends the ban on foreign donations to also prohibit foreign campaigners from engaging in certain electoral conduct. A foreign campaigner means a person or entity who is not an elector, an Australian citizen, an Australian resident,[2] or a New Zealand citizen who holds a Subclass 444 (Special Category) visa.[3]

1.32 In particular, the bill prohibits foreign campaigners from authorising certain electoral matter, including paying for the production or distribution, and approving the content, of electoral advertisements; or approving the content of electoral materials such as how-to-vote cards, posters, flyers, notices and pamphlets.[4] This prohibition, however, does not apply to certain electoral matters, including matters

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Foreign Influences and Offences) Bill 2022, *Report 2 of 2022*; [2022] AUPJCHR 11.

2 Section 287 of the *Commonwealth Electoral Act 1918* defines an 'Australian resident' as a person who holds a permanent visa under the *Migration Act 1958*. Subsection 30(1) of the *Migration Act 1958* defines a 'permanent visa' as a visa to remain in Australia indefinitely.

3 Schedule 1, item 1; *Commonwealth Electoral Act 1918*, sections 287 and 287AA. 'Foreign campaigner' has the same meaning as 'foreign donor', as defined in section 287AA of the *Commonwealth Electoral Act 1918*.

4 Schedule 1, item 8, new subsection 321DA(1).

that form part of opinion polls or research relating to voting intentions at an election; personal or internal communications; and certain communications at meetings.[5] Contravention of this prohibition attracts a civil penalty of 120 penalty units ($26,640).[6] The bill also extends the Electoral Commissioner's existing information-gathering powers to circumstances where they have reason to believe that a person has information or a document relevant to investigating a possible contravention of this prohibition.[7]

1.33 In addition, the bill prohibits foreign campaigners from either fundraising or directly incurring electoral expenditure in a financial year equal to, or more than, $1,000.[8] The prohibition extends to conduct that occurs in and outside Australia.[9]

International human rights legal advice

Rights to privacy, freedom of expression, freedom of association and equality and non-discrimination

1.34 Given this bill applies to foreign persons, it is important to note at the outset that Australia's human rights obligations apply to all people subject to its jurisdiction, regardless of whether they are Australian citizens. This means that Australia owes human rights obligations to everyone in Australia, including foreign persons who are not citizens or permanent residents.[10] While many foreign campaigners would not fall within Australia's jurisdiction for the purposes of international human rights law, there are likely to be some foreign persons residing in Australia who are owed human rights obligations and whose rights may be impacted by this bill.

1.35 By prohibiting foreign persons authorising the production and distribution of electoral materials, and fundraising or directly incurring electoral expenditure, the measure interferes with these persons' right to freedom of expression, particularly

5 Schedule 1, item 8, new subsection 321DA(2).

6 Schedule 1, item 8, new subsection 321DA(1).

7 Schedule 1, item 15. The Commissioner's information-gathering powers are set out in section 321F of the *Commonwealth Electoral Act 1918*.

8 Schedule 1, item 21, new section 314AJ.

9 Schedule 1, item 21, new subsection 314AJ(2).

10 Australia's obligations under the International Covenant on Civil and Political Rights are applicable in respect of its acts undertaken in the exercise of its jurisdiction to anyone within its power or effective control (and even if the acts occur outside its own territory). See United Nations Human Rights Committee, *General Comment No.31: The nature of the general legal obligation imposed on States Parties to the Covenant,* CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136 [107]–[111].

their right to disseminate ideas and information.[11] This is acknowledged in the statement of compatibility.[12] The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice, including online platforms.[13] It protects all forms of expression, including political discourse and commentary on public affairs, and the means of its dissemination, including spoken, written and sign language and non-verbal expression (such as images).[14] International human rights law has placed particularly high value on uninhibited expression in the context of public debate in a democratic society concerning figures in the public and political domain.[15]

1.36 To the extent that the restriction on foreign persons fundraising or incurring electoral expenditure interferes with the ability of a political association to carry out its activities, it may also engage and limit the right to freedom of association. The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[16] This right prevents States parties from imposing unreasonable and disproportionate restrictions on the right to form associations, including imposing procedures that may effectively prevent or discourage people from forming an association. For instance, the European Court of Human Rights has found that legislation prohibiting a French political party receiving

11 The European Court of Human Rights has found that legislation restricting persons from incurring electoral expenditure in the weeks prior to an election amounted to a restriction on the right to freedom of expression. See *Bowman v The United Kingdom*, European Court of Human Rights (Grand Chamber), Application No. 141/1996/760/961 (1998), particularly [33]. Further, it is noted that the right to take part in public affairs and elections is not directly engaged by this measure as this right only applies to citizens. See International Covenant on Civil and Political Rights, article 25.

12 Statement of compatibility, p. 4.

13 International Covenant on Civil and Political Rights, article 19(2). See also UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, UNHRC Res. 20/8 (2012).

14 UN Human Rights Committee*, General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11]–[12].

15 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [34], [37] and [38]. The UN Committee has previously raised concerns about certain restrictions on political discourse, including 'the prohibition of door-to-door canvassing' and 'restrictions on the number and type of written materials that may be distributed during election campaigns'.

16 International Covenant on Civil and Political Rights, article 22.

funding or donations from foreign entities interfered with its right to freedom of association by impacting its financial capacity to carry on its political activities.[17]

1.37 In addition, by prohibiting individuals from engaging in certain conduct in the private sphere, such as incurring electoral expenditure, and expanding the Electoral Commissioner's information-gathering powers, the measure also engages and limits the right to privacy. The statement of compatibility acknowledges this, noting that information or documents gathered by the Electoral Commissioner may contain personal information.[18] The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[19] It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy also includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It includes the right to control the dissemination of information about one's private life.

1.38 Further, noting the measure applies to foreign persons, treating such persons differently from others on the basis of their nationality, it engages and may limit the right to equality and non-discrimination.[20] 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.[21] 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).[22] While Australia maintains a discretion under international law with respect to its treatment of non-citizens in the context of the electoral process, Australia also has obligations under

17 *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France*, European Court of Human Rights, Application No. 71251/01 (2007) [43]–[44]. Ultimately the Court concluded at [51] that 'the impact of the measure in question on the applicant party's ability to conduct its political activities is not disproportionate. Although the prohibition on receiving contributions from the Spanish Basque Nationalist Party has an effect on its finances, the situation in which it finds itself as a result is no different from that of any small political party faced with a shortage of funds'.

18 Statement of compatibility, p. 3.

19 International Covenant on Civil and Political Rights, article 17; UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4].

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

21 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.

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

article 26 of the International Covenant on Civil and Political Rights not to discriminate on grounds of nationality or national origin.[23] Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria.[24]

1.39 It is noted that the statement of compatibility only addresses potential limitations on the rights to privacy and freedom of expression and does not provide an assessment as to the compatibility of the measure with the rights to freedom of association or equality and non-discrimination.

1.40 The above rights 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.[25] In relation to the rights to freedom of expression and freedom of association, a legitimate objective is one that is necessary to protect specified interests, including the rights or reputations of others, national security, public order, or public health or morals.[26]

1.41 The statement of compatibility states that the objective of the bill is to safeguard the integrity of the electoral system by ensuring that only those with a legitimate connection to Australia are able to influence Australian elections, and by reducing both the real and perceived threat of foreign influence in Australian democracy.[27] This objective is reflected in the bill itself.[28] Regarding the expanded information-gathering powers, the statement of compatibility states that this will facilitate the gathering of information to enable the Electoral Commissioner to regulate the potential influence of foreign campaigners over Australian elections.[29] The statement of compatibility notes the threat of foreign influence in democratic elections can risk undermining electoral integrity and has the potential to erode

23 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens* (2004).

24 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].

25 Regarding limitations on the right to privacy see, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, A/HRC/13/37 (2009) [15]–[18]. Regarding limitations on the right to freedom of expression see, UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

26 International Covenant on Civil and Political Rights, article 19(3) and article 22(2). See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32]–[35].

27 Statement of compatibility, pp. 3–4.

28 Schedule 1, item 21, new section 314AI.

29 Statement of compatibility, p. 3.

democracy by compromising trust in electoral results.[30] It states the prohibition of foreign campaigners engaging in certain conduct is a mechanism to counteract the effects of foreign influence, and maintain trust, in Australia's democracy.[31]

1.42 Seeking to protect the integrity of the electoral system has been recognised as a legitimate objective for the purposes of international human rights law.[32] Indeed, the UN Human Rights Committee has accepted that legislation 'restricting the publication of opinion polls for a limited period in advance of an election' for the purposes of guaranteeing fair elections and protecting the rights of Presidential candidates addressed the legitimate objectives of protecting public order and respecting the rights of others.[33] The European Court of Human Rights has accepted that prohibiting foreign States and foreign legal entities from funding national political parties pursued the legitimate objective of protecting institutional order and prevention of disorder.[34] In light of this jurisprudence, the measure appears to pursue a legitimate objective. To the extent that prohibiting foreign campaigners from engaging in certain electoral conduct would reduce the threat of foreign influence on elections and maintain the public's confidence in the integrity of the electoral process, the measure would be rationally connected to the stated objective.

1.43 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.

1.44 The breadth of the measure is relevant in considering whether it is sufficiently circumscribed. The measure applies to foreign campaigners, which, as noted above, encompasses foreign persons who are not citizens or permanent residents but may still reside in Australia on another type of visa. This definition may capture a broad range of people, some of whom may have a legitimate connection with Australia and a genuine stake in the outcome of the Australian political process, noting that the

30 Statement of compatibility, p. 4.

31 Statement of compatibility, p. 4.

32 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [37].

33 *Kim Jong-Cheol v Republic of Korea*, UN Human Rights Committee Communication No. 968/2001 (2005) [8.3].

34 *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France*, European Court of Human Rights, Application No. 71251/01 (2007) [43]–[44]. See also *Bowman v The United Kingdom*, European Court of Human Rights (Grand Chamber), Application No. 141/1996/760/961 (1998), where the Court found that legislation restricting electoral expenditure prior to an election pursued the legitimate aim of protecting the rights of others, namely the candidates for election.

outcome of elections may impact certain areas of concern for such persons, such as employment opportunities; access to social welfare and support services; access to education and housing; and migration policies and laws. As to the type of expression captured, the measure prohibits the expression of electoral matters that are in electoral advertisements paid for and approved by a foreign campaigner; and electoral matters approved by a foreign campaigner that form part of a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how to vote card. Electoral matter is defined as a 'matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election', including communications that expressly promote or oppose a political entity or parliamentarian but not those that serve an educative purpose.[35] Noting this definition, the prohibition could potentially capture a wide range of materials and forms of expression. Considering the broad range of people to whom the measure may apply, and the types of expression prohibited, questions remain as to whether the measure is sufficiently circumscribed.[36]

1.45 In addition, the UN Human Rights Committee has noted that restrictions on the right to freedom of expression must not be overly broad and, even where restrictions are based on legitimate grounds, States parties 'must demonstrate in [a] specific and individualized fashion the precise nature of the threat' and establish 'a direct and immediate connection between the expression [in question] and the threat'.[37] In the context of this bill, it does not allow for an individualised assessment of the threat posed by the foreign persons, or the forms of expression, captured by the measure. It is therefore not clear that all forms of expression prohibited by this bill would necessarily pose a threat to Australia's democracy and electoral system in practice. A measure that imposes a blanket prohibition without regard to the merits of an individual case is less likely to be proportionate than those which provide flexibility to treat different cases differently.

35 *Commonwealth Electoral Act 1918*, section 4AA. 'Electoral matter' does not include communications whose 'dominant purpose is to educate their audience on a public policy issue, or to raise awareness of, or encourage debate on, a public policy issue'.

36 The Parliamentary Joint Committee on Human Rights has previously raised concerns about the breadth of related measures that restrict foreign political donations and impose registration requirements on certain campaigners and entities, as well as persons undertaking activities on behalf of a foreign principal. See Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, *Report 1 of 2018* (6 February 2018), pp.11–29; *Report 3 of 2018* (27 March 2018) pp. 154–180; Foreign Influence Transparency Scheme Bill 2017 and Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017, *Report 1 of 2018* (6 February 2018), pp.34–44; *Report 3 of 2018* (27 March 2018) pp. 189–206.

37 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]–[35].

1.46 Further, it is not clear from the information provided in the statement of compatibility that the measure is accompanied by sufficient safeguards to ensure any limitation on rights is proportionate. It is also not clear whether there are less rights restrictive ways of achieving the stated objective. Without this information, it is not possible to conclude that the measure is a proportionate limit on the rights to privacy, freedom of expression, freedom of association and equality and non-discrimination.

Committee view

1.47 The committee notes this bill prohibits foreign campaigners, including foreign persons who are neither citizens nor permanent residents, from engaging in certain electoral conduct, including authorising the production and distribution of certain electoral matters, and fundraising or directly incurring electoral expenditure. The bill also expands the Electoral Commissioner's existing information-gathering powers to allow for investigation of possible contraventions of these new prohibitions.

1.48 By prohibiting foreign persons in Australia from engaging in certain electoral conduct, and expanding the Electoral Commissioner's information-gathering powers, the measure engages and limits the rights to freedom of expression and privacy. To the extent that restricting foreign persons fundraising or incurring electoral expenditure interferes with the ability of a domestic political association to carry out its activities, it may also engage and limit the right to freedom of association. Further, noting the measure treats foreign persons differently from others on the basis of nationality, it engages and 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.

1.49 The committee considers the measure pursues the legitimate objective of protecting the integrity of Australia's electoral system and reducing the threat of foreign influence on Australia's elections. However, the committee notes that it is not clear that the measure is proportionate, noting that it applies to almost all non-nationals living in Australia who are not permanent residents, such that they would be prohibited from engaging in any form of campaigning in the political process (for example, prohibiting those on student visas from creating pamphlets opposing a political party).

1.50 The committee notes with concern that this bill passed four sitting days after introduction.[38] It notes that this short timeframe did not provide the committee with adequate time to scrutinise the legislation and seek further information in order to provide appropriate advice to the Parliament as to the human rights compatibility

38 This bill was introduced in the Senate on 9 February 2022; finally passed both Houses on 16 February 2022; and received Royal Assent on 17 February 2022.

of the bill. As the bill has now passed, the committee makes no further comment on this bill.

Social Media (Anti-Trolling) Bill 2022[1]

Purpose	This bill seeks to create a framework to regulate defamatory content posted on social media The bill would deem an Australian person who maintains or administers a social media page not to be the publisher for material posted on the page by another person. Instead, the social media service provider would be considered the publisher of material published on their service for the purposes of defamation law The bill would introduce a defence in defamation proceedings for social media service providers if certain conditions are satisfied, including the provision of, and compliance with, a complaints scheme The bill would introduce end-user information disclosure orders that would require a social media service provider to disclose the poster's relevant contact details and country location data to the potential complainant in defamation proceedings
Portfolio	Attorney-General
Introduced	House of Representatives, 10 February 2022
Rights	Privacy; freedom of expression

Disclosure of poster's personal information

1.51 This bill seeks to provide a framework to regulate who is responsible for defamatory content posted on social media, and introduce powers for anonymous commenters to be identified, for the purpose of instituting defamation proceedings.

1.52 In particular, the bill seeks to introduce end-user information disclosure orders (disclosure orders) that would require a social media service provider (the provider)[2] to disclose the poster's relevant contact details and country location data to the potential complainant in defamation proceedings, irrespective of whether the poster consents to the disclosure. The relevant contact details would include the poster's name, email address, phone number and such other details (if any) as are specified in

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Media (Anti-Trolling) Bill 2022, *Report 2 of 2022*; [2022] AUPJCHR 12.

2 This bill would apply to foreign social media service providers if they have at least 250,000 Australian account-holders or they are specified in legislative rules. See clauses 21 and 22.

the legislative rules.[3] An Australian person[4] (the prospective applicant) may apply to a court for a disclosure order if they reasonably believe they may have a right to obtain relief against the anonymous poster in a defamation proceeding relating to the defamatory material posted.[5] The court may order the disclosure of the poster's contact details and/or country location data if satisfied of particular matters, including that there are reasonable grounds to believe that there may be a right for the prospective applicant to obtain relief against the poster in a defamation proceeding that relates to the material.[6] However, the court may refuse to make a disclosure order if they are satisfied that the disclosure of the relevant contact details or country location data is likely to present a risk to the poster's safety.[7] If a disclosure order is made, the provider must comply with that order in order to rely on the defence set out in clause 16 and avoid liability in any defamation proceedings.[8]

Preliminary international human rights legal advice

Rights to privacy and freedom of expression

1.53 The bill may promote the right to privacy to the extent that it facilitates the resolution of defamation complaints, assisting potential applicants to seek an effective remedy for reputational damage. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[9] International human rights law recognises that all human rights, including the right to privacy, must be protected online.[10]

1.54 However, by requiring providers to collect and disclose personal information of their users, including, where ordered to do so by a court, disclosing the contact details of anonymous users without their consent, the measure would also limit the right to privacy. The measure may also limit the right to privacy if it were to incentivise providers to pre-emptively collect additional personal information of their users to

3 Clause 6.

4 An Australian person means an Australian citizen; an individual who holds a permanent visa; or a body corporate incorporated in Australia. See clause 6.

5 Subclause 19(1).

6 Subclause 19(2).

7 Subclause 19(3).

8 Subparagraph 16(2)(d)(ii).

9 International Covenant on Civil and Political Rights, article 17. There is international case law to indicate that this protection only extends to attacks on reputation that are unlawful. See *RLM v Trinidad and Tobago*, UN Human Rights Committee Communication No. 380/89 (1993); and *IP v Finland,* UN Human Rights Committee Communication No. 450/91 (1993).

10 UN General Assembly, *The right to privacy in the digital age*, UNGA Res. 68/167 (2014); UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, UNHRC Res. 20/8 (2012).

ensure that they can access the defence contained in the bill and thereby avoid liability for defamatory material posted on their platforms.[11] 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.[12] It also includes the right to control the dissemination of information about one's private life. The right to privacy has been recognised as a 'a gateway to the enjoyment of other rights, particularly the [right to] freedom of opinion and expression'.[13]

1.55 The measure also engages and limits the right to freedom of expression insofar as it interferes with a person's ability to express themselves via posts on social media.[14] To the extent that it may deter people from expressing themselves for fear of defamation proceedings being instituted against them, the bill may have a chilling effect on free speech. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice, including online platforms.[15] The right to freedom of expression encompasses expression that may be favourably received as well as expression that may be regarded as deeply

11 Statement of compatibility, pp. 6–7.

12 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been processed contrary to legal provisions, every person should be able to request rectification or elimination. See UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [18].

13 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [17].

14 To the extent that the measure applies to children, the rights of the child may also be engaged, including their rights to privacy and freedom of expression. See Convention on the Rights of the Child, articles 13 and 16.

15 International Covenant on Civil and Political Rights, article 19(2). See also UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, UNHRC Res. 20/8 (2012).

offensive and insulting, although such expression may be restricted in certain contexts, such as hate speech.[16]

1.56 Relevantly in relation to this measure, international human rights law has recognised the importance of anonymous expression, particularly in the context of public debate concerning political and public institutions.[17] The United Nations (UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has, in a number of reports, highlighted the value of anonymous expression in protecting the rights to freedom of expression and privacy.[18] In a 2015 report, the Special Rapporteur stated:

> Anonymity has been recognized for the important role it plays in safeguarding and advancing privacy, free expression, political accountability, public participation and debate…Encryption and anonymity, and the security concepts behind them, provide the privacy and security necessary for the exercise of the right to freedom of opinion and expression in the digital age. Such security may be essential for the exercise of other rights, including economic rights, privacy, due process, freedom of peaceful assembly and association, and the right to life and bodily integrity.[19]

1.57 Noting the significant ways anonymity facilitates opinion and expression online, the Special Rapporteur has stated that 'States should protect it and generally not restrict the technologies that provide it' and any 'restrictions on encryption and anonymity must be strictly limited according to principles of legality, necessity,

16 Article 20 of the International Covenant on Civil and Political Rights places limits on freedom of expression by prohibiting propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. See UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [11] and [38]. See also UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/17/27 (2011) at [37], where the Special Rapporteur noted that 'the right to freedom of expression includes expression of views and opinions that offend, shock or disturb'. The European Court of Human Rights has made similar statements, see, eg, *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [83].

17 See, eg, UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* [38]; *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021); *Delfi AS v Estonia*, European Court of Human Rights (Grand Chamber), Application No. 64569/09 (2015).

18 See, eg, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [12]–[17], [47]–[60]; A/HRC/32/38 (2016) [62], [85]; A/HRC/35/22 (2017) [21], [78]; UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/23/40 (2013) [47]–[49].

19 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [47], [56].

proportionality and legitimacy in objective'.[20] In another report, the Special Rapporteur noted that:

> restrictions on anonymity have a chilling effect, dissuading the free expression of information and ideas. They can also result in individuals' de facto exclusion from vital social spheres, undermining their rights to expression and information, and exacerbating social inequalities. Furthermore, restrictions on anonymity allow for the collection and compilation of large amounts of data by the private sector, placing a significant burden and responsibility on corporate actors to protect the privacy and security of such data.[21]

1.58 The Special Rapporteur has observed that intermediary liability, whereby States impose liability on internet service providers or media platforms for anonymous defamatory statements posted on their sites, and broad mandatory data retention policies, limit an individual's ability to remain anonymous and consequently interfere with their rights to freedom of expression and privacy.[22] The Special Rapporteur observed that:

> intermediary liability is likely to result either in real-name registration policies, thereby undermining anonymity, or the elimination of posting altogether by those websites that cannot afford to implement screening procedures, thus harming smaller, independent media.[23]

1.59 These comments are noteworthy given the bill seeks to introduce a form of intermediary liability, whereby liability would be imposed on social media service providers for defamatory third-party material unless certain conditions are met.

1.60 The European Court of Human Rights has also recognised the importance of anonymity for internet users to enhance their free expression of opinion, ideas and information online, and has observed the chilling effect on free speech of measures that require the disclosure of anonymous internet users' identity. In a recent case concerning an Austrian daily newspaper (the applicant) that had been ordered to disclose the identities of persons who anonymously posted defamatory comments on its website, the Court was of the view that 'an obligation to disclose the data of authors of online comments could deter them from contributing to debate and therefore lead

20 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [47].

21 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/23/40 (2013) [49].

22 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [54]–[55].

23 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [54].

to a chilling effect among users posting in forums in general'.[24] The Court found that 'the interference [with the right to freedom of expression] lies in the lifting of anonymity and the effects thereof, irrespective of the outcome of any subsequent [defamation] proceedings'.[25] In this way, the lawfulness, or otherwise, of the comments for the purposes of defamation law did not change the Court's evaluation. While the Court acknowledged that there is not an 'absolute right to anonymity on the Internet', it recognised the 'interest of Internet users in not disclosing their identity', noting that '[a]nonymity has long been a means of avoiding reprisals or unwanted attention' and as such, 'is capable of promoting the free flow of opinions, ideas and information in an important manner, including, notably, on the Internet'.[26] In light of this international human rights law jurisprudence, it is evident that the measure would limit the rights to privacy and freedom of expression by seeking to establish a framework that would lift the anonymity of persons who post online material considered to be defamatory.

Limitation criteria

1.61 The rights to privacy and freedom of expression 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.[27] In relation to the right to freedom of expression, a legitimate objective is one that is necessary to protect specified interests, including the rights or reputations of others.[28] The UN Special Rapporteur has emphasised that in the context of measures that restrict online anonymity, any limitation on these rights must be strictly interpreted.[29]

1.62 As restrictions on freedom of expression on the ground of protecting the reputation or rights of others invariably involve a clash of rights, competing rights and

24 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [74].

25 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [79].

26 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [76].

27 See UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, A/HRC/13/37 (2009) [15]–[18]; UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

28 International Covenant on Civil and Political Rights, article 19(3). See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32]–[35].

29 See UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [29] and [56]. See generally UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[22].

interests must be balanced. In undertaking this balancing exercise, the European Court of Human Rights has considered whether 'domestic authorities have struck a fair balance when protecting' the rights to privacy and freedom of expression, noting that as a matter of principle, both rights 'deserve equal respect'.[30] In balancing these conflicting rights, the Court has considered several factors about the relevant online comment, including:

> whether a contribution is made to a debate of public interest; the subject of the report in question; the prior conduct of the person concerned and how well he or she is known; the content, form and consequences of the publication in question; and the gravity of the penalty imposed on the journalists or publishers.[31]

Legitimate objective and rational connection

1.63 The statement of compatibility states that the purpose of the bill is to address the harm of defamation on social media and create a framework to regulate defamatory content posted on social media.[32] It notes that defamatory material published on social media can be relatively more harmful than the equivalent material published through traditional media outlets, given the speed at which the material can spread on social media. It further notes that potential complainants may not be able to vindicate their reputation when harmful material is posted anonymously. The statement of compatibility states that by requiring the disclosure of the poster's personal information, the potential complainant can commence defamation proceedings against the poster and pursue a remedy.[33] In this way, the measure promotes the right of individuals to be free from attacks to their honour and reputation.[34] As to the necessity of the measure, the statement of compatibility states that the disclosure of the poster's contact details is necessary for the mechanisms in the bill to be effective, and providers having access to that personal information is necessary to enable effective disclosure.[35]

1.64 Legislation relating to defamation claims has been found to pursue the legitimate objective of protecting the rights or reputations of others, particularly

30 *Delfi AS v Estonia*, European Court of Human Rights (Grand Chamber), Application No. 64569/09 (2015) [138]–[139]. See also *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [84].

31 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [85].

32 Statement of compatibility, pp. 4 and 9.

33 Statement of compatibility, p. 6.

34 Statement of compatibility, pp. 6 and 8.

35 Statement of compatibility, p. 8.

against arbitrary or unlawful interference with privacy and attacks on reputation.[36] Therefore, in general terms, seeking to regulate defamatory content on social media and facilitate the resolution of defamation complaints is capable of being a legitimate objective for the purposes of international human rights law.

1.65 However, in order to establish whether these indeed are legitimate objectives, further information is required as to whether there is a pressing and substantial concern which gives rise to the need for the specific measure. The UN Special Rapporteur has observed that 'the State must show that any restriction on encryption or anonymity is "necessary" to achieve the legitimate objective', meaning that the 'restriction must be something more than "useful", "reasonable" or "desirable"'.[37] While it is clear that there is a need to obtain the relevant contact details of the poster in order to institute defamation proceedings, there is already an existing preliminary discovery process that enables potential applicants to apply to the court to ascertain the identity or whereabouts of prospective defendants where the applicant is unable to obtain that information themselves.[38] In the context of defamation claims, discovery orders may be granted to enable potential complainants to identify an

36 The UN Human Rights Committee has observed that '[d]efamation laws must be crafted with care to ensure that they comply with [the right to freedom of expression], and that they do not serve, in practice, to stifle freedom of expression': *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [47]. For jurisprudence of the European Court of Human Rights, see, eg, *Lukpan Akhmedyarov v Kazakhstan*, UN Human Rights Committee Communication No. 2535/2015 (2020), particularly [9.7]–[9.10]; *Aquilina and Others v. Malta*, European Court of Human Rights, Application No. 28040/08 (2011); *Palomo Sánchez and Others v. Spain*, European Court of Human Rights (Grand Chamber), Application Nos. 28955/06, 28957/06, 28959/06, and 28964/06 (2011).

37 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [34]. At [35], the Special Rapporteur noted that the concept of necessity also implies an assessment of proportionality. See also UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [33].

38 The Judicial Commission of NSW summarises the preliminary discovery process as follows: 'If an applicant satisfies the court that, having made reasonable enquiries, he or she is unable to ascertain sufficiently the identity or whereabouts of a proposed defendant (or cross-defendants as the case may be), and that someone may have information, or may have or have had possession of a document or thing that tends to assist in ascertaining such identity or whereabouts, the court may order that such person attend the court for examination or give discovery of such documents'. See Judicial Commission of NSW, 'Preliminary discovery to ascertain identity or whereabouts of prospective defendants', *Civil Trials Bench Book* (2021) [2-2290] https://www.judcom.nsw.gov.au/publications/benchbks/civil/discovery.html#p2-2280.

anonymous poster of online material for the purposes of commencing defamation proceedings against that poster.[39]

1.66 Noting that the preliminary discovery process offers potential complainants a mechanism to ascertain the identity or whereabouts of prospective defendants, including anonymous online users, it is not clear why there is a pressing and substantial need to introduce disclosure orders. The bill provides that the power conferred on the court to make disclosure orders is in addition to, and not instead of, any other powers of the court.[40] The explanatory memorandum states that the disclosure order is intended to provide an additional mechanism to prospective applicants to obtain the relevant contact details of the poster. It states that the prospective applicant will be able to choose between a disclosure order and existing mechanisms to obtain personal information, such as an order for preliminary discovery. It notes that both mechanisms may be utilised, subject to the criteria of each mechanism and any relevant laws or rules of court.[41] It is unclear, in practice, how both mechanisms would operate concurrently, and how disclosure orders would differ from orders for preliminary discovery.[42] Questions therefore remain as to whether there is a pressing and substantial concern which gives rise to the need for these orders.

1.67 To the extent that disclosing the poster's personal information would assist the complainant to institute defamation proceedings against the person who made the defamatory expression and seek a remedy for any reputational damage, the measure appears to be rationally connected to the stated objective.

Proportionality

1.68 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 assessing proportionality, it is necessary to consider a number of factors, including whether it is accompanied by sufficient safeguards and sufficiently flexible to treat different cases differently; and

39 See *Kabbabe v Google LLC* [2020] FCA 126. In this case the applicant sought to commence defamation proceedings against an anonymous poster of a Google review. As Google, the internet intermediary, was considered 'likely' to have information about the poster's identity, an order was granted requiring Google to provide preliminary discovery of all documents or things in its possession or control relating to the description of the unknown person who posed an allegedly defamatory review on Google, see [18].

40 Subclause 19(5).

41 Explanatory memorandum, p. 22.

42 A number of submitters raised similar queries in their submissions to the Senate Standing Committee on Legal and Constitutional Affair's inquiry into this bill, particularly querying the necessity of the new powers and their effectiveness given the existing court powers. See, e.g. Law Council of Australia, *Submission 1*, p. 18; Professor David Rolph, *Submission 14*, p. 11.

whether any less rights restrictive alternatives could achieve the same stated objective.[43]

1.69 The statement of compatibility identifies a number of safeguards that accompany the measure, including:

- that disclosure mechanisms are only enlivened when a potentially defamatory comment has been posted on a social media service;
- the definition of 'relevant contact details' is narrowly drafted to only include the minimum amount of information necessary to institute defamation proceedings, including by way of substituted service;
- the definition of 'country location data' is narrowly drafted so as to only encompass whether the poster was located in or outside of Australia when they posted the material in question;
- the poster's contact details may only be disclosed with their consent or pursuant to a court order;
- social media service providers will continue to be subject to the same privacy obligations regarding collection of personal information;
- the availability of independent judicial oversight by way of disclosure orders; and
- the court's discretion to refuse to make a disclosure order if it is not satisfied of the specified matters or if disclosure may present a risk to the poster's safety.[44]

1.70 These safeguards are likely to assist with the proportionality of the measure. The availability of external and independent judicial oversight and access to review is a particularly important safeguard, especially in the context of restrictions on anonymity.[45] The UN Special Rapporteur has stated that:

> Strong procedural and judicial safeguards should also be applied to guarantee the due process rights of any individual whose use of encryption or anonymity is subject to restriction. In particular, a court, tribunal or other independent adjudicatory body must supervise the application of the restriction.[46]

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43 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [34]–[35].

44 Statement of compatibility, pp. 7–9.

45 See UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/35/22 (2017) [78].

46 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [32]. See also [34].

1.71 The requirement that disclosure orders are court-ordered would ensure that restrictions on anonymity and consequent interferences with privacy occur on a case-by-case basis, subject to judicial supervision.[47] In this way, the measure contains flexibility to enable different cases to be treated differently.

1.72 Further, noting that the misuse of a poster's personal information by a complainant may lead to a greater interference with their right to privacy, the court's discretion to refuse to make a disclosure order where doing so may present a risk to the poster's safety may also operate as an important safeguard. On this issue the eSafety Commissioner has stated that withholding a poster's personal information from the complainant is an 'important protection against the risk of retaliation', noting that basic subscriber information from social media services 'can be used for harmful purposes, including doxing'.[48] Doxing refers to the 'intentional online exposure of an individual's identity, private information or personal details without their consent', which may undermine their privacy, security, safety and/or reputation.[49] For example, as noted by the eSafety Commissioner, 'a person could post an email address or phone number online and invite others to dole out punishment'.[50]

1.73 Regarding the operation of this safeguard, the explanatory memorandum states that it does not limit the court's general power to refuse to make an order (for example, where the potential defamation claim is trivial or *prima facie* untenable). It states that while there is no positive obligation on the court to undertake investigations to ascertain the impact of a disclosure order on a poster's safety, if there is information before the court to suggest that the poster's safety might be at risk, the court may refuse to grant the order.[51] The strength of this safeguard therefore depends on what, if any, information is before the court regarding the poster's safety. Noting that the poster would not be a party to disclosure order proceedings and the

47 The UN Special Rapporteur has observed that blanket prohibitions on anonymity are not necessary and proportionate, and that court-ordered decryption 'may only be permissible when it results from transparent and publicly accessible laws applied solely on a targeted, case-by-case basis to individuals (i.e., not to a mass of people) and subject to judicial warrant and the protection of due process rights of individuals': UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, A/HRC/29/32 (2015) [60], see also [57]. See also *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5]; UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to privacy)* (1988) [8].

48 eSafety Commissioner, *Submission 5*, p.14 to the Senate Standing Commission on Legal and Constitutional Affairs, *Inquiry into the Social Media (Anti-Trolling) Bill 2022*.

49 eSafety Commission, *Doxing trends and challenges – position statement*, 23 May 2020, p. 1 https://www.esafety.gov.au/industry/tech-trends-and-challenges/doxing (accessed 10 March 2022).

50 eSafety Commissioner, *Submission 5*, p.14 to the Senate Standing Commission on Legal and Constitutional Affairs, *Inquiry into the Social Media (Anti-Trolling) Bill 2022*.

51 Explanatory memorandum, p. 9.

provider does not appear to have an obligation to seek the poster's views on disclosure, including whether disclosure poses any safety risks, there may be a risk that, in practice, the court may not be provided with the necessary information to properly assess the risk of disclosure.[52]

1.74 Additionally, to protect against the risk of misuse of the poster's personal information as well as the consequent risk of greater interference with their right to privacy, it is important that there are adequate safeguards to ensure the poster's personal information is only used for the purpose of instituting defamation proceedings. It is not clear that the above safeguards would be adequate to mitigate this risk, noting that the bill does not prohibit the use or onwards disclosure of the poster's personal information for unauthorised purposes.

1.75 Further, noting that the measure involves competing rights and interests, it is important that the court considers these other matters when making a disclosure order. The bill provides that the court may make a disclosure order where a prospective applicant satisfies the court that a poster has posted material on social media; there are reasonable grounds to believe the applicant might have a right to obtain relief in a defamation proceeding; an Australian court would have jurisdiction to hear the matter; and the applicant cannot ascertain the poster's contact details, or whether they are in Australia, or they reasonably believe the material was posted in Australia.[53] However, the bill does not require the court to consider other relevant matters, such as the poster's rights to privacy and expression, including whether any limit on the poster's privacy is only as extensive as is strictly necessary, and the type of expression and the context in which it was made. While the court may consider these other matters using its general power to make orders as it considers appropriate in the interests of justice, it would not be specifically required to do so.[54]

1.76 The UN Human Rights committee has observed that the form of expression and the means of its dissemination are relevant considerations in assessing the proportionality of restrictions on the right to freedom of expression.[55] In particular, it

52 The eSafety Commissioner similarly queried 'how a court is to obtain the factual information it would need to make this assessment – particularly if the commenter [or poster] has not been involved in the proceedings': eSafety Commissioner, *Submission 5*, p.14 to the Senate Standing Commission on Legal and Constitutional Affairs, *Inquiry into the Social Media (Anti-Trolling) Bill 2022*.

53 Subclause 19(2).

54 Section 23 of the *Federal Court Act 1986* provides that the 'Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate'. Rule 1.32 of the Federal Court Rules 2011 provides that the 'Court may make any order that the Court considers appropriate in the interests of justice'.

55 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [34].

has noted that 'the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain'.[56] In relation to defamation complaints instituted by public figures, the UN Human Rights Committee has observed that a fair balance must be struck between protection of the complainant's rights and reputation, and the author's right to freedom of expression, including the right to express information of public interest and the public's right to receive such information.[57] The European Court of Human Rights has also emphasised the importance of balancing competing rights and interests in the context of defamation claims and restrictions on anonymity, particularly where political speech and debates of public interest are concerned.[58] In deciding whether to disclose an anonymous author's identity, the Court has observed that it must first examine the alleged defamation claim and then weigh the conflicting interests at stake.[59] In cases where these competing rights and interests were not balanced, and weight was not given to the value of anonymity in promoting the free flow of opinions, ideas and information, the Court has found a violation of the right to freedom of expression.[60]

1.77 Given the importance of this balancing exercise, it is not clear why the bill does not require the court to consider the competing rights and interests at stake as well as the form of expression in deciding whether to make a disclosure order. Such a

56 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [34]. The Committee further stated at [38] that: 'the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition'. See also *Lukpan Akhmedyarov v Kazakhstan*, UN Human Rights Committee Communication No. 2535/2015 (2020) [9.7].

57 *Lukpan Akhmedyarov v Kazakhstan*, UN Human Rights Committee Communication No. 2535/2015 (2020) [9.9]–[9.10]. In this case, which involved a defamation lawsuit by a public official against a journalist, the committee considered that the national courts in Kazakhstan did not make 'an appropriate attempt to strike a fair balance between protection of the claimant's rights and reputation, on one hand, and the author's right to impart information of public interest and the public's right to receive it, on the other hand'. On this basis, the Committee considered that the state party failed to justify that the restriction on the author's freedom of expression was proportionate and thus found a violation of the author's rights.

58 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [91]–[92].

59 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [92].

60 *Standard Verlagsgesellschaft MBH v Austria (No. 3)*, European Court of Human Rights, Application No. 39378/15 (2021) [95]–[97].

requirement may also ensure the least rights restrictive approach is applied in each case.

1.78 Finally, it is noted that the above safeguards primarily apply to the right to privacy and may offer little protection in relation to the right to freedom of expression. While court-ordered disclosure may only occur when the complainant may have a right to obtain relief against the poster in defamation proceedings, this may offer little safeguard value where the scope of permitted speech under defamation law is narrower than under international human rights law.

1.79 To assess the compatibility of this measure with the rights to privacy and freedom of expression, further information is required as to:

(a) why the existing preliminary discovery process in defamation proceedings is insufficient so as to justify the need to introduce end-user information disclosure orders;

(b) why does the bill not require the court to balance competing rights and interests (particularly the rights to privacy and freedom of expression) as well as consider other relevant matters, such as the form of expression and the context in which it is made;

(c) how would the court's power to refuse to make a disclosure order, where to do so would pose a safety risk to the poster, be effective in practice, noting it is not clear how the court would obtain the necessary information to make this assessment;

(d) what safeguards are there, if any, to ensure that the poster's personal information is only used by the applicant for the purposes of instituting defamation proceedings; and

(e) why does the bill not prohibit the unauthorised use and disclosure of the poster's personal information once it is disclosed.

Committee view

1.80 This bill seeks to provide a framework to regulate who is responsible for defamatory content posted on social media, and introduce powers for anonymous commenters to be identified, for the purpose of instituting defamation proceedings. In particular, it seeks to introduce end-user information disclosure orders (disclosure orders) that would require a social media service provider to disclose the poster's relevant contact details and country location data to the applicant, irrespective of whether the poster consents to the disclosure. The court may make a disclosure order if satisfied of particular matters, including that there are reasonable grounds to believe that there may be a right for the prospective applicant to obtain relief against the poster in defamation proceedings.

1.81 The committee notes that the bill may promote the right to privacy to the extent that it assists potential applicants to institute defamation proceedings and seek an effective remedy for any reputational damage. The committee notes that

defamatory material published on social media can be particularly harmful because of the speed at which it is disseminated. It further notes that where harmful material is posted anonymously, potential complainants may be unable to vindicate their reputation. By providing a framework to regulate defamatory content on social media and assist complainants to institute defamation proceedings directly against the author of the defamatory content, the committee considers that the measure promotes the right of individuals to be free from attacks to their honour and reputation.

1.82 However, the committee notes that the measure also limits the right to privacy by permitting the collection and disclosure of the poster's personal information without their consent. The measure also engages and limits the right to freedom of expression insofar as establishing a framework to lift the anonymity of social media users may have a chilling effect on free speech if it inhibits a person from expressing themselves on social media.

1.83 The committee notes that these rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee notes that while the measure pursues the legitimate objective of protecting the rights or reputations of others, particularly against unlawful attacks on reputation, there are some questions as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law. Further, the committee notes that there are a number of important safeguards that assist with proportionality, including judicial oversight of disclosure orders. However, there are some questions as to whether these safeguards are sufficient, noting the absence of any requirement for the courts to specifically consider the rights to privacy and freedom of expression of the poster of the content, and the lack of prohibition against the unauthorised use and disclosure of the poster's personal information.

1.84 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the Attorney-General's advice as to the matters set out at paragraph [1.79].

Telecommunications (Interception and Access) Amendment (Corrective Services Authorities) Bill 2022

Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [F2022L00154][1]

Purpose	The Telecommunications (Interception and Access) Amendment (Corrective Services Authorities) Bill 2022 seeks to amend the *Telecommunications (Interception and Access) Act 1979* to provide State and Territory corrective services authorities with the ability to access telecommunications data The Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [F2022L00154] declares the NSW Department of Communities and Justice to be an enforcement agency, and each staff member of Corrective Services NSW, to be an officer, for the purpose of accessing telecommunications data
Portfolio	Home Affairs
Bill introduced	House of Representatives, 17 February 2022
Last day to disallow instrument	15 sitting days after tabling
Authorising legislation	*Telecommunications (Interception and Access) Act 1979*
Rights	Privacy

Access to telecommunications data by corrective services authorities

1.85 The *Telecommunications (Interception and Access) Act 1979* (TIA Act) provides a legal framework for certain agencies to access telecommunications data for law enforcement and national security purposes. Telecommunications data is information about a communication – such as the phone number and length of call or email address from which a message was sent and the time it was sent – but does not include

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (Corrective Services Authorities) Bill 2022; Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [F2022L00154], *Report 2 of 2022*; [2022] AUPJCHR 13.

the content of the communication.[2] The TIA Act provides that an authorised officer in an enforcement agency can authorise the disclosure of such data if it is for the purposes of enforcing the criminal law or a law imposing a pecuniary penalty, or for the protection of public revenue.[3] An enforcement agency is defined as a criminal law enforcement agency[4] or an authority or body the minister declares, by legislative instrument, to be an enforcement body.[5] A corrective services authority can be declared to be an enforcement body under this power.[6] Such a declaration ceases to be in force 40 sitting days after it is made.[7]

1.86 This bill seeks to amend the TIA Act to amend this declaration power in relation to corrective services authorities. It provides that the minister may declare, by legislative instrument, that a state or territory corrective services authority is an enforcement agency if the relevant state or territory minister has requested this. In considering whether to make such a declaration, the Commonwealth minister may consult such persons or bodies as the minister thinks fit, such as the Privacy Commissioner or Ombudsman (but this is not required). The minister may also make the declaration subject to conditions. The declaration would not be time-limited and could be revoked by the minister if satisfied the authority's compliance with the TIA Act is unsatisfactory and must be revoked if the relevant state or territory minister requests it be revoked.[8]

1.87 The Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 (NSW Declaration), is made under the TIA Act as it currently stands, and it declares the New South Department of Communities and Justice (being that part known as Corrective Services NSW) to be an enforcement agency under the TIA Act. It also declares that each staff member of Corrective Services NSW is an officer for the purposes of the TIA Act – such that they can authorise the disclosure of telecommunications data.[9] The NSW

2 *Telecommunications (Interception and Access) Act 1979*, section 172.

3 *Telecommunications (Interception and Access) Act 1979*, Part 4.1, Division 4.

4 *Telecommunications (Interception and Access) Act 1979*, section 110A, which includes all state and territory police agencies, the Department of Home Affairs (for limited purposes), the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the Australian Criminal Intelligence Commission, and various integrity and corruptions Commissions.

5 *Telecommunications (Interception and Access) Act 1979*, subsection 176A(1).

6 See, e.g., Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [F2022L00154]

7 *Telecommunications (Interception and Access) Act 1979*, paragraph 176A(10(b).

8 Schedule 1, item 4, proposed section 176B.

9 Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022, section 3.

Declaration is subject to the condition that officers cannot apply for a journalist information warrant.[10]

International human rights legal advice

Right to privacy

1.88 The power to declare a corrective services authority as an enforcement body, which means it may access telecommunications data, 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.[11] It also includes the right to control the dissemination of information about one's private life. Communications data can reveal quite personal information about an individual, even without the content of the data being made available, by revealing who a person is in contact with, how often and where.[12] It is noted that in accessing telecommunications data under the bill a corrective services authority would be able to access information not only in relation to prisoners, but also anyone in contact with them. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.89 The bill's statement of compatibility acknowledges that the measure limits the right to privacy, but states that the measure seeks to achieve the legitimate objective of protecting national security, public order and the rights and freedoms of others.[13] In particular, it states that there is a threat posed by illicit mobile phones in correctional facilities, 'including their use to facilitate serious offences such as escape attempts, threatening the safety of victim and witnesses and the trafficking of contraband'. It states that telecommunications data is vital in establishing the ownership or location of mobile phones used to commit offences within correctional facilities.[14] It is also noted that the *Comprehensive Review of the Legal Framework of the National Intelligence Community* recommended that corrective services authorities should be granted the power to access telecommunications data, if the

10 Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022, section 4.

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

12 See *Digital Rights Ireland Ltd (C-293/12) and Kärntner Landesregierung ors (C-594/12), v Minister for Communications, Marine and Natural Resources and ors*, Court of Justice of the European Union (Grand Chamber), Case Nos. C-293/12 and C-594/12 (2014) [27]

13 Statement of compatibility, p. 5.

14 Statement of compatibility, p. 5.

relevant state or territory government considers it to be necessary.[15] However, this review also stated that several police authorities questioned the need to enable corrective services authorities to access telecommunications data in their own right, as such data can already be sought from police authorities. The review stated that 'evidence from several states indicates that well-managed, cooperative and joint investigative arrangements between police forces, integrity bodies and corrections agencies can work well to investigate criminal activity in prisons'.[16]

1.90 The objective of addressing the threat posed by illicit mobile phones in prison is, in general, likely to constitute a legitimate objective. However, under international human rights law a legitimate objective must be one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not sufficient, therefore, that a measure simply seeks an outcome regarded as desirable or convenient. The bill's statement of compatibility does not fully address why current laws are insufficient to achieve the stated objective. Given that corrections agencies can currently work with the police to access telecommunications data to investigate alleged offences within correctional facilities (or alternatively a time limited declaration can already be made under the TIA Act), this raises questions as to whether the measure in the bill addresses a pressing and substantial concern.

1.91 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.

1.92 The statement of compatibility states that the bill includes multiple safeguards to ensure appropriate oversight, namely:

- before issuing a declaration the minister 'will consider whether the agency has demonstrated its readiness to access telecommunications data (for example, having regard to the authority's privacy arrangements, ensuring appropriate policies and procedures to govern access to, and use, of data are in place and having engaged with the Commonwealth Ombudsman regarding oversight)';
- the declaration may be subject to conditions. The statement of compatibility gives, as an example, that 'a declaration could provide that a corrective

15 Comprehensive Review of the Legal Framework of the National Intelligence Community by Mr Dennis Richardson AC, Volume 2: Authorisations, Immunities and Electronic Surveillance, December 2019, recommendation 78.

16 Comprehensive Review of the Legal Framework of the National Intelligence Community by Mr Dennis Richardson AC, Volume 2: Authorisations, Immunities and Electronic Surveillance, December 2019, p. 278.

services authority is not able to apply for journalist information warrants, as these type of warrants are not relevant to the functions of the authority or the purposes for which they seek access to telecommunications data';

- the declaration can only be made if requested by the relevant state or territory minister, so as to ensure only those states and territories that require access to telecommunications data will be able to access it;
- the declaration must be revoked if this is requested by the relevant state or territory minister, and the Commonwealth minister may revoke a declaration if satisfied that an authority's compliance with the TIA Act has been unsatisfactory.[17]

1.93 The bill's statement of compatibility also notes that existing safeguards in the TIA Act would continue to apply, including independent oversight by the Commonwealth Ombudsman and the Minister for Home Affairs' annual report to Parliament on the operation of the data retention scheme.[18]

1.94 It is noted that some of these safeguards may operate, in practice, to help protect against arbitrary interference with the right to privacy. However, in relation to those measures that may operate to safeguard the right to privacy, these would be discretionary only and not required as a matter of law. The minister would not be required before making a declaration to consider whether the authority has demonstrated its readiness to access telecommunications data. This is in contrast to the current requirements in the TIA Act which, among other things, require the minister to have regard to whether:

- the authority is required to comply with the Australian Privacy Principles, or with a binding scheme that provides sufficient protection of personal information, or has agreed in writing to comply with such a scheme;
- the authority proposes to adopt processes and practices that would ensure its compliance with the obligations under the TIA Act; and
- the declaration would be in the public interest.[19]

1.95 Further, while a declaration may be subject to conditions, there is no legislative requirement that conditions must be attached. Noting that the statement of compatibility states that journalist information warrants are not relevant to the functions of a corrective services authority or the purposes for which they seek access to telecommunications data, it is not clear why the bill does not specifically state that a declaration could not include access to journalist information warrants (noting

17 See statement of compatibility, p. 5–6.

18 Statement of compatibility, p 6.

19 *Telecommunications (Interception and Access) Act 1979*, subsection 176A(4).

access to such warrants would also have implications for the right to freedom of expression).

1.96 It is also noted that the bill provides the minister with the discretion to consult with whomever the minister thinks fit, including the Commonwealth Ombudsman or Information Commissioner. Yet, it is not clear why there is no specific requirement to consult with relevant persons, particularly the Information Commissioner.

1.97 Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.[20] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time. As there are very few legislative safeguards that would apply before the minister could make a declaration that a corrective services authority be granted the ability to access telecommunications data, and it has not been fully established that such authorities need this power (noting they can access the data via the police), the measure risks arbitrarily interfering with the right to privacy.

1.98 In relation to the NSW Declaration, the inclusion of the condition that journalist access warrants cannot be accessed by Corrective Services NSW officers operates as a safeguard that assists with the proportionality of the measure. However, it is noted that every officer of Corrective Services NSW has been designated as an authorised officer under the NSW Declaration. This would appear to apply to thousands of employees of Corrective Services NSW.[21] It is not clear why all such officers need to be authorised to access telecommunications data, rather than restricting it to those persons performing particular roles who require it to perform their functions. As such, this does not appear to be the least rights restrictive way of achieving the stated objective, and there is a risk that this measure arbitrarily interferes with the right to privacy.

Committee view

1.99 The committee notes this bill seeks to amend the *Telecommunications (Interception and Access) Act 1979* to change the basis on which the minister may declare, by legislative instrument, that a state or territory corrective services authority is an enforcement agency for the purposes of accessing telecommunications data. Such a declaration gives corrective services authorities, such as prisons, the right to access telecommunications data to investigate illicit mobile phone usage. The committee notes the NSW Declaration, made under the

20 See, e.g., UN Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

21 See Media Release, *Corrective Services NSW salutes its staff*, 19 January 2019 which stated that there were 9,000 prison, parole and other corrective services staff.

existing law, enables Corrective Services NSW, and all of its officers, to access telecommunications data.

1.100 The committee notes that enabling a corrective services authority to access telecommunications data engages and limits the right to privacy. Communications data can reveal quite personal information about an individual, even though it does not include the content of the data, it reveals who a person is in contact with, how often and where. The committee notes that in accessing telecommunications data a corrective services authority would be able to access information not only in relation to prisoners, but also anyone in contact with them. The right to privacy may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate

1.101 The committee considers that seeking to address the threat posed by illicit mobile phones in correctional facilities is, in general terms, a legitimate objective. However, the committee considers that some questions remain as to the necessity of this power given that corrective services authorities can already access such data via the police or via a more time-limited declaration. The committee is also concerned that there are few legislative safeguards in the bill to guide the making of such a declaration, and that safeguards that currently apply would no longer apply to the making of this new declaration. Further, the committee notes that the NSW Declaration enables thousands of employees of Corrective Services Australia to access telecommunications data, rather than restricting this to only those with a specific need to access such data. As such, the committee considers that the bill and NSW Declaration, as currently drafted, risk arbitrarily interfering with the right to privacy.

Suggested action

1.102 The committee considers that the compatibility of the measure in the bill with the right to privacy may be assisted were the bill amended to provide that:

- **(a) in requesting a declaration, the state or territory minister for a corrective services authority must explain why it is not sufficient for the authority to seek access to the data via police authorities, and before making a declaration the Commonwealth minister must consider, and be satisfied with, this explanation;**
- **(b) a corrective services authority is not able to apply for journalist information warrants; and**
- **(c) in considering whether to make a declaration the minister must:**
  - **(i) consider the authority's privacy arrangements and ensure the authority has appropriate policies and procedures to govern access to and use of data;**
  - **(ii) consider that the declaration would be in the public interest;**

(iii) consult with the Commonwealth Ombudsman and the Information Commissioner.

1.103 Further, the committee considers the compatibility of the measure in the NSW Declaration may be assisted were the Declaration amended to declare only those staff members who require access to telecommunications data to perform their functions to be officers for the purposes of the TIA Act (rather than all staff members of Corrective Services NSW).

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

Legislative Instruments

Biosecurity (Remote Communities) Determinations[1]

Purpose	These seven legislative instruments[2] determine remote communities' requirements to prevent a person from entering or exiting a designated area unless they meet certain criteria, to prevent or control the spread of COVID-19 in designated areas
Portfolio	Health
Authorising legislation	*Biosecurity Act 2015*
Last day to disallow	These instruments are exempt from disallowance (see subsections 477(5) and 477(6) of the *Biosecurity Act 2015*)
Rights	Health; life; free movement; private life; equality and non-discrimination

Controlling entry and exit to certain remote Northern Territory communities

1.105 These Biosecurity determinations designated (or amended the designations) of a number of geographical areas in the Northern Territory for the purposes of the *Biosecurity Act 2015* (Biosecurity Act). They established that persons could not enter or leave these areas except in specified circumstances during specified periods of time. These time periods differed depending on the determination and area. The first period began on 20 December 2021[3] and the last period ended on 17 February 2022.[4] The length of time an area was subject to entry and exit requirements differed according

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Remote Communities) Determinations, *Report 2 of 2022*; [2022] AUPJCHR 14.

2 Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2021 [F2021L01863]; Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 3) 2021 2021 [F2021L01885]; Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 1) 2022 [F2022L00029]; Biosecurity (Emergency Requirements—Remote Communities) Amendment Determination (No. 1) 2022 [F2022L00041]; Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2022 [F2022L00073]; Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 3) 2022 [F2022L00104]; and Biosecurity (Emergency Requirements—Remote Communities) Amendment (No. 2) Determination 2022 [F2022L00149].

3 Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2021 [F2021L01863].

4 Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 3) 2022 [F2022L00104].

to the area, with some areas (such as Amoonguna, Yuelamu and Yuendumu) subject to three extensions, totalling 15 days.[5]

1.106 These instruments were made under section 477(1) of the Biosecurity Act, which provides that during a human biosecurity emergency period, the Minister for Health may determine emergency requirements, or give directions, that they are satisfied are necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory. Failure to comply with such a direction is a criminal offence punishable by five years' imprisonment, or a penalty of up to $63,000.

International human rights legal advice

Rights to life, health, freedom of movement, private life and equality and non-discrimination

1.107 The explanatory statements accompanying these determinations note that the purpose of designating these geographical areas is to prevent or control the entry or spread of COVID-19 in these areas.[6] As the measures are intended to prevent the spread of COVID-19, which has the ability to cause high levels of morbidity and mortality, it would appear to promote the rights to life and health.[7] The right to life requires the State to take positive measures to protect life.[8] The United Nations Human Rights Committee has stated that the duty to protect life implies that State parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.[9] The right to health is the right to enjoy the highest attainable standard of physical and mental health, which includes taking steps to prevent, treat and control epidemic diseases.[10]

1.108 However, by restricting entry and exit to these locations, these measures also limit a number of other human rights, including the right to freedom of movement, a private life and equality and non-discrimination. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country. It is linked to the right to liberty—a person's movement across borders

5 See Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 1) 2022 [F2022L00029]; Biosecurity (Emergency Requirements—Remote Communities) Amendment Determination (No. 1) 2022 [F2022L00041]; Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2022 [F2022L00073].

6 Explanatory statement, p. 1.

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

8 International Covenant on Civil and Political Rights, article 6.

9 See United Nations Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (2019), [26].

10 International Covenant on Economic, Social and Cultural Rights, article 12.

should not be unreasonably limited by the state.[11] It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places.

1.109 The requirement to specify reasons for entering or leaving a designated area also engages the right to a private life. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[12] A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.110 Further, as these remote geographical areas likely have a high proportion of Indigenous persons living there, the restrictions likely had a disproportionate impact on Indigenous persons. Consequently, the measures may also engage the right to equality and non-discrimination,[13] which provides that everyone is entitled to enjoy their rights without distinction based on a personal attribute (for example, race).[14] 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). 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.

1.111 These rights 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. As there are no statements of compatibility accompanying the explanatory statements to these determinations,[15] no assessment of the compatibility of these measures with any human rights has been provided.

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11 UN Human Rights Committee, *General Comment 27: Freedom of movement* (1999) [8]. The freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. The right of the individual to determine the State of destination is part of the legal guarantee.

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

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

14 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'.

15 Noting that section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* only requires rule-makers to prepare a statement of compatibility in relation to a legislative instrument that is subject to disallowance under section 42 of the *Legislation Act 2003*.

1.112 While the measures seek to achieve the legitimate objective of protecting public health, questions remain as to whether the measures are proportionate. The length of time these restrictions were in place is an important consideration and it is noted that each determination generally lasted less than one week. However, it is noted that there is no set limit on the amount of extensions that may be applied. There is also insufficient information in the explanatory statements as to:

- whether these measures constitute a proportionate limit on the rights to freedom of movement and a private life, having particular regard to the existence of any safeguards and oversight mechanisms;
- whether these measures have a disproportionate impact on Indigenous Australians;
- why it was necessary to impose these restrictions on the designated remote communities over and above the COVID-19 restrictions imposed by the Northern Territory government; and
- whether affected community members in these remote communities were consulted prior to the imposition of these measures, and/or were consulted about the measures while they were in place (noting that information in the explanatory statements suggested consultation was focused on governments, land councils and health organisations).

1.113 Without further information, it is not possible to conclude as to whether these determinations permissibly limited the rights to freedom of movement, private life and equality and non-discrimination.

Committee view

1.114 The committee notes that these legislative instruments determined requirements for entry to, or exit from, designated remote communities in the Northern Territory for a range of different short time periods.

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

1.116 The committee considers that the measures sought to achieve the clearly legitimate objective of seeking to prevent the spread of COVID-19 to vulnerable remote communities. The committee also notes the particular importance of seeking to protect the life and health of those who reside in remote communities, who may be particularly vulnerable to COVID-19. The committee also considers that the

limited time period for each of these designations greatly assisted with the proportionality of the measure.

1.117 However, the committee notes that as there are no statements of compatibility accompanying these determinations, some questions remain as to whether the measures were accompanied by sufficient safeguards to ensure any limitation on the rights to freedom of movement, private life and equality and non-discrimination was proportionate.

1.118 The committee notes that there is no legislative requirement that these determinations, which are exempt from the disallowance process, be accompanied by a statement of compatibility.[16] However, the committee notes its role is to scrutinise all legislative instruments for compatibility with human rights, including exempt legislative instruments.[17]

Suggested action

1.119 As the committee has consistently said since the start of the legislative response to the COVID-19 pandemic,[18] given the human rights implications of legislative instruments dealing with the COVID-19 pandemic, it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility (regardless of whether this is required as a matter of law).

1.120 The committee draws this matter to the attention of the minister and the Parliament.

16 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, provides that only legislative instruments subject to disallowance under the *Legislation Act 2003* require a statement of compatibility.

17 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7, provides that the function of the committee is to examine all legislative instruments that come before either House of the Parliament for compatibility with human rights.

18 The committee first stated this in Parliamentary Joint Committee on Human Rights*, Report 5 of 2020: Human rights scrutiny of COVID-19 legislation*, 29 April 2020. The committee also wrote to all ministers advising them of the importance of having a detailed statement of compatibility with human rights for all COVID-19 related legislation in April 2020 (see media statement of 15 April 2020, available on the committee's website).

Online Safety (Restricted Access Systems) Declaration 2022 [F2022L00032]

Online Safety (Basic Online Safety Expectations) Determination 2022 [F2022L00062][1]

Purpose	The Online Safety (Restricted Access Systems) Declaration 2022 [F2022L00032] specifies an access-control system as a restricted access system for 'relevant class 2 material' being the material covered by certain provisions of the *Online Safety Act 2021* The Online Safety (Basic Online Safety Expectations) Determination 2022 [F2022L00062] sets out basic online safety expectations for social media services, relevant electronic services and designated internet services
Portfolio	Infrastructure, Transport, Regional Development and Communications
Authorising legislation	*Online Safety Act 2021*
Last day to disallow	15 sitting days after tabling (both tabled in the Senate and the House of Representatives on 8 February 2022)
Rights	Child; privacy; freedom of expression

Restricting access to online content

1.121 Part 9 of the *Online Safety Act 2021* enables the eSafety Commissioner (Commissioner) to require that a social media service, electronic service, designated internet service, or a hosting service provider remove, or otherwise deny access to, certain classes of material on their services. Relevantly, the Commissioner may investigate whether end-users in Australia can access relevant class 2 material, and if so, whether this access is subject to a restricted access system. This can be done either on the Commissioner's own initiative, or after a complaint.[2] In certain circumstances, the Commissioner may give an Australian provider or host of a service allowing access to relevant class 2 material a remedial notice requiring the provider to ensure that

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Online Safety (Restricted Access Systems) Declaration 2022 [F2022L00032] and Online Safety (Basic Online Safety Expectations) Determination 2022 [F2022L00062], *Report 2 of 2022*; [2022] AUPJCHR 15.

2 *Online Safety Act 2021*, section 42.

material is removed from the service or access to the material is subject to a restricted access system.[3] If the Commissioner is satisfied that relevant class 2 material is not, or was not, subject to a restricted access system (among other things) on two or more occasions in the previous 12 months, the Commissioner may prepare and publish a statement to that effect.[4] Relevant class 2 material includes films or computer games classified (or likely to be classified) as R 18+, or publications classified (or likely to be classified) as Category 1 restricted, or any other kind of material which would likely be similarly classified were it classified.[5] This includes content that depicts realistically simulated sexual activity between adults; or high impact nudity, violence, drug use or language.[6]

1.122 The Online Safety (Restricted Access Systems) Declaration 2022 (Declaration) specifies an access-control system as a restricted access system for relevant class 2 material.[7] The purpose of this Declaration is to seek to ensure that access to relevant class 2 material is limited to persons aged 18 years and over and the methods used for limiting this access meet a minimum standard.[8] The Declaration does not specify or prescribe technologies or processes to be used by service providers to determine age and restrict access to content. Rather, it requires that an access control system must:

- require an application for access to the material, and a declaration from the applicant that they are at least 18 years of age;
- provide warnings as to the nature of the material;
- provide safety information for parents and guardians on how to control access to the material;
- incorporate reasonable steps to confirm that an applicant is at least 18 years of age; and
- limit access to the content unless certain steps are complied with, including that age has been verified, which may include the use of a PIN.[9]

3 *Online Safety Act 2021*, sections 119 and 120.

4 *Online Safety Act 2021*, section 123A.

5 Online Safety (Restricted Access Systems) Declaration 2022, explanatory statement, p. 1.

6 Online Safety (Restricted Access Systems) Declaration 2022, explanatory statement, p. 3.

7 Being material covered by the *Online Safety Act 2021*, paragraphs 107(1)(f), (g), (h), (i), (j), (k) and (l).

8 Online Safety (Restricted Access Systems) Declaration 2022, explanatory statement, p. 2.

9 Online Safety (Restricted Access Systems) Declaration 2022, sections 5–9.

1.123 The Online Safety (Basic Online Safety Expectations) Determination 2022 (Determination) also provides, as an expectation of service providers,[10] that they will take reasonable steps to ensure that technological or other measures are in effect to prevent access by children to class 2 material provided on the service, including implementing age assurance mechanisms.[11]

International human rights legal advice

Rights of the child and rights to privacy and freedom of expression

1.124 Restricting children's access to material on the internet that may be harmful to them is likely to promote the rights of the child. The United Nations (UN) Human Rights Council has stated that the human rights which people have offline must also be protected online.[12] Children have special rights under human rights law taking into account their particular vulnerabilities,[13] including the right to protection from all forms of violence, maltreatment or sexual exploitation.[14] The international community has recognised the importance of creating a safer online environment for children,[15] and noted the need to establish regulation frameworks which enable users to report concerns about content.[16] However, it is also noted that age alone has been seen as

10 Service providers that do not comply with an expectation of them are not subject to any formal penalty. Rather, the *Online Safety Act 2021* gives the Commissioner the power to require reports to be provided on the extent to which the provider complied with provisions in the Determination (see sections 49, 52, 56 and 59).

11 Online Safety (Basic Online Safety Expectations) Determination 2022, section 12. This determination also includes an expectation that the provider will take reasonable steps to minimise the extent to which other material is provided on the service (not just restricted to those over 18), and this includes access to class 1 material (see section 11). In relation to section 11 of the determination and the regulation of class 1 material, the committee reiterates its comments in relation to the regulation of online content by the Online Safety Bill 2021, see Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021) pp. 63–69.

12 See, UN Human Rights Council, *Resolution 32/13 on the promotion, protection and enjoyment of human rights on the internet*, A/HRC/RES/32/13 (2016).

13 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

14 See, Convention on the Rights of the Child, articles 19, 34, and 36.

15 UNICEF and International Telecommunications Union, *Guidelines for industry on child protection* (2015) p. 8.

16 See, for example, International Telecommunications Union, *Guidelines for policy-makers on Child Protection Online* (2020).

an imperfect metric to assess the capabilities of children,[17] and access to certain class 2 material may not always be inappropriate for some children in some circumstances.

1.125 Implementing access control measures, which include a requirement to verify the age of the person accessing content on the internet is also likely to limit a number of rights, particularly the rights to privacy and freedom of expression.

1.126 International human rights law recognises that the right to privacy must be protected online. The right to privacy is multi-faceted. It protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[18] It can also be considered as the presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private sphere' with or without interaction with others, free from excessive unsolicited intervention by other uninvited individuals.[19] The Declaration does not set out how an access control system should verify that a person is aged 18 years or older, only that it must verify this before access to relevant class 2 material is provided.[20] The explanatory statement to the Declaration states that service providers must continue to comply with their obligations under applicable privacy laws, and that 'age confirmation methods should be privacy preserving to the extent possible'. It states that the only attribute being tested is the age of the applicant, and 'age confirmation does not involve identity verification'. It also states that practical steps to protect privacy include 'collecting the minimum amount of personal information necessary to take reasonable steps to confirm age, implementing security measures for any information collected and not using information collected for age confirmation for other purposes'.[21] However, it does not explain how a person's age may be verified without the person being identified.

1.127 The measure may also limit the right to freedom of expression if the requirement to provide proof of age to access class 2 material is likely to deter individuals from accessing such material. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either

17 Report of the Special Rapporteur on the right to privacy, Joseph A. Cannataci, Artificial intelligence and privacy, and children's privacy, 25 January 2021, paragraph [113].

18 There is international case law to indicate that this protection only extends to attacks which are unlawful. See *RLM v Trinidad and Tobago*, UN Human Rights Committee Communication No. 380/89 (1993); and *IP v Finland,* UN Human Rights Committee Communication No. 450/91 (1993).

19 UN Human Rights Council, *Report of the High Commissioner for Human Rights: the right to privacy in the digital age*, A/HRC/39/29 (2018) [5]; *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, A/HRC/13/37 (2009) [11].

20 Online Safety (Restricted Access Systems) Declaration 2022, sections 8 and 9.

21 Online Safety (Restricted Access Systems) Declaration 2022, explanatory statement, p. 7.

orally, in writing or print, in the form of art, or through any other media of an individual's choice.[22] As a UN Special Rapporteur on the right to freedom of expression has said, restrictions on anonymity online 'have a chilling effect, dissuading the free expression of information and ideas' and 'allow for the collection and compilation of large amounts of data by the private sector, placing a significant burden and responsibility on corporate actors to protect the privacy and security of such data'.[23]

1.128 The rights to privacy and freedom of expression may be permissibly limited where the measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is a proportionate means by which to achieve it.

1.129 The statement of compatibility states that the Declaration seeks to achieve the legitimate objective of protecting children from exposure to content that is unsuitable for children. Protecting children in this way is a legitimate objective for the purposes of international human rights law and requiring service providers to verify a user's age may be rationally connected to (that is, effective to achieve) this objective.

1.130 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, accompanied by sufficient safeguards and the least rights-restrictive way to achieve the stated objective. In this respect the statement of compatibility states:

> As the explanatory statement makes clear, age confirmation methods should be privacy preserving to the extent possible, and a data minimisation approach should be taken to ensure that the only attribute being tested is the age of the applicant. Age confirmation does not involve identity verification.[24]

1.131 However, as noted above, it remains unclear how age confirmation is possible without identity verification, unless it is through the use of a third-party entity that verifies this information. There is nothing in the Declaration itself that specifies that age confirmation methods should be privacy preserving and that a data minimisation approach should be taken. Instead, it leaves it to private companies to determine how much, or how little, data to collect on users – while requiring that the company comply with this legislative requirement to verify age. While service providers would still be required to comply with their obligations under applicable privacy laws, it is not clear what privacy protections would apply. For example, the Australian Privacy Principles

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

23 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 2013, paragraph [49].

24 Online Safety (Restricted Access Systems) Declaration 2022, statement of compatibility p. 7.

state that if an entity no longer needs personal information about a person they must take reasonable steps to destroy or deidentify the information.[25] However, if the provider is required to be able to prove that they have verified the age of a user, it may be that the retention of such information will be considered to be still necessary. Further, the *Privacy Act 1988* only applies, in general, to businesses with an annual turnover of over $3 million,[26] and it is therefore unclear what privacy legislation would apply to Australian based service providers who do not meet this criterion. If such data is to be collected and retained by service providers it would appear this may make such data more at risk of hacking, identity theft and leaks.

1.132 Mr David Kaye, a previous UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, expressed concern with respect to a proposed age verification scheme to access online pornographic content in the United Kingdom, which similarly provided no guidelines, technical requirements or conditions for the design of the age-verification mechanisms it imposed. Mr Kaye expressed concern:

> at the bill's lack of privacy obligations, yet it effectively makes it compulsory to use technologies that limit the right to privacy through the age-verification requirement. I am concerned at the imposition of the age-verification mechanism which has implications for the right to privacy without imposing conditions for the storage of such data. The mechanism does not provide sufficient guarantees against abuse and the bill lacks clear provisions to protect information gathered through the age-verification mechanism, including the length of the storage of such data and their collection by government and private companies. States are required by article 17(2) of the ICCPR [right to privacy] to regulate, through clearly articulated laws, the recording, processing, deletion of, use and conveyance of automated personal data and to protect those affected against misuse by State organs as well as by private parties.[27]

1.133 The lack of detail in the Declaration (or Determination) as to the operation of a restricted access system raises significant concerns that the measure is not sufficiently circumscribed and does not include sufficient safeguards to adequately protect the rights to privacy and freedom of expression. It is noted that there appears

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25 See *Privacy Act 1988*, Australian Privacy Principle 11 – security of personal information.

26 Under the *Privacy Act 1988*, privacy obligations apply to an 'APP entity', which is defined in section 6 to mean an agency (government body) or organisation. Section 6C defines an organisation as anyone other than a small business operator. A small business operator is defined in section 6D to have a turnover of $3 million or less (subject to some exceptions).

27 See, correspondence from Mr David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, to Mr Julian Braithwaite, Ambassador, Permanent Mission of the United Kingdom to the United Nations (9 January 2017), p. 5.

to have been significant discussion in recent years around what standards should be included in any age-verification system, and the safeguards that could apply. For example, the House of Representatives Standing Committee on Social Policy and Legal Affairs, in its report into age verification for online wagering and online pornography, recommended the Digital Transformation Agency develop standards for online age verification which should specify minimum requirements for privacy, safety, security, data handling, usability, accessibility, and auditing of age-verification providers.[28] Submitters to that inquiry raised numerous options that could help to protect the rights to privacy and freedom of expression, including:

- requiring that the service provider of the class 2 content is not able to know who a user is, only that the user has been verified as 18 years or older;
- requiring that the entity verifying the age should not know what site the person wishes to view, only that age verification has been requested;
- requiring that age-verification data is not retained once confirmation of age is made; and
- restricting the amount of data that can be requested.[29]

1.134 The possibility of including all, or some, of these proposed safeguards, suggests there may be a less rights restrictive way to achieve the stated objective.

1.135 In the absence of explicit privacy protections and requirements for data minimisation in these legislative instruments, there is a significant risk that an internet user's privacy may be arbitrarily interfered with by service providers who are required, as a matter of law, to establish an age-verification service, and that users may be dissuaded from accessing class 2 material, which would impermissibly limit the right to freedom of expression.

Committee view

1.136 The committee notes that the Online Safety (Restricted Access Systems) Declaration 2022 (Declaration) is designed to ensure that children are not able to access relevant class 2 material (including content that depicts realistically simulated sexual activity between adults; or high impact nudity, violence, drug use or language). The Declaration does not specify or prescribe technologies or processes to be used by service providers to determine age and restrict access to content, rather it requires users to declare they are 18 years or older; are provided with

28 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Protecting the age of innocence: Report of the inquiry into age verification for online wagering and online pornography*, February 2020, recommendation 1.

29 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Protecting the age of innocence: Report of the inquiry into age verification for online wagering and online pornography*, February 2020, pp. 6–31.

warnings and safety information about the material; reasonable steps are taken to confirm the user's age; and access is limited unless certain steps are complied with, including that age has been verified.

1.137 The committee notes the Online Safety (Basic Online Safety Expectations) Determination 2022 also provides, as an expectation of service providers, that they will take reasonable steps to ensure that technological or other measures are in effect to prevent access by children to class 2 material provided on the service, including implementing age assurance mechanisms.

1.138 The committee considers that restricting children's access to material on the internet that may be harmful to them is likely to promote the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities, including the right to protection from all forms of violence, maltreatment or sexual exploitation. The committee recognises the importance of creating a safer online environment for children.

1.139 However, the committee notes that requiring age verification is likely to limit the right to privacy and, if it could deter individuals from accessing relevant material, limit the right to freedom of expression (including the right to seek information and ideas of all kinds). These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.140 The committee considers that protecting children from exposure to content that is unsuitable for them online is clearly a legitimate objective for the purposes of international human rights law and requiring service providers to verify a user's age is likely to be effective to achieve this objective. However, concerns arise as to whether the measure is proportionate to the objective being sought. The committee notes that there is nothing in the legislative instruments specifying that age confirmation methods should be privacy preserving and that a data minimisation approach should be taken. Instead, it leaves it to private companies to determine how much, or how little, data to collect on users – while requiring that the company comply with this legislative requirement to verify age. It is not clear what privacy protections would apply. The lack of detail as to the operation of a restricted access system raises significant concerns that the measure is not sufficiently circumscribed and does not include sufficient safeguards to adequately protect the rights to privacy and freedom of expression. The committee considers the inclusion of such detail and safeguards would be a less rights restrictive way to achieve the stated objective.

1.141 The committee considers that in the absence of explicit privacy protections and requirements for data minimisation in these legislative instruments, there is a significant risk that an internet users privacy may be arbitrarily interfered with by service providers who are required, as a matter of law, to establish an age-verification service, and that user's may be dissuaded from accessing class 2 material, thereby impermissibly limiting the right to freedom of expression.

Suggested action

1.142 The committee considers that the proportionality of the measure may be assisted were the Declaration amended to specify minimum privacy and data minimisation requirements that an access control system must comply with, including clear advice to users as to the use of any data provided for the purposes of age verification.

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

Telecommunications (Interception and Access) Amendment (International Production Orders) Regulations 2022 [F2022L00111][1]

Purpose	This legislative instrument amends the *Telecommunications (Interception and Access) Regulations 2017* to give effect in domestic law to the agreement between Australia and the United States of America on access to electronic data for the purpose of countering serious crime
Portfolio	Home Affairs
Authorising legislation	*Telecommunications (Interception and Access) Act 1979*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 8 February 2022)
Rights	Privacy; life

Designation of agreement with the United States to access electronic data

1.144 The *Telecommunications (Interception and Access) Act 1979* (the TIA Act) regulates access to telecommunications content and data. It creates a legal framework by which law enforcement and intelligence agencies can access information held by communications providers (such as social media and other internet providers) within Australia. Schedule 1 to the TIA Act establishes an International Production Order (IPO) framework to enable Australian law enforcement and national security agencies to obtain an IPO to allow them to seek content or data from a foreign communications service provider. This is subject to Australia having a designated international agreement with the foreign country.

1.145 These regulations seek to designate such an agreement between Australia and the United States (US) (the AUS-US CLOUD Act Agreement). The effect of designating this agreement is to allow Australian law enforcement and national security agencies to ask communications service providers in the US to provide content or data to investigate or prosecute serious offences in Australia, and to allow US law enforcement and security agencies to similarly request access to content or data held by Australian-based communication service providers to investigate or prosecute crimes in the US. The agreement provides that each party cannot target each other's

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Telecommunications (Interception and Access) Amendment (International Production Orders) Regulations 2022 [F2022L00111], *Report 2 of 2022*; [2022] AUPJCHR 16.

citizens or permanent residents, so that the US will be prevented from targeting Australian citizens and residents, and vice versa.[2]

International human rights legal advice

Right to privacy

1.146 Designating the agreement with the US will mean that Australian communications providers are not prohibited by law from granting the US government access to private communications data (as long as an appropriate order, made by the US, is in place). It also means that Australian law enforcement and national security agencies will be able to seek an IPO to gain access to private communications data held by US based communications providers. This necessarily 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.[3] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.147 The committee has previously raised a number of concerns regarding the compatibility of the IPO framework with the right to privacy, when this framework was introduced in 2020.[4] Designating this agreement raises similar privacy concerns: namely, that while the IPO framework seeks to address the legitimate objective of protecting national security and public safety and addressing crime and terrorism, the framework is not sufficiently circumscribed and does not contain sufficient safeguards to ensure it would not arbitrarily limit the right to privacy.[5]

1.148 In terms of the safeguards that would apply to data collected by the US, there are a number of safeguards in the agreement and elsewhere that would likely help protect the right to privacy, including that:

2 Agreement between the Government of Australia and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime (AUS-US CLOUD Act Agreement), Article 4.

3 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been processed contrary to legal provisions, every person should be able to request rectification or elimination. UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

4 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020) pp. 87–129.

5 Parliamentary Joint Committee on Human Rights, *Report 7 of 2020* (17 June 2020) p. 114.

- the Attorney-General has issued a statutory requirements certificate confirming the US has demonstrated respect for the rule of law and respect for human rights relevant to cross-border access to data;[6]
- personal data received by the US must be protected, subject to reasonable restrictions, including by limiting the use and disclosure of the data and limiting retention for only so long as is necessary and appropriate;[7]
- US orders must not intentionally target Australian citizens or permanent residents;[8]
- US orders must be subject to independent review or oversight;[9]
- US orders for interception must be for a fixed, limited duration and not last longer than reasonably necessary.[10]

1.149 This may operate to ensure that US orders do not arbitrarily interfere with the right to privacy in relation to personal data held by communications providers in Australia. However, much of this depends on the exact laws that apply in the US to this data. Without knowing the content of these laws and the safeguards applicable (for example, whether judicial authorisation is required for the issuance of such orders), it is not possible to conclude that designating this agreement is compatible with the right to privacy.

Right to life

1.150 The TIA Act provides that an agreement with a foreign government cannot be specified as a designated agreement unless the minister has received a written assurance from the foreign government relating to the use or non-use of Australian-sourced information in connection with any proceeding by way of a prosecution for a death-penalty offence.[11] The AUS-US CLOUD Act Agreement provides that where data has been received from a communications service provider and Australia has declared that its essential interests may be implicated by the introduction of such data 'as evidence' in the prosecution's case in the US for an offence for which the death penalty applies, then prior to using that data, the US must obtain Australia's permission. The explanatory statement explains:

> The text of the Agreement and the side letters of understanding in relation to the death penalty will require the US to obtain Australia's permission to

6 Explanatory statement, p. 6.

7 AUS-US CLOUD Act Agreement, Article 3(4).

8 AUS-US CLOUD Act Agreement, Article 4.

9 AUS-US CLOUD Act Agreement, Article 5(2).

10 AUS-US CLOUD Act Agreement, Article 5(3).

11 *Telecommunications (Interception and Access) Act 1979*, Schedule 1, section 3.

> use Australian sourced data obtained under the AUS-US CLOUD Act Agreement as evidence in the prosecution's case for an offence in which the death penalty is sought. Australia will retain the discretion to refuse permission, or to grant permission subject to such conditions as Australia considers necessary. This reflects Australia's policy position on the death penalty and domestic legal requirements.[12]

1.151 By providing that communications data can be shared with the US to investigate or prosecute an offence against the laws of that country that is punishable by the death penalty, the measure engages and may limit the right to life.[13] The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits States which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state.[14] The provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies is also prohibited.[15] In 2009, the UN Human Rights Committee stated its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.[16]

1.152 The agreement with the US would mean the US government would be able to obtain private telecommunications data held by Australian-based communications service providers, which could be used to *investigate* a person for an offence which could be punishable by the death penalty. It would appear that the use of such data to investigate a death penalty offence would not require the Australian government's permission. Permission would only be required if the data is to be used as evidence in the prosecution's case. At that point Australia could permit the data to be used, or may not grant approval. Whether Australia permits this would be a matter for the discretion of the Australian government at the time of the request. As such, the agreement would not prevent such data being used in death penalty cases.

12 Explanatory statement, p. 2.

13 International Covenant on Civil and Political Rights, article 6.

14 Second Optional Protocol to the International Covenant on Civil and Political Rights.

15 UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009), [20].

16 UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009), [20].

1.153 There are therefore two concerns with the approach taken under this agreement in relation to the right to life. The first is that there is no basis on which Australia could object to personal data being used by the US to discover leads in an investigation that could ultimately lead to the death penalty being applied. Indeed, Australia would not necessarily even know if such data were used for such an investigation. On this basis, there appears to be a significant risk that under this agreement Australia would breach its obligations to protect the right to life.

1.154 The second concern is that the agreement would allow such data to be used as evidence in a death penalty case should Australia give permission to do so. The explanatory statement states that this gives the government the discretion to refuse permission or 'to grant permission subject to such conditions as Australia considers necessary'. It is unclear what such conditions could be. This permission therefore would rely on the discretion of the government at the time to adequately uphold the right to life. Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law. This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes. As such, there would appear to be a risk that Australia could grant permission to use data obtained under this agreement as evidence in a death penalty trial, which would be incompatible with Australia's right to life obligations.

Committee view

1.155 The committee notes in 2020 the International Production Order (IPO) framework was established to enable Australian law enforcement and national security agencies to seek telecommunications data (including the content of personal communications) from a foreign communications service provider, and to allow foreign governments to access Australian-based data. This is subject to Australia having a designated international agreement with the foreign country.

1.156 These regulations seek to designate an agreement between Australia and the United States for this purpose. This would allow Australian law enforcement and national security agencies to ask communications service providers in the US to provide data to investigate or prosecute serious offences in Australia, and allow US law enforcement and security agencies to similarly request access to data held by Australian-based communication service providers to investigate or prosecute crimes in the US.

1.157 Enabling access to private telecommunications data engages and limits the right to privacy. The right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considers that designating this agreement seeks to achieve the legitimate objective of protecting national security and public safety and addressing crime and terrorism. However, it reiterates its previous comments in relation to IPOs that the framework may not be sufficiently circumscribed or contain sufficient safeguards to ensure the

orders would not arbitrarily limit the right to privacy. The committee further considers that while the agreement with the US contains some important safeguards, without knowing the process by which orders to allow access to data held within Australia are issued in the US, for example, whether judicial authorisation is required, it is not possible to conclude that designating this agreement is compatible with the right to privacy.

1.158 Further, the committee raises particular concerns that designating this agreement would allow data held within Australia to be shared with the US government to investigate, and potentially prosecute, a person for an offence to which the death penalty may apply. The committee considers this engages the right to life, and notes that international law prohibits States which have abolished the death penalty from exposing a person to the death penalty in another state or providing information that may be used to investigate someone for a death penalty offence.

1.159 The committee notes that under the agreement the US would only be required to obtain Australia's permission to use telecommunications data if it intended to use it as evidence in a death penalty trial. As such, under the agreement the US could use personal telecommunications data to discover leads in an investigation which could ultimately lead to the death penalty being applied, without notifying Australia. It is only if the US wished to admit the data as evidence in a death penalty trial that they would need to get the permission of Australia to do so. The committee considers there is a significant risk that designating this agreement is incompatible with the right to life as the agreement could result in the provision of assistance to the US in the investigation of crimes that may result in the imposition of the death penalty.

1.160 The committee also notes that as the agreement would allow data to be used as evidence in a death penalty case should Australia give permission to do so, this would rely on the discretion of the government at the time of the request to adequately uphold the right to life. As such, the committee considers there would appear to be a risk that under the agreement Australia could grant permission to use data obtained under this agreement as evidence in a death penalty trial, which would be incompatible with Australia's right to life obligations.

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

Bills and instruments with no committee comment[1]

1.162 The committee has no comment in relation to the following bills which were introduced into the Parliament between 8 and 17 February 2022. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:[2]

- Agriculture Biodiversity Stewardship Market Bill 2022;
- Anti-Money Laundering and Counter-Terrorism Financing Amendment (Increased Financial Transparency) Bill 2022;
- Australian Radioactive Waste Agency Bill 2022;
- Brisbane Airport Curfew and Demand Management Bill 2022;
- Electoral Legislation Amendment (Authorisations) Bill 2022;
- Electoral Legislation Amendment (COVID Enfranchisement) Bill 2022;
- Fair Work Amendment (Equal Pay for Equal Work) Bill 2022;
- Health Insurance Amendment (Administrative Actions) Bill 2022;
- Higher Education Support Amendment (Australia's Economic Accelerator) Bill 2022;
- Income Tax Amendment (Labour Mobility Program) Bill 2022;
- Moratorium on New Coal, Gas and Oil Bill 2022;
- Parliamentary Workplace Reform (Set the Standard Measures No. 1) Bill 2022;
- Public Sector Superannuation Legislation Amendment Bill 2022;
- Regulator Performance Omnibus Bill 2022;
- Renewable Energy (Electricity) Amendment (Cheaper Home Batteries) Bill 2022;
- Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022;
- Social Security Amendment (Improved Child to Adult Transfer for Carer Payment and Carer Allowance) Bill 2022;
- Social Services Legislation Amendment (Workforce Incentive) Bill 2022;

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 2 of 2022*; [2022] AUPJCHR 17.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

- Transport Security Amendment (Critical Infrastructure) Bill 2022;
- Telecommunications Legislation Amendment (Faster Internet for Regional Australia) Bill 2022;
- Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Bill 2022;
- Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022;
- Treasury Laws Amendment (Modernising Business Communications) Bill 2022;
- Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022;
- Treasury Laws Amendment (Tax Concession for Australian Medical Innovations) Bill 2022; and
- Veterans' Affairs Legislation Amendment (Enhanced Family Support) Bill 2022.

Private Members' and Senators' bills that may limit human rights

1.163 The committee notes that the following private members' and senators' bills appear to engage and may limit human rights. Should these bills proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- Commonwealth Electoral Amendment (Cleaning up Political Donations) Bill 2022;
- Sex Discrimination and Other Legislation Amendment (Save Women's Sport) Bill 2022; and
- Social Media (Protecting Australians from Censorship) Bill 2022.

Legislative instruments

1.164 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 20 December 2021 and 15 March 2022.[3] The committee has reported on 17 legislative instruments from this period earlier in this

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

chapter. This period includes a number of autonomous sanctions instruments.[4] The committee has considered the human rights compatibility of similar instruments on a number of occasions.[5] As these legislative instruments do not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to these instruments at this time.The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

4 See Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Ukraine) Amendment (No. 1) Instrument 2022 [F2022L00181]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment (No. 3) Instrument 2022 [F2022L00186]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment (No. 2) Instrument 2022 [F2022L00187]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Ukraine) Amendment (No. 4) Instrument 2022 [F2022L00192]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 1) Instrument 2022 [F2022L00193]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 2) Instrument 2022 [F2022L00194]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 4) Instrument 2022 [F2022L00281]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 5) Instrument 2022 [F2022L00283]; and Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 6) Instrument 2022 [F2022L00313].

5 See, most recently, Parliamentary Joint Committee on Human Rights, Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021), pp. 2-11.

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