

Ministerial responses — Report 10 of 2023¹

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Attorney-General

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Mr Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

By email: Human.rights@aph.gov.au

Dear Chair

I refer to the Parliamentary Joint Committee on Human Rights' (the Committee) request in *Human Rights Scrutiny Report 8 of 2023* (the report), dated 2 August 2023, for further information on the Intelligence Services Legislation Amendment Bill 2023 (the Bill).

The Bill makes a number of important amendments, including amending the *Inspector-General of Intelligence and Security Act 1986*, the *Intelligence Services Act 2001* and other Commonwealth legislation to expand the jurisdictions of the Inspector-General of Intelligence and Security and the Parliamentary Joint Committee on Intelligence and Security to oversee additional agencies. The Bill also amends the *Criminal Code Act 1995* (the Criminal Code) to include an exemption from civil and criminal liability for defence officials and others for certain computer-related conduct as recommended by the 2019 *Comprehensive review of the legal framework of the National Intelligence Community* conducted by Mr Dennis Richardson AC.

The Committee seeks further information on these latter amendments. I appreciate the time the Committee has taken to consider the Bill. Please find below my response to questions under paragraph 1.124 of the report.

Engagement with the right to privacy

Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 16 of the *Convention on the Rights of the Child* provide that no person (adult or child) shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. The term 'unlawful' means that no interference can take place except as authorised under domestic law. The use of the term 'arbitrary' means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR or CRC (as applicable) and should be reasonable in the particular circumstances.

The Bill provides 'defence officials' with immunity from criminal and civil liability for computer-related activities done in the proper performance of approved Australian Defence Force (ADF) activities and on the reasonable belief that they will take effect outside Australia. While the Bill does not have the effect of directly limiting the right to privacy, the Bill indirectly creates a risk that a person in Australia's right to protection against arbitrary and unlawful interferences with privacy under Article 17 of the ICCPR may be violated.

Permissible limitation of the right to privacy

The right to privacy may be subject to permissible limitations where those limitations are provided by law and are non-arbitrary. Limitations must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.

The amendment pursues the legitimate objective of protecting defence officials from personal liability when utilising cyber capabilities for activities connected to the defence and security of Australia. Limitation of the right to privacy is necessary to ensure that the ADF can counter serious threats to Australia's national security. Protecting defence officials from liability for engaging in such conduct, in the proper performance of ADF activities, is necessary to ensure those officials can undertake necessary cyber activities without fear of personal liability.

The immunity is proportionate, as it is limited to circumstances where defence officials engage in conduct in the proper performance of authorised ADF activities, including in compliance with rules of engagement and other applicable processes and procedures. Defence officials will not be immune for conduct engaged in otherwise than in the proper performance of an authorised ADF activity.

It is not always possible for a defence official to be certain as to the location of a computer or device online, particularly where an adversary takes active steps to conceal or obfuscate their location. Protecting defence officials from liability in such circumstances is necessary to ensure that those officials can undertake such activities on the reasonable belief that their conduct will take effect outside Australia, without fear of personal liability if their belief turns out to be mistaken. A defence official will not be immune if they believe that their conduct will take effect inside Australia nor if their belief is not reasonable in the circumstances.

The amendment also requires that a person must provide written notification if they engage in conduct that causes material damage, material interference or material obstruction to a computer in Australia. This notification will go to the Chief of the Defence Force (CDF) for persons who fall under the CDF's command and to the Secretary of the Defence Department in other cases. The notification process will facilitate consideration at the most senior levels within Defence of any necessary or appropriate internal review processes, to ensure accountability. Such review could include consideration of the legal basis for the original conduct, or operational review to ensure computer capabilities were used appropriately and in line with Defence standard operating procedures. The CDF and Secretary of Defence would also be able to take steps to remedy any issues identified in such an internal review, such as updating procedures and guidelines, and take any disciplinary action.

Right to an effective remedy and alternative remedies

Article 2(3) of the ICCPR protects the right to an effective remedy for any violation of rights or freedoms recognised by the ICCPR, including the right to have such a remedy determined by the competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State. The right to an effective remedy applies notwithstanding that a violation has been committed by persons acting in an official capacity. Accordingly, the Bill engages the right to an effective remedy for any unlawful or arbitrary violation to the right to privacy.

While a person who has been adversely affected by this conduct would not be able to take civil action against the defence official involved, a person may still be entitled to claim compensation or remedial relief from the Commonwealth. For example, and depending on the particular circumstances, a person may be able to seek and obtain compensation or remedial relief for

alleged defective actions under the Compensation for Detriment caused by Defective Administration or an act of grace payment under the *Public Governance, Performance and Accountability Act 2013*. Complaints may also be able to be made to the Office of the Australian Information Commissioner or the Defence Ombudsman. I trust this information is of assistance.

Yours sincerely



THE HON MARK DREYFUS KC MP

31 / 8 /2023