Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents 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 included at **Appendix 3**.

Counter-Terrorism Legislation Amendment Bill (No. 1) 2018

Purpose	Seeks to make a range of amendments to the *Criminal Code Act 1995*, *Crimes Act 1914*, *Australian Security Intelligence Organisation Act 1979*, *Intelligence Services Act 2001* and the *Administrative Decisions (Judicial Review) Act 1977*, including to extend the operation of the control order regime, the preventative detention order regime, declared area provisions, and the stop, search and seize powers of the Australia Federal Police by a further three years; and to extend the operation of the Australian Security Intelligence Organisation's questioning, and questioning and detention powers for a further 12 months
Portfolio	Attorney-General
Introduced	House of Representatives, 24 May 2018
Rights	Equality and non-discrimination; liberty; freedom of movement; fair trial and the presumption of innocence; privacy; freedom of expression; freedom of association; protection of the family; prohibition on torture and cruel, inhuman or degrading treatment; work; social security; adequate standard of living; children (see **Appendix 2**)
Previous report	6 of 2018
Status	Concluded examination

Background

2.3 The bill amends various Acts relating to counter-terrorism, including to extend for a further three years the following regimes which are scheduled to sunset on 7 September 2018:

- the control order regime in Division 104 of the *Criminal Code Act 1995* (Criminal Code);
- the preventative detention order regime in Division 105 of the Criminal Code;

- the declared areas provisions in sections 119.2 and 119.3 of the Criminal Code; and
- the stop, search and seize powers in Division 3A of Part IAA of the *Crimes Act 1914*.

2.4 The bill also amends the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to extend the operation of ASIO's questioning and detention powers for a further 12 months.

2.5 The committee first reported on the bill in its *Report 6 of 2018*.[1] The committee has considered the measures listed above on a number of previous occasions.[2] In its *Report 6 of 2018*, the committee set out the concerns raised in its previous human rights assessments in relation to the declared area provisions and ASIO's questioning and detention powers, respectively, and concluded its examination by drawing these concerns to the attention of the parliament.[3]

2.6 The committee also requested a response from the Attorney-General by 11 July 2018 in relation to control orders, preventative detention orders and stop, search and seize powers.

2.7 The bill passed both Houses of Parliament on 16 August 2018.

2.8 A response from the Attorney-General and the Minister for Home Affairs to the committee's inquiries was received on 13 August 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Control orders

2.9 The committee has previously considered the control orders regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016.[4]

---

1 Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 2-29.

2 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 3-69; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 71-73; *Nineteenth report of the 44th Parliament* (3 March 2015) pp. 56-100; *Thirtieth report of the 44th Parliament* (10 November 2015) pp. 82-101; and *Report 4 of 2018* (8 May 2018) pp. 88-90.

3 See, Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 2-29.

4 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 3; *Sixteenth Report of the 44th Parliament* (25 November 2014) p. 7; *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); *Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 85; *Report 7 of 2016* (11 October 2016) p. 64.

2.10 The control orders regime grants the courts power to impose a control order on a person (including children aged between 14 and 17) at the request of the Australian Federal Police (AFP), with the Attorney-General's consent. The maximum penalty for contravening a condition of a control order is five years imprisonment.[5] The current 2018 bill extends the operation of the control orders regime for a further three years noting the regime was due to sunset on 7 September 2018.[6] The 2018 bill also makes some specific amendments to the operation of the regime.[7]

Terms of a control order

2.11 The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person subject to the order. These include:

- requiring a person to stay in a certain place at certain times;
- preventing a person from going to certain places;
- preventing a person from talking to or associating with certain people;
- preventing a person from leaving Australia;
- requiring a person to wear a tracking device;
- prohibiting access or use of specified types of telecommunications, including the internet and telephones;
- preventing a person from possessing or using specified articles or substances; and
- preventing a person from carrying out specified activities, including in relation to their work or occupation.[8]

Steps for the issue of a control order

2.12 The steps for the issue of a control order are:

- a senior AFP member must obtain the Minister for Home Affairs'[9] consent to seek a control order on prescribed grounds;[10]

---

5 Criminal Code, section 104.5.

6 Explanatory Memorandum (EM) p. 2; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (2018 bill), item 11.

7 These amendments include permitting an issuing court to vary an interim control order where there is agreement to a variation between the AFP and the subject of the control order; extending the minimum duration of time between the making of the interim control order and the confirmation proceeding from 72 hours to seven days; providing that the issuing court cannot make cost orders against the controlee except in limited circumstances where the controlee has acted unreasonably in conducting the control order proceedings: see EM, pp. 3-38, 40-41.

8 See Criminal Code, section 104.5.

9 See Criminal Code, section 104.2; EM p. 8.

- once consent is granted, the AFP member must seek an interim control order from an issuing court through an *ex parte* proceeding. The court must be satisfied on the balance of probabilities:
    - (i) that making the order would substantially assist in preventing a terrorist act; or
    - (ii) that the person in respect of whom the control order is sought has provided training to, received training from or participated in training with a listed terrorist organisation; or
    - (iii) that the person has engaged in a hostile activity in a foreign country; or
    - (iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or
    - (v) that the person has been convicted in a foreign country for an equivalent offence; or
    - (vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
    - (vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country; and
- the court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of:
    - (i) protecting the public from a terrorist act; or
    - (ii) preventing the provision of support for or the facilitation of a terrorist act; or
    - (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.[11]

2.13 In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account:

(a) as a paramount consideration in all cases the objects of:

(i) protecting the public from a terrorist act;

(ii) preventing the provision of support for or the facilitation of a terrorist act;

---

10 See Criminal Code, sections 104.2 and 104.4.

11 See Criminal Code, section 104.4.

(iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country;

(b) as a primary consideration in the case where the person is 14 to 17 years of age—the best interests of the person; and

(c) as an additional consideration in all cases—the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).[12]

2.14 The AFP must subsequently elect whether to seek the court's confirmation of the control order, with a confirmed order able to last up to 12 months (or three months if the person is aged between 14 and 17).[13] Currently, an interim control order is subject to confirmation by the court as soon as practicable but at least 72 hours after the interim control order is made. The bill extends this minimum period of time from 72 hours to seven days.[14]

Compatibility of continuing the control orders regime with human rights

2.15 The control orders regime involves significant limitations on human rights. Notably, it allows the imposition of a control order on an individual without following the regular criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.

2.16 The initial human rights analysis stated that the extension of the control orders regime by the 2018 bill engages and may limit a number of human rights, including:

- right to equality and non-discrimination;
- right to liberty;
- right to freedom of movement;
- right to a fair trial and fair hearing;
- right to privacy;
- right to freedom of expression;
- right to freedom of association;
- right to the protection of the family;
- right to work;
- right to social security and an adequate standard of living; and
- rights of children.

---

12 See Criminal Code, section 104.4.

13 See Criminal Code, sections 104.5(f), 104.14; EM, statement of compatibility (SOC) p. 8.

14 EM, p. 4.

2.17 The statement of compatibility acknowledges that the bill engages a range of human rights.[15] These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

2.18 The committee's previous reports have raised serious concerns as to whether control orders constitute permissible limitations on human rights.[16] Noting that the control orders regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the control orders regime that set out in detail how the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand).[17] As set out below, the statement of compatibility for the 2018 bill provides some of this information.

Extending control orders - legitimate objective

2.19 In relation to whether extending the control orders regime pursues a legitimate objective, the statement of compatibility states that:

> The control order regime achieves the legitimate objective of preventing serious threats to Australia's national security interests, including in particular, preventing terrorist acts. In the current national security landscape, it is critical that law enforcement agencies have access to preventative powers such as control orders to proactively keep the Australian community safe.[18]

2.20 In this respect, the statement of compatibility also provides some information as to the importance of this objective as a pressing concern.[19] Based on this information, the initial analysis stated that the objective of preventing serious threats to Australia's national security interests, including preventing terrorist acts, is likely to constitute a legitimate objective for the purposes of international human rights law. The committee has previously considered that the objective of the measure constituted a legitimate objective.[20]

Extending control orders—rational connection to a legitimate objective

---

15 EM, SOC, from p. 10.

16 See, for example, Parliamentary Joint Committee on Human Rights*, Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 94; *Report 7 of 2016* (11 October 2016) p. 69.

17 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 69.

18 EM, SOC, p. 9.

19 EM, SOC, p. 7.

20 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 16.

2.21 As set out above, a measure that limits human rights must be rationally connected to (that is, effective to achieve) its legitimate objective. In this respect, the human rights assessment in the committee's previous reports noted that there was doubt as to whether control orders are rationally connected to their stated objective. This was because it was unclear whether control orders were an effective tool to prevent terrorist acts noting the availability of regular criminal justice processes (including for preparatory acts).[21]

2.22 It was noted that since the committee's last report on control orders,[22] the current Independent National Security Legislation Monitor (INSLM), James Renwick SC, had reported that control orders may be effective in preventing terrorism, based on recent court cases.[23] This contrasted with the findings of a previous INSLM, Bret Walker SC, who found that 'control orders in their present form are not effective, not appropriate and not necessary'.[24]

2.23 On this issue, the statement of compatibility notes that since control orders were introduced in 2005 they have been used only six times. However, rather than indicating that control orders are ineffective or not necessary, the statement of compatibility argues that this indicates that the control order regime has been used judiciously to date.[25] It refers to the findings of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) that 'the limited use of the provisions reflects the AFP's position that, in circumstances where there is enough evidence to formally charge and prosecute a person, the AFP will take this approach over seeking the imposition of a control order'.[26] While this may be the case as a matter of policy and practice, there is no legal requirement that control orders be restricted in this manner.

---

21 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) p. 90; *Report 7 of 2016* (11 October 2016) p. 68. See, also, Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) p. 30.

22 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

23 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54. See, Parliamentary Joint Committee on Intelligence and Security, Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime (1 March 2018) p. 54.

24 INSLM, *Declassified Annual Report* (20 December 2012) p. 4.

25 EM, SOC, p. 9.

26 Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime,* (February 2018) [3.56] p. 54.

2.24 It was acknowledged that there is some evidence that the imposition of a control order could be capable of being effective in particular individual cases.[27] However, some questions remain as to whether the control order regime as a whole is rationally connected to its objective, noting in particular the availability of the regular criminal processes.

Extending control orders—proportionality

2.25 In relation to proportionality, the human rights assessment in the committee's previous reports on the control orders regime noted that there may be questions as to whether control orders are the least rights restrictive approach to preventing terrorist-related or hostile activities, and whether control orders contain sufficient safeguards to appropriately comply with Australia's human rights obligations.[28]

2.26 The previous human rights assessment raised concerns that control orders could be sought in circumstances where there is not necessarily an imminent threat to personal safety. The previous report stated that protection from imminent threats had been a critical rationale relied on for the introduction and use of control orders rather than ordinary criminal processes. It further stated that, in the absence of an imminent threat, it is difficult to justify as proportionate the imposition of significant limitations on human rights without criminal charge or conviction.[29]

2.27 As noted above, the issuing criteria for a control order set out in section 104.4 of the Criminal Code require that each proposed condition of a control order must be reasonably necessary, and reasonably appropriate and adapted, to the purpose of protecting the public from the threat of a terrorist act, or support for terrorist or hostile activities. The issuing court must also have regard to the impact of the obligations on the person's circumstances.[30] The statement of compatibility explains that this threshold ensures that any restrictions on human rights are 'reasonable, necessary and proportionate'.[31] However, while this criterion may act as a relevant safeguard, there is no explicit requirement that the conditions be the least rights restrictive measures for the person subject to the control order to protect the public.[32] In this respect, it was noted that the impact on the individual is given the

27 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54.

28 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) p. 11.

29 See, for example, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

30 See Criminal Code, section 104.4.

31 EM, SOC, p. 11.

32 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

status of 'additional consideration', while the effect on preventing or providing support to terrorism is to be a 'paramount consideration' of the issuing court.[33]

2.28 As noted in the previous human rights assessment of control orders, a less rights restrictive approach would not mean that public protection would become a secondary consideration in the issuance of a control order. Rather, it would require a decision-maker to take into account any possible less invasive means of achieving public protection as an equally paramount consideration. In the absence of such requirements, it may be difficult to characterise the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.[34]

2.29 The statement of compatibility also outlines some additional safeguards relating to the application of the control orders regime against children (aged 14 to 17 years). This includes, subject to exceptions, the requirement that the court must appoint a lawyer to act for a young person (aged 14 to 17 years) in control order proceedings if the young person does not already have a lawyer. Additionally, when considering whether to impose a particular condition under a control order on a child, the court is required to consider the best interests of the child as a primary consideration and the safety and security of the community as a paramount consideration.[35] Overall, while these safeguards are relevant to the proportionality of the limitations imposed on human rights, the initial analysis stated that questions remain as to whether they are sufficient to ensure that the application of the control orders regime to children is a proportionate limit on human rights. This includes questions as to whether applying a coercive regime to children (noting their maturity and particular vulnerabilities as children) constitutes a least rights restrictive approach.

2.30 In order to constitute a proportionate limitation on human rights, coercive powers must also be no more extensive than is strictly necessary to achieve their legitimate objective. In this respect, the initial analysis stated that there were questions about how the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal justice processes (e.g. arrest, charge and remand). The committee's previous human rights assessment of control orders noted there are a range of offences in the Criminal Code that cover preparatory acts to terrorism offences, which allow police to detect and prosecute terrorist activities at early stages.[36] In the absence of further information, and as

33 See Criminal Code, section 104.4.

34 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

35 See Criminal Code, subsection 104.4(1)-(2).

36 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 17.

indicated in the committee's previous assessment, the control orders regime is likely to be incompatible with a number of human rights.[37]

2.31 In light of the proposed extension of the regime, the committee sought further advice as to:

- how the control orders regime as a whole is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

Minister and Attorney-General's response

Legitimate objective

2.32 The minister and Attorney-General's response notes that the committee has accepted that the control orders regime pursues a legitimate objective for the purposes of international human rights law.

Rational connection

2.33 As to how the measures are effective to achieve (that is, rationally connected to) the stated objective, the response provides the following context:

> Control orders are a measure of last resort, which are only relied upon when traditional law enforcement options such as arrest, charge and prosecution are not available. As noted by the PJCIS Powers Report, the limited use of the control order regime demonstrates that the preference of law enforcement agencies is to employ traditional law enforcement methods to more comprehensively address the threat posed by an individual.

2.34 Noting the serious limitation on human rights that may be imposed by control orders, it is relevant that as a matter of policy and practice their use has been restricted. However, as noted above, there may still be questions about the potential application of the regime given there is no legal requirement that the use of control orders be restricted to circumstances where traditional law enforcement options are not available. In relation to evidence of effectiveness, the response refers to the report by INSLM Renwick and notes that he found that examples from recent cases demonstrate the effectiveness of control orders in pursuing the objects of the regime. The response does not directly address the findings by previous INSLM Walker which queried the effectiveness of the regime.

---

37 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 17.

2.35 The response further reiterates that while only six control orders have been made to date:

> …there will be circumstances where law enforcement agencies may have sufficient information or intelligence to establish a serious concern regarding the threat posed by an individual that falls short of the evidentiary burden to commence criminal prosecution. However, without an appropriate preventative mechanism, law enforcement agencies have limited means to manage the threat in the short to medium term. Use of a control order is considered in conjunction with, and is complementary to, criminal prosecution, and allows a balance to be achieved between mitigating the risk to community safety and allowing criminal investigations to continue.

2.36 Further, in relation to how the control order regime is rationally connected to 'preventing a terrorist act', the response from the minister and the Attorney-General points to specific legislative requirements:

> When determining which conditions to impose on an individual under a control order, the issuing court must consider whether the proposed obligation, prohibition or restriction is 'reasonably necessary, and reasonably appropriate and adapted' for the purposes of achieving one of the permitted purposes for a control order, such as protecting the public from a terrorist act (paragraph 104.4(1)(d)). This requires the issuing court to be satisfied that each condition under a control order must be effective in addressing the risk posed by the individual. Where a condition is not effective or necessary in addressing this threat, the issuing court may not impose that condition, or if it does impose the condition, may at a later time, upon application by the subject of the control order, determine that that condition is no longer necessary or effective to address the threat posed by the individual.
>
> Accordingly, the control order regime ensures that each of the limitations on a human right that may be imposed under a control order is rationally connected to minimising serious threats to Australia's national security, including in particular, the prevention of terrorist acts.

2.37 On the basis of the information provided, it appears that the control order regime may be rationally connected to its stated objective. However, much may depend on how the control orders are used in practice and how they interact with regular criminal justice processes. Noting that they have only been used six times to date, there is limited evidence in this respect.

Proportionality

2.38 The response identifies a number of safeguards which it states ensure that the control order regime 'represents the least restrictive way to achieve the legitimate purpose of preventing a serious threat to Australia's national security interests, including in particular, the prevention of terrorist acts.' The response states that these safeguards include that the control order is made by a judicial officer and

that under section 104.4(1)(d) of the *Criminal Code* the court must be satisfied on the balance of probabilities that each of the obligations, prohibitions or restrictions to be imposed on the person by the control order is reasonably necessary, and reasonably appropriate and adapted for the purpose of achieving one of the permitted purposes for a control order, such as protecting the public from a terrorist.

2.39 The response states that this requirement in subsection 104.4(1)(d) of the Criminal Code ensures that only the obligations, prohibitions and restrictions directly capable of achieving the objective of the control order are imposed by the issuing court. The response argues that this means that the control order is no more restrictive than it needs to be for the purpose of achieving the legitimate objective. That is, the response appears to suggest that while there is no explicit requirement that the conditions in the control order be the least rights restrictive approach, the requirement that each obligation, prohibition or restriction be 'reasonably necessary, and reasonably appropriate and adapted' to a permitted purpose is an equivalent test.

2.40 However, the provision as drafted would seem to permit conditions to be imposed in circumstances where this is not the least rights restrictive approach. This is because while the court is required to take into account the effect on preventing or providing support to terrorism as a 'paramount consideration',[38] it is not required to take into account any possible less invasive means of achieving public protection as an equally paramount consideration. As a result, it is difficult to characterise the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.[39] This is the case particularly in light of the fact that, under section 104.4, the impact on the subject of the control order is only given the status of 'additional consideration'.[40]

2.41 The response does, however, point to some other mechanisms to assist with the proportionality of the regime including the ability to treat individual cases differently:

> …the control order regime allows for each application to be dealt with flexibly, and based on the circumstances of each case. For instance, for control order applications in relation to young persons between the age of 14 and 17, the issuing court must consider the best interests of the young person when determining whether each of the obligations, prohibitions or restrictions to be imposed on the individual is reasonably necessary, and reasonably appropriate and adapted to the protecting the public from a terrorist act (paragraph 104.4(2)(b)). Subsection 104.4(2A) outlines specific

38 See Criminal Code, section 104.4.

39 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

40 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

> matters that the issuing court must take into account when determining what is in the best interest of the young person, including their age, maturity, background, the right of the person to receive an education, the benefit to the person of having a meaningful relationship with his or her family and friends and the physical and mental health of the individual.
>
> In addition, paragraph 104.4(2)(c) provides that the issuing court must consider the impact of each of the proposed obligations, prohibitions or restrictions on the person's circumstances (including the person's financial and personal circumstances). This enables the control order regime to provide sufficient flexibility to treat the circumstances of each control order application differently, rather than imposing a blanket restriction on human rights without regard to the specific needs of the individual, or the threat they pose.

2.42 The flexibility to take individual circumstances into account is relevant to the proportionality of the regime. The response further explains that the control order regime contains mechanisms for assessing the ongoing need for a control order, and each of its obligations:

> An individual subject to a control order may apply at any time to have a confirmed control order revoked or varied. The issuing court can revoke a control order if it is no longer satisfied on the balance of probabilities that the control order would substantially assist in the prevention of a terrorist act. Alternatively, the issuing court may remove certain obligations, prohibitions and restrictions in relation to an individual if it is no longer satisfied that the condition is reasonably necessary, and reasonably appropriate and adapted to achieving the purpose of protecting the public from a terrorist act. These review mechanisms ensure that the intrusions on human rights that may be occasioned by a control order are no greater than necessary to achieve the legitimate objective.
>
> … The restrictions on human rights occasioned by a control order are not indiscriminate or disproportionate intrusions, but rather tailored to the specific threat being mitigated, and the individual circumstances of the individual who is the subject of the restrictions.

2.43 While these mechanisms for oversight and review are important safeguards in relation to the operation of the regime, it is unclear that they will be sufficient to ensure that it imposes a proportionate limit on human rights in all circumstances. In this context, it is important to bear in mind that control orders will be used in cases where there is insufficient evidence to charge someone with an offence. It is not clear from the response that other less rights restrictive mechanisms, such as engagement or de-radicalisation, would not be sufficient to address the stated objectives of the measure, rather than imposing conditions under a control order, a

breach of which constitutes a criminal offence.[41] This is particularly the case given that, as noted above, control orders may be sought in circumstances where there is not necessarily an imminent threat to personal safety. This means that there is a risk that the potential threat could be more remote. In these circumstances, the imposition of significant limitations on human rights without criminal charge or conviction may be difficult to characterise as permissible as a matter of international human rights law. For these reasons, the control order regime does not appear to be a proportionate limitation on human rights.

Committee response

2.44 The committee thanks the minister and the Attorney-General for their response and has concluded its examination of this issue.

2.45 While the control order regime pursues a legitimate objective and may be rationally connected to that objective, the preceding analysis indicates that the regime does not impose a proportionate limit on human rights.

2.46 Consistent with the concerns raised in the previous human rights assessment relating to the control orders regime, the committee draws the human rights implications of the bill (now Act) to the attention of the Parliament.[42]

Compatibility of extending the minimum duration of time between the interim control order and the confirmation proceedings with the right to a fair hearing

2.47 As noted above, currently, an interim control order is subject to confirmation by the court as soon as practicable but at least 72 hours after the interim control order is made. The bill would extend this minimum period of time from 72 hours to seven days.[43] As interim control orders are made *ex parte* (that is, without the person subject to the control order being present), this means that the person will, generally, be subject to the conditions of the control order until the confirmation proceeding, without having an opportunity to be heard. In this context, while it was acknowledged that both parties to a confirmation proceeding may require sufficient time to prepare their case,[44] the extension of the minimum period raises other questions about the compatibility of the measure with the right to a fair hearing. This is because a delay in confirmation hearing may have significant implications for a person who remains subject to an interim control order while awaiting this hearing.

2.48 The explanatory memorandum explains the timing of confirmation hearings further in the context of the measure:

---

41 Under section 104.27 of the Criminal Code it is offence with a maximum penalty of five years imprisonment for contravening a control order.

42 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 70.

43 EM, p. 2.

44 EM, SOC, p. 15.

> Confirmation proceedings have to date occurred many months after the making of an interim control order. However, under existing subsection 104.5(1A), it remains open to the issuing court to set the confirmation date only 72 hours after the making of an interim control order. This would leave both parties potentially unprepared to make detailed submissions to the court at the confirmation proceeding.[45]

2.49 While this may be the case as a matter of practice, it was unclear why it is insufficient to leave it to the court to set a confirmation date as soon as reasonably practicable. It would have been useful if the statement of compatibility had provided further information in this respect.

2.50 The committee therefore sought further advice as to the compatibility of extending the minimum duration of time between the interim control order and the confirmation proceedings with the right to a fair hearing.

Minister and Attorney-General's response

2.51 In relation to the compatibility of the measure with the right to a fair hearing, the response acknowledges that the measure has the potential to limit the subject of the control order's right to contest the interim control order as soon as practicable. However, the response argues that the measure also provides greater opportunity for the subject of the control order to prepare to present their case to the court:

> Confirmation proceedings are complex, and may take both parties a substantial amount of time to prepare for. While subsection 104.5(1B) allows the issuing court to consider a range of factors when determining the date of the confirmation hearing, subsection 104.5(1A) enables the issuing court to set the confirmation date as early as 72 hours after the making of an interim control order. This could prevent both the subject of the control order and the AFP from being adequately prepared for the confirmation hearing.
>
> To date, the issuing court, the AFP and the subject of the control order application, have been satisfied in holding confirmation proceedings several months after the making of an interim control order. In light of this reality, the proposed extension of time between the making of an interim control order and the confirmation date from 72 hours to seven days is unlikely to amount to an undue delay in an individual's right to contest the interim control order.

2.52 An important aspect of the right to a fair hearing is for there to be adequate time for an individual to prepare their case. It is further noted that, to date, the issuing court has set the date for confirmation proceedings sometimes many months after the making of the interim control order. It is acknowledged that this means that

45 EM, p. 37.

from a practical perspective the measure is unlikely to lead to delay in an individual's ability to contest the control order. However, as noted above, while this may be the case as a matter of practice, it is unclear why it cannot be left to the court to set a confirmation date as soon as 'practicable'. This issue was not addressed in the response. Noting this, there is a concern that the measure may result in a delay to the confirmation hearing in an individual case. This may have significant implications for a person who remains subject to an interim control order while awaiting this hearing.

Committee response

2.53 The committee thanks the minister and the Attorney-General for their response and has concluded its examination of this issue.

2.54 Based on the information provided, from a practical perspective the measure is unlikely to lead to delay in an individual's ability to contest the control order. However, noting the potential for delay, there may be a risk in relation to the right to a fair hearing in the individual case.

Preventative detention orders

2.55 The committee has previously considered the Preventative Detention Orders (PDO) regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016.[46]

2.56 The AFP can apply for a PDO which allows a person to be taken into custody and detained[47] if it is suspected, on reasonable grounds, that a person will engage in a terrorist act, possesses something in connection with preparing for or engaging in a terrorist act, or has done an act in preparation for planning a terrorist act.[48] The terrorist act must be one that 'is capable of being carried out, and could occur, within the next 14 days'.[49]

---

46 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 3; *Sixteenth Report of the 44th Parliament* (25 November 2014) p. 7; *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); *Thirty-sixth Report of 44th Parliament* (16 March 2016) p. 85; *Report 7 of 2016* (11 October 2016) p. 64.

47 The period of detention is up to 48 hours.

48 See subsection 105.4(4) of the Criminal Code. There is also the power for a PDO to be issued if a terrorist act has occurred within the last 28 days and it is reasonably necessary to detain the subject to preserve evidence of, or relating to, the terrorist act, and detaining the subject for the period for whi1ch the person is to be detained is reasonably necessary for preserving that evidence (subsection 105.4(6)).

49 Criminal Code, section 105.4(5).

2.57 The 2018 bill sought to extend the operation of the PDO regime for a further three years, noting the regime was due to sunset on 7 September 2018.[50]

2.58 The police must not question the person subject to a PDO while they are detained subject to limited exceptions.[51]

2.59 There are restrictions on who the subject of the PDO can contact while detained.[52] A person subject to a PDO may contact a family member or employer. However, contact can be monitored by police and can only occur for the purposes of letting the contacted person know that the subject being detained is safe but is not able to be contacted for the time being.

Compatibility of extending the operation of the PDO with multiple human rights

2.60 The PDO regime engages and may limit a number of human rights, including:

- right to liberty;
- right to security of the person;
- right to a fair hearing and fair trial;
- right to freedom of expression;
- right to freedom of movement;
- right to privacy;
- right to be treated with humanity and dignity;
- right to protection of the family; and
- right to equality and non-discrimination.

2.61 In particular, as PDOs are administrative orders made, in the first instance, by a senior AFP member, which authorise an individual to be detained without charge, the extension of the PDO regime engages and limits the right to liberty. Further, as there are restrictions on who a person can contact while detained under a PDO and what they can say to those they contact, the regime also engages and limits the right to freedom of expression. Being held in a form of detention, which is in effect incommunicado, may also have implications for a number of other human rights.

2.62 The statement of compatibility acknowledges that PDOs engage and limit a number of these rights.[53] These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

---

50 EM, p. 2; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018, item 11.

51 Criminal Code, section 105.42.

52 Criminal Code, sections 105.34, 105.35, 105.45.

53 EM, SOC, p. 19.

2.63 Noting that the PDO regime was not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the PDO regime,[54] setting out in detail how the necessarily coercive powers impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal processes (e.g. arrest and charge).[55] As set out below, the statement of compatibility for the 2018 bill provides some of this information.

Extending the operation of the PDO regime – legitimate objective

2.64 In relation to the objective of the PDO regime, the statement of compatibility explains:

> The PDO regime supports the legitimate objective of preventing serious threats to Australia's national security and, in particular, preventing terrorist acts. In recent years, there has been an increase in the threat of smaller-scale, opportunistic attacks by lone actors. Law enforcement agencies have had less time to respond to these kinds of attacks than other terrorist plots.[56]

2.65 Consistent with the committee's previous analysis, the objective of preventing serious terrorist attacks is likely to constitute a legitimate objective for the purposes of international human rights law.

Extending the operation of the PDO regime – rational connection

2.66 Since the committee's last report on PDOs,[57] current INSLM Renwick reported that PDOs 'have the capacity to be effective'.[58] This contrasts with the findings of previous INSLM Walker who found that '[t]here is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism'.[59] The PJCIS has

---

54 In accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

55 See, for example, Parliamentary Joint Committee on Human Rights: *Fourteenth Report of the 44th Parliament* (28 October 2014); *Sixteenth Report of the 44th Parliament* (25 November 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); and *Thirty-Sixth Report of the 44th Parliament* (16 March 2016).

56 EM, SOC, p.18.

57 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64.

58 INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (2017) pp. 51-54. See, Parliamentary Joint Committee on Intelligence and Security, Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime (1 March 2018) p. xii.

59 INSLM, *Declassified Annual Report* (20 December 2012) p. 67.

also recommended that the PDO regime continue.[60] There is therefore conflicting evidence as to whether the PDO regime is effective to achieve its stated objective.

2.67 The statement of compatibility notes that to date no PDOs have been issued since the commencement of the regime in 2005.[61] However, it argues that this:

> …reflects the policy intent that these orders should be invoked only in limited circumstances where traditional investigative powers available to law enforcement agencies are inadequate to respond to a terrorist threat.[62]

2.68 However, as stated in the initial analysis, while this may be the policy intention of the measure, the fact that no PDOs have been issued also raised questions as to whether the PDO regime is effective to achieve its stated objective. Further, noting in particular the availability of the regular criminal processes, additional questions remained as to whether the PDO regime as a whole is rationally connected to its objective. It would have been useful if the statement of compatibility had provided further information about this issue.

Extending the operation of the regime – proportionality

2.69 In relation to proportionality, the previous human rights assessment of the PDO regime stated that the PDO regime involves very significant limitations on human rights. Notably, it allows the imposition of a PDO on an individual without following the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt.

2.70 The previous assessment noted that it was unclear that the PDOs were necessary to achieve their stated objective, noting the availability of ordinary criminal justice processes including the criminalisation of preparatory terrorism offences.[63] In this respect, the UN Human Rights Committee has indicated that, in order to justify preventative detention, the state must show that the threat posed by the individual cannot be addressed by alternative (less rights restrictive) means.[64] This issue was not fully addressed in the statement of compatibility.

2.71 In terms of proportionality, the statement of compatibility for the 2018 bill argues that the 'high threshold' for making a PDO ensures that it is 'inextricably linked to preventing an imminent terrorist incident' and is a proportionate limit on

---

60 Parliamentary Joint Committee on Intelligence and Security, *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime,* (February 2018) [4.80] p. 103.

61 EM, SOC, p. 18.

62 EM, SOC, p. 18.

63 Section 101.6 of the Criminal Code makes it an offence to do 'any act in preparation for, or planning a terrorist act'.

64 *Miller & Carroll v New Zealand* (2502/2014) UN Human Rights Committee (2017) [8.5].

human rights.[65] However, the previous human rights assessment noted that given a PDO could be sought even where there is not an imminent threat to life, it was unclear that the regime imposes a proportionate limitation on the right to liberty in the pursuit of national security.[66] In this respect, it was noted that the regime would potentially allow for detention of a person, who may not themselves pose a risk to society, for the purpose of preserving evidence. This kind of power is an extraordinary one in the context of the right to liberty and appears not to be a least rights restrictive approach.

2.72 In light of the proposed extension of the regime, the committee sought further advice as to:

- how the PDO regime is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

Minister and Attorney-General's response

Legitimate objective

2.73 The minister and Attorney-General's response notes that the committee has accepted that the PDO regime pursues a legitimate objective for the purposes of international human rights law.

Rational connection

2.74 In relation to whether the PDO regime is effective to achieve its stated objective, the response explains the scope of the PDO regime in the context of the type of risks that may occur:

> Under a Commonwealth PDO, a person can be detained for up to 48 hours to:
>
> - prevent a terrorist act that is capable of being carried out, and could occur, within the next 14 days from occurring, or
> - preserve evidence of, or relating to, a recent terrorist act.
>
> In the current threat environment, there is a heighted risk of smaller-scale opportunistic attacks, undertaken principally by lone actors or small

65 EM, SOC, p. 19.

66 See, for example, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64. Schedule 5 of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (now Act) changed the current definition of a 'terrorist act' as being one that is imminent and expected to occur in the next 14 days, to one that 'is capable of being carried out, and could occur, within the next 14 days'.

> groups. While there is still the need to prepare for more complex attack plots, simple attack methodologies that enable individuals to act independently and with a high degree of agility remain the more likely form of terrorism in Australia. The simple nature of these attacks means preparation may not involve activity that is concerning enough to come to the attention of authorities immediately. In such circumstances, law enforcement agencies need to act quickly and decisively to disrupt terrorist acts and prevent catastrophic consequences to the community.

2.75 This information indicates that there may be challenges in preventing and responding to simple attack methodologies using traditional investigative methods. In this respect, the response reiterates that the PDO is a measure of last resort, which is only sought in exceptional circumstances before a terrorist act occurs, or after an act of terrorism occurs to preserve evidence. The response further states the lack of use of the PDO regime reflects the understanding by the AFP that the PDO regime is only anticipated to be used 'in times of an unfolding emergency (or in its immediate aftermath) and when the traditional investigative powers available to law enforcement are inadequate to contain the threat'. The response explains that while the PDO regime is yet to be used, there are scenarios when its use will be effective to achieve its stated objectives. The response cites the following hypothetical situation of when use of the PDO regime may be necessary and appropriate:

> In its supplementary submission to the PJCIS, the Attorney-General's Department (AGD) and the AFP provided the following example of when a PDO is an effective means of responding to a terrorist act:
>
> > Consider there has been an explosion in a crowded place in the Melbourne central business district. There are significant casualties. Police arrest a person suspected of causing the explosion and establish that the terrorist suspect had called an unknown associate around the time of the attacks. The associate is previously unknown to police, and at this stage, there is insufficient information to reach the threshold for arrest, and further investigation is required. A Commonwealth PDO is issued by a senior AFP member to the associate.
>
> In this scenario, the detention of the associate is rationally connected to the prevention of a further terrorist act. The rational connection to the prevention of a terrorist act is outlined in the legislation itself which requires an analysis by the AFP member and the issuing authority of whether the PDO would 'substantially assist' in preventing a terrorist act occurring (paragraph 105.4(4)(c)). This ensures that a PDO can only be made if it is likely to be effective in achieving its objective of addressing a serious terrorist threat.

2.76 This hypothetical scenario shows how the PDO could be capable of being used in a way that is rationally connected to its stated objective. However, the hypothetical also raises questions as to the effectiveness of the PDO regime. This is because there is a question about whether the threshold for arrest and the issue of a

PDO will be different in the type of circumstances canvassed in the scenario. In this respect, the threshold for affecting the arrest of the 'associate' for a terrorism offence is set out in section 3WA of the *Crimes Act 1914* and provides that a person may be arrested if a constable suspects on reasonable grounds the person has committed or is committing an offence.[67] To make a PDO in relation to the 'associate' the AFP member would be still be required to suspect, on reasonable grounds, that the person will engage or has engaged in a terrorist act, the planning of such an act, or possesses a thing that is connected with such an act.[68] This means that, at least in relation to activity that has already been engaged in by the 'associate', the threshold for arrest and issue of a PDO would appear to be quite similar. It is difficult to reach conclusions in relation to questions of effectiveness in circumstances where PDOs have not been used and the hypotheticals provided do not appear to completely address the issue.

2.77 The response further argues that each of the restrictions on human rights occasioned by the making of a PDO (including restrictions on communications) are rationally connected with preventing a terrorist act, or preserving evidence in the immediate aftermath of a terrorist act. It would have been useful if the response had explained how these restrictions would be effective in preventing a terrorist act or preserving evidence. On this basis, it appears that there are some outstanding questions as to whether PDOs are effective to achieve their stated objective.

Proportionality

2.78 In relation to whether the limitation is proportionate, the response points to safeguards in relation to the operation of the PDO regime. This includes the threshold requirements under subsection 105.4(4) that to obtain a PDO the AFP member must suspect on reasonable grounds that the subject of the PDO:

- will engage in a terrorist act, or
- possesses a thing connected with the preparation for, or the engagement of a person in, a terrorist act, or
- has done an act in preparation for, or planning, a terrorist act.

2.79 In addition, the AFP member must:

- be satisfied that making the PDO would substantially assist in preventing a terrorist act occurring, and

67 In circumstances where a summons against the person would not be effective.

68 Criminal Code, subsection 105.4(4)(a). Alternatively, a PDO can be issued in relation to the 'associate' where it is reasonably necessary to preserve evidence after a terrorist attack has occurred: Criminal Code, subsection 105.4(6).

- be satisfied that detaining the individual for the period for which the individual is to be detained under the PDO is reasonably necessary for the purpose of preventing a terrorist act.

2.80 These thresholds are relevant to the proportionality of the PDO regime. Further, the response states that the test for seeking and making a PDO also requires both the AFP member and the issuing authority to undertake a proportionality analysis:

> The PDO can only be sought and made where it would 'substantially assist' in preventing a terrorist act occurring. The AFP member and issuing authority must also consider whether detention of the individual under a PDO is 'reasonably necessary' for the underlying purpose of making a PDO. These criteria require the AFP member and issuing authority to weigh the effectiveness of the PDO against other measures that are available to prevent or respond to a terrorist threat.
>
> Accordingly, the test for seeking and making a PDO is targeted and narrowly framed, to ensure it is only used where it is likely to be effective, and in circumstances where it can prevent terrorist acts which are likely to occur within a short period of time.

2.81 These requirements are relevant safeguards in relation to making a PDO. However, the particular assessment required in 105.4(4) is not necessarily equivalent to the test of proportionality for the purposes of international human rights law. In order to be a proportionate limitation on human rights, a measure must be the least rights restrictive approach, reasonably available, to achieve the stated objective. Concerns remain because it is possible that an AFP member may be satisfied that the PDO may 'substantially assist' preventing a terrorist act occurring and that the PDO is 'reasonably necessary', even though less rights restrictive approaches may be available. On this issue of proportionality, it is important to note that the threshold would appear to allow a PDO to be sought even where there is not an imminent threat to life.[69]

2.82 The response further argues that a similar proportionality analysis is undertaken where a PDO is sought and made for the purposes of preserving evidence in the immediate aftermath of a terrorist act:

> In such circumstances, the AFP member and issuing authority must be satisfied that a terrorist act has occurred within the last 28 days, that it is necessary to detain the person to preserve evidence of, or relating to the

69 See, for example, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 64. Schedule 5 of the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (now Act) changed the current definition of a 'terrorist act' as being one that is imminent and expected to occur in the next 14 days, to one that 'is capable of being carried out, and could occur, within the next 14 days'.

terrorist act, and that detention is reasonably necessary to achieve this objective (subsect 105.4(6)).

2.83 However, again, this assessment in subsection 105.4(6) is not equivalent to the test of proportionality for the purposes of human rights law. As noted above, the test under international human rights law requires consideration of whether the measure is proportionate to achieve the stated objective of 'preventing serious threats to Australia's national security and, in particular, preventing terrorist acts.' The specific concern is that the regime would allow for detention of a person, who may not themselves pose a risk to society, for the purpose of preserving evidence. As noted in the initial analysis, this kind of power is an extraordinary one in the context of the right to liberty and appears not to be a least rights restrictive approach.

2.84 The response explains that once a person is detained under a PDO they are subject to a number of safeguards:

- after 24 hours the AFP must apply to an issuing authority, such as a judge, to have the detention continued for a further 24 hours;
- there are additional protections for those under 18 or incapable of managing their own affairs to contact their parent or guardian;
- while a person subject to a PDO is prevented from communicating, they may still inform specified individuals they are safe or make a complaint to the Commonwealth;
- an individual detained under a PDO has the right to be treated with humanity and respect for human rights, and not to be subject to cruel, inhuman or degrading treatment;
- after the PDO has expired, the person subject to the PDO may apply to the Security Division of the Administrative Appeals Tribunal to seek merits review of the decision to make or extend a PDO. The person may also bring proceedings in a court for a remedy in relation to the PDO, or for their treatment under the PDO.

2.85 These are important and relevant safeguards in relation to the proportionality of the measure. However, despite these safeguards and the considerations to be made by the issuing authority, serious questions remain as to the proportionality of the PDO regime. As noted above, in its current form, the breadth of the PDO regime extends to detaining people who may have committed no crime and pose no threat, for the purpose of securing evidence. As noted in the initial analysis, the UN Human Rights Committee has indicated that, in order to justify preventative detention, the state must show that the threat posed by the individual cannot be addressed by alternative (less rights restrictive) means.[70] The information

70 *Miller & Carroll v New Zealand* (2502/2014) UN Human Rights Committee (2017) [8.5].

provided in the response does not completely address this issue. Accordingly, the PDO regime does not appear to impose a proportionate limit on human rights.

Committee response

2.86 The committee thanks the minister and the Attorney-General for their response and has concluded its examination of this issue.

2.87 While the PDO regime pursues a legitimate objective for the purposes of human rights law, the preceding analysis indicates that the regime as drafted is likely to be incompatible with human rights.

2.88 Consistent with the concerns raised in the previous human rights assessment relating to the PDO regime, the committee draws the human rights implications of the bill (now Act) to the attention of the Parliament.[71]

Australian Federal Police – stop, search and seize powers

2.89 The committee has previously considered stop, search and seize powers as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.[72]

2.90 Part IAA Division 3A of the *Crimes Act 1914* was first introduced in 2005 to provide 'a new regime of stop, question, search and seize powers…exercisable at airports and other Commonwealth places to prevent or respond to terrorism'.[73]

2.91 Division 3A provides a range of powers for the AFP and state and territory police officers that can be exercised if a person is in a 'Commonwealth place' (such as an airport)[74] and:

- the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act; or
- the Commonwealth place is a 'prescribed security zone'.[75]

---

71 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) p. 77.

72 See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Thirtieth Report of the 44th Parliament* (10 November 2015).

73 EM, Anti-Terrorism Bill (No 2) 2005, p. 1.

74 'Commonwealth place' means a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth: *Commonwealth Places (Application of Laws) Act 1970*, section 3.

75 The minister may, upon application from a police officer, declare, in writing, a Commonwealth place to be a 'prescribed security zone' if the minister considers that a declaration would assist in preventing a terrorist act occurring, or in responding to a terrorist act that has occurred: *Crimes Act 1914*, section 3UJ.

2.92 In these circumstances, the powers that the officers may exercise include:

- requiring a person to provide their name, residential address and reason for being there;
- stopping and searching persons, their items and vehicles for a terrorist related item; and
- seizing terrorism related items.[76]

2.93 Division 3A, section 3UEA also allows a police officer to enter and search premises without a search warrant and to seize property without the occupier's consent in certain circumstances.[77] These powers are not limited in their application to Commonwealth places.[78]

2.94 The 2018 bill sought to extend the operation of stop, search and seize powers for a further three years noting the regime was due to sunset on 7 September 2018.[79]

Compatibility of extending the stop, search and seize powers with multiple human rights

2.95 The stop, search and seize powers engage and may limit a number of human rights, including:

- the right to privacy;
- the right to freedom of movement;
- the right to security of the person and the right to be free from arbitrary detention;
- the right to a fair trial and fair hearing.[80]

2.96 These rights may be subject to permissible limitations providing they pursue a legitimate objective and are rationally connected and proportionate to that objective.

2.97 The committee's previous reports have raised concerns as to whether the stop, search and seize powers constitute permissible limitations on human rights.[81]

---

76 *Crimes Act 1914*, sections 3UC-3UE.

77 *Crimes Act 1914*, section 3UEA.

78 EM, SOC, p. 26; *Crimes Act 1914*, section 3UEA.

79 EM, SOC, p. 26; Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 (2018 bill), item 11.

80 As noted in the committee's *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 28: These powers may also engage and limit the right to freedom of expression; the right to be treated with humanity and dignity; and the right to equality and non-discrimination.

81 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

Noting that the stop, search and seize powers were not previously subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility[82] be prepared.[83] As set out below, the statement of compatibility for the 2018 bill provides some of this foundational assessment.

Extending stop, search and seize powers – legitimate objective

2.98 The statement of compatibility states that the powers 'achieve the legitimate purpose of protecting Australia's national security, including in particular, preventing and responding to terrorist acts'. This is likely to constitute a legitimate objective for the purposes of international human rights law.

Extending stop, search and seize powers – rational connection

2.99 The statement of compatibility acknowledges that the powers have not been used to date.[84] However, it points to recent reviews of the powers by INSLM Renwick and the PJCIS which recommended that the powers be continued as evidence of their importance.[85] Other than pointing to these other reviews, the statement of compatibility does not further explain how the powers are effective. Accordingly, it was unclear from the information provided how the powers are rationally connected to their stated objective.

Extending stop, search and seize powers – proportionality

2.100 The human rights assessment of the powers in the committee's previous report raised concerns about the proportionality of the limitation. The assessment noted that these powers are coercive and highly invasive in nature. For example, once a 'prescribed security zone' is declared, everyone in that zone is subject to stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. In deciding whether to declare a prescribed security zone, the minister need only 'consider' that such a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred.[86]

2.101 There were further questions about whether the powers are more extensive than is strictly necessary to achieve their stated objective. The previous assessment noted that the powers are in addition to existing police powers under

82 In accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

83 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

84 EM, SOC, p. 26.

85 EM, SOC, pp. 26-27.

86 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 25-28.

Commonwealth criminal law, including a range of powers to assist in the collection of evidence of a crime.[87] For example, Division 2 of Part IAA of the *Crimes Act 1914* sets out a range of search and seizure powers, including the primary Commonwealth search warrant provisions that apply to all offences against Commonwealth law. Under these provisions, an issuing officer can issue a warrant to search premises and persons if satisfied by information on oath that there are reasonable grounds for suspecting that there is, or will be in the next 72 hours, evidential material on the premises or in the possession of the person. An application for such a search warrant can be made by telephone in urgent situations.[88] A warrant authorises a police officer to seize anything found in the course of the search that he or she believes on reasonable grounds to be evidential material of an offence to which the warrant relates (or another indictable offence) and seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.[89] The statement of compatibility does not explain how these ordinary powers are insufficient to protect national security.

2.102 The statement of compatibility argues that the powers are proportionate, pointing to restrictions on their use and noting they are subject to oversight by the ombudsman. The 2018 bill also proposes to introduce additional requirements for the AFP to report to the PJCIS after the AFP exercises such powers. These matters assist with the proportionality of the limitation. However, as noted above, questions remain as to whether the powers are more extensive than is strictly necessary and so may not represent the least rights restrictive approach.

2.103 The committee therefore sought advice as to the compatibility with international human rights of each of the stop, question, search and seizure powers, and their proposed extension, including:

- whether each of the stop, question, search and seizure powers, and their proposed extension, is effective to achieve (that is, rationally connected to) its stated objective; and
- whether each of the stop, question, search and seizure powers, and their proposed extension, is a reasonable and proportionate measure for the achievement of that objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

87 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 25-28.

88 Section 3R of the *Crimes Act 1914*.

89 Division 2 of Part IAA of the *Crimes Act 1914.*

Minister and Attorney-General's response

Legitimate objective

2.104 The minister and Attorney-General's response notes that the committee has accepted that the stop, search and seizure powers in Division 3A of Part IAA of the *Crimes Act* pursue a legitimate objective for the purposes of international human rights law.

Rational connection

2.105 The response explains that the scope of the powers in Division 3A is mostly confined to Commonwealth places. It states that 'Commonwealth places' 'are generally places of national significance, or areas of mass gathering (or both), where a terrorist act could have potentially catastrophic consequences.' The response notes that only section 3UEA, which provides that a police officer may enter premises without a warrant in certain circumstances, may be exercised by law enforcement agencies outside of a Commonwealth place.

2.106 In relation to how the powers are rationally connected to (that is, effective to achieve) the stated objective, the response explains:

> As noted in the PJCIS Powers Report, the stop, search and seize provisions are emergency powers which are only likely to be used 'in rare and exceptional circumstances' to enable police to 'respond rapidly to terrorism incidents'. While these powers have not yet been used by law enforcement agencies, they 'fill a critical, albeit narrow, gap in state and territory emergency counter-terrorism powers, by enabling law enforcement agencies to act immediately in the event of a terrorist threat to, or terrorism incident within, a Commonwealth place'. In the joint submission from AGO and the Australian Federal Police (AFP) to the PJCIS, a hypothetical scenario was outlined in which the stop, search and seize powers would be an effective measure and markedly improve the capability of law enforcement agencies to respond to the threat of a terrorist act:
>
> > AFP provides a Uniformed Protection Function at Garden Island Defence Precinct (NSW). The AFP's function in that regard is to provide for the safety and security of the Precinct and its population along with providing a first response capability in the event of a critical incident.
> >
> > In this hypothetical example, intelligence indicates that an unidentified person is planning to commit an edged weapon terrorist attack at the Precinct. A suspect is identified loitering in the public area for a prolonged period of time, constantly keeping his hands in his pocket and trying to secret himself from view of CCTV cameras with a black and white flag visible in his rear pocket.
> >
> > In this scenario reasonable grounds to suspect the person might be about to commit a terrorist act exist to exercise powers under

> Division 3A. The suspect is approached and required to provide their name and reason for being at the Precinct under section 3UC. The person provides their name and shows a NSW driver's licence. Intelligence checks identify that they are an associate of a known terrorism suspect. Meanwhile, police search the person under section 3UD, and seize a knife and Islamic State flag found in their possession. The person is arrested on suspicion of planning a terrorist act.
>
> In the current terrorism threat environment, an attack on a Commonwealth place is not unlikely. It is therefore vital that law enforcement agencies have appropriate and targeted powers to prevent or respond to terrorist acts in Commonwealth places. The stop, search and seize powers are rationally connected to the legitimate purpose of preventing serious threats to Australia's national security and, in particular, preventing terrorist acts.

2.107 Although the powers have not been used to date, the information provided indicates that there may be circumstances where these powers would be effective to achieve the legitimate objective of protecting Australia's national security, including in particular, preventing and responding to terrorist acts.

Proportionality

2.108 In relation to whether each of the stop, question, search and seizure powers, and their proposed extension, is a proportionate measure for the achievement of the stated objective, the response states:

> The stop, search and seize powers contain a number of safeguards to ensure that they represent the least restrictive way to achieve the legitimate purpose of preventing serious threat of Australia's national security interests, including in particular, preventing terrorist acts.
>
> Firstly, as noted in the PJCIS Powers Report, the stop, search and seize powers are only likely to be exercised in emergency scenarios. Under such circumstances, it is anticipated that traditional law enforcement powers are unlikely to be as effective in responding to the terrorist threat. In a rapidly evolving threat scenario, the stop, search and seize powers are likely to represent the most effective means of responding to a terrorist threat, and therefore may represent the least restrictive way to achieve the legitimate objective of safeguarding the community from a terrorist act.
>
> Secondly, the stop, search and seize powers are, with the exception of the emergency entry into premises power in section 3UEA, narrowly confined in their application to Commonwealth places. Accordingly, these powers are not broadly applicable and are limited in their exercise to locations which are generally of national significance or places of mass gathering (or both). Similarly, while section 3UEA is not limited in its application to a Commonwealth place, the circumstances in which it may be applied are narrowly confined to emergency scenarios, where rapid law enforcement

action is necessary because there is a serious and imminent threat to a person's life, health or safety.

Thirdly, in exercising the stop and search power in section 3UD, a police officer must not use more force, or subject the person to greater indignity, than is reasonable and necessary in order to conduct the search (subsection 3UD(2)). Furthermore, a person must not be detained longer than is reasonably necessary for a search to be conducted (subsection 3UD(3)). Similarly, in searching a thing (including a vehicle), a police officer may use such force as is reasonable and necessary in the circumstances, but must not damage the thing by forcing it, unless the person has been given a reasonable opportunity to open the thing, or it is not possible to give that opportunity (subsection 3UD(4)). These safeguards ensure that the stop, search and seize powers are exercised in a proportionate manner and cause the least amount of interference with an individual's rights.

Fourthly, a police officer who is responsible for an item seized under section 3UE or section 3UEA must, within seven days, serve a seizure notice on the owner of the thing (or, if the owner cannot be found, the person from whom the thing was seized), to enable the owner to request for the return of the item (section 3UF).

Fifthly, where the Minister makes a declaration for a prescribed security zone in respect of a Commonwealth place, the Minister is subject to an ongoing requirement to revoke the declaration as soon as there is no longer a terrorism threat that justifies the declaration being continued, or if it is no longer required to respond to a terrorist act that has already occurred (subsection 3UJ(4)). This ensures that the inference with human rights that may be occasioned through the making of a prescribed security zone declaration does not last any longer than necessary to achieve the legitimate objective of the preventing or responding to a terrorist act.

Finally, the stop, search and seize powers are subject to important oversight mechanisms. For instance, complaints on the use of these powers by the AFP could be investigated by the Commonwealth Ombudsman or the Australian Commission for Law Enforcement Integrity. Similarly, the use of these powers by state and territory police can be reviewed by the appropriate jurisdictional oversight bodies, such as state and territory Ombudsman. In addition, the INSLM has the power to review the operation of counter-terrorism legislation, which includes the power to request information or produce documents for the purposes of performing the INSLM's function. This enables the INSLM to seek information and review documents associated with the exercise of stop, search and seize powers by the AFP.

The Bill strengthens these oversight arrangements by also requiring that as soon as possible after the exercise of the stop, search and seize powers by an AFP police officer, the Commissioner of the AFP must provide a report about the use of the powers to the Minister, the INSLM and the PJCIS.

> Furthermore, the Bill also introduces a new annual reporting requirement for the exercise by the AFP of the stop, search and seize powers.
>
> These safeguards ensure that the stop, search and seize powers are targeted in their application and do not cause greater interference with human rights than is necessary to achieve the legitimate objective of preventing serious threat of Australia's national security interests, including in particular, preventing terrorist acts.

2.109 These safeguards are highly relevant to the proportionality of the stop, search and seizure powers. Noting that the powers have not been used to date, it is acknowledged that use of these powers has been approached cautiously. In this respect, in light of the safeguards identified, in circumstances where a police officer believes on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act, the stop, search and seizure power may be a proportionate limitation on human rights. However, concerns remain as to the proportionality of other aspects of the powers.

2.110 The response states that the powers are 'only likely to be exercised in emergency scenarios.' While this may be the case as a matter of policy and practice, the provisions themselves appear to be able to apply more broadly. As noted above, once a Commonwealth place is declared by the minister to be a 'prescribed security zone', everyone in that zone is subject to stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. As Commonwealth places may be areas of public significance such powers could have considerable human rights implications. In deciding whether to declare a prescribed security zone, the minister need only 'consider' that such a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred. While the law has not operated so broadly to date, there is a concern that in future such declarations may be made on a more regular basis. This issue is not fully addressed in the response and it appears that the breadth of the powers' potential application may not be the least rights restrictive approach.

2.111 Additionally, in relation to the power to search premises without a warrant, it is unclear from the information provided why these provisions are necessary in light of the ordinary powers of the police. As noted above, under Division 2 of Part IAA of the *Crimes Act 1914*, an issuing officer can issue a warrant to search premises and persons if satisfied by information on oath that there are reasonable grounds for suspecting that there is, or will be in the next 72 hours, evidential material on the premises or in the possession of the person. An application for such a search warrant can be made by telephone in urgent situations.[90] A warrant authorises a police officer to seize anything found in the course of the search that he or she believes on

90 Section 3R of the *Crimes Act 1914*.

reasonable grounds to be evidential material of an offence to which the warrant relates (or another indictable offence) and seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence.[91] The response does not explain how these ordinary powers are insufficient to protect national security. As such, it is unclear that the powers Division 3A, section 3UEA represent the least rights restrictive approach as required to be a proportionate limitation on human rights.

Committee response

2.112 The committee thanks the minister and the Attorney-General for their response and has concluded its examination of this issue.

2.113 The committee notes that the stop, search and seizure powers have not been used to date.

2.114 Based on the information provided, in circumstances where a police officer believes on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act the stop, search and seizure powers may be a proportionate limitation on human rights.

2.115 However, the preceding analysis indicates that the scope of other aspects of the stop, search and seizure powers is likely to be incompatible with human rights.

2.116 Consistent with the concerns raised in the previous human rights assessment relating to the stop, search and seizure powers, the committee draws the human rights implications of the bill (now Act) to the attention of the parliament.[92]

91 Division 2 of Part IAA of the *Crimes Act 1914.*

92 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 69.

Office of National Intelligence Bill 2018

Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018

Purpose	Seeks to establish the Office of National Intelligence as an independent statutory agency within the prime minister's portfolio, subsuming the role, functions and staff of the Office of National Assessments Seeks to repeal the *Office of National Assessments Act 1977*, make consequential amendments to a range of Acts and provide for transitional arrangements
Portfolio	Prime Minister
Introduced	House of Representatives, 28 June 2018
Rights	Freedom of expression; presumption of innocence; privacy; equality and non-discrimination; life; torture, cruel, inhuman and degrading treatment or punishment (see **Appendix 2**)
Previous report	7 of 2018
Status	Concluded examination

Background

2.117 The committee first reported on the bills in its *Report 7 of 2018*, and requested a response from the Prime Minister and the Attorney-General by 29 August 2018.[93]

2.118 A response from the Attorney-General to the committee's inquiries was received on 31 August 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Offences for unauthorised use or disclosure of information

2.119 The Office of National Intelligence Bill 2018 (the bill) seeks to create a number of offences related to the unauthorised communication, use or recording of information or matters acquired or prepared by or on behalf of the Office of National Intelligence (ONI) in connection with its functions or that relates to the performance by ONI of its functions (ONI information).

93 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) pp. 48-64.

2.120 Proposed section 42 would create an offence for persons to communicate ONI information or matters in circumstances where the person is or was a staff member of ONI, is otherwise engaged by ONI, or is an employee or agent of a person engaged by ONI (in other words, an ONI 'insider').[94] The offence carries a maximum penalty of 10 years' imprisonment.

2.121 Proposed section 43 would create an offence for the subsequent disclosure of ONI information or matters which come to the knowledge or into the possession of a person other than due to their employment or association with ONI[95] (in other words, an ONI 'outsider'), in circumstances where the person intends that the communication cause harm to national security or endanger the health or safety of another person, or where the person knows that the communication will or is likely to cause harm to national security or endanger the health or safety of another person. The offence carries a maximum penalty of 5 years' imprisonment.

2.122 Proposed section 44 would create offences for the unauthorised 'dealing with'[96] or making records of ONI information where the person is an ONI 'insider'. The offences carry a maximum penalty of 3 years' imprisonment.

Defences and exceptions

2.123 There are specific exemptions to the offences in proposed sections 42 and 44 where the communication is made:

- to the Director-General[97] or a staff member by the person in the course of their duties as a staff member or in accordance with a contract, agreement or arrangement; or
- within the limits of authority conferred on the person by the Director-General or with the approval of the Director-General or a staff member having the authority of the Director-General to give such an approval.

2.124 The bill also provides for a number of defences to each of the offences in proposed sections 42, 43, and 44, including where:

---

94 See subsection 42(1)(b).

95 Under proposed subsection 43(1)(a) these associations include 'that the person is or was a staff member of ONI, that the person has entered into any contract, agreement or arrangement with ONI or that the person has been an employee or agent of a person who has entered into a contract, agreement or arrangement with ONI'. See explanatory memorandum (EM), p. 38.

96 Under proposed subsection 44(1)(a) 'dealing with' information includes copying a record, transcribing a record, retaining a record, removing a record, or dealing with a record in any other manner.

97 Under the bill, Director-General means the Director-General of National Intelligence, whose functions include overseeing and managing ONI. See division 1 of part 3 of the bill.

- the information or matter is already publicly available with the authority of the Commonwealth;[98]
- the information is communicated to an Inspector-General of Intelligence and Security (IGIS) official for the purpose of the official exercising a power or performing a function or duty as an IGIS official;[99]
- the person deals with, or makes, a record for the purpose of an IGIS official exercising a power or performing a function or duty as an IGIS official;[100] and
- the subsequent communication is in accordance with any requirement imposed by law or for the purposes of relevant legal proceedings or any report of such proceedings.[101]

2.125 The defendant bears an evidential burden in relation to these matters.

Compatibility of the measures with the right to freedom of expression

2.126 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. By criminalising the disclosure of certain information, as well as particular forms of use of such information, the proposed secrecy provisions engage and limit the right to freedom of expression.

2.127 The committee has previously raised concerns in relation to limitations on the right to freedom of expression relating to secrecy offences introduced or amended by the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018; the Australian Border Force Amendment (Protected Information) Bill 2017; the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016; and the National Security Legislation Amendment Bill (No. 1) 2014 (all now Acts).[102] The secrecy offences examined in this report raise similar concerns.

98 See proposed subsections 42(2), 43(2) and 44(3).

99 See proposed subsections 42(3) and 43(3).

100 See proposed subsection 44(4).

101 See proposed subsection 43(3).

102 See, respectively, Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 213-279; *Report 11 of 2017* (17 October 2017) pp. 72-83; *Report 7 of 2016* (11 October 2016) pp. 64-83; and *Sixteenth Report of the 44th Parliament* (25 November 2014) pp. 33-60.

2.128 Measures limiting the right to freedom of expression may be permissible where the measures pursue a legitimate objective, are rationally connected to that objective, and are a proportionate way to achieve that objective.[103]

2.129 The statement of compatibility for the bill acknowledges that the secrecy offences engage and limit the right to freedom of expression but argues that the measures are reasonable, necessary and proportionate to achieve the objectives of protecting national security; protecting the right to privacy of individuals whose personal information may be provided to ONI; and enabling ONI to perform its functions, including promoting a well-integrated intelligence community.[104] While generally these matters are likely to constitute legitimate objectives for the purposes of international human rights law, the initial analysis stated that it would have been useful if the statement of compatibility provided further information as to the importance of these objectives in the specific context of the secrecy measures.

2.130 As to whether the measures are rationally connected to the stated objective, the statement of compatibility explains that:

> By providing a deterrent against the disclosure or handling of information without authorisation, the risk of national security being prejudiced through that disclosure or inappropriate handling is minimised, the risk of a person's privacy being breached is lowered, and agencies will be more willing to provide information to ONI in the knowledge that there are strict penalties for unauthorised disclosure of that information.[105]

2.131 It was acknowledged that, to the extent that the type of information or matters prohibited from unauthorised use or disclosure under the bill may prejudice national security or contain an individual's personal information, the measures may be capable of being rationally connected to the objectives stated above. However, the breadth of information or matters that the proposed offences may apply to raises questions as to whether the measures would in all circumstances be rationally connected to the stated objectives.

2.132 Similar questions arose in relation to the proportionality of the measures as drafted.

Breadth of information

2.133 As set out at [1.3], the proposed offences apply to information or matters acquired or prepared by or on behalf of ONI in connection with its functions or that

---

103 See, generally, UN Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34 (2011) [21]-[36]. The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.

104 EM, Statement of compatibility (SOC), p. 13.

105 EM, SOC, p. 13.

relate to the performance by ONI of its functions. ONI's functions are extensive and include leading and evaluating the activities of the 'national intelligence community' (NIC);[106] collecting information and preparing assessments on matters of political, strategic or economic significance to Australia, including of a domestic or international nature; and providing advice to the Prime Minister on national intelligence priorities, requirements and capabilities and other matters relating to the NIC. Under the bill, ONI may receive information on matters of political, strategic or economic significance to Australia from a Commonwealth authority, an intelligence agency or agency with an intelligence role, and may request such information subject to certain restrictions.[107]

2.134 In relation to the type of information prohibited from unauthorised use or disclosure under the bill, the statement of compatibility explains that:

> Such information is likely to be sensitive, and unauthorised disclosure or handling could threaten Australia's national security. The provisions also provide for NIC agencies to give ONI documents or things that relate to ONI's functions. This information is likely to relate to highly sensitive information that could prejudice national security if disclosed – for example, information relating to intelligence workforce information, intelligence capabilities or national intelligence priorities.[108]

2.135 While it was acknowledged that the disclosure of some types of ONI information may potentially harm national security, as noted above, proposed section 42 of the bill prohibits the unauthorised disclosure of ONI information or matters generally, regardless of the material's security classification or whether it concerns national security or is otherwise deemed to be potentially harmful. It therefore appears that the 'insider' offence set out in proposed section 42 would criminalise the unauthorised communication of information that is not necessarily harmful to national security, to Australia's interests or to a particular individual, and is not intended to cause harm. This raises concerns that the measures may not be the least rights restrictive way of achieving the stated objectives and may be overly broad.

Breadth of application and definition of 'national security'

106 This includes the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), Defence Intelligence Organisation (DIO), Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO), the Australian Criminal Intelligence Commission (ACIC); and the intelligence functions of the Department of Home Affairs, the Australian Federal Police (AFP), the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Department of Defence.

107 See division 1 of part 4 of the bill.

108 EM, SOC, p. 13.

2.136 In this context, the breadth of the proposed 'insider' offence in section 44, which prohibits the unauthorised 'dealing with'[109] or recording of ONI information or matters, was also a concern. The initial analysis stated that it appears that a person does not have to publicly communicate the information or matter, or intend to do so, in order to commit an offence. It was unclear whether criminalising unauthorised 'dealing with' all information or matters classified as ONI information, including where the information is not otherwise harmful or sensitive and is not communicated publicly, is rationally connected or proportionate to achieve the legitimate objectives.

2.137 The proposed 'outsider' offence in section 43 relating to the subsequent communication of information or matters by persons other than, for example, ONI employees or contractors, applies to the same broad range of information. However, the offence only applies where the person intends that the communication cause harm to national security or endanger the health or safety of another person, or knows that it will or is likely to. While this may potentially assist with the proportionality of the limitation on the right to freedom of expression, concerns remained that the offence is overly broad with respect to the stated objectives.

2.138 In particular, the scope of information or matters that may be considered as causing harm to Australia's national security if publicly disclosed is potentially broad. Under the bill, national security has the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), which provides that 'national security means Australia's defence, security, international relations or law enforcement interests'.[110] 'International relations' is in turn defined in the NSI Act as the 'political, military and economic relations with foreign governments and international organisations'.[111] In light of these definitions, it appears that the proposed offence in section 43 would apply to a journalist who publishes an article containing ONI information that they know will likely cause harm to Australia's political relations with an international organisation, notwithstanding that the communication may be in the course of reporting on an issue considered to be in the public interest. It would also appear possible that the public disclosure of certain information may endanger the health or safety of another person — for example, a person held in immigration detention — and therefore constitute an offence despite the information being in the public interest, including in circumstances where the affected person consents to the information being made public. It was therefore not

---

109 As stated above, under proposed subsection 44(1)(a) 'dealing with' information includes copying a record, transcribing a record, retaining a record, removing a record, or dealing with a record in any other manner.

110 See section 8 of division 2 of part 2 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

111 See section 10 of division 2 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

clear whether the measure, as drafted, is sufficiently circumscribed in order to be a proportionate limitation on the right to freedom of expression.

2.139 Further, it may not be clear to a person as to whether information or matters that they come to know or possess constitutes ONI information and is therefore protected from subsequent disclosure subject to the exceptions set out above. As noted at [1.17], ONI information may potentially include a very broad range of documents or other matters that may initially have been produced by a range of Commonwealth agencies, including non-intelligence agencies. It is possible that a person may receive information that was originally produced by, for example, the Department of Home Affairs, but may be unaware that the information has also become ONI information by reason of it having been acquired by ONI. Under proposed section 43, the prosecution is only required to prove that the defendant was reckless as to whether information or a matter is ONI information.[112]

Safeguards and penalties

2.140 There were also questions about whether the defences (set out at [1.8]) act as adequate safeguards in respect of the right to freedom of expression. For example, the defences may not sufficiently protect the disclosure of information that is in the public interest or in aid of government accountability and oversight. There is no general defence related to public reporting in the public interest or general protections for whistle-blowers, other than for the communication of information to the IGIS. This raised further questions about the proportionality of the limitation on the right to freedom of expression.

2.141 Further, the severity of the penalties is also relevant to whether the limitation on the right to freedom of expression is proportionate. In this case, it was noted that the proposed penalties are serious and range from three to 10 years' imprisonment.

2.142 The committee therefore sought advice as to:

- how the measures are effective to achieve (that is, rationally connected to) the stated objectives of the bill; and
- whether the limitations are reasonable and proportionate to achieve the stated objectives (including in relation to the breadth of information subject to secrecy provisions; the range of information or matters that may be considered as causing harm to Australia's national security or the health and safety of another person; the adequacy of safeguards; and the severity of the criminal penalties).

112 See EM, SOC, p. 38.

2.143 In relation to the proportionality of the measures, in light of the information requested above, advice was also sought as to whether it would be feasible to amend the secrecy offences to:

- appropriately circumscribe the scope of information subject to the prohibition on unauthorised disclosure or use under proposed sections 42 and 44 (by, for example, introducing a harm element or otherwise restricting the offences to defined categories of information);
- appropriately circumscribe the definition of what causes harm to national security for the purposes of proposed section 43;
- expand the scope of safeguards and defences (including, for example, a general 'public interest' defence); and
- reduce the severity of the penalties which apply.

Attorney-General's response

2.144 In response to the committee's concerns regarding proposed section 43, the Attorney-General states:

> The development of the ONI Bill overlapped with the consideration by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (EFI Bill). Noting the PJCIS' recommendations on the EFI Bill, and the form in which that Bill passed Parliament, the ONI Bill including its Explanatory Memorandum will be amended to remove section 43 (the offence of subsequent communications of certain information) in its entirety. On that basis, this response only deals with clauses 42 and 44 of the Bill.

2.145 In light of the committee's concerns, the committee welcomes the removal of section 43 from the bill.

2.146 In relation to whether the measures in sections 42 and 44 are effective to achieve the stated objectives of the bill, the Attorney-General's response explains:

> In order to effectively perform its functions, ONI will need to have access to [a] wider range of information (frequently of a sensitive and classified nature) from a broader range of agencies than is currently required for ONA's functions. The offences in clauses 42 and 44 are part of a range of safeguards contained in the Bill to ensure that this information, as well as information generated by ONI, is appropriately protected from unauthorised disclosure, particularly given the potentially devastating consequences that unauthorised disclosures and compromises of intelligence-related information can have.

2.147 Based on this information, it appears that the measures are capable of being effective to achieve the stated objectives of the bill to protect national security, protect the right to privacy of individuals whose information may be provided to ONI, and enable ONI to perform its functions.

2.148 The Attorney-General's response also provides additional information as to whether the measures constitute a proportionate limitation on the right to freedom of expression. For example, regarding the scope of the offences, the response explains:

> The offences in clauses 42 and 44 will only apply where the information or matter came into the person's knowledge or possession by reason of one the following circumstances: that the person is or was a staff member of ONI, that the person has entered into any contract, agreement or arrangement with ONI, or that the person has been an employee or agent of a person who has entered into a contract, agreement or arrangement with ONI.
>
> This is in recognition of the special duties and responsibilities that apply to ONI staff and people with whom the agency has an agreement or arrangement, and the strong and legitimate expectation that those persons will handle all information obtained in that capacity in strict accordance with their authority at all times.

2.149 It is acknowledged that restricting the offence to staff assists with the proportionality of the limitation. However, concerns remain regarding the scope of the information which is subject to the prohibition on disclosure.

2.150 More specifically, in response to the committee's inquiry about the feasibility of circumscribing the scope of information subject to the prohibition on unauthorised disclosure or use under proposed sections 42 and 44, the Attorney-General's response states:

> Limiting the scope of the offences to ONI information of a particular security classification would be insufficient to provide adequate protection against harm to national security. It is well-recognised that the information handled by intelligence agencies is so sensitive that even isolated disclosures of seemingly innocuous information could cause harm; as these may be analysed collectively to reveal significant matters. Limiting the scope of the offences to the communication of information would be also insufficient to provide sufficient protection as it would not capture the full continuum of behaviour that may result in the unauthorised disclosure of information, limiting the ability of authorities to take steps to prevent significant harm to national security.

2.151 In light of the potentially significant impact of the proposed measures on the right to freedom of expression, concerns remain as to the proportionality of a measure which makes it a criminal offence to disclose all information to be held by ONI. While it is acknowledged that seemingly innocuous information could be capable of being harmful in particular circumstances, the concern in relation to the proportionality of the measure is that this could also capture the disclosure of information which is not harmful. It is noted in this respect that the offence does not require that the unauthorised disclosure of information 'may cause harm' by itself or

when used in combination with other material. In these circumstances, it appears that the offence as drafted may be overly broad.

2.152 In relation to whether the scope of the safeguards and defences could be expanded, for example, by including a general public interest defence, the Attorney-General's response explains:

> The offences do not constitute an absolute bar on the disclosure of ONI information and contain appropriate safeguards to facilitate the communication of ONI information in appropriate circumstances including:
>
> - with the approval of the Director-General of National Intelligence (Director-General) or a staff member with authority to give such approval; and
>
> - to an Inspector-General of intelligence and Security (IGIS) official for the purpose of that official exercising a power, or performing a function or duty as such an official. This will include disclosures to the Office of the IGIS under the *Public Interest Disclosure Act 2013* that relate to an intelligence agency.
>
> Given the existing exceptions and the limited application of the offences, the inclusion of a general public interest defence is not considered necessary.

2.153 Despite these exceptions, the disclosure of information for public interest purposes appears to be barred in circumstances where the disclosure lacks the approval of the Director-General, or is made to a party other than an IGIS official, due to the operation of the proposed offences in combination with the broad definition of 'intelligence information' in the *Public Interest Disclosure Act 2013*.[113] Consequently, concerns remain about the apparently limited availability of safeguards and defences.

2.154 Finally, regarding the severity of the penalties, the Attorney-General's response explains:

> The maximum penalties are consistent with the penalties that apply to the existing secrecy provisions in the IS Act [*Intelligence Services Act* 2001] and reflect the higher level of culpability on the part of persons who obtain ONI information in their capacity as an ONI staff member, or through a contract, arrangement or agreement with ONI.

2.155 Whilst similarly severe penalties may exist in other legislation, evidence of consistency with other penalty frameworks does not, of itself, provide an answer to the question of whether the proposed penalties can be reduced to address concerns

113 Section 41 of the *Public Interest Disclosure Act 2013* defines 'intelligence information' to include 'information that has originated with, or has been received from, an intelligence agency'.

about whether a measure constitutes a reasonable and proportionate limitation on human rights in pursuit of a legitimate objective.

2.156 The preceding analysis indicates that many of the concerns raised in the initial analysis regarding the proportionality of the limitation imposed on the right to freedom of expression by the offences in sections 42 and 44 remain; particularly with regard to the breadth and scope of information to which the offences apply, and the limited availability of relevant safeguards.

Committee response

2.157 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.158 The committee welcomes the removal of proposed section 43 in its entirety.

2.159 However, noting, in particular, the breadth and scope of information to which the measures in sections 42 and 44 relate, the preceding analysis indicates that the remaining measures may be incompatible with the right to freedom of expression.

Compatibility of the measures with the right to be presumed innocent

2.160 Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent usually requires that the prosecution prove each element of an offence beyond reasonable doubt.

2.161 An offence provision which requires the defendant to carry an evidential or legal burden of proof (commonly referred to as 'a reverse burden') with regard to the existence of some fact also engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in legislation, these defences or exceptions may effectively reverse the burden of proof and must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

2.162 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

2.163 As set out at [1.8] above, proposed sections 42, 43 and 44 include offence-specific defences to the various secrecy offences in the bill. In doing so, the provisions reverse the evidential burden of proof as subsection 13.3(3) of the *Criminal Code Act 1995* (Criminal Code) provides that a defendant who wishes to rely

on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.164 While the objectives of the secrecy provisions are stated generally as being to protect national security and individual privacy, the statement of compatibility does not expressly explain how reversing the evidential burden in the offences pursues a legitimate objective or is rationally connected to this objective.

2.165 The statement of compatibility acknowledges that the offence-specific defences engage and limit the presumption of innocence but argues that the measures are reasonable, necessary and proportionate.[114] The justification provided in the explanatory memorandum and statement of compatibility is, generally, that the relevant evidence 'should be readily available to the accused'[115] or that it is 'far more reasonable' to require a defendant to point to the relevant evidence than to require the prosecution to demonstrate that such evidence does not exist.[116] However, the initial analysis stated that this does not appear to be a sufficient basis to constitute a proportionate limitation on human rights.

2.166 It was unclear that reversing the evidential burden, as opposed to including additional elements within the offence provisions themselves, is necessary. For example, it is a defence for a person to provide ONI information to an IGIS official for the purpose of the official exercising a power or performing a function or duty as an IGIS official. This would appear to leave individuals who provide information to the IGIS open to a criminal charge and then place the evidential burden of proof on them to raise evidence to demonstrate that they were in fact acting appropriately. In this context, the approach of including the fact that the information was not provided to an IGIS official as described above as an element of the offence provisions themselves, would seem to be a less rights restrictive alternative. This raised questions as to whether the current construction of the offences is a proportionate limitation on the right to be presumed innocent.

2.167 The committee therefore requested advice as to:

- whether the reverse burden offences are aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the reverse burden offences are rationally connected to (that is, effective to achieve) this objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and

114 EM, SOC, p. 12.

115 EM, SOC, p. 12.

116 EM, p. 37.

- whether it would be feasible to amend the measures so that the relevant matters (currently in defences) are included as elements of the offences or, alternatively, to provide that despite section 13.3 of the Criminal Code, a defendant does not bear an evidential (or legal) burden of proof in relying on the offence-specific defences.

Attorney-General's response

2.168 The Attorney-General's response explains that the reverse burden offences aim to achieve 'the legitimate objectives of protecting national security, the privacy of individuals and enabling ONI to perform its functions'.

2.169 The response does not, however, provide any specific information about the nature of these objectives in the context of the offences for unauthorised use and disclosure of information, or how the reverse burden offences specifically are effective to achieve these objectives.

2.170 In noting that the offences only apply to ONI staff and related parties, the Attorney-General's response explains:

> These individuals will be well aware of the sensitivity of the information being communicated or dealt with and the importance of ensuring appropriate authorisation when communicating and dealing with that information.

2.171 Given that staff may have unique access to sensitive information relevant to national security and the privacy of individuals, the imposition of a reverse evidentiary burden may encourage staff to be more mindful of their authorisation and responsibilities in communicating and dealing with information that is likely to affect the privacy of individuals and national security.

2.172 Accordingly, despite the lack of specific information provided by the legislative proponent, it appears that that the objectives identified in the Attorney-General's response are capable of constituting legitimate objectives for the purposes of international human right law, and that the measures are rationally connected to (that is, effective to achieve) the stated objectives.

2.173 In relation to the proportionality of the reverse burden offences, the Attorney-General's response states:

> The reversal of proof provisions are proportionate, as the prosecution will still be required to prove each element of the offence beyond a reasonable doubt before a defence can be raised by the defendant. In circumstances where evidence in relation to an offence-specific defence is raised by the defendant, the prosecution will also need to disprove that evidence beyond a reasonable doubt.

2.174 It is acknowledged that the offence-specific defences impose an evidential rather than legal burden of proof on the defendant and that the prosecution will still be required to prove other elements of the offence beyond a reasonable doubt. This

is relevant to the proportionality of the limitation. However, while the Attorney-General's response argues that one basis on which the reverse burden of proof is permissible is that the offence-specific defences are peculiarly within the knowledge of the defendant, it does not explain how the matters in each of these defences are actually peculiarly within the knowledge of the defendant. For example, it is unclear that the defence in sections 42(3) and 44(3), that the information has already been communicated or made available to the public, is peculiarly within the knowledge of the defendant.

2.175 Regarding the feasibility of amending the measures to include the relevant matters as elements of the offence, the minister's response states:

> Including the matters in the exceptions to the offences as elements of the offences would impact on the effectiveness of the offences in achieving these legitimate objectives. This is because it would be significantly more difficult and costly for the prosecution to prove, beyond a reasonable doubt (and in every case), that the circumstances in the exceptions did not exist.

2.176 While it may be 'significantly more difficult and costly' for the prosecution to establish that a person did not, for example, have lawful authority to engage in the conduct set out in the offences, it is unclear from the information provided whether this sufficiently affects the achievement of the legitimate objectives such as to constitute a sufficient justification for reversing the burden of proof for the purposes of international human rights law.

2.177 Finally, as discussed at [1.54], the Attorney-General's response notes that the offences 'only apply to ONI staff and people with whom the agency has an agreement or arrangement'. This is relevant to the proportionality of the measures insofar as the limitation on the right to the presumption of innocence is limited to a particular class of people. However, this does not address concerns about the nature and extent of the limitation on the right to the presumption of innocence imposed by the reverse burden offences as they apply to ONI staff and associated people.

2.178 In light of this analysis, concerns remain that reversing the evidential burden, as opposed to including additional elements within the offence provisions themselves, is not the least rights-restrictive approach, as ONI staff and associated people remain open to a criminal charge and bear the evidential burden of proof in circumstances in which they may be acting in accordance with their employment. As such, the reverse evidential burden in the statutory defences does not appear to be a proportionate limitation on the right to be presumed innocence.

Committee response

2.179 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.180 The committee welcomes the removal of the reverse burden offence in section 43.

2.181 However, the preceding analysis indicates that the reverse evidential burdens may not be compatible with the presumption of innocence.

Information gathering powers

2.182 The bill would provide ONI with a number of information gathering powers. Under proposed section 7 ONI will have broad statutory functions, including to:

- assemble, correlate and analyse information related to international and other matters that are of political, strategic or economic significance to Australia and prepare assessments and reports (section 7(1)(c)-(d)); and
- collect, interpret and disseminate information relating to matters of political, strategic or economic significance to Australia that is accessible to any section of the public (section 7(1)(g)).

2.183 Under proposed section 37, for the purpose of ONI performing its function under section 7(1)(c), the Director-General of ONI may make a written request that a Commonwealth authority provide information, documents or things in its possession that relate to international matters of political, strategic or economic significance to Australia; or domestic aspects relating to such international matters.

2.184 Proposed section 38 provides that a Commonwealth authority may provide to ONI information, documents or things that the head of the authority considers relate to matters of political, strategic or economic significance to Australia.

2.185 Proposed section 39 provides that an intelligence agency or agency with an intelligence role or function may provide to ONI information, documents or things that relate to any of ONI's functions.

Compatibility of the measures with the right to privacy

2.186 The right to privacy includes respect for private and confidential information, particularly the collection, storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.[117] The statement of compatibility acknowledges that the above measures, by enabling ONI to obtain, and in some cases compel, information, including personal information, engage and limit the right to privacy.[118]

2.187 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, they must seek to achieve a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to that objective. In this respect, the statement of compatibility states that the measures constitute a permissible limitation on the right to privacy and are aimed at two legitimate objectives:

117 Article 17 of the International Covenant on Civil and Political Rights.

118 SOC, p. 8.

> …firstly, to ensure national security, by collecting, interpreting and disseminating open source intelligence on matters of significance to Australia, and by promoting the collective performance of the NIC agencies through its leadership and enterprise management functions; and secondly, to promote well-informed and rigorous policy making by the Australian government through preparing and communicating assessments on matters of significance.[119]

2.188 These are likely to constitute a legitimate objective for the purposes of international human rights law. Collecting relevant information is likely to be rationally connected to (that is, effective to achieve) these stated objectives.

2.189 In order to be a proportionate limitation on the right to privacy, a measure must be no more extensive than is strictly necessary to achieve its stated objective and must be accompanied by adequate and effective safeguards. In this respect, in relation to the proportionality of the limitation, the statement of compatibility provides relevant information. It acknowledges that proposed sections 37 and 38 provide a requirement or authorisation under Australian law for the purposes of the *Privacy Act 1988* (Privacy Act). As such, this requirement or authorisation operates as an exception to the prohibition on the disclosure of personal information by a Commonwealth entity for a secondary purpose and allows information to be disclosed to ONI. This means the Privacy Act will not act as a safeguard in the context of the measures. However, the statement of compatibility argues that the measures are nevertheless sufficiently circumscribed. In relation to the compulsory evidence gathering power in proposed section 37, it states:

> …section 37 is broad, but it is not unconstrained. It can only be exercised for the purposes of ONI's international assessments function under paragraph 7(1)(c). The Director-General is also obliged to consider any privacy concerns raised by the relevant Commonwealth authority before making the request to compel information. This ensures that requests will not be made unless the Director-General considers that the importance of obtaining the information outweighs the importance of preserving the right to privacy.[120]

2.190 The statement of compatibility further explains that section 37 does not override any existing secrecy provisions and ONI will have express obligations in relation to the use and protection of such information.[121] While these matters are relevant to the proportionality of the limitation, the initial analysis noted that the breadth of the power remains broad.

---

119 SOC, p. 8.

120 SOC, p. 8.

121 SOC, p. 9.

2.191 In relation to proposed section 38, the statement of compatibility acknowledges that the provision provides a permissive authority for Commonwealth authorities to disclose information to ONI even if doing so would not otherwise fall within the scope of the authority's statutory functions. However, the statement of compatibility explains that these disclosure powers are also limited to material related to ONI's assessment functions.[122] While this may be the case, it was noted that the assessment functions are broad and so may permit disclosure of a very extensive range of information to ONI.

2.192 In relation to proposed section 39, the statement of compatibility explains that while this provides a broad power of voluntary disclosure from NIC agencies, the broader power is reasonable as NIC agencies will hold far greater information that is relevant to ONI's functions than Commonwealth agencies more generally. The statement of compatibility further outlines some relevant safeguards in relation to the handling of disclosed information.[123] While these are relevant safeguards, it was unclear from the information provided that the scope of the power is sufficiently circumscribed. This is because while NIC agencies may hold information relevant to ONI's functions, it was unclear whether the disclosure of information from NIC agencies would be proportionate in each case.

2.193 In relation to ONI's proposed power to collect 'identifiable information'[124] under ONI's open source function, the statement of compatibility explains that the Prime Minister will be required to make privacy rules governing ONI's collection, communication, handling and retention of such information.[125] Such rules may operate as a safeguard in relation to the right to privacy. However, the likely content of these rules is not described in the statement of compatibility and it was therefore difficult to assess whether the rules will be sufficient to ensure that the limitation on the right to privacy is proportionate.

2.194 Further, in relation to the scope of the rules as a potential safeguard, it was noted that the requirement to make rules regarding 'identifiable information' will only apply in respect of Australian citizens and permanent residents rather than all persons in Australia or subject to Australian jurisdiction. This is of concern as Australia owes human rights obligations to all persons within Australia.

2.195 In explaining the scope of the requirement to make privacy rules, the statement of compatibility nevertheless states that:

---

122 SOC, p. 9.

123 SOC, p. 9.

124 'Identifiable information' means information about an Australian citizen or permanent resident, who is identified or reasonably identifiable: section 4.

125 SOC, p. 9. See section 53 of the bill.

> …the provision does not limit the matters in relation to which the Prime Minister may make rules. It remains open to the Prime Minister to extend these rules, or to make additional rules, to protect the personal information of others, including foreign nationals.[126]

2.196 The initial analysis stated that, while it is possible that the Prime Minister may decide to make rules to protect the privacy of people who are not Australian citizens or permanent residents, there is no requirement to make such rules. Accordingly, it was unclear what other safeguards are in place to protect the right to privacy of non-nationals or whether the measure is the least rights restrictive approach. In this respect, there may also be concerns about the compatibility of the measure with the right to equality and non-discrimination.

2.197 The committee therefore sought advice as to whether the measures are reasonable and proportionate to achieve the stated objectives, including:

- whether each of the information gathering powers are sufficiently circumscribed and accompanied by adequate and effective safeguards;
- how the measures constitute the least rights restrictive approach;
- in relation to the power to collect open source information, whether a copy of the proposed rules could be provided; and
- what safeguards will be in place in relation to the power to collect open source information from people who are not Australian citizens or permanent residents.

Attorney-General's response

2.198 In response to the committee's inquiries, the Attorney-General states that in order to effectively perform its functions, ONI will need to have access to a wider range of information (frequently of a sensitive and classified nature) from a broader range of agencies than is currently required for ONA's functions. However, the Attorney-General's response states that the bill contains a number of safeguards to ensure that the measures are a reasonable and proportionate limitation on the right to privacy. The minister's response explains that these safeguards were canvassed in the independent Privacy Impact Assessment (PIA) undertaken by the Australian Government Solicitor. A copy of the PIA was usefully provided to the committee at **Attachment A** to the Attorney-General's response. The Attorney-General explains that the PIA concluded:

> - Key aspects of the ONI Bill are positively directed towards the management and protection of personal information and privacy, but in a manner which is seen as appropriate to the functions of ONI as a national intelligence agency.

126 SOC, p. 9.

- ONI's information collection and reporting functions are such that it can be expected to collect more information than ONA. This is recognised in the ONI Bill, which provides a stronger, more transparent regime for the handling and protection of personal information than currently exists for ONA.

2.199 These matters set out in the PIA are relevant to the proportionality of the limitation on the right to privacy. The Attorney-General's response further notes that the PIA concludes that the secrecy provisions in the ONI Bill are more restrictive of the communication of ONI's information, including personal information, than the provisions in the Privacy Act. As noted above, the secrecy provisions apply to all ONI information and are not restricted to the unauthorised disclosure of personal information. In this respect, while the secrecy provisions may act as a potential safeguard in relation to the unauthorised disclosure of personal information, this also raises concerns in relation to the scope of the provisions and the right to freedom of expression. The secrecy provisions also do not fully address concerns about the *authorised* collection, use and disclosure of personal information. As noted above, the collection of private, confidential and personal information under the bill may be extensive. Further, there are broad powers for voluntary and compulsory disclosure from other government agencies. This raises particular concerns that the powers as drafted may not be the least rights restrictive approach.

2.200 In relation to ONI's proposed power to collect 'identifiable information'[127] under ONI's open source function, the content of the rules governing the collection of 'identifiable information' are important in determining the proportionality of the measures. The Attorney-General's response usefully provides a copy of the draft privacy rules to assist the committee in its consideration on the bill (**Attachment B** to the Attorney-General's response). The rules relevantly address a number of matters including what constitutes publicly available information and by whom it may be collected, as well as matters relating to the retention, handling and communication of 'identifiable information'. While there are specific restrictions on communicating 'identifiable information' about an Australian national, these safeguards do not appear to apply to non-nationals. Nevertheless the Attorney-General's response states that in addition to the possibility for the privacy rules to include requirements regarding the collection of open source information relating to non-nationals in the future, there are a number of other relevant safeguards in the bill including:

- ONI's collection role under paragraph 7(1)(g) is limited to the collection of information relating to matters of political, strategic, or economic significance to Australia that is accessible to any section of the public. The function does not authorise ONI to undertake unlawful activity to obtain the information.

127 'Identifiable information' means information about an Australian citizen or permanent resident, who is identified or reasonably identifiable: section 4.

- The disclosure of such information will be subject to the secrecy provisions in the Bill.

2.201 These are relevant safeguards in relation to the proportionality of the limitation imposed on the right to privacy. However, concerns remain that the measures as currently drafted may not be the least rights restrictive approach to addressing the stated objective of the measures. In relation to ONI's power to collect open source information, even in respect of Australian nationals, the measures would appear to permit the collection of a broad range of information and disclosure of this information in a broad range of circumstances. Taken together with the broad powers for ONI to collect information from other agencies, the measures as drafted would appear to be overly broad.

Committee response

2.202 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.203 The preceding analysis indicates that the measures may be incompatible with the right to privacy.

Compatibility of the measures with the right to equality and non-discrimination

2.204 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 entitled without discrimination to equal and non-discriminatory protection of the law.

2.205 'Discrimination' under articles 2 and 26 of the ICCPR includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination).[128] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively or disproportionately affects people with a particular personal attribute (for example, nationality or national origin).[129]

2.206 In this respect, while Australia maintains some discretion under international law with respect to its treatment of non-nationals, Australia has obligations not to

128 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'.

129 *Althammer v Austria*, Human Rights Committee Communication no. 998/01 (8 August 2003) [10.2].

discriminate on the grounds of nationality or national origin.[130] As acknowledged in the statement of compatibility, by providing that the proposed privacy rules (see above, [1.78]) are only required to apply to Australian citizens and permanent residents, the measure engages the right to equality and non-discrimination on the basis of nationality. That is, the measure allows for Australian citizens and permanent residents to be treated differently to people who do not fall into these categories.

2.207 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 legitimate objective and is a proportionate means of achieving that objective.

2.208 In relation to the objective of the differential treatment, the statement of compatibility states it:

> …is to provide protections for Australians while facilitating the performance of ONI's functions in the interests of national security and for Australia's economic, strategic and political benefit.[131]

2.209 However, the statement of compatibility does not explain the importance of this objective in the context of the measure nor how the measure is rationally connected to that objective. The statement of compatibility instead states that 'special protection for Australians is a long-standing, core principle of accountability for intelligence agencies'.[132] While privacy protections for Australians may assist to ensure the accountability of intelligence agencies, it was unclear from the information provided why there needs to be differential treatment in the form of less protection of the right to privacy for those who are within Australia but are not Australian citizens or permanent residents.

2.210 In relation to proportionality, the statement of compatibility provides some information as to how the information collection powers of intelligence agencies are circumscribed. While this is relevant to the question of proportionality, it was unclear from the information provided whether excluding non-nationals from additional privacy protections is based on reasonable and objective criteria or represents the least rights restrictive approach. This raised questions as to whether the measure is compatible with the right to equality and non-discrimination.

2.211 Accordingly, the committee requested advice as to:

---

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

131 SOC, p. 6.

132 SOC, p. 6.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measures are effective to achieve (that is, rationally connected to) that objective; and
- whether the measures are reasonable and proportionate to achieving the stated objective of the bill (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights restrictive way of achieving the stated objective and the existence of any safeguards).

Attorney-General's response

2.212 In relation to the extent of the interference with the right to privacy for non-nationals, the Attorney-General's response states:

> ONI information related to non-nationals will only be collected for the purposes of performing the statutory functions of ONI. This information will also be protected under the secrecy provisions in the ONI Bill. As detailed above, the Privacy Impact Assessment into the ONI Bill noted that these secrecy provisions are more restrictive of the communication of ONI's information, including personal information, than the provisions in the Privacy Act relating to the disclosure of personal information. Further, the Bill does not prevent the Prime Minister from also making privacy rules concerning non-nationals, should he/she wish to.

2.213 While such factors are relevant to whether the measure is compatible with the right to equality and non-discrimination, it remains unclear as to whether the distinction between nationals and non-nationals is based on reasonable and objective criteria. In this respect, the Attorney-General explains that the human rights analysis of measures in the bill may have implications for similar measures in other legislation:

> Clause 53 of the Bill, which is the enabling provision for the privacy rules, is based upon section 15 of the Intelligence Services Act which requires the responsible Ministers for the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO) to make privacy rules to protect Australians. This privileged status is thus consistent with other Intelligence Services Act agencies…
>
> As the comments raised by the Committee would impact intelligence agencies more widely than just ONI, this topic may be best addressed by the Comprehensive Review of the Legal Framework Governing the National Intelligence Community, announced by the Attorney-General on 30 May 2018.

Committee response

2.214 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.215 Noting that the measure allows for nationals and non-nationals to be treated differently, the preceding analysis raises concerns as to whether the measure is compatible with the right to equality and non-discrimination.

2.216 The Attorney-General notes that issues related to the measures and the right to equality and non-discrimination would impact intelligence agencies more widely than just ONI and that this topic may be best addressed by the Comprehensive Review of the Legal Framework Governing the National Intelligence Community.

2.217 The committee recommends that the Comprehensive Review of the Legal Framework Governing the National Intelligence Community give consideration to the right to equality and non-discrimination and the committee's report.

Cooperation with entities in connection with ONI's performance of functions

2.218 Proposed section 13 provides that, subject to relevant approvals, ONI may cooperate with an authority of another country approved by an instrument, or any other person or entity, within or outside Australia.

Compatibility of the measure with the right to privacy

2.219 As set out above, the right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life. By providing that ONI may cooperate with an authority or person outside Australia, this measure appears to allow for the sharing of personal or confidential information. As such, the measure may engage and limit the right to privacy. While the right to privacy may be subject to permissible limitations in certain circumstances, this issue is not addressed in the statement of compatibility.

2.220 The committee therefore requested advice as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards in relation to the operation of the measure).

Attorney-General's response

2.221 The Attorney-General's response does not expressly address whether the measure is aimed at achieving a legitimate objective or is rationally connected to that objective for the purposes of permissibly limiting human rights. However, the Attorney-General's response explains that ONA has established guidelines and practices in place for the communication of information with foreign partners. As ONI is set up, ONI will develop new internal policies (in consultation with the IGIS) to govern ONI's cooperation with foreign partners. Such policies and practices are likely to be relevant to whether the measure is compatible with the right to privacy.

2.222 The Attorney-General's response explains the procedure for authorising cooperation with a foreign authority:

> The Director-General (or his or her delegate) will be required to authorise ONI's cooperation with an authority from another country before such cooperation takes place. Once an authorisation has been given, it will remain in place until amended or revoked by the Director-General or cancelled by the Prime Minister under subclause 13(5). Subclause 13(3) provides that the Director-General (or his or her delegate) must notify the Prime Minister on a monthly basis of each approval given during the month, and each variation or revocation made during the month.
>
> These requirements are based upon existing requirements that apply to the Australian Security Intelligence Organisation (ASIO) and agencies under the IS Act in respect of their cooperation with foreign authorities - with some modification to reflect ONI's cooperation is much less likely to be operational in nature than is the case with these agencies. The measures included in the ONI Bill are thus consistent with others across the intelligence community.

2.223 These authorisation processes may be capable of operating as a relevant safeguard.

2.224 The Attorney-General's response further states:

> Furthermore, ONI information will be protected under the secrecy provisions in the ONI Bill. As detailed above, the Privacy Impact Assessment into the ONI Bill noted that these secrecy provisions are more restrictive of the communication of ONI's information, including personal information, than the provisions in the Privacy Act relating to the disclosure of personal information. Further, the Bill does not prevent the Prime Minister from also making privacy rules concerning non-nationals, should he/she wish to.
>
> These matters will also remain subject to IGIS oversight, who will review ONI activity to ensure ONI acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights.

2.225 These matters are also relevant to the proportionality of the limitation the measure imposes on the right to privacy. However, noting that the Attorney-General

has not provided specific information as to the legitimate objective of the measure, it is difficult to assess whether the measure is only as extensive as strictly necessary to achieve that objective. Accordingly, in the absence of further information it is not possible to conclude that the measure is compatible with the right to privacy.

Committee response

2.226 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.227 Based on the information provided and the preceding analysis, it is not possible to conclude that the measure is compatible with the right to privacy.

Compatibility of the measure with the right to life and the prohibition on torture and cruel, inhuman, or degrading treatment or punishment

2.228 Under international human rights law every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation on state parties to protect people from being killed by others or from identified risks. While the ICCPR 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 nation state.

2.229 The United Nations (UN) Human Rights Committee has made clear that international law prohibits 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. In this context, the UN Human Rights Committee stated in 2009 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'.[133]

2.230 By providing that ONI may cooperate with an authority or person outside Australia, this measure appears to allow for the sharing of personal or confidential information overseas. Such sharing of information internationally could accordingly engage the right to life. This issue was not addressed in the statement of compatibility.

2.231 A related issue raised by the measure is the possibility that sharing of information may result in torture, or cruel, inhuman or degrading treatment or punishment. Under international law the prohibition on torture is absolute and can

133 UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5, 7 May 2009, [20].

never be subject to permissible limitations.[134] This issue was also not addressed in the statement of compatibility.

2.232 In relation to the right to life, the committee sought advice on the compatibility of the measure with this right (including the existence of relevant safeguards or guidelines).

2.233 In relation to the prohibition on torture, or cruel, inhuman or degrading treatment or punishment, the committee sought advice in relation to the compatibility of the measure with this right (including any relevant safeguards or guidelines).

Attorney-General's response

2.234 The Attorney-General's response provides information addressing the committee's concerns as to whether sharing information with an authority of another country could lead to torture or cruel, inhuman, or degrading treatment or punishment or prosecution of a person for an offence involving the death penalty. In relation to these rights and in the context of information sharing powers, it is essential that there are effective safeguards in place. The Attorney-General's response indicates that the authorisation process operates as a relevant safeguard:

> The Director-General (or his or her delegate) will be required to authorise ONI's cooperation with an authority from another country before such cooperation takes place. Once an authorisation has been given, it will remain in place until amended or revoked by the Director-General or cancelled by the Prime Minister under subclause 13(5). Subclause 13(3) provides that the Director-General (or his or her delegate) must notify the Prime Minister on a monthly basis of each approval given during the month, and each variation or revocation made during the month.
>
> The Director-General (and the Prime Minister as part of their consideration of whether to revoke an authorisation) would consider a range of factors when deciding whether it would be appropriate for such an authorisation to be given, including the human rights record of the country/particular foreign authority.

2.235 It is relevant to the human rights compatibility of the measure that the Director-General will regularly review the authorisation and in doing so will consider the human rights record of particular countries or foreign authorities. In practice, this may reduce the risk that information is shared with foreign countries in circumstances that may not be compatible with Australia's human rights obligations. However, at the same time, it is noted that the authorisation process does not necessarily prevent the sharing of information in circumstances where there may be

---

134 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, article 4(2); UN Human Rights Committee, *General Comment 20: Article 7* (1992) HRI/GEN/1, [3].

concerns that the disclosure may lead to a real risk of a person being tortured or prosecuted for an offence which is subject to the death penalty.

2.236 The Attorney-General's response also notes that the authorisation requirements are based upon existing requirements that apply to ASIO and agencies under the IS Act in respect of their cooperation with foreign authorities. The Attorney-General's response further notes that guidelines will be established by ONI (in consultation with the IGIS) for the communication of information with foreign partners. The response notes that these policies will ensure that consideration is given to the human rights records of the country and this will be factored into the internal approval mechanisms required to share information. Such an approach may provide important safeguards in relation to the disclosure of information. It is noted that much may depend on the adequacy and the content of these policies and guidelines. Of particular relevance will be whether the guidelines require that ONI decline to share information where it may result in a person being tortured; subject to cruel, inhuman, degrading treatment or punishment; or prosecuted for an offence carrying the death penalty. Without reviewing the content of these guidelines it is difficult to determine whether the measure is compatible with human rights.

2.237 Further, it is noted that discretionary or administrative safeguards may be insufficient for the purpose of ensuring compliance with the prohibition on torture. This is the case particularly given that there is currently no requirement under Australian law to decline to disclose information where it may result in a person being tortured or prosecuted for an offence carrying the death penalty.

Committee response

2.238 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.239 The preceding analysis indicates that unless there are adequate and effective safeguards in place, there is a risk that information sharing may occur in circumstances where it is incompatible with the prohibition on torture and cruel, inhuman, degrading treatment or punishment and the right to life, that is, where the death penalty may be applied.

2.240 Noting that ONI will be developing guidelines in relation to the disclosure of information to foreign partners, the committee requests a copy of the guidelines, once they are drafted, insofar as they relate to disclosure in situations where there may be risks associated with torture, and cruel, inhuman, or degrading treatment or punishment or the death penalty.

Mr Ian Goodenough MP
Chair