Responses from legislation proponents — Report 6 of 2019[1]

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Responses from legislation proponents, *Report 6 of 2019*; [2019] AUPJCHR 104.

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Leader of the Government in the Senate

REF: MC19-003004

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

I am writing in response to your request on 18 September 2019, seeking further information on human rights issues in relation to the Emergency Response Fund (Consequential Amendments) Bill 2019.

My response to the questions outlined in the Committee's *Report 5 of 2019* is attached. I trust this additional information is sufficient to address the concerns of the Parliamentary Joint Committee on Human Rights.

I have copied this letter to the Treasurer, as a responsible Minister, and the Minister for Water Resources, Drought, Rural Finance, Natural Disaster and Emergency Management.

Kind regards

Mathias Cormann
Minister for Finance

1 October 2019

Response to Parliamentary Joint Committee on Human Rights in relation to the Emergency Response Fund (Consequential Amendments) Bill 2019

1.8 The committee seeks the minister's advice as to:

- **whether the repeal of the Education Investment Fund and the transfer of its balance into the proposed Emergency Response Fund may reduce the availability of funding for higher education; and**
- **if so, whether this is compatible with the right to education.**

The Emergency Response Fund Bill 2019 and the Emergency Response Fund (Consequential Amendments) Bill 2019 (together, the Emergency Response Fund legislation) would close the Education Investment Fund (EIF) and transfer its balance (approximately $4 billion as at 30 June 2019) to the Emergency Response Fund upon establishment.

The repeal of the EIF and the transfer of its balance into the proposed Emergency Response Fund will not reduce the availability of funding for higher education and is compatible with the right to education.

The Government has not entered into any new spending commitments from the EIF since 2013 and all commitments from the EIF have been paid. No credits have been made to the EIF since its initial credit of $6.5 billion upon establishment in January 2009.

The EIF was not designed to be a perpetual fund. The EIF legislation provided for both the capital and the earnings to be used to fund education infrastructure projects. This intention was made clear in the Explanatory Memorandum to the Nation-building Funds Bill 2008[1]:

> *"It is intended that that both the capital contributions and the earnings of the [Building Australia Fund], EIF and [Health and Hospitals Fund] will be available over time to finance specific infrastructure projects"*

The Government's economic and fiscal management has delivered a strong and improving budget position, which means that the Budget process can be used to support significant and ongoing investments into the education sector. The Government has decided that the Budget process should be used to fund higher education projects rather than the EIF.

In the 2019-20 Budget, the Government announced it is investing a record $17.7 billion in the university sector in 2019, with this figure projected to grow to more than $19 billion by 2024[2]. In addition, in the 2018-19 Budget, the Government announced funding of $1.9 billion (to 2028-29) as part of its Research Infrastructure Investment Plan[3]. This funding is being provided through the National Collaborative Research Infrastructure Strategy (NCRIS) to refresh the nationally significant research infrastructure that researchers from universities, Publicly Funded Research Agencies and industry use.

This funding is in addition to operational funding of $150 million per annum (indexed, ongoing) for NCRIS projects, which was announced as part of the National Innovation and Science Agenda in December 2015. This funding supports a range of national research infrastructure that is separate to research infrastructure funded at an institutional level and was previously supported and enabled through the EIF.

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[1] Explanatory Memorandum to the Nation-building Funds Bill 2008, page 8.
[2] Higher Education Expenditure Report - Budget 2019-20
https://www.budget.gov.au/2019-20/content/business.htm
[3] *Stronger and smarter economy* page 19 of the Budget Overview, Budget 2018-19
https://archive.budget.gov.au/2018-19/additional/budget_overview.pdf

As NCRIS supports an estimated 65,000 academic and industry researchers each year, it is a critical component of the Government's support for research in Australia. As a result, in addition to funding being provided, the policy framework to direct NCRIS funding will continue to ensure that the research infrastructure being supported is what is required by researchers for their future work. This will be done through the development of National Research Infrastructure Roadmaps every five years, and Research Infrastructure Investment Plans every two years.

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS19-002911

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Ian,

Thank you for your letter dated 11 September 2019 requesting my response in relation to the human rights compatibility of the Migration Amendment (Repairing Medical Transfers) Bill 2019.

I note the Committee has sought further information regarding the compatibility of the proposed power in the Bill to remove or return persons brought to Australia under the medical transfer provisions with Australia's *non-refoulement* obligations and the right to an effective remedy. The Committee has also requested information on the effect on the right to health of persons in regional processing countries if the medical transfer provisions are repealed.

My response for the Committee's consideration is attached. I appreciate the extension until 1 October 2019 in which to provide the response.

Yours sincerely

PETER DUTTON 25/09/19

Response to the Parliamentary Joint Committee on Human Rights – Migration Amendment (Repairing Medical Transfers) Bill 2019

The Committee seeks the Minister's advice as to the compatibility of these measures with the obligation of non-refoulement and the right to an effective remedy, in particular:

What are the conditions for such individuals in regional processing countries and is there a risk that such conditions could amount to torture or cruel, inhuman or degrading treatment or punishment?

Under existing memoranda of understanding with Australia, both Nauru and PNG have committed to treat transferees with respect and dignity and in accordance with relevant human rights standards.

Nauru and PNG are parties to various relevant treaties:

- PNG is a party to the International Covenant on Civil and Political Rights (ICCPR), which prohibits torture and other cruel, inhuman or degrading treatment or punishment, and to the International Covenant on Economic, Social and Cultural Rights.
- Nauru is a party to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and has signed but not ratified the ICCPR.
- Both Nauru and PNG are party to the Convention on the Rights of the Child and the Convention relating to the Status of Refugees.

The Australian Government works closely with the governments of Nauru and PNG to ensure transferees have access to a range of health, welfare and support services, including extensive physical and mental healthcare, free accommodation and utilities, and allowances. Transferees are accommodated in the Nauruan and PNG communities and are not detained. They are free to move about without restriction.

Australia has supported regional processing countries to put various structures in place to support transferees residing in Nauru and PNG:

- Contracted health services providers to deliver health care to transferees, including comprehensive mental health and wellbeing programs.
- All transferees reside in community-based accommodation – no one is in detention.
- Transferees have access to education and a range of welfare support programs.
- Refugees have access to work rights, subject to visa conditions.
- Further details of available health services are outlined in the response below to the Committee's question about the right to health.

Prior to transfer to a regional processing country, Australia considers the individual circumstances of each transferee, including whether transfer could put them at risk of torture or cruel, inhuman or degrading treatment or punishment. This is explained further in response to the Committee's next question.

What safeguards are in place to ensure that a person is not removed from Australia to a regional processing country in contravention of Australia's non-refoulement obligations?

The Department of Home Affairs undertakes a pre-transfer assessment prior to a person being taken from Australia to a regional processing country. These assessments are undertaken to determine whether it is practical to transfer a person to a regional processing country considering operational and individual circumstances.

The pre-transfer assessment considers whether obstacles exist that could prevent or delay transfer. The pre-transfer assessment is undertaken in consultation with the transferee and allows the individual the opportunity to raise any concerns about the transfer, including claims against regional processing countries. Various factors are considered when making an assessment whether obstacles exist impacting transfer, including the conditions in which people reside, access to health services and welfare supports, child-specific services, and security and safety issues.

Where claims are raised, the Department undertakes an assessment to determine whether transfer would contravene Australia's non-refoulement obligations. The *Migration Act 1958* (Migration Act) provides the Minister with the power to exempt a transferee from being taken to a regional processing country (section 198AE(1)) if it is in the public interest to do so.

Is there independent, impartial and effective review of any decision to remove the person from Australia?

Decisions to take transferees to a regional processing country are done a case by case basis and in accordance with departmental procedure. As discussed, a pre-transfer assessment is undertaken on each person ahead of transfer to explore whether obstacles existing preventing or delaying transfer. While this process does not include an independent review process, it does require officers exercising powers under the Migration Act to ensure all necessary considerations have been taken into account when conducting a transfer.

Consideration of *non-refoulement* obligations under the Ministerial intervention powers, such as the power in section 198AE mentioned above, takes place in good faith and allows for consideration of a person's individual circumstances. These powers allow the Minister to consider *non-refoulement* obligations before the point of removal or transfer.

Persons who wish to challenge their removal from Australia or return to a regional processing country are not precluded from seeking judicial review.

The Committee seeks the Minister's advice as to the compatibility of the measure with the right to health, including:

To what extent the repeal of the medical transfer provisions will restrict access to health care for persons in Nauru and Papua New Guinea under regional processing arrangements

Repeal of the medevac legislation does not prevent or restrict transferees from accessing health care or medical treatment, including treatment in a third country.

Consistent with Australia's commitment under respective memoranda of understanding with PNG and Nauru, Australia has contracted health services to support the delivery of health care to transferees in regional processing countries. Health services are provided by the Pacific International Hospital in PNG and the International Health and Medical Services in Nauru. Health services are provided by a range of registered healthcare professionals including general practitioners, psychiatrists, psychologists, counsellors, dentists, radiographers, pharmacists, mental health nurses and specialists who provide clinical assessment and treatment.

- Pacific International Hospital provides primary and tertiary medical services to transferees in Port Moresby and facilitates medical access to refugees in other locations throughout PNG.
- Transferees in Nauru receive health care through the Nauru Settlement Health Clinic at the Republic of Nauru Hospital. Health services can also be accessed through the Republic of Nauru Hospital and the Medical Centre at the Regional Processing Centre.

Where a transferee requires medical treatment not available in a regional processing country, they may be transferred to a third country (including Australia) for assessment or treatment, in line with existing transfer mechanisms under section 198B of the Migration Act.

- Such transfers are managed on a case-by-case basis according to clinical need.
- Third country options include Taiwan and PNG (for transferees in Nauru) and Australia.

Since September 2017, transitory persons in Nauru who require medical treatment not available in Nauru, can access medical services in Taiwan. Taiwan has a global reputation for high-quality medical care and this arrangement is in line with Taiwan's existing health cooperation with Nauru, under which Taiwan provides technical assistance to the Republic of Nauru Hospital.

- As at 19 September 2019, 33 transitory persons have transferred to Taiwan for medical treatment.

The adequacy and effectiveness of the remaining discretionary transfer provisions under section 198B of the Migration Act 1958 in protecting the right to health

Repeal of the medevac provisions does not compromise the integrity of existing medical transfer processes under section 198B of the Migration Act. All transfers under section 198B are based on clinical assessment and recommendation from treating medical practitioners. A medical officer of the Commonwealth also provides assessment.

Section 198B provides for the transfer of transitory persons to Australia for a temporary purpose including for medical treatment. This is supported by the fact that during the period November 2012 to 31 July 2019, 1,343 individuals (717 medical and 626 accompanying family transfers) were transferred to Australia for medical treatment utilising existing powers under section 198B of the Migration Act. Of the 1,343 individuals transferred, 39 cases, involving 96 individuals, were court ordered. The remaining 1,247 transfers were facilitated utilising the existing power in the Migration Act.

As noted earlier, in addition to this transfer provision, the Australian Government maintains third country medical transfer arrangements with PNG and Taiwan. These arrangements provide alternative medical transfer options outside Australia.

Parliament of Australia
The Senate

Larissa Waters
Australian Greens
Senator for Queensland

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
Canberra ACT 2600

7 October 2019

Dear Chair

National Integrity Commission Bill 2018 (No 2)

Thank you for the opportunity to respond to matters raised in Report 5 of 2019 regarding the *National Integrity Commission Bill 2018 (No 2)* (the Bill). My responses to the questions posed are set out below.

In addition to the specific responses, please note that Part 11 of the Bill establishes a Parliamentary Joint Committee on the Australian National Integrity Commission. This Commission will oversee the implementation of the Bill and monitor and review the National Integrity Commissioner's performance of her or his functions. This oversight will serve to ensure that the Commissioner is exercising any powers granted under the Bill responsibly.

Why is it considered necessary for the scope of the Commission's powers to extend to the investigation of conduct that has occurred in the past? What is the rationale for a retrospective period of 10 years?

The majority of anti-corruption and integrity bodies in Australian states have powers to investigate conduct that has occurred in the past.

The Australian Commission for Law Enforcement Integrity (ACLEI) also provides for the investigation of conduct engaged in prior to the commencement of the *Law Enforcement Integrity Commissioner Act 2006* (section 6(4)). There is no limit on the historical application of the definition of corrupt conduct under that Act, consistent with the approach adopted for other State agencies, such as the Queensland Crime and Corruption Commission.

The capacity to investigate historical allegations has been critical to ensure that past conduct that has had a corrupting influence on decision making and policy development can be brought to light. For example, the CPSU submission to the inquiry into the Bill stated that its

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ACLEI members were "strongly of the view that the ability to investigate up to a decade before the commencement of the Act is necessary."[1]

Decisions by the National Integrity Commissioner regarding an investigation will be made in the context of the objects of the Bill, the functions of the Commissioner, and the matters set out in clauses 48 and 50 of the Bill. In particular, the Commissioner may decide to take no further action in relation to a complaint regarding past conduct if satisfied that an investigation is not warranted in the circumstances.

The 10-year restriction proposed by the Bill strikes a reasonable balance between the public interest in investigating past conduct that continues to influence current activities, and the need for some certainty as to the historical scope.

Why is it considered necessary and appropriate to allow persons other than police officers to execute search warrants?

As noted by the Committee, the National Integrity Commissioner (the Commissioner) can appoint authorised officers who can apply for and, once granted, execute search warrants.

Authorised officers may be AFP officers, or a staff member of the Commission "whom the National Integrity Commissioner considers has suitable qualifications or experience". This would allow the Commissioner to appoint state police officers or others that the Commissioner is satisfied have the necessary expertise to assist the Commission to perform its functions. For example, where the AFP is the subject of a search warrant, the Commissioner may determine that it is necessary and appropriate for a non-AFP officer to conduct the search.

Any authorised officers must comply with any directions given by the Commissioner (clause 145(4)), and with the terms of the warrant issued by an issuing officer. A warrant will specify the name of the authorised officer, so the issuing officer (a judge or magistrate) must also be satisfied that issuing a warrant allowing the named officer to conduct the relevant search is appropriate.

Given these safeguards, allowing warrants to be executed by authorised officers other than federal police officers is appropriate and necessary to ensure that the Commission's broad investigative powers can be exercised in a manner that best satisfies the objects of the Bill.

Why is it considered necessary and appropriate that the Commission can issue an opinion or finding that is critical of a person without the person first having had the opportunity to respond?

The exception provided in subclause 62(2) applies only where the Commissioner is satisfied that the person subject to the critical opinion or finding may have committed a criminal or civil offence or serious misconduct, and that an investigation or any related action would be compromised by giving the person the opportunity to make submissions.

Corruption often occurs in networks of mutually beneficial relationships of powerful and influential people. Where a finding or opinion of the Commission would reveal information to a member of this network, the information could assist efforts to hide corrupt behaviour and undermine ongoing investigations

Avoiding premature disclosure of information to a person the Commissioner reasonably suspects has committed an offence (or serious misconduct) is appropriate and necessary to ensure the integrity and effectiveness of investigations.

[1] CPSU Submission to the Senate Legal and Constitutional Affairs Committee, dated 22 January 2019 – Submission 8, p4.

Why do subclauses 79(3) and 102(4) not include a 'derivative use immunity' for information provided without the protection against self-incrimination?

The direct use immunity allowed for in subclauses 79(3) and 102(4) is consistent with the restricted immunities available under the *Law Enforcement Integrity Commissioner Act 2006*.

Providing for a derivative use immunity would prevent further investigation into information revealed to the Commission which could uncover corruption and misconduct. It would also provide an unfair protection against prosecution for anyone implicated by information revealed to the Commission. These outcomes would undermine the purpose of the Bill.

Access and use of information provided without the protection against self-incrimination is reasonable, necessary and appropriate. The Commission does not have power to prosecute civil or criminal wrongdoing, but the Commission's findings can assist law enforcement agencies to further investigate and secure information that would lead to such prosecution.

Increasing the prospects that those engaging in unlawful interference will be rigorously investigated and brought to justice promotes freedom from arbitrary or unlawful interference.

Why are contempt provisions necessary to 'protect the rights or reputations of others, national security, public order, or public health or morals'?

What safeguards are in place to permit legitimate criticism of, or objection to, the proposed Commission and its activities?

The contempt provisions in clauses 93-97 support the Commissioner's power to control the way that hearings proceed and to address improper and threatening behaviour. The provisions will preserve the integrity and due conduct of proceedings by discouraging any attempts to influence the Commissioner or the outcome of any hearing. These protections are consistent with the contempt provisions under the *Law Enforcement Integrity Commissioner Act 2006* (ss 96A – 96E).

Any contempt proceeding will be heard by the Federal Court or relevant Supreme Court. The person who is the subject of the proceeding must be given advance notice of the Commissioner's intention to commence proceedings. The Federal and Supreme Court judges are familiar with the objectives of contempt provisions and balancing this against concerns regarding undue restriction of legitimate criticism. This judicial oversight provides an appropriate safeguard to ensure that contempt proceedings are used cautiously.

Why is it necessary to allow for a person who the Commissioner considers is in contempt to be detained without a court order? What safeguards are in place to protect against arbitrary detention?

The detention powers in clause 96 act as a deterrent against contempt and support the Commissioner's powers to ensure hearings are conducted in a manner that does not undermine the outcome of the proceedings or the protections offered to witnesses. Clause 96 is consistent with powers of detention under the *Law Enforcement Integrity Commissioner Act 2006*.

Clause 96(2) ensures that a person detained under the provision is brought before a court as soon as practicable. The Commissioner must make an application to the court as soon as practicable, and the person detained will be notified of the application and the basis on which it is made prior to the application being filed.

Why is the power to seek an order that a witness surrender their travel documents necessary to 'protect the rights or reputations of others, national security, public order, or public health or morals'?

What safeguards are in place to ensure a person who has given evidence (and is not subject to a summons) is not indefinitely prevented from leaving Australia pending completion of the Commission's investigation or inquiry?

Corruption and misconduct are complex and are often committed by highly skilled, well-resourced professionals in positions of power. Strong investigative powers are essential to uncover corruption.

Clause 103 is aimed at preserving the evidence of witnesses by assuring their attendance at a hearing to provide information, documents, or oral testimony. Given the complex nature of corruption hearings, evidence may be given after a person has first appeared which the Commissioner may wish to interrogate further, or which indicates that the person has further information relevant to the investigation.

Where there is a reasonable suspicion that a person has been involved in, or is aware of, corrupt conduct and that person presents a flight risk, orders to surrender travel documents are appropriate and necessary to support the Commissioner's investigation and to uncover instances of undue influence.

In deciding to make an order to surrender documents, or to maintain on order if an application is made to vary or revoke the order, the court must be satisfied that the person still has access to evidence relevant to the inquiry and is likely to leave the country. This must be based on sworn or affirmed evidence from the Commissioner to that effect. This safeguards against arbitrary or indefinite restriction of movement.

The powers granted under clause 103 are consistent with existing powers under section 97 of the *Law Enforcement Integrity Commissioner Act 2006*.

Commission staff are immune from civil liability, which may limit the right to an effective remedy. Are there any other mechanisms by which a person whose rights are violated may seek a remedy?

As is common in many regulatory bodies, staff members are immune from civil proceedings that could arise from actions done in the performance of their roles (clause 274). However, these actions must have been done in good faith, within the proper exercise of their functions, powers and duties and subject to the Bill.

The immunity is not intended to provide broad protection against defamatory or misleading statements made by staff.

Staff are also subject to confidentiality requirements regarding information gathered during investigations, and the Commissioner is a quasi-judicial officer with a duty to the Commission. These obligations are intended to protect against misuse of information or other inappropriate conduct.

Yours sincerely,

Larissa Waters
Australian Greens Senator for Queensland

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