Responses from legislation proponents — Report 13 of 2020[1]

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Senator the Hon Sarah Henderson
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Dear ~~Chair~~ Sarah

Thank you for your email of 24 September 2020 regarding the consideration by the Parliamentary Joint Committee on Human Rights (the Committee) of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders Bill) 2020 and National Commissioner for Defence and Veteran Suicide Prevention Bill 2020.

The Committee has requested further information to inform its consideration of the proposed measures contained in both bills and their compatibility with Australia's human rights obligations. The enclosed documents respond to the Committee's request for further information.

I thank the Committee for its robust consideration of these Bills and trust the additional information enclosed will assist the Committee.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

Encl. Response to Report 11 of 2020 of the Parliamentary Joint Committee on Human Rights concerning the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders Bill) 2020 and National Commissioner for Defence and Veteran Suicide Prevention Bill 2020.
CC. The Hon Peter Dutton MP, Minister for Home Affairs.

Response to the Parliamentary Joint Committee on Human Rights – *Report 11 of 2020*
Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020

Extended supervision order scheme

(a) Conditions

The Committee requested further information regarding whether the type of conditions that may be imposed under an extended supervision order (ESO) may be so severe as to amount to a penalty.

ESOs are designed to ensure the protection of the community from the unacceptable risk posed by convicted high risk terrorist offenders. They do not serve a retributive or punitive purpose, and the orders therefore do not have the character of a penalty. While the conditions which may be imposed by a Supreme Court under an order are restrictive, the court may only impose conditions if satisfied that each condition is reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the community from the unacceptable risk of the offender committing a serious Part 5.3 offence.

In determining whether a condition is reasonably necessary, and reasonably appropriate and adapted, the court is required to take into account, as a paramount consideration in all cases, the object of Division 105A, namely the protection of the community from serious Part 5.3 offences.

The legislation is designed to ensure that orders are appropriately tailored to protect the community from the specific risk posed by an offender, and that any limitation of the offender's rights is only to the extent necessary to protect the community from the risk posed of committing a further serious terrorism offence.

The process involved in identifying conditions for an ESO would be similar to the approach taken by the Australian Federal Police (AFP) in relation to control orders. When applying for a control order in relation to an individual, the AFP seeks controls which balance the need to ensure that the risk to the community can be mitigated, with the need to ensure that the individual can reintegrate into the community. These factors are considered in drafting the controls in control orders for released offenders and will continue to be important considerations in the drafting of ESO conditions. Operational experience in applying for control orders has also shown that courts have considered proposed control order conditions in close detail in determining whether the conditions are necessary and proportionate to achieve the protective purpose of the order.

The proposed ESO scheme includes safeguards which seek to ensure that any limitations on human rights are proportionate to the legitimate objective of protecting the community from the risk of terrorism. For example, it is open to an offender to apply to the court to vary a condition imposed under the order or to appeal the making of an order.

An offender may also apply to a specified authority for a temporary exemption to a condition, where the court specifies an exemption condition. This seeks to ensure that orders are not unduly onerous and allow for a level of flexibility, while maintaining their protective purpose.

(b) Application of the CDO and ESO scheme

The Committee requested further information regarding why it is appropriate to apply the ESO scheme to those who committed offences before the ESO scheme (or the continuing detention order (CDO) scheme) was in operation.

It is appropriate that the ESO scheme would apply to those who committed offences before the ESO scheme was in operation to achieve the purpose of the scheme, which is to protect the community from terrorist acts. The ESO scheme has been specifically designed and tailored to address the risk posed by high risk terrorist offenders who have committed, and been convicted of, a serious terrorism offence(s).

As noted in the Explanatory Memorandum to the Bill, the imposition of an ESO is not a penalty for criminal offending, as the purpose of an ESO is protective rather than punitive or retributive. While eligibility for a post-sentence order (ESO or CDO) depends on the person having been convicted of a specified terrorism offence, the decision of the court as to whether to impose an ESO is based on an assessment of future risk, rather than as punishment for past conduct. An order could only be made where the court is satisfied that the offender poses an unacceptable risk of committing a serious Part 5.3 offence once released in the community following their custodial sentence. Post-sentence orders are thus based on the risk posed by the offender as they are approaching completion of their custodial sentence, rather than at the time of conviction, consistent with their protective rather than punitive purpose. This is in line with similar state schemes which serve to protect the community from high risk violent and sexual offenders.

(c) Court's determination of 'unacceptable risk'

The Committee requested further information about the factors a court would consider in determining whether a person poses an 'unacceptable risk' (in the context of a court assessing a person's level of future risk under the proposed ESO scheme), and the threshold that a court would apply in determining whether a risk is an acceptable or unacceptable one.

In considering whether a person poses an unacceptable risk, the Bill provides that the court must have regard to a range of matters, which are listed in proposed section 105A.6B.

These matters include:

- the object of Division 105A (being the protection of the community from serious Part 5.3 offences)
- any report of an assessment received from a relevant expert, and the level of the offender's participation in the assessment, under section 105A.6 or section 105A.18D
- the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment
- any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by State or Territory corrective services, or any other person or body who is competent to assess that extent

- any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs
- the level of the offender's compliance with any obligations to which the offender is or has been subject while on parole or while subject to post-sentence order, interim post-sentence order or control order
- the offender's history of any prior convictions for, and findings of guilt made in relation to, any offence referred to in paragraph 105A.3(1)(a)
- the views of the sentencing court at the time any sentence for any offence referred to in paragraph 105A.3(1)(a) was imposed on the offender, and
- any other information as to the risk of the offender committing a serious Part 5.3 offence.

The Bill provides that the court is not prevented from considering any other factor which it considers relevant. The court would determine what weight it gives to the matters listed in section 105A.6B.

Ultimately, it would be a matter for the court to make an assessment on a case-by-case basis, on the basis of admissible evidence, as to whether the risk an offender poses is unacceptable to meet the threshold for a post-sentence order. This would likely be informed by information which demonstrates the likelihood of the offender being at risk of committing a terrorism offence and the gravity of that potential offending. A court's assessment of whether a person poses an unacceptable risk may also be informed by their experience with similar supervisory schemes. For example, in determining what would constitute an unacceptable risk for the purposes of the Terrorist High Risk Offenders scheme, the courts in New South Wales consider both the degree of likelihood of the risk being realised and the extent of harm which might result from that realisation.

Consistent with the current approach to CDOs, the court would also have the ability to appoint an independent expert to help inform its decision about the risk posed by an offender, if the court considers that doing so is likely to materially assist the court in deciding whether to make a post-sentence order.

(d) Terrorism threat in Australia

The Committee requested further information about what evidence there is of a pressing and substantial concern to which the proposed ESO scheme is directed (including evidence of terrorism offenders in Australia who have been released from a custody sentence and subsequently engaged in terrorism related conduct).

The current threat level for terrorist acts remains at PROBABLE, which means that credible intelligence, assessed by Australia's security agencies, indicates that individuals or groups continue to possess the intent and capability to conduct a terrorist attack in Australia.

As noted in the Explanatory Memorandum to the Bill, the 2019 London Bridge and 2020 Streatham attacks in the United Kingdom were carried out by convicted terrorist offenders who had been released into the community. While Australia has not experienced a similar attack by convicted terrorist offenders to date, the evolving nature of the terrorism threat now

includes a specific risk posed by released offenders, who can be highly radicalised, motivated and capable of engaging in further offending (or inspiring others to do so).

There is now a growing cohort of convicted terrorist offenders who have been released into the community following the end of their custodial sentences. Between January 2020 and October 2020, nine convicted terrorist offenders were released into the community, with a further 12 offenders due to be released between November 2020 and 2025.

It is essential that Australia's counter-terrorism framework effectively manages the risk posed by this cohort. The ESO scheme is designed to ensure that appropriate controls are available where a court is satisfied that a particular offender poses an unacceptable risk of committing a serious terrorism offence. This is necessary to ensure the safety and protection of the community from potentially catastrophic terrorist attacks.

(e) Expert assessments

The Committee requested further information about how expert assessments as to the risk of a person engaging in future terrorism related conduct would be effective to accurately assess such a risk, and whether the imposition of an ESO would be rationally connected with the objective of protecting the public from terrorist acts.

Expert assessors provide the court with their assessment of the person's risk of engaging in future terrorism acts, based on their professional judgement. The expert assessor considers the nature and extent of any risks presented by an offender by reviewing:

- the offender's offending history and past conduct
- the offender's behaviour whilst serving their custodial sentence, including behaviours that indicate maintenance of or disengagement from violent extremist beliefs
- the offender's participation in rehabilitation programs
- the offender's plans on release from custody, including in relation to their family and social networks, and
- a structured psychosocial assessment of the offender using the Violent Extremism Risk Assessment 2 Revised (VERA-2R) tool and other appropriate assessment instruments.

When conducting the psychosocial assessment, the expert undertakes a risk assessment by combining their clinical expertise with the support of professional assessment tools such as the VERA-2R. The expert's assessment is based on factual information provided to the expert and information gained from interviewing the person. Instruments such as the VERA-2R support the assessor to identify and analyse risks presented by the person that are associated with terrorism related conduct. The VERA-2R is a structured professional judgement tool that supports a clinician to formulate a subject's risk of committing a violent extremism offence. The risk formulation is therefore ultimately a product of the expert's professional judgment. Unlike actuarial risk assessment tools, the VERA-2R does not claim predictive validity, but assists the assessor to identify and explore risk and protective factors that should be addressed to reduce the subject's risk of reoffending. It has been designed such that the offender's participation in an assessment is not required in order for an assessment to be made, and also permits the measurement of longitudinal change in offender risk over time.

The VERA-2R also supports the expert to explore scenarios in which the offender's risk might be increased or reduced, and identify case management and treatment strategies to reduce the risk. This includes informing the Government of the need for an ESO and the particular conditions that may reduce risk.

The VERA-2R has been subject to peer reviews and is widely used within Australia and internationally. It has also been used by the New South Wales Supreme Court in relation to applications under their Terrorist High Risk Offender scheme.

Instruments such as the VERA-2R do not produce a standalone risk assessment or risk prediction. The assessment is that of the expert, not the instrument itself. Instruments that give a statistical prediction of violent extremist reoffending are not available. The small numbers of convicted violent extremists who have been released and have subsequently offended does not provide a large enough sample for statistical analysis.

As noted in the Explanatory Memorandum to the Bill, the court must consider amongst other factors the report of an assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence (proposed section 105A.6B). It is then a matter for the court as to how much weight it chooses to afford to the assessment when deciding whether it is necessary to make an order to protect the public from terrorist acts. As such, the court's decision as to whether to impose an ESO is appropriately informed by an expert's assessment of the risk the offender poses of committing a further terrorism offence, and is rationally connected to the objective of protecting the public from terrorist acts.

(f) Parole for terrorist offenders

The Committee requested further information as to why, and in what respects, the power to release an offender on parole during the final quarter of their sentence (subject to conditions) would not be effective to protect the public from any potential risk sought to be addressed by these measures, including by supporting a person to rehabilitate and reduce their risk of recidivism.

Parole allows for the conditional release of offenders to serve the remainder of their prison sentence in the community. It does not provide an effective means to protect the public from the threat posed by high risk terrorist offenders at the end of their sentences. ESOs would provide an appropriately tailored option to manage the enduring risk that an offender poses to the community following their release. Orders would be available for up to three years. There is also the possibility of successive orders, providing that the court is satisfied that the offender continues to pose an unacceptable risk of committing a serious Part 5.3 offence. In contrast, conditions imposed on offenders released on parole can only apply for the duration of the offender's sentence.

Under section 19ALB of the *Crimes Act 1914*, the Attorney-General must only grant parole to a specified individual (including an individual convicted of a terrorist offence) where satisfied that exceptional circumstances exist to justify making a parole order. Exceptional circumstances is not defined. Section 19ALB does not operate as a blanket ban against parole for terrorists and terrorism-related offenders, and offenders still have the opportunity to be released into the community under supervision and parole conditions where there are exceptional circumstances. However, due to the seriousness of the offending it is appropriate

that terrorist offenders are subject to a higher threshold when considered for release from prison.

Matters that are generally taken into consideration include (but are not limited to) the offender's engagement in rehabilitation, their behaviour in prison, their progression through prison classification systems, the views of operational agencies regarding the threat the offender poses to the community if released, and whether the offender's release on parole is supported by those agencies.

While each case is assessed on its merits, in circumstances where operational agencies have information which indicates that an offender poses a threat to community safety, it is unlikely that exceptional circumstances can be established and they will not be able to be released on parole.

(g) Parole conditions and ESO conditions

The Committee requested further information around whether a person could be released from prison and be subject to both parole conditions and conditions under an extended or interim supervision order, and if so, how would any conflict between the two be managed.

A person will be eligible for an ESO if they are detained in custody serving a sentence of imprisonment for an eligible offence (proposed new section 105A.3A(1)). As such, if an offender is released on parole, they would no longer be eligible for an ESO as they would no longer be detained in custody.

There are some limited circumstances where it is theoretically possible that a person could be subject to an ESO and bail or parole conditions at the same time. For example, an offender could be released after serving a sentence for an eligible terrorism offence and made the subject of an ESO for a three year period. In the first year of their release, the offender is convicted of a further offence and sentenced to 12 months imprisonment. During this period of imprisonment, the Bill would provide that the order is suspended, which means that the conditions do not apply. This suspension does not affect the expiry date of the order. If the offender was then released on parole, then they would be subject to both parole and the ESO conditions.

Such cases are likely to be infrequent, and will be managed by ensuring that the conditions of parole take into account the fact that the ESO conditions would resume once the person is released from custody. This is similar to the current arrangements where an individual can be subject to state and Commonwealth parole conditions simultaneously. Where this occurs, the Commonwealth Parole Office works with state agencies to manage the offender under both orders.

(h) Terrorist offenders who have received parole

The Committee requested further information about the percentage of persons who have been imprisoned for a terrorism offence under Part 5.3 of the Criminal Code, and who have received parole in the past 10 years.

One terrorist prisoner has been granted parole since October 2012. At the time of his release, he had been in a normal prison environment for many years and was undertaking supervised work outside of the prison. His release on parole was supported by the AFP and Corrective Services NSW.

Before October 2012, the *Crimes Act 1914* did not provide discretion to refuse to grant parole to any federal prisoners whose head sentences were under 10 years. For example, some of the offenders convicted as a result of Operation Pendennis received sentences that were under 10 years imprisonment and as a result, these offenders were automatically released on parole at the expiry of the non-parole periods set by the sentencing courts.

(i) Current prison services available to manage terrorist offenders

The Committee requested further information regarding whether, how, and to what extent the current prison services available to manage terrorist offenders are not effective in reducing the risk of recidivism with respect to terrorism offences.

The management and rehabilitation of federal terrorist offenders is a state and territory responsibility. The Australian Government has supported the states and territories to implement and develop rehabilitation programs. However, the relatively small number of convicted terrorists who have been released in Australia makes it difficult to obtain statistically valid evaluations of the effectiveness of prison terrorist rehabilitation programs in reducing the risk of terrorism recidivism. Prisoners who are eligible under the HRTO scheme may also have declined to participate in rehabilitation programs, attended but not engaged meaningfully, or may need to undertake further participation in programs beyond their sentence to reduce their risk.

Success in these programs relies on the person's motivation to change and their willingness to re-evaluate their ideology. An offender's successful rehabilitation may also depend on whether they have appropriate family, social and professional supports in the community.

(j) Civil standard of proof for ESOs

The Committee requested further information as to why it is appropriate that the civil standard of proof (balance of probabilities) should be required for the issue of an ESO or ISO, noting the potential significant impact on human rights by the imposition of a supervision order.

The civil standard of proof required for making of an ESO or ISO is appropriately set to the 'balance of probabilities' (which is the same standard of proof for making a control order) to reflect the fact that these orders impose restrictions on an individual's personal liberties that fall short of custody. As such, this standard of proof is lower than the current standard of proof required for making a CDO, which is a high degree of probability. It is also consistent with the standard of proof that ordinarily applies in other civil proceedings.

This standard is appropriate to ensure that the scheme achieves its intended objective of protecting the community from terrorist acts. Any imposition on the offender's rights will be considered by the court as it assesses whether the proposed conditions are reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the community.

(k) Condition to remain at specified premises for more than 12 hours within any 24 hour period

The Committee requested further information as to whether, as a matter of statutory interpretation, a court could impose a condition that an offender remain at specified premises for more than 12 hours within any 24 hour period, noting that the general conditions listed in proposed subsection 105A.7B(3) are expressly stated as being 'without limiting' a court's ability to impose any condition they were satisfied was necessary (under proposed subsection 105A.7B(1)).

It would be open to a court to impose any condition under an ESO, provided it is satisfied that the condition is reasonably necessary, and reasonably appropriate and adapted.

The possible conditions listed in subsections 105A.7B(3) and 105A.7B(5) do not limit the court's ultimate discretion to impose whatever conditions the court is satisfied are proportionate to the risk posed by the offender. However the specific listing of those conditions are intended to provide some guidelines on the Parliament's views on what may constitute reasonable conditions. The proposed provisions have been framed this way to ensure there is sufficient flexibility to tailor the conditions to the specific risk posed by the offender in the community.

It is relevant to note the safeguards proposed which seek to ensure that any limitations on human rights are proportionate to the legitimate objective of protecting the community from the risk of terrorism. For example, it is open to an offender to apply to the court to vary a condition imposed under the order or to appeal the making of an order.

An offender may also apply to a specified authority for a temporary exemption to a condition, where the court specifies an exemption condition. Requests for exemptions would be considered on a case by case basis, and will depend on a range of factors including the range of conditions currently in place, the individual's past behaviour, though protection of the community will ultimately be the primary factor. This is similar to the approach taken by the AFP in relation to control orders where exemptions from certain conditions may be issued from time to time to afford sufficient flexibility for the offender in circumstances where the risk to the community would not be increased (for example, compliance with curfew conditions where a person may be working a late night shift). It is envisaged that the consideration of exemptions under the ESO scheme will be similar.

As noted in the Explanatory Memorandum to the Bill, the court may set out the process for seeking an exemption in the terms of the order. For example, the condition may be drafted so the subject is required to provide a certain period of notice. To request an exemption, the offender will need to submit a written request to the specified authority for an exemption to a particular condition, outlining the exemption sought and reasons for seeking an exemption.

Noting that the Supreme Court would have already made a finding that the condition the offender is seeking an exemption from is necessary for the protective purpose of the order, it would not be appropriate to have a requirement to provide reasons for refusing an exemption to the subject as police may have come to this decision based on sensitive or intelligence information.

Exemptions that constitute a substantial variation of the condition would follow the variation process.

Court-only evidence and the special advocates scheme

(a) Court-only evidence in CDO and ESO proceedings

The Committee requested further information regarding why it is appropriate that a court considering an ESO should have different powers to admit evidence, which the offender may not have had a sufficient opportunity to challenge, than those applicable in CDO proceedings.

The Bill would amend the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) to extend the court-only evidence provisions which currently apply in control order proceedings to ESO proceedings. Court-only evidence is only available for control orders and ESOs, as these orders allow for supervision rather than detention. These are exceptional provisions and would only be used in exceptional circumstances, where it is absolutely necessary to present highly sensitive information to a court to support an application. It is not appropriate for court-only evidence to be available for CDOs, given the result of such an order is the continued detention of an offender for a period of time following the end of their custodial sentence.

The Bill also amends the NSI Act to ensure that special advocates, which are available where court-only evidence is considered in control order proceedings, will also be available where court-only evidence is considered in ESO proceedings. As noted in the Explanatory Memorandum to the Bill, a special advocate represents the offender's interests during the parts of a hearing from which the offender and their ordinary legal representative are excluded when the court agrees to consider highly sensitive court-only evidence. The special advocate is able to make arguments to the court querying the need to withhold information from the offender, and can challenge the relevance, reliability and weight accorded to that information. The appointment of a special advocate ensures that the offender will have a reasonable opportunity to present their case and challenge the arguments adduced by the other party.

(b) Instructing a special advocate

The Committee requested further information about when sufficient information could be provided to an offender in order to allow them to give effective instructions to a special advocate, and will this information be given before restrictions are placed on communication with the special advocate.

Before making an order to allow for court-only evidence, the court must be satisfied that the offender has been given sufficient information about the allegations on which the request for an order was based to enable effective instructions to be given in relation to those allegations.

Whether the offender is provided the 'sufficient information' prior to the special advocate seeing the sensitive national security information will depend on the circumstances of the case. The offender will be given sufficient information about the allegations such that they can instruct their ordinary legal representative, and special advocate in relation to those allegations, prior to the special advocate having seen the sensitive national security information.

However, there may be some circumstances in which further information is disclosed to the offender after the special advocate has seen the sensitive national security information. Under these circumstances, the communication restrictions under the NSI Act would apply, requiring the special advocate to seek the approval of the court for any proposed communications to the offender. The offender can continue to communicate with the special advocate about any matter connected with the proceeding in writing through their ordinary legal representative without restriction. This allows the offender to provide information to the special advocate that the offender considers relevant in relation to the allegations on which the request for an order was based.

(c) Court's appointment of a special advocate

The Committee requested further information regarding whether there will there be circumstances in which a special advocate will not be appointed where a court is considering whether to admit evidence which has not been provided to an offender or their legal representative.

The appointment of a special advocate is at the discretion of the court, which is best placed to assess whether a special advocate is necessary to assist the court process and safeguard the rights of the offender in proceedings. In some instances, the court may consider itself sufficiently equipped to safeguard the rights of the offender without the appointment of a special advocate. It is appropriate that that decision be made on a case by case basis.

The application of the principles in clause 12

The Committee has requested further information as to whether the Commissioner must have regard to the principles in clause 12 (of taking a trauma-informed and restorative approach) prior to exercising any of their powers, including the power to summon a person to give evidence, or to provide a document or thing

Clause 12 of the Bill provides the general principles that the National Commissioner for Defence and Veteran Suicide Prevention (the Commissioner) should take into account in the performance or exercise of their functions or powers. The general principles include taking a trauma-informed and restorative approach. The Explanatory Memorandum outlines that 'this means the principles of safety, confidentiality, consultation and informed participation, for example, will underpin the way the Commissioner undertakes its role'. Clause 12 also recognises that families and others affected by a suicide death have a unique contribution to make to the Commissioner's work, and may wish to be consulted.

Applying a restorative and trauma-informed approach will involve the Commissioner ensuring that families and other people are appropriately assisted and supported when providing information and giving evidence, including when exercising their compulsory powers to summon a person to give evidence, or to provide a document or thing. This may include, for example, considering the use of non-compulsory information-gathering mechanisms, where appropriate.

In practice, families and others affected by a death by suicide will have the opportunity to engage with the Commissioner in a variety of informal ways. This could be, for example, through making a submission on a matter relevant to the Commissioner's work. It could also include engaging with families and other interested persons through meetings and discussions. While formal 'evidence' would not be taken during these meetings, they will be an important way for families and others to share their experiences, and for the Commissioner to develop an understanding of the circumstances surrounding a death by suicide, and/or systemic issues. A formal hearing might then be a further way for the Commissioner to formally inquire into particular relevant issues, and take evidence, if the Commissioner thinks this is required.

Merits Review

The Committee has requested further information as to whether the performance of any of the Commissioner's functions or powers would be subject to review, in particular, whether a person could seek merits review of a decision to issue a summons (and if not, how this is compatible with the right to an effective remedy)

The Bill implements the Australian Government's commitment that the Commissioner will have inquiry powers broadly equivalent to a Royal Commission. Generally aligning the Commissioner's inquiry powers with those of a Royal Commission includes providing appropriately broad discretion to the Commissioner in the exercise of those powers.

The Bill does not exclude the performance of any of the Commissioner's functions or powers from being subject to judicial review, such as under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or section 39B of the *Judiciary Act 1903* (Cth). This will enable a party that may hold a concern about the legality of a decision of the Commissioner to seek judicial review.

The Bill does not provide for merits review of the performance or exercise of the Commissioner's functions or powers. Doing so would constitute a significant departure from the processes in the *Royal Commissions Act 1902* (Cth) (Royal Commissions Act), which does not provide for merits review of the performance of functions and exercise of powers by a member of a Royal Commission. Like a Commissioner appointed to a Royal Commission, the Commissioner has the same protection and immunity as a Justice of the High Court of Australia in the performance or exercise of their functions (clause 64 of the Bill, section 7 of the Royal Commissions Act).

Providing a pathway for merits review of the Commissioner's decisions would undermine the Commissioner's standing as an independent statutory office holder, as this would involve placing another person or body in the position of reconsidering whether the Commissioner made the correct or preferable decision in the course of their inquiries or other work. The framework in the Bill provides appropriate autonomy and flexibility to the Commissioner in exercising their role, which extends to ensuring the Commissioner is not subject to direction in the way they undertake their inquiries (whether through a merits review process, or otherwise).

The Committee has commented that the Bill engages and may limit the right to an effective remedy. The right to an effective remedy is contained in article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and requires state parties to provide an effective remedy for violations of human rights protected under the ICCPR. Therefore, article 2(3) does not in itself confer substantive rights, such as a right to merits review.

The right to an effective remedy is preserved in the Bill through the availability of judicial review, which provides recourse for a person who may be concerned about the legality of a compulsory request issued by the Commissioner. The opportunity for a relevant party to claim public interest immunity, and the following defences in the Bill, also enable a person to resist a compulsory request and to have their basis for doing so upheld by a court, if required:

- the defence of relevance (subclause 45(4)) – which is available to protect a person from being compelled to provide information that is not relevant or connected to the matters into which the Commissioner is inquiring

- the defence of reasonable excuse (subclause 45(3)) – which ensures a person is not penalised where they may be unable legitimately to produce a document or attend a hearing due to circumstances beyond their control, or where there is some other good and acceptable reason.

As outlined in the Explanatory Memorandum, the general defences under Part 2.3 of the Criminal Code (such as mistake of fact, duress, lawful authority, and sudden or extraordinary emergency), would also be available to a person subject to a compulsory request.

Clause 56 – Authorisation to disclose information

The Committee has requested further information as to why the Bill does not set out additional criteria as to what the Commissioner must consider in determining whether, pursuant to clause 56, to disclose information provided to them to other entities (such as, for example, the public interest in disclosing such information and the right to privacy of any affected person)

Clause 56 authorises the Commissioner to disclose information they have received to other entities in certain circumstances. It supports the objectives of:

- Enabling the Commissioner to refer material evidencing a potential civil, criminal or similar probity issue to law enforcement or integrity bodies, similar to the arrangements for Royal Commissions under section 6P of the Royal Commissions Act. Given the Commissioner is not permitted to make findings of civil or criminal wrongdoing, it is necessary and appropriate that the Commissioner has broad discretion to refer material raising potential wrongdoing of this kind to an appropriate authority.

- Enabling the Commissioner to work collaboratively with other bodies engaged in suicide prevention efforts, such as the Australian Institute of Health and Welfare, Coroners, and any other relevant bodies. It is a priority that the Commissioner, as an enduring body, can work in partnership with others on suicide prevention, and be empowered to share information flexibly within this remit.

A range of safeguards are provided in the Bill to ensure the information sharing power in clause 56 is appropriately exercised, and any risk to privacy issues is mitigated:

- Only the Commissioner is authorised to disclose information under clause 56 - the power cannot be delegated.

- Clause 55 prevents the unauthorised use or disclosure of protected information (including by the Commissioner themselves), except in certain limited circumstances. Clause 56 operates as a limited exception to the unauthorised disclosure offence in clause 55.

- Paragraph 56(1)(a) limits the information the Commissioner may disclose to that received through an authorised voluntary disclosure (clauses 40 and 41 refer), or to information received in response to a notice or summons (clauses 30 and 32 refer).

- Paragraph 56(1)(b) requires the Commissioner to be satisfied that the information proposed to be disclosed will assist the receiving entity to perform any of its functions or powers – this requires an assessment of the relevance of the information to be disclosed, against the functions and powers of the potential receiving entity. It is anticipated that such disclosure would generally occur for the purposes of law enforcement and integrity action, or the performance of functions or exercise of powers by other government bodies and officers where there is a clear nexus with defence and veteran suicide prevention.

- The power to disclose information under clause 56 is discretionary, and the Commissioner would have due regard to all relevant considerations, including the particular circumstances in deciding whether to disclose information. For example, as outlined above, clause 12 provides that the Commissioner should take a trauma-informed and restorative approach to the performance or exercise of their functions or powers, and to recognise that the families and other persons affected by a relevant death may wish to be consulted. In keeping with a trauma-informed approach, the wishes and interests of families (including appropriate consultation about the sharing of their sensitive information) will inform the way the Commissioner exercises their functions and powers in relation to the disclosure of information under clause 56.
- The Commissioner can determine the form of any information to be disclosed under clause 56, enabling (for example) de-identification, redaction of material that is not relevant, and/or relaying material with requests as to its future use (for example, requesting the receiving entity preserve confidentiality).

Legal Professional Privilege

The Committee has requested further information as to according to what criteria the Commissioner may determine whether legal professional privilege attaches to a communication in relation to which the privilege has been claimed

The approach to legal professional privilege (LPP) in the Bill is closely modelled on section 6AA of the Royal Commissions Act and is intended to ensure the Commissioner can conduct full inquiries, with access to all relevant information, like a Royal Commission. As acknowledged in the Explanatory Memorandum, the approach taken in the Bill gives weight to the public benefit in equipping the Commissioner with appropriate powers of inquiry which are broadly equivalent to the powers of inquiry of a Royal Commission.

In deciding a claim of LPP under subclause 48(2), it is intended that the Commissioner would apply the established common law principles relevant to determining a claim of LPP. This subclause effectively replicates subsection 6AA(2) of the Royal Commissions Act, which does not expressly set out the test to be applied. Applying the common law principles would require the Commissioner to have regard to the information presented by the party making the claim (noting that the Commissioner would need to afford procedural fairness to the affected parties in deciding that claim). The Commissioner could also seek additional information, as required.

Further, it is intended that a decision to reject a claim of LPP would be an administrative decision subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), as well as under section 39B of the *Judiciary Act 1903* (Cth). As such, even leaving aside the ability of an affected party to seek a declaration from a court that the relevant information is subject to LPP, there will be appropriate judicial oversight where there are concerns as to whether the Commissioner has applied the relevant common law principles correctly.

The person appointed as the Commissioner must, in the Governor-General's opinion, be suitable for appointment because of their qualifications, training or experience (see subclause 16(2)). This will provide scope for the Governor-General to consider, among a

range of other relevant factors, whether the person's qualifications, training or experience would enable them to effectively assess claims of LPP.

The Commissioner will also be supported by legal and other specialist staff in the Office of the National Commissioner as required, enabling them to draw on expert assistance and advice when assessing claims of LPP.

The Committee has requested further information as to whether a lawyer who had been summoned or notified to provide advice to the Commissioner would be exposed to risk of a penalty under Part 4 of the bill, where their client has claimed legal professional privilege with respect to the relevant communications (noting that only a client may waive legal professional privilege)

If a lawyer was summonsed or notified to provide communications to the Commissioner in respect of which their client has claimed LPP, paragraph 48(1)(b) would allow for a claim to be made to the Commissioner that the communications in question were subject to LPP. The Commissioner would then decide the claim. As outlined above, this would be done through the application of established common law principles regarding LPP.

This provides a mechanism for LPP to be relied upon as a reasonable excuse for not complying with a summons or notice to produce, even in circumstances where a court had not found the relevant material to be subject to LPP. If the LPP claim was accepted by the Commissioner, the lawyer would be able to rely on LPP as a reasonable excuse for the purposes of clause 45. This means that where there is a legitimate LPP claim and the process for making such a claim to the Commissioner is followed, a lawyer would not be exposed to penalties under Part 4 of the Bill in respect of a failure to comply with the summons or notice.

Additionally, subclause 64(4) of the Bill, which affords witnesses or persons responding to a summons or notice the same protection as a witness in the High Court, means that such protections would be available for a lawyer in such circumstances (for example, in relation to any subsequent proceedings they might face).

As discussed above, the approach to LPP in the Bill is very closely modelled on section 6AA of the Royal Commissions Act, consistent with the Australian Government's commitment that the Commissioner will have inquiry powers broadly equivalent to a Royal Commission.

The exclusion of 'derivative use immunity'

The Committee has requested further information as to why the bill does not provide an individual with a derivative use immunity with respect to information which they are compelled to disclose to the Commissioner, including having regard to the proposed functions of the Commissioner.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement powers* (the Guide) provides that 'the privilege against self-incrimination may be overridden by legislation where there is clear justification for doing so' and 'if the privilege against self-incrimination is overridden; the use of incriminating evidence should be constrained' (9.5.3-4 of the Guide refers).

As noted in the Explanatory Memorandum, the justification for a partial abrogation of the privilege against self-incrimination is to support the Commissioner's function to inquire into, and report on, a matter of public importance – namely the prevention of defence member and veteran deaths by suicide. In doing so, the approach gives weight to the public benefit and expectation that the Commissioner will have appropriate inquiry powers. As is the case with a Royal Commission, the abrogation of the privilege against self-incrimination is not absolute and there are limits and safeguards on the abrogation.

The partial abrogation of the privilege against self-incrimination operates alongside the protection that a person appearing as a witness, or giving or producing evidence or a statement in response to a notice, has the same protection as a witness in the High Court (clause 64). This will enable relevant persons to claim the defence of absolute privilege in respect of information disclosed, when appearing as a witness or in response to a compulsory notice, for example, in separate criminal or civil proceedings. The Commissioner also has powers under clause 53 to issue a non-publication direction to limit the further disclosure or publication of evidence which may be self-incriminating.

It is acknowledged that the Commissioner may disclose information to listed entities, including the police or the Director of Public Prosecutions, where the Commissioner considers the information will assist the entity to perform its functions or exercise its powers (clause 56). During the course of their work, the Commissioner may uncover information indicating a crime may have been committed. Introducing a 'derivative use' immunity to prevent any incriminating evidence being used to gather other evidence against the person may unreasonably hinder the ability of law enforcement agencies to investigate and prosecute matters the Commissioner identifies.

This consideration has been central in the design of the approach taken in the Bill, noting that the approach in the Bill to partially abrogate the privilege against self-incrimination, and not to provide a 'derivative use' immunity, is consistent with the approach taken in other inquiry legislation, such as the Royal Commissions Act and subsection 9(4) of the *Ombudsman Act 1976* (Cth).

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS20-002524

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Sarah,

Dear Ms Henderson

Thank you for your letter dated 24 September 2020 requesting my response in relation to the human rights compatibility of the Crimes Legislation Amendment (Economic Disruption) Bill 2020.

I note the Committee has sought further information regarding the compatibility of the proposed measures with Australia's international human rights obligations.

My response for the Committee's consideration is attached.

Yours sincerely

PETER DUTTON 20/10/20

Parliamentary Joint Committee on Human Rights
Crimes Legislation Amendment (Economic Disruption) Bill 2020

Offence with no fault element and a reversal of the legal burden of proof

Right to presumption of innocence

Committee comment

The committee sought further information in order to assess the compatibility of the proposed offences at item 62 of Schedule 1 to the Crimes Legislation Amendment (Economic Disruption) Bill 2020 (**the Bill**) with the right to the presumption of innocence, in particular:

(a) why is it necessary to completely remove the need for the prosecution to prove that the defendant suspected that the money or property was the proceeds of indictable crime (noting that the threshold is only suspicion rather than knowledge); and

(b) why is it necessary to reverse the legal burden of proof (requiring the defendant to positively prove that they had no reasonable grounds for suspecting unlawful activity), rather than reversing the evidential burden of proof (which would require the defendant to raise evidence about the matter).

Response

The proposed offences under section 400.9 of the *Criminal Code* follow the same structure as existing offences under this section, and only relate to higher values of property (valued at $1,000,000 or more and $10,000,000 or more respectively).

No need to prove that the defendant actually held a reasonable suspicion

The new offences place a burden on the prosecution to prove beyond reasonable doubt that the defendant dealt with money or other property and that it was reasonable to suspect that the property (including money) was proceeds of indictable crime. This may be satisfied where circumstances exist that would create a reasonable suspicion in the trier of fact that the property was derived from a particular indictable offence or a kind of indictable offence (for example, tax evasion).

The prosecution is not required to also prove that the defendant knew or subjectively suspected that the property was proceeds of an indictable crime. If the defendant had no knowledge of circumstances that would give rise to a reasonable suspicion that the property was derived or realised from some form of unlawful activity, they may rely on the defence at subsection 400.9(5) to avoid criminal liability.

Framing the offences with reference to an objective test that it was 'reasonable to suspect' that property was proceeds of indictable crime, rather than requiring proof of the defendant's subjective knowledge or suspicion, is necessary and appropriate to deal with the activities of money laundering networks.

These networks operate in a ways which seek to insulate operatives from information as to the true origins of the property to be laundered. Through engaging in this information compartmentalisation, networks can ensure that participants do not subjectively suspect that property was derived from a particular kind of offence, even if they suspect that it was derived from offending generally.

For example, a person may be asked to deliver $1 million in cash to a third party in an abandoned car park whilst using encrypted communications to contact his instructor and also using tokens to identify himself to the third party. In these circumstances, the defendant may have reasonable grounds to suspect that the property was derived from some form of unlawful activity but is not given enough information by his instructor to suspect that it came from a specific kind of indictable offence.

Unknown to the defendant, the money came from a drug cartel and was likely derived from drug trafficking offences. Criminal liability could be established under the proposed offence provisions as the trier of fact could find that it was objectively reasonable to suspect that the money came from drug trafficking. The defendant would be unable to rely on the defence under subsection 400.9(5) as, on the information known to him, he had reasonable grounds to suspect that the cash was derived from some form of unlawful activity.

Reversing the legal (not evidential) burden of proof

The defence at subsection 400.9(5) imposes a legal burden of proof on the defendant, requiring them to establish, on the balance of probabilities, that they had no reasonable grounds for suspecting that money or property was derived or realised, directly or indirectly, from some form of unlawful activity. A legal burden of proof is higher than an evidential burden, which requires a defendant to merely adduce or point to evidence that suggests a reasonable possibility that a particular matter exists or does not exist.

It is necessary to impose a legal rather than evidential burden on the defendant here to ensure that the offences can pierce the 'veil of legitimacy' that money laundering networks frequently use to disguise their activities.

These networks often exploit seemingly legitimate front companies; complex financial, legal and administrative arrangements; real estate and other high-value assets; gambling activities; and a range of formal and informal nominee arrangements to conceal proceeds of crime and obscure beneficial ownership. This layering activity generates a paper trail that can be used to establish a 'reasonable possibility' of legitimacy that, in many cases, would be sufficient to meet an evidential burden under subsection 400.9(5) and thereby allow these networks to avoid criminal liability.

An evidential burden may be met by pointing to evidence, even *slender* evidence, adduced as part of the prosecution case. Hence a defendant could discharge an evidential burden by pointing to an answer provided in a police record of interview which suggested that the money or other property was derived from a legitimate business activity. By imposing a legal burden of proof on the defendant, the offences will ensure that courts look beyond this 'reasonable possibility' to properly examine the genesis and operation of structures used to legitimise transactions, reducing the effectiveness of layering activity.

Interviews of a child suspect by an undercover operative

Rights of the child

Committee comment

The committee sought further information in order to assess the compatibility of Schedule 2 to the Bill with the rights of the child, in particular:

(a) in what circumstances do undercover operatives question child suspects and what safeguards are in place to protect the rights of the child;

(b) in what circumstances is it appropriate that undercover operatives question a child in the absence of a family member or support person (noting that the removal of the obligation to allow a child to contact a family member or support person would apply to a child of any age of criminal responsibility, including those aged 10 years of age); and

(c) whether there is reasoning or evidence to establish that removing the obligation on undercover operatives to allow a child suspect to contact a family member or other support person before being questioned is aimed at achieving a legitimate objective.

Response

<u>The necessity of questioning children (without supervision) in undercover operations</u>

Requiring an undercover operative to only question a child suspect after allowing them to communicate confidentially with an independent person would significantly increase the chance that criminal groups would identify an operative. This would also severely jeopardise operations targeting serious criminal behaviour of individuals under the age of 18 years, including in counter-terrorism operations where suspects have been children in the past. This would effectively mean that undercover operatives could not undertake undercover engagement in some circumstances (regardless of the severity of any suspected criminal conduct). The consequences of this could be severe given undercover operatives can be used in investigations for the most serious Commonwealth offences (for example, terrorism).

Clarifying that this obligation does not apply to undercover operatives is necessary to achieve the legitimate objective of protecting national security and public safety, and ensuring the ability of law enforcement to undertake essential investigative activity, while maintaining the safety of officers.

<u>Safeguards to protect the rights of the child</u>

At all times during the course of covert undercover operations, law enforcement agencies are mindful to conduct themselves to the highest standard, and to comply with their legal obligations.

The inability to afford a child suspect, or person of interest, with an interview friend (for example) is a reflection of the nature of undercover work.

Any interaction an undercover officer has with a child (or any person) in terms of evidence collection will be scrutinised by a Court and determined as to whether such evidence should be admissible or not under well-established rules of evidence. This will take account of factors such as propriety and fairness. This significant external scrutiny also ensures law enforcement agency processes and procedures are robust and fit for purpose.

This measure is a reasonable and proportionate limitation on the rights of the child as:

- law enforcement agencies will continue to conduct themselves to the highest standard when engaging with a child suspect or person of interest in undercover operations;
- the Commonwealth Ombudsman provides independent oversight of the use of powers by law enforcement agencies in investigations into serious Commonwealth offences, including in relation to covert undercover operations which may involve engagement with individuals under the age of 18 years; and
- courts will continue to have discretion to consider whether or not to admit evidence obtained by an undercover officer in these circumstances.

Expansion of Proceeds of Crime Act 2002

Right to a fair trial and fair hearing (including prohibition on retrospective criminal law)

Committee comment

The committee requested further information to determine if the proposed amendments to the terms 'benefit' and 'serious offence' in the *Proceeds of Crime Act 2002* (the POC Act) are compatible with the right to a fair trial and fair hearing, in particular:

(a) whether the restraint or forfeiture powers that are broadened by the amendments to the definitions of what constitutes a 'benefit' and what is a 'serious offence' may be characterised as 'criminal' for the purposes of international human rights law, having regard to the nature, purpose and severity of those powers; and

(b) the extent to which the provisions are compatible with the criminal process guarantees set out in Articles 14 and 15, including any justification for any limitations of these rights.

Response

Relevant restraint and forfeiture powers (as expanded by the Bill) are properly characterised as civil for the purposes of international human rights law. These powers do not engage the criminal process guarantees as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights.

The Committee's Guidance Note 2 states that the test for whether a penalty can be classified as 'criminal' for the purposes of international human rights law relies on three criteria:

(a) the domestic classification of the penalty

(b) the nature and purpose of the penalty, and

(c) the severity of the penalty.

On the domestic classification of the penalty, section 315 of the POC Act expressly provides that relevant restraint and forfeiture powers are characterised as civil in nature under Commonwealth law.

On the nature and purpose of the penalty, the POC Act is not solely focused on deterring or punishing persons for breaching laws, but under paragraphs 5(a)-(ba) is primarily focused on remedying the unjust enrichment of criminals who profit at society's expense, while

paragraphs (d)-(da) are focussed on the removal of illicit funds from the licit economy. In addition, actions taken under the POC Act also make no determination of a person's guilt or innocence and can be taken against assets without finding any form of culpability against a particular individual (see sections 19 and 49 of the POC Act).

On the severity of the penalty, Guidance Note 2 provides that a penalty is likely to be considered criminal for the purposes of human rights law if the penalty is imprisonment or a substantial pecuniary sanction. Proceedings under the POC Act cannot in themselves create any criminal liability and do not expose individuals to criminal sanction (or a subsequent criminal record). Further, penalties under the POC Act cannot be commuted into a period of imprisonment.

On whether the penalty is substantial, it also remains open to a court to decrease the quantum to be forfeited under the POC Act to accurately reflect the quantum that has been derived or realised from crime, ensuring that orders are aimed primarily at preventing the retention of ill-gotten gains, rather than the imposition of a punishment or sanction (see, for example, compensation orders at sections 77 and 94A of the POC Act.

For these reasons, amending the definitions of what constitutes a 'benefit' and what is a 'serious offence' does not make the restraint and forfeiture powers criminal for the purposes of international human rights law.

Privilege against self-incrimination

Right to a fair trial

Committee comment

The committee required further information in order to assess the compatibility of proposed amendments to section 271 of the POC Act with the right to a fair trial, in particular:

(a) 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; and

(b) whether the measure is a proportionate limitation on the right to a fair trial, including whether it is the least rights restrictive way of achieving the stated objective (noting the possibility of setting up quarantining of information and information-sharing protocols).

Response

Measure is aimed at achieving a legitimate objective

The removal of the derivative use immunity at paragraph 271(2)(c) is necessary to achieve the legitimate objectives of preserving public order and public safety by ensuring that the POC Act can be effectively used to trace, restrain and confiscate illicitly obtained funds.

The derivative use immunity applies in relation to information gained under the Official Trustee's powers at Part 4-1 of the POC Act including their powers to access books, seek assistance from suspects and obtain information and evidence. These information-gathering powers can only be used to support the Official Trustee's powers and functions, which relate to managing property seized under the POC Act and the Confiscated Assets Account into which the sale proceeds from confiscated property is credited.

The derivative use immunity creates operational issues of substantial concern, which are capable of severely undermining the confiscation mechanisms underpinning the POC Act and later unrelated criminal investigations. As it is not always possible to identify whether information may later become relevant to a criminal investigation, the information barriers required to mitigate the risk must be extremely restrictive, creating impediments that go far beyond mere administrative inconvenience.

For example, books may be provided by Official Trustee to show that a person had provided false or misleading information and documents. Two years later these books could be seized separately as part of investigations into a separate criminal matter (such as breach of corporations offences, or money laundering). Under the current use and derivative use provisions, the Australian Federal Police could be required to go into great depth to show that information originally provided by the Official Trustee has been appropriately quarantined. This could include not only locking down the information in relevant systems, but also showing that no officer had worked on both cases and that there was no potential that investigators had access to the Official Trustee's material.

Sufficient quarantine procedures are not only administratively burdensome but can be impossible to achieve in some cases, given how closely staff supporting the Official Trustee are required work with law enforcement to ensure that restrained property is preserved pending the resolution of a matter. As the POC Act relies on the Official Trustee and law enforcement maintaining a high level of cooperation to remain effective, the necessary quarantining practices can severely undermine the effectiveness of the scheme, raising substantial concerns in asset confiscation cases.

Measure is a proportionate limitation on the right to a fair trial

The measure is also a proportionate limitation on the right to a fair trial, being the least rights restrictive means of achieving its objective.

The derivative use immunity only relates to information obtained by the Official Trustee under Part 4-1 of the POC Act, and the Official Trustee's information-gathering powers under this Part can only be used for a narrow range of purposes relating to the administration of seized property and the Confiscated Assets Account.

Under subsection 271(2) of the POC Act (as amended by items 15-17 of Schedule 6 to the Bill), information and documents obtained using these information-gathering powers will only be admissible in the following criminal proceedings:

- proceedings under, or arising out of, section 137.1 or 137.2 of the *Criminal Code* (false and misleading information and documents) in relation to giving the information or document; or
- proceedings for an offence against Division 2 of Part 4-2 of the POC Act.

In effect, this ensures that evidence gathered under the Official Trustee's information-gathering powers will only be admissible in criminal proceedings to prove non-compliance with these powers. The removal of the derivative use immunity at paragraph 271(2)(c) will not allow the evidence to be used against the person in unrelated criminal proceedings (such as criminal proceedings for fraud).

Disclosure of information to foreign countries for investigating or prosecuting offences

Right to life and prohibition against torture and other cruel, inhuman and degrading treatment or punishment

Committee comment

The committee sought further information in order to assess the compatibility of Schedule 6 to the Bill with the right to life and the prohibition on torture and cruel, inhuman and degrading treatment or punishment, in particular:

- the adequacy of the protections in the Mutual Assistance Act in ensuring that information is not disclosed to a foreign country in circumstances that could expose a person to the death penalty, and if there are any other relevant safeguards or guidelines; and
- what safeguards are in place to ensure that information would not be disclosed to a foreign country in circumstances that could expose a person to cruel, inhuman or degrading treatment or punishment.

Response

The note inserted at item 11 of Schedule 6 to the Bill makes it clear that the proposed amendments are not intended to alter or override the procedures applicable to the disclosure of information to foreign countries (for example, procedures under the *Mutual Assistance in Criminal Matters Act 1987* (the MACMA)). As the section applies to information, it only gives authorisation for the disclosure of this information pursuant to these procedures.

The particular amendments in Schedule 6 reinforce, and make no substantial changes, to the way in which information obtained under the POC Act is shared with foreign authorities. On that basis, these amendments do not further engage the right to life or prohibition against torture and other cruel, inhuman and degrading treatment or punishment.

If it was considered that these amendments in Schedule 6 do engage this right or prohibition, there are sufficient safeguards to ensure that the subject of a particular information-gathering request is not subject to the death penalty or cruel, inhuman or degrading treatment or punishment.

Death penalty safeguards

Subsection 8(1A) of the MACMA provides that a request by a foreign country for mutual assistance must be refused if it relates to the investigation, prosecution or punishment of a person arrested or detained on suspicion of, or charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

Special circumstances' is not defined in the MACMA. However, the Explanatory Memorandum to the Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996 (at paragraphs 60-61) provides that 'special circumstances' exist if the evidence sought is exculpatory or if the foreign country has given an assurance concerning the death penalty, for instance that it will not be sought, or if sought will not be imposed, or if imposed will not be carried out. The Federal Court in *McCrea v Minister for Customs and Justice* [2005] FCAFC 180 sets out the test for an acceptable death penalty undertaking. The test requires that the Attorney-General be satisfied that 'the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the death penalty would not be carried out'.

Where a mutual assistance request is received in circumstances where no person has yet been charged, arrested, detained or convicted of an offence that could result in the death

penalty (generally in the early investigatory stages), subsection 8(1B) of the MACMA covers cases where the Attorney-General believes that the provision of the assistance may result in the death penalty being imposed on a person. It gives the Attorney-General a discretion to refuse a request if the Attorney-General:

- believes that the provision of the assistance may result in the death penalty being imposed on a person; and
- after taking into consideration the interests of international criminal co-operation, is of the opinion that in the circumstances of the case the request should not be granted.

In addition, under paragraph 8(2)(g) of the MACMA, the Attorney-General has a discretion in all cases to refuse a request if 'it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted'. The MACMA also enables conditions to be placed on the provision of the assistance. This could include restricting the use of the material to investigation purposes, or requiring the country to seek the Minister's authorisation to use the material for the purposes of prosecuting a person.

Safeguards against cruel, inhuman or degrading treatment or punishment

Concerns about cruel, inhuman or degrading treatment or punishment are addressed through the Attorney-General's general discretion under paragraph 8(2)(g) of the MACMA to refuse mutual assistance where 'it is appropriate, in all the circumstances of the case'.

Serious forms of cruel, inhuman or degrading treatment or punishment are addressed through the requirement under paragraph 8(1)(ca) of the MACMA for the Attorney-General to consider torture as a mandatory ground of refusal. There is no definition of 'torture' in the MACMA. This ensures that in making a decision on whether to provide assistance, the Attorney-General is able to take a broad approach and take into account a number of considerations in deciding whether there is a risk of torture.

The Hon Dan Tehan MP
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Our Ref: MC20-025173

Senator the Hon Sarah Henderson
Senator for Victoria
Chair
Parliamentary Joint Committee on Human Rights
human.rights@aph.gov.au

13 OCT 2020

Dear Senator Sarah,

Thank you for your email of 24 September 2020 on behalf of the Parliamentary Joint Committee on Human Rights regarding the Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Bill 2020. I appreciate the time the Committee has taken to consider the Bill, and bring these matters to my attention.

These reforms do not change the ability of Australian students to access a tertiary education. Specifically, no Australian student is denied access to a tertiary education based on their ability to pay. In fact, the reforms will allow more students to access higher education from 2021. For this reason, the Australian Government does not consider that the Bill introduces retrogressive measures.

The Australian Higher Education Loan Program (HELP) is one of the most generous student loan schemes in the world. Access is not determined by age, income or background, and eligible students can participate in higher education without the barrier of upfront fees. Australian students also have access to a fair, accessible and transparent Australian income support system which ensures that the opportunity to study is not dependent on wealth.

The Job-ready Graduates package of reforms to higher education does not change this. No eligible student will be required to pay tuition fees up front and Australia's generous welfare system remains in place.

Student HELP loans will only be repaid, through the tax system, when the student is earning over $46,620 (in 2020–21). A person on the lowest repayment threshold (which starts at 80 per cent of the median earnings for Australian employees) will pay only $8.80 to $10.20 per week.

By global comparison, students in the United States of America do not generally have access to income contingent loans to defer fees. And while students in the United Kingdom can access income contingent loans, they incur a real interest rate once earning a reasonable wage, whereas HELP debts are only indexed by Consumer Price Index.

The Bill includes amendments to strengthen and extend student protection and provider integrity measures, as well as other compliance measures, to all higher education providers. Student protections measures, including quality and accountability requirements, were first introduced for non-university higher education providers in 2017 building on similar student protections in place in the vocational education and training sector following lessons learned from VET FEE-HELP. These measures are not about limiting access to education, but protecting students from debts they will likely never see the benefit of.

As universities are autonomous entities, established under state and territory legislation, they are required to ensure that all students are academically suitable for their course and that students are engaged with the course and maintaining a reasonable completion rate. This will ensure universities are supporting students to succeed in their degree. The low-completion measure will ensure students do not accumulate large debts without having a degree to show for it. Universities will have the ability to respond to individual circumstances if a student's studies have been impacted by factors outside their control, like ill health, or a bereavement. If a student transfers to another course the low completion rate will not be carried with them. This measure will only apply to students commencing courses that start after 1 January 2022.

A 2018 analysis of university enrolments indicated strengthening accountability requirements for universities would formalise best practices, while extending student protections measures. The Bill responds to evidence and the cases where students have been continuously enrolled at multiple providers at the same time, resulting in excessive HELP debts (at the most extreme, these debts ranged from $220,000 to more than $600,000 per individual) with very low pass rates (on average, passing one in five units attempted). This Bill will protect these students from building such substantial debts in the future.

These measures will be critical in maintaining the high quality of Australia's higher education sector, particularly at a time when the number of online students has increased as a result of COVID-19. Strengthening student protections in public universities will bring universities into alignment with non-university higher education providers, and strengthen quality and accountability in Australia's tertiary sector.

The new provisions requiring students who have attempted eight or more units to successfully complete more than 50 per cent of those units would affect 9,654 students, around two per cent of Commonwealth supported students. For most full-time students, this gives universities at least two study periods to identify struggling students and link them with existing support services, including potentially transitioning them to a course they are better-suited to complete.

The Bill will ensure every student in Australia can be confident that wherever they choose to study, they will be assessed as being academically suited to that study, their academic progress and engagement will be monitored throughout the course, and they will be prevented from incurring debt for study for which they are not suited. With the increase in online delivery of education as a result of the COVID-19 pandemic, it is more important than ever that we ensure student progress is actively managed.

The employment challenge presented by the COVID-19 pandemic demands changes in our education systems. This package incentivises students to pursue careers where the employment outcomes are better.

Students will always have the freedom to choose what they want to study—and because the Government continues to offer one of the world's best student loan schemes, no student will be denied a place because of their capacity to pay.

Graduates enjoy an income premium of around 60 per cent higher than those without tertiary qualifications. Nearly all gains in employment over the last 40 years (96 per cent) have been made by people with tertiary qualifications (Certificate III or higher). This trend is expected to continue. Furthermore, demand for higher education increases during economic slowdowns, and students are seeking job-relevant skills to help them enter or re-enter the workforce. The Government is responding to economic circumstances by ensuring students are ready for the labour market that lies beyond the pandemic.

The regionally focused measures announced in the package address the disparity between metropolitan and regional and remote students, whether they choose to relocate to study or stay in their local community. These measures are targeted to provide opportunities for regional and remote students to attend university, and to support additional investment in regional universities to boost regional development.

New growth funding will see funding allocated where the nation needs it most. It provides a 3.5 per cent boost to funding for regional campuses to address the gap in attainment. It provides 2.5 per cent additional funding per annum for campuses located in high-growth metropolitan areas, to allow those to grow in line with the population, especially in outer-metropolitan growth corridors. It provides 1 per cent growth funding per annum for other campuses to allow them to keep up with population growth in cities.

Providing a boost to funding for regional campuses responds to Recommendation 1 of the Napthine Review to '*improve access to study options for students in rural, regional and remote areas*.' The Napthine Review found regional and remote students had less access to tertiary education options in their local communities, and to increase university participation rates, revision of funding caps for university places would be necessary. Additional places will support the capacity of regional education institutions and, the communities they serve, in line with Recommendation 6 to 'strengthen the role of tertiary education providers in regional development and grow Australia's regions.'

The Bill lowers the cost of education in current female dominated careers like teaching and nursing. This lowers the cost of these important careers. The Bill also lowers the costs of science, technology, engineering, and mathematics (STEM) subjects, which will help to attract more women (and men) into these fields, particularly given the demand for STEM skills is high and will continue to grow as society tackles the challenges of a digital and technologically-enabled world. Contemporary data suggests women who elect to enrol in units relevant to the jobs of the future—STEM, health, and education – will be more employable and more likely to achieve higher lifetime earnings.

The choice to study STEM and health is increasing. Since 2014, growth in enrolments in STEM and health has been higher than the humanities for females and Indigenous Australians. This Bill further incentivises this choice.

The Napthine Review highlighted the increased challenges and very low higher education participation rates for Indigenous students in regional and remote areas.

In 2016, the participation rate for Indigenous students from regional and remote areas was 2.6 per cent, less than half the rate for all regional and remote students (5.3 per cent) and just over a third of the rate for people from metropolitan areas (7.3 per cent).

The Bill introduces demand driven funding for Aboriginal and Torres Strait Islander students from regional areas, when they are admitted to a bachelor-level place in their university of choice. In 2021, an additional 160 Aboriginal and Torres Strait Islander students from regional and remote areas are expected to benefit from this policy. This number is expected to rise to over 1,700 students by 2024.

This will enable universities to provide better support for Indigenous students by providing funding capacity that aligns with enrolment levels. It will also have flow-on benefits for Indigenous communities, including in remote locations, by providing professional services and other enterprises requiring a university educated workforce.

In addition to demand driven funding for regional and remote Indigenous students, from 2021, the Higher Education Participation and Partnerships Program (HEPPP) will be reformed to ensure Indigenous students receive greater support in accessing and succeeding in higher education.

For the first time, Indigenous students and students from regional and remote areas will be recognised as a target group in the distribution of access and equity funding through the HEPPP. The formula for distributing funding, which rewards university performance in meeting the needs of groups of students, will balance the barriers to education faced by low socio-economic status, Indigenous, and regional and remote students.

The Higher Education Support Amendment (Job-Ready Graduates and Supporting Regional and Remote Students) Bill 2020 Inquiry recommended that a review be conducted two years after implementation, the Government has accepted this recommendation. The same inquiry by the Senate Education and Employment Legislation Committee found:
'The bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in Section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011'.

The measures in this Bill do not constitute retrogressive measures to the right to education. The Bill retains the most important education safety-net, the HELP system. The Bill lowers the cost of education where the need for those skills will be intensified in the future—and it does this at the unit level, meaning the cost of a degree can be lowered by choosing key STEM-skills to enhance your future employability. The Bill supports student decision making, who, since 2014 have been enrolling in STEM and health degrees at a rate higher than humanities.

Thank you again for bringing your concerns to my attention.

Yours sincerely

DAN TEHAN

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
Cyber Safety and the Arts

MS20-000762

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator Sarah

Thank you for your email dated 24 September 2020, requesting advice about human rights issues identified by the Parliamentary Joint Committee on Human Rights in the Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020 (the Bill).

The Bill will amend the *Radiocommunications Act 1992* (the Act) to implement recommendations of the 2015 Spectrum Review (the Spectrum Review) and fulfil the Australian Government's commitment to modernise the legislative framework for spectrum management.

The Committee has sought further information on the Bill, in particular:

(a) whether the proposed civil penalties in Schedules 4 and 6 of the bill could apply to members of the public, including volunteers working under an organisation which holds a radiocommunications licence; and
(b) whether any of the civil penalties in Schedule 4 could be characterised as criminal for the purposes of international human rights law, and if so, how are they compatible with criminal process rights set out in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

I have set out some advice in response to the issues raised by the Committee in this letter. I welcome further debate on the provisions of the Bill, including discussion of these issues, as they are considered by the Parliament.

Civil penalty provisions in Schedules 4 and 6 of the Bill that apply to individuals

Schedule 4 of the Bill repeals and substitutes Part 4.1 of the Act which deals with the regulation of radiocommunications equipment and prohibitions regarding possession and use. The effective regulation of equipment is necessary to contain interference to radiocommunications, provide for the electromagnetic compatibility of equipment, and to protect the health and safety of individuals from adverse effects attributable to radio emissions.

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Schedule 4 of the Bill contains a number of civil penalty provisions that could apply to an individual in some circumstances. These provisions include:

- non-compliance with an interim ban on equipment related to the operation of such equipment in proposed section 170, and
- non-compliance with a permanent ban on equipment related to the possession or operation of such equipment in proposed section 176.

While these provisions can apply to individuals, the high levels of civil penalty available under section 176 would not apply until processes specified in the Bill had been undertaken. These include the Australian Communications and Media Authority (ACMA) issuing a permanent ban by legislative instrument, following public consultation, and the expiry of any amnesty period determined by ACMA, during which the individual would have the opportunity to forfeit the equipment without penalty. It is also expected that alternative enforcement options will generally be more appropriate in the case of non-compliance by individuals (discussed more below).

Schedule 6 of the Bill introduces a graduated set of enforcement tools to enable ACMA to take proportionate action in response to non-compliance with the provisions of the Act. As part of this, Schedule 6 introduces several civil penalty provisions and also repeals a number of the current criminal penalties and replaces these with civil penalty provisions where this provides a more appropriate response than a criminal sanction.

Schedule 6 also contains a number of civil penalties that could, in some circumstances, apply to an individual. These provisions include amendments to:

- section 46, which concerns the operation of a radiocommunications device without a licence,
- section 47, which concerns the unauthorised possession of a radiocommunications device, and
- section 197, which concerns reckless conduct that may result in substantial interference, disruption or disturbance to radiocommunications.

Sections 46 and 47 would not apply to individuals who were working for an organisation that holds an appropriate licence under the Act. Section 197 concerns conduct that can cause significant harm to radiocommunications and risks to health and safety.

The remaining civil penalty provisions in Schedules 4 and 6 to the Bill apply to either licensees or businesses that deal with radiocommunications equipment and, consistent with related advice in the Statement of Compatibility with Human Rights contained in the Explanatory Memorandum to the Bill, this class of persons can reasonably be expected to be aware of their obligations under the legislation.

Characterisation of the civil penalty provisions

Having regard to the aims, quantum, exemptions and broader regulatory context, I consider it is appropriate to conclude that these civil penalty provisions should not be regarded as criminal penalties for the purposes of human rights law.

The civil penalties in the Bill are intended to regulate conduct in a manner proportionate with reference to the regulatory context, and the nature of the regulated industry.

The civil penalty provisions, including the instances where a comparatively high civil penalty may be applied (for example, the proposed section 176), are designed to be commensurate with the potential harm caused in the form of disruption to radiocommunications and risks to health and safety from non-compliant radio emissions. The amount of the penalties is in line with similar penalties in regulatory regimes relating to product bans under the Australian Consumer Law (ACL) and the transportation of dangerous goods. Under the ACL, non-compliance with a product ban attracts the same amount of penalty for both the civil penalty and the offence.

The amount of the civil penalties was also determined based on the considerations set out in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, published by the Attorney-General's Department.

The Act will also provide suitable exemptions from these civil penalty provisions that are relevant to their characterisation as civil penalties for the purposes of human rights law.

Section 27 of the Act allows ACMA to determine that acts or omissions by a person performing their duties or functions in a specified organisation or in relation to defence, law enforcement or the response to an emergency are exempt from all or part of Parts 3.1, 4.1 or 4.2. This includes a person performing their duties as part of a fire-fighting, civil defence or rescue organisation. The proposed subsection 269(6) in Schedule 4 to the Bill also provides that a person is not liable to a civil penalty for conduct that is reasonable in response to an emergency.

In relation to members of the public, the Act provides for the exemption of persons from licensing provisions in the Act in circumstances where it is considered appropriate. For example, section 49 of the Act provides that a person operating a radiocommunications device in an emergency does not contravene the prohibitions in sections 46 and 47 requiring a person operating or possessing a device to have a licence.

In addition, the civil penalties are part of a graduated set of enforcement tools that also include infringement notices (which extinguish future liability and have a maximum penalty of 12 penalty units for individuals) and forfeiture notices (which extinguish future liability on the condition that non-compliant equipment is forfeited to ACMA). These additional tools are designed to assist ACMA to deal proportionately with lower level non-compliance with the Act, such as inadvertent contraventions by individuals.

In this context, I consider that the civil penalty provisions should not be characterised as criminal penalties for the purposes of human rights law.

Protection of criminal process rights

It is also important to note that the criminal process guarantees contained in the ICCPR are not limited by the provisions of the Bill. This includes the right to the presumption of innocence, the right to a fair trial and the right not to be tried twice for the same offence.

The right to a fair hearing is not limited by the Bill. The proposed section 269 in Schedule 6 to the Bill requires that the hearing must be by the Federal Court or the Federal Circuit Court of Australia, thus meeting the requirement for the hearing to be by a competent, independent and impartial tribunal established by law. Under section 82 of the Regulatory Powers Act, civil penalty orders can only be granted by a relevant court, which must consider all relevant matters before determining the amount of the penalty.

The right not to be tried twice for the same offence is also not limited. While a small number of provisions (for example, the proposed section 176) contain a penalty for an offence as well as a civil penalty, protections are in place through sections 88 and 89 of the *Regulatory Powers (Standard Provisions) Act 2014*. These sections apply to all civil penalty provisions in the Bill and mean that a civil penalty cannot be imposed by a court if a criminal penalty has already been imposed.

I would like to thank the Committee for its consideration of these reforms, which will improve and modernise the framework for spectrum management in Australia. I trust that the above information is of assistance to the Committee in its further consideration of the Bill.

Paul Fletcher

8 / 10 / 2020

SENATOR THE HON RICHARD COLBECK
Minister for Aged Care and Senior Australians
Minister for Youth and Sport

Ref No: MS20-001116

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

05 OCT 2020

Dear Chair Sarah,

Thank you for your letter of 24 September 2020 concerning the Sport Integrity Australia Amendment (Enhancing Australia's Anti-Doping Capability) Regulations 2020 (Amending Regulations) and the Sport Integrity Australia Amendment (World Anti-Doping Code Review) Bill 2020 (Code Review Bill).

I note the Parliamentary Joint Committee on Human Rights (Committee) has provided questions on both the Amending Regulations and Code Review Bill in its Report 11 of 2020. I have provided answers to the Committee's questions, however for clarity, I have provided additional background information on Australia's anti-doping arrangements and how they interact with the World Anti-Doping Code (Code) as this is pertinent to both issues.

Australia's anti-doping legislation gives effect to its international obligations under the UNESCO International Convention against Doping in Sport (Convention). The Convention requires State Parties to implement anti-doping arrangements that are consistent with the principles of the Code. The Code provides the framework for the operation of global harmonised anti-doping rules and processes. Australia's National Anti-Doping Scheme (NAD Scheme) – contained as Schedule 1 of the Sport Integrity Australia Regulations 2020 (Principal Regulations) – provides the legislative basis to ensure Australia remains compliant with its international obligations. As such, careful consideration is provided to the wording of Australia's legislation to maintain compliance with these international obligations, whilst respecting all requirements of our own parliamentary processes and legal requirements.

Sport Integrity Australia Amendment (Enhancing Australia's Anti-Doping Capability) Regulations 2020

As noted by the Committee in its Report, the *Sport Integrity Australia Act 2020* (SIA Act) provides that the NAD Scheme must authorise the Chief Executive Officer (CEO) of Sport Integrity Australia to publish information relating to assertions of possible violations of the anti-doping rules, if:

- the CEO of Sport Integrity Australia considers the publication to be in the public interest; the publication is required or permitted by the Code; or the athlete or support person to whom the information relates has consented to the publication
- the other conditions specified in the NAD Scheme are satisfied.

Division 4.4 of the NAD Scheme provides that the CEO of Sport Integrity Australia may only publish this information if one or more of the following applies:

a) a decision has been handed down by a sporting tribunal in relation to the assertion to which the information relates;
b) the athlete or support person has waived their right to a hearing
c) the athlete or support person has refused to recognise the jurisdiction of a sporting tribunal to conduct a hearing process in relation to the assertion to which the information relates
d) no sporting tribunal has jurisdiction to conduct a hearing process in relation to the assertion to which the information relates.

The Amending Regulations retain what was already in the Principal Regulations, but in doing so removes reference to where the athlete or support person has applied to have the decision reviewed by the Administrative Appeals Tribunal (AAT). This amendment is consequential to the *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020*, which removed the right of appeal to the AAT.

The Committee sought further information on the following:

a) the objective behind enabling the Commissioner to publish assertions of possible violations of anti-doping rules, and whether this is aimed at achieving a legitimate objective for the purposes of human rights law
b) how is the measure rationally connected to (that is, effective to achieve) that objective
c) if an athlete or support person does not recognise the jurisdiction of a sporting tribunal, or if there is no sporting tribunal with jurisdiction to determine the assertion, how would that athlete or support person challenge the assertion
d) whether the measure is a proportionate limitation on the right to privacy
In particular, is there any less restrictive ways to achieve the stated objective and are there any safeguards in place to protect the right to privacy.

As the Committee notes in its report at 1.187, the process for publishing assertions is not new. The Principal Regulations has historically included the same process and wording since 2008[1]. Throughout this time, the provisions were always considered a proportional limitation on the right to privacy. Given the provisions remain unchanged by the Amending Regulations, the issue was not addressed in the Statement of Compatibility with Human Rights.

Objective and rational connection of the measure

The objective of publication is to ensure the integrity of sporting competitions by enabling the global sporting community, and in particular sporting organisations, to accurately ascertain individuals who are ineligible to compete or perform any other official function (such as coach, or work in an administrative capacity) within sport.

[1] https://www.legislation.gov.au/Details/F2008C00525.

The measure ensures Australia meets publication requirements under 14.3.1 of the Code, with the additional publication requirements to accommodate scenarios where athletes or support persons fail to recognise the jurisdiction of the sporting tribunal, or no sporting tribunal has jurisdiction.

Sanctioned athletes who continue to compete in sport despite their ineligibility (generally because organisers may not be aware they are sanctioned) can prevent legitimate competitors from winning awards, accolades or prize money, creates an uneven playing field, and encroaches on the rights of clean athletes to compete in sport free from doping. In most cases, athletes have little recourse to retrieve lost earnings or accolades when such rewards are improperly awarded to sanctioned athletes who should not have competed. In addition, if athlete support persons who have committed an anti-doping rule violation are not publicised, they may continue to improperly influence athletes and others within the sporting community.

Publication of an assertion where the person does not recognise the jurisdiction, or there is no jurisdiction, is primarily a matter of public safety. For example, there may be a situation where a person meets the definition of 'support person' under the SIA Act, but has not signed a membership agreement with a sporting organisation to fall within a sporting tribunal's jurisdiction. If a criminal court were to convict that support person of trafficking an illegal substance, for example steroids, the CEO of Sport Integrity Australia should have the ability to alert sporting organisations that this particular support person has an assertion of an anti-doping rule violation for trafficking.

Likewise it is imperative to publish an assertion of an anti-doping rule violation where a person who has contractually agreed to anti-doping rules, including arbitration through appropriate hearing bodies, tries to avoid sanction or publication by refusing to engage in an arbitration hearing process. In both examples, the ability to publish the assertion is directly linked and proportional to protect the safety of other participants and the integrity of sporting events in Australia and potentially internationally.

The clauses currently included within the Principal Regulations allow the CEO of Sport Integrity Australia to meet the objective to protect sport and its participants through the publication of timely, clear and accurate information which is published and easy for relevant members of the sporting community to access.

How can an athlete or support person challenge an assertion?

In either situation identified by the Committee (non-recognition of the jurisdiction of a sporting tribunal, or no sporting tribunal with jurisdiction), an individual against whom a violation is asserted may challenge the assertion through judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In addition to judicial review, a person may make a complaint to the Commonwealth Ombudsman.

In the case where an athlete or support person does not recognise the jurisdiction of a sporting tribunal it is important to understand that international anti-doping arrangements are structured to ensure athletes and support personnel agree to the jurisdiction of the relevant tribunal when they enter into a contractual arrangement with the sport (usually a membership agreement) and agree to abide by the anti-doping rules of the sport. The ability for the CEO of Sport Integrity Australia to publicly disclose details of the assertions if an athlete or athlete support person simply refuses to cooperate with the established process they have contractually agreed to is required to ensure Australia remains compliant with its obligations to the Code.

Whether the measure is a proportionate response

The measure is a proportionate response when seeking to ensure other members of the sporting community are not adversely affected by the actions of a person who is asserted to have committed an anti-doping rule violation, but has avoided the proper hearing process. To ensure the proportionality of the measure, the long-standing practice of Sport Integrity Australia, and the former Australian Sports Anti-Doping Authority, is to remove the publication once the athlete or athlete support person's period of ineligibility has, or would have, expired. This ensures the publication does not last beyond the intended objective.

Sport Integrity Australia Amendment (World Anti-Doping Code Review) Bill 2020

As outlined in the Committee's report, section 68E of the SIA Act provides that the CEO of Sport Integrity Australia may disclose protected information relating to an athlete or support person if public comments have been 'attributed' to the athlete or support person or their representative, and the disclosure is for the purposes of Sport Integrity Australia responding to the comments.

Protected information is defined in the SIA Act as information that was obtained for the purposes of the SIA Act or a legislative instrument made under the SIA Act; relates to the affairs of a person (other than an entrusted person); and, identifies, or is reasonably capable of being used to identify, that person.

The Code Review Bill seeks to amend the SIA Act to allow the CEO of Sport Integrity Australia to also disclose protected information if public comments have been 'based on information provided by' the athlete, support person or their representative, and also by a relevant 'non-participant'.

The Committee sought further information on the following:

a) whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law, and how it is rationally connected (that is, effective to achieve) that objective
b) whether the measure is a proportionate limitation of the right to privacy, in particular whether this is the least rights restrictive way to achieve the stated objective, and whether there are any safeguards in place to help protect the right to privacy
c) what type of information is likely to be disclosed in order to respond to comments based on information provided by an athlete or other relevant person.

As noted in the explanatory memorandum, the Code Review Bill implements the approved revisions to the Code set to commence on 1 January 2021. It applies the relevant legislative changes to ensure Australia remains compliant with its international anti-doping obligations under the Convention. The proposed amendments, specifically in Schedule 1, Item 24, directly reflect the wording of the revisions to Article 14.3.6 of the Code, which allow an anti-doping organisation to respond:
"...to public comments attributed to, or based on information provided by the Athlete, other Person or their entourage or other representatives."

All provisions of the Code are mandatory in substance and must be followed as applicable. The issue of publication and the ability to respond to public comments (either attributable to a person, or based on information by that person) reflect a mandatory guiding principle of the Code. If the mandatory guiding principle on this issue is not reflected in Australia's anti-doping framework there is a risk that the World Anti-Doping Agency may take compliance action against Sport Integrity Australia, where possible consequences include Australia's exclusion from hosting or bidding for major sporting events, and exclusion of Australian athletes from international sporting competitions.

Objective of the measure

A key objective of the Code is to ensure the anti-doping system (designed to protect athletes' right to fair competition) is respected and protected. This is reflected in the proposed measure relating to public comment in the Code Review Bill. Where information, and particularly misinformation, is released by the athlete or their representative, or in the case of the amendment, based on information *provided* by that person, the CEO of Sport Integrity Australia must have the ability to respond to ensure that accurate and truthful information is available to the public. This is crucial to preserve the integrity of the anti-doping system. While there is no obligation to comment, the opportunity to provides the CEO of Sport Integrity Australia with an avenue to provide factual corrections where incorrect information, particularly in the media, threatens to undermine the process, the perception of fairness, or the rights of athletes.

Proportionality of the measure

Section 68E, as amended by the measure, remains proportionate and safeguards the privacy of the participant or non-participant as any public response by the CEO of Sport Integrity Australia is restricted to the subject matter of the information released by the athlete, their representative or someone associated with them. Importantly, it does not give the CEO of Sport Integrity Australia scope to comment on any or all aspects of the case, and the CEO of Sport Integrity Australia may not initiate the comment – only respond. Other than not responding at all, which could result in public circulation of information which is misleading and potentially harmful, there is no less restrictive way to achieve the objective and comply with the mandatory guiding principle of the Code.

What type of information is likely to be disclosed?

At paragraph 1.194 the Committee raises concern at several hypothetical examples or types of information which the CEO of Sport Integrity Australia may disclose, including the use of medication or intersex status of the athlete to a sports doping allegation. In direct response to the example provided, it is important to note that the intersex status of an athlete has no part to play in the anti-doping process. Whilst it is a topic currently challenging sport and sporting organisations, the issue of intersex and transgender athletes is not within scope of anti-doping organisations and therefore is not a matter the CEO of Sport Integrity Australia is permitted to disclose (if it was even known at all) under this measure. Rather, concerns around intersex athletes relate to participation issues that are for sporting organisations to determine.

Noting the measure only extends the situations in which the CEO of Sport Integrity Australia can comment, and does not expand the parameters of the public comment as it presently stands, the most likely information disclosed would include the name of the athlete or athlete support person, and the factual status of the process to determine an alleged anti-doping rule violation. For example, this may include claims regarding the sample collection process, or status of the B sample testing and the disciplinary process. Where a matter involves an adverse analytical finding, it is possible the type of information confirmed by the CEO of Sport Integrity Australia (in response to public comment) will include the prohibited substance the athlete is alleged to have used (as opposed to details relating to personal medications or medical treatment).

Thank you for the opportunity to provide clarification on the matters the Committee has raised and to highlight that both are legitimate objectives representing proportionate limitations on the right to privacy.

Yours sincerely

Richard Colbeck