Responses from legislation proponents — Report 4 of 2020[1]

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THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: MS20-000279

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

Sarah,

Dear Senator Henderson

Thank you for your letter dated 6 Febrary 2020 requesting my response in relation to the human rights compatibility of the Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019.

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 03/03/20

Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019

The Parliamentary Joint Committee on Human Rights' (**the Committee's**) *Report 1 of 2020* has identified that item 125 of the Bill, which inserts new section 400.10A into the *Criminal Code Act 1995*, may engage the right to a fair trial and fair hearing in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 14(1) provides that:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charges against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Section 400.10A provides that money or property provided by a law enforcement participant in a controlled operation or civilian participant acting under the direction of a law enforcement officer does not need to be proven to be the proceeds of crime for the purposes of the money laundering offences under sections 400.3-400.8 of the *Criminal Code Act 1995*.

Section 400.10A may engage the rights in Article 14 of the ICCPR to that extent that covert law enforcement operations may limit a person's rights to a fair trial or a fair hearing if such operations amounted to incitement or entrapment.

To assess the compatibility of section 400.10A with the right to a fair trial in Article 14, the Committee has requested additional information (at paragraph 1.11) on:

- whether there are adequate procedural safeguards in place to prevent covert law enforcement operations from amounting to entrapment
- whether there is any independent oversight, or rights of review, in relation to the conduct of covert law enforcement operations, and
- whether there are any limits on the admissibility of evidence provided by a law enforcement or civilian participant in the context of a controlled operation, in relation to the prosecution for a proceeds of crime offence, if the conduct of such operation were to amount to incitement.

These queries relate to the operation of the controlled operations scheme under Part IAB of the *Crimes Act 1914* (**Crimes Act**). In response to these queries, I have provided the information below.

Procedural safeguards to prevent entrapment

The controlled operations regime has strong protections to prevent it from being used to induce an individual into committing a criminal offence.

As acknowledged by the Committee (at paragraph 1.7), an authorising officer must not grant an authority to conduct a controlled operation unless the authorising officer is satisfied on reasonable grounds that the controlled operation will not be conducted in such a way that a person is likely to be induced to commit a Commonwealth offence or an offence against a law of a State or Territory that the person would not otherwise have intended to commit (see paragraph 15GI(2)(f) of the Crimes Act).

The Committee has raised concerns that this threshold requirement appears to be overly broad and has requested further information. The term 'reasonable grounds' ensures that authorising officers may only approve a controlled operation where there are objectively reasonable grounds for finding that the threshold requirement under paragraph 15GI(2)(f) is met. It is also open to an authorising officer to request additional information from the applicant under subsection 15GH(5) and attach conditions to an authority to conduct a controlled operation under subsection 15GI(1).

As part of a controlled operation, a participant will only be protected from criminal responsibility for an offence committed in the course of the operation, and be indemnified from civil liability, where the conduct does not involve the participant intentionally inducing a person to commit a Commonwealth offence or an offence under a law of a State or Territory that the person would not otherwise have intended to commit (subsections 15HA(2)(c) and 15HB(c)). This ensures that a participant who induces an individual is not protected from criminal responsibility or civil liability.

Agencies that conduct controlled operations also have robust procedures to ensure that entrapment does not occur. Participants are required to complete regular education and training in relation to their legal responsibilities, and receive guidance materials and advanced training in avoiding circumstances of entrapment. All controlled operation applications are comprehensively reviewed before authorisation is sought or granted, and the principal law enforcement officer responsible for the conduct of the controlled operation monitors the process to ensure that participants only act in accordance with their relevant authorisation.

An appropriate authorising officer may, at any time and for any reason, cancel an authority to conduct a controlled operation (section 15GY). This cancellation must occur if any of the matters in section 15GI can no longer be satisfied, including that a person is likely to be induced to commit an offence.

These procedural safeguards support the right to a fair trial and a fair hearing by ensuring that controlled operations are only authorised where there are reasonable grounds for believing that a person will not be induced to commit an offence they would not otherwise have committed and by providing that a participant is not protected from criminal or civil liability if they do act in a way which induces a person to commit an offence.

Independent oversight

Controlled operations are subject to the independent oversight of the Commonwealth Ombudsman.

In its oversight role, the Ombudsman has the power to inspect the records of the Australian Federal Police (**AFP**), the Australian Criminal Intelligence Commission (**ACIC**) and the Australian Commission for Law Enforcement Integrity (**ACLEI**) at any time (see section 15HS of the Crimes Act) and obtain relevant information from any law enforcement officer, including an officer from an agency other than the AFP, the ACIC or ACLEI (see section 15HT). It is an offence to fail or refuse to give information to the Ombudsman or answer questions asked by the Ombudsman under section 15HU.

The chief officers of the AFP, ACLEI and the ACIC (as defined at section 15GC) are also required, under section 15HP, to keep a copy of all formal variation applications and authorisations (amongst other documents). If the Ombudsman finds any irregularity in these documents, the Ombudsman is able to report these concerns to the Minister. In addition, these chief officers must report every six months to the Ombudsman and the Minister on all controlled operations authorised by their agency during the previous six months, and the Ombudsman may require the chief officer of an authorising agency to give additional information covering any controlled operation to which a report relates.

Under section 15HO, the Ombudsman is required to prepare an annual report as soon as practicable after 30 June each year on the work and activities of the Ombudsman under Part IAB of the Crimes Act. The Minister must cause a copy of the report to be tabled in Parliament within 15 sitting days of receiving the report.

Rights of review

Individuals who are affected by the conduct of controlled operations will have the right to seek independent review.

The decision to authorise a controlled operation is an administrative decision, and can therefore be subject to judicial review under section 75(v) of the Commonwealth Constitution or section 39B of the *Judiciary Act 1903*.

Under section 15HF the Commonwealth is liable to pay a person compensation for any loss or serious damage to property, or personal injury, incurred in the course of, or as a direct result of a controlled operation authorised under Part IAB of the Crimes Act.

Furthermore, a controlled operation will not protect a participant from civil or criminal liability if they engage in conduct that:

- is intended to entrap a person
- is not in accordance with the authority to conduct the controlled operation
- is likely to cause the death of, or serious injury to, any person, or
- involves the commission of a sexual offence against any person.

If a participant engages in any of the above prohibited conduct, the protection from criminal responsibility and indemnification from civil liability will not be available (see sections 15HA and 15HB). These measures support the right to a fair trial and a fair hearing in Article 14 of the ICCPR by ensuring that a decision to authorise a controlled operation can be reviewed and that if a participant engages in prohibited conduct, they may face civil or criminal penalties for that conduct, and a person who suffers loss as a result of a controlled operation is able to seek compensation for the loss.

Limits on admissibility of evidence in cases of entrapment

If a participant in a controlled operation engages in conduct which is outside of, or contrary to, the terms of a controlled operations authority, such conduct will not be 'controlled conduct' for the purposes of the controlled operations scheme. Any evidence obtained as a result of such conduct will therefore be subject to the general laws of evidence (see section 15GA of the Crimes Act).

Evidence that is obtained improperly or illegally in contravention of Australian law, or as a consequence of such impropriety or illegality, must not be admitted into evidence by a Court unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence (see section 138 of the *Evidence Act 1995* (Cth)). Where a participant in a controlled operation intentionally induces a person to commit a Commonwealth, State or Territory offence that the person would not otherwise have intended to commit, such conduct will be in clear contravention of the controlled operations authority. Any evidence obtained as a result of such conduct is therefore likely to be excluded by a Court in exercise of its discretion. This discretion, together with the strict limits placed on 'controlled conduct' by the controlled operations scheme, provides courts with the

proper authority to ensure that an accused person receives a fair trial, supporting the rights in Article 14 of the ICCPR.

Right to a fair trial and fair hearing

While controlled operations amounting to entrapment could engage and limit the right to a fair trial and a fair hearing, there are sufficient procedural safeguards to prevent incitement and entrapment. Combined with the deterrent of civil and criminal penalties and the overarching discretion of the courts regarding the admissibility of evidence, these safeguards ensure that the bill does not limit the right to a fair trial or a fair hearing in Article 14 of the ICCPR.

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

Ref No: MC20-001933

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Senator for Victoria
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28 FEB 2020

Dear Senator Sarah,

Thank you for your correspondence of 6 February 2020 concerning the Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019 and the Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019.

Please find below my response to the request for information contained within the Parliamentary Joint Committee on Human Rights *Report 1 of 2020*.

Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability Bill) 2019

The Committee seeks further information on the following issues in connection with the Bill:

- what, if any, oversight would apply to the CEO's decision to issue a disclosure notice, noting that the Bill seeks to remove the need to have the agreement of three members of the Anti-Doping Violation Panel (ADRVP)
- whether there are other, less rights restrictive, measures for investigating doping related matters when the CEO suspects (but does not yet believe) contravention may have occurred
- the nature of the information, documents or things that may be required to be provided pursuant to a disclosure notice.

Oversight of the notice decision

Issuing a disclosure notice involves an administrative decision. As such, it is subject to judicial review and is open to challenge in the same way as the coercive powers available to various bodies entrusted with the investigation of matters in the Commonwealth interest. Moreover, the Chief Executive Officer of the Australian Sports Anti-Doping Authority (ASADA) appreciates every step taken in an investigation is liable to be subject to scrutiny in any court or tribunal proceedings (including the new National Sports Tribunal).

It is also open to an aggrieved recipient of a notice to complain to the Commonwealth Ombudsman if there is any suggestion of the notice powers not being used properly. The Ombudsman would be able to access any information relevant to the ASADA decision.

This level of review and scrutiny is typical in relation to the various bodies given coercive powers to perform their investigative functions. It is proportionate in those cases and there is nothing to suggest it is insufficient or disproportionate in relation to ASADA. I am advised there does not appear to be any investigative body with a power to issue production notices that is required to seek external endorsement of the reasonableness of the issuing officer's state of mind in issuing a notice. The existing situation appears unique and is, on reflection, unnecessary.

If anything, the role of the ADRVP in this respect imposes a disproportionate and unnecessary administrative burden on the investigative process, given the very limited value added by it in a practical sense. The ADRVP does not consider the merits of the decision generally to issue a notice in a given case. It merely considers whether the CEO's assessment as to the prospect of the recipient of the information *having* relevant information, documents or things is *reasonably* made. That is a limited matter for investigative judgment. It does not require an additional layer of approval by convening three members of an expert panel established for a different purpose. With the adoption of a threshold of suspicion, rather than belief, there will be even less reason to query the reasonableness of the CEO's judgment in this very narrow respect.

The fact it has been decided to discontinue the other functions of the ADRVP provides a timely opportunity to remove this unnecessary step in the investigative process.
As mentioned, I am advised there appears to be no equivalent requirement in comparable investigative powers. It is unnecessary and counter-productive to impose another body into what should be a relatively routine investigative process entrusted to the ASADA CEO.
The existence of the standard review mechanisms applying in relation to other agencies ensure the notice power is exercised reasonably in any event.

There are no effective alternatives

The effectiveness of conventional 'drug tests' in combating sports doping in an increasingly sophisticated environment is limited. In recommending the change to the threshold for issuing disclosure notices, the *Review of Australia's Sports Integrity Arrangements* (Wood Review) found intelligence-led investigations are indispensable in the detection of doping incidents and programs. Disclosure notices are a critical feature of ASADA's intelligence-led approach.

Self-evidently, if relevant information can be obtained effectively without resort to a notice, then ASADA investigators will do so. The overwhelming majority of information relied on by ASADA is obtained without a disclosure notice.

But, once a credible intelligence lead is collected or developed, it is imperative it is resolved effectively and efficiently, without prejudicing an investigation or prejudicing interests of any stakeholders. The capacity to require relevant information before a credible allegation or indication of a threat develops to the 'belief' threshold is vital. Information and evidence needs to be collected at an early stage and it is in no-one's interests for unresolved risks to sports integrity to fester for lack of information before an informed assessment can be made about them.

Disclosure notices are an important part of ASADA investigations on several levels. The sophistication and capability of those involved in sports doping is increasingly challenging to combat. Simply asking for information voluntarily from a person suspected of being complicit in, or sympathetic to, doping activity may be met with a refusal and alert those concerned to the investigation, providing an opportunity to destroy or conceal relevant evidence.

Reliance on a notice in appropriate cases also allows ASADA investigators to obtain key information quickly, including to corroborate or test information provided by whistle-blowers or others who come forward in a way best protecting the confidence and privacy of those persons. In some cases, where relevant information is held by non-suspects, those persons prefer to provide the information in response to a notice rather than volunteering it, because of the protections coming with responding to a legal obligation.

A disclosure notice is less intrusive than other powers of investigation, such as search warrants, which allow the use of force to trawl through premises in search for something relevant. They require specification of the relevant information, documents or things to be produced. The point of the notice process is to enable access to relevant information in a way that advances the investigation and protects the interests of all concerned.

If a person does not have the information the CEO suspects they hold, then there will be nothing to produce. If it transpires information produced is not relevant to the investigation then there are strict secrecy provisions applying to its further use or disclosure. However, the objective of the notice regime would be defeated if other methods of investigation had to be attempted first. Investigations would be compromised and evidence would be lost. Attempts to resolve allegations or indications of doping would need to proceed in an indirect and protracted manner, increasing the risks to the individuals who come forward with information needing to be tested or corroborated and offering those who are complicit in doping activity an opportunity to evade detection.

The nature of the information, documents or things

In a practical sense, the information, documents or things required to be produced under a notice is determined by their relevance to the National Anti-Doping Scheme. And, while relevance can only be determined case by case, given the serious and sophisticated nature of the sports doping threat a wide variety of information, documents or things may prove to be relevant.

There are restrictions on even relevant information able to be sought. In particular, a notice can only be given to a medical practitioner if the CEO of ASADA has declared in writing the practitioner is reasonably believed to be involved in the violation under investigation. However, within those restrictions, the relevance of particular information, documents or things will turn on the threat under investigation.

In some cases, a notice might be used to require the production of something going to the heart of an investigation. It may, for example, require the production of a vial of a prohibited substance in the person's possession. Of course, if the person does not have that thing, then there will be nothing to produce in answer to the notice.

In other cases, information might be sought to develop an intelligence led investigation. Records held on communications devices evidencing contact or communications between a person complicit in doping activities and particular athletes or support persons would be an example. And records of internet searches demonstrating athletes or support persons seeking information at relevant times as to how long certain prohibited drugs remain in their system have been used in anti-doping proceedings.

Records from third parties can also be vital. Information about financial transactions or orders relating to the purchase of prohibited substances can be obtained pursuant to a disclosure notice.

Again, ASADA understands its practices in this respect to be consistent with those of other agencies with similar coercive powers. The proposed amendments do not affect the nature of the information, documents or things required to be produced.

Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019

At paragraph 1.33 of Scrutiny Digest 1/20, the Committee requested '[my] advice as to the matters set out at paragraph [1.32]'. Paragraph 1.32 reads as follows:

1.32 More information is required in order to assess the compatibility of this measure with the right to privacy, in particular:

- the legitimate objective that the measure seeks to address (including any reasoning or evidence that establishes that the objective addresses a substantial and pressing concern)
- the type of information it is anticipated that Sport Integrity Australia would obtain and/or share in addressing threats to 'sports integrity' (including what investigations are likely to be conducted by Sport Integrity Australia in relation to the abuse of children and any bullying, intimidation, discrimination or harassment in a sporting environment)
- whether there are any other, less rights restrictive, methods to achieve the stated objective
- whether an eligible data breach would be required to be notified once any prejudice to an enforcement related activity has ceased
- what safeguards would protect the privacy of personal information which Sport Integrity Australia could share (including with overseas entities).

Legitimate objective

The Wood Review recommended the proposed National Sports Integrity Commission (Sport Integrity Australia) be made an enforcement body for the purposes of the *Privacy Act 1988* (Privacy Act) (at p 172). This recommendation was in the following terms:

> *That the...[NSIC]...be authorised to deal with information captured by the Privacy Act, and have the ability to collect and use 'sensitive information' about a person without consent. The NSIC be designated as a law enforcement agency to have the confidence of international and Australian law enforcement agencies as both a receiver and provider of personal information, and material alleging criminality.*

In recommending the establishment of a national sports integrity body, the Wood Review described it as being: (at 175)

> *...the central point for overseeing the full range of integrity issues and challenges including collecting, assessing and disseminating relevant intelligence to policing and law enforcement agencies and NSOs, and other relevant organisations as may be appropriate. It would have extra functions in supporting sporting bodies in the development of their own integrity requirements and capabilities, including education and training. It would also have a strategic risk assessment role in relation to risk levels and threats in individual sports and of their capacity to manage those risks or threats, in line with the...approach mentioned earlier in this report.*

Consistent with the recommendation and observations of the Wood Review, Sport Integrity Australia's cannot achieve its functions in a vacuum. It is vital there be seamless communications between relevant stakeholders, including between Sport Integrity Australia, regulators and existing law enforcement agencies.

Serious criminal activity is fundamental to at least some of Sport Integrity Australia's responsibilities, for example, match-fixing and organised crime elements of sports doping, among other things. That said, other elements of threats to sport integrity do not necessarily involve criminal behaviour and fall outside of the functions and responsibilities of conventional law enforcement agencies. In one sense, a key role of Sport Integrity Australia will be to bridge that gap.

By exchanging information seamlessly with a wide range of sources, including sports organisations and other entities, Sport Integrity Australia will be able to identify patterns and matters relevant to detecting threats to sports integrity.

There is a rational connection between these legitimate objectives and designating Sport Integrity Australia to be an enforcement body for the purposes of the *Privacy Act 1988*. Most relevantly in this context, the effects of making Sport Integrity Australia an enforcement body include:

- the capacity to be given information that is reasonably believed to be necessary for one or more of Sport Integrity Australia's enforcement related activities
- permitting Sport Integrity Australia to collect sensitive information about a person who may be subject to its enforcement related activities. In many cases, it would defeat the purpose of Sport Integrity Australia's functions if suspects had to be informed they had come to Sport Integrity Australia's notice
- permitting Sport Integrity Australia to exchange information effectively with overseas enforcement bodies, consistent with exchanges with existing Australian enforcement bodies.

These effects would only apply in relation to Sport Integrity Australia's enforcement related activities. They would have no application to other activities conducted by Sport Integrity Australia. On that basis, the effect of this measure is limited and proportionate to the overall objective.

Sport Integrity Australia's enforcement related activities

It is anticipated Sport Integrity Australia's enforcement related activities will focus on detection and intelligence gathering relevant to threats to sports integrity. As explained, in some cases those threats could involve possible criminal conduct. It could also involve misconduct of a serious nature within the terms of the definition of 'enforcement related activity' in s 6(1) of the *Privacy Act 1988*.

Inevitably, this will involve the exchange of personal information, and in some cases, sensitive information. It remains the case information can only be provided by an APP entity to Sport Integrity Australia where it is reasonably necessary to do so for the purpose of one of Sport Integrity Australia's enforcement related activities. It is not an unconstrained authority to share information with Sport Integrity Australia. It is a proportionate means of achieving the legitimate objective discussed above for the *Privacy Act 1988* to enable provision to Sport Integrity Australia of this limited class of information.

It is not anticipated those activities would ordinarily include Sport Integrity Australia's functions in relation to matters involving, for example, less serious behavioural issues.

Type of information Sport Integrity Australia is anticipated to receive and/or share

Sport Integrity Australia's key role in this respect is detecting activities requiring an enforcement response. To do this, it requires timely access to information from all areas of the sports environment relevant to integrity threats, to enable it to respond effectively, before a threat is realised. There can be a fine line between indicators apparent in sporting code of conduct matters and those developing into grave threats to the integrity of Australian sport, potentially doing irreparable damage to the reputation of Australian sport. Where criminal activity is disclosed, ordinarily a prosecution response by a law enforcement agency will take its course, but in the event relevant conduct is not proved to the criminal standard, it may still be necessary for Sport Integrity Australia to facilitate action involving the sport's controlling body or by others.

For example, in its enforcement activity of detecting criminal activity or serious misconduct, potentially crucial information could come from one or more sources indicating the integrity of a sporting event will be, or has been, compromised. It could start with something as simple as detection of suspicious betting patterns, followed by separate reports of suspicious conduct in the sporting arena and intelligence from a separate source about organised crime figures suggesting they are corrupting sporting events, or involved in the supply of prohibited substances to elite athletes. Enabling Sport Integrity Australia to deal with differing sources of information such as these will enable a more effective response to sport integrity threats.

Links between organised crime and drugs in sport are well reported and, in some cases, high profile investigations have ultimately been resolved by disciplinary action within the sporting codes, because there was insufficient evidence for criminal prosecutions.
For this reason, it is important Sport Integrity Australia has the capacity to traverse the discrete areas of the sports environment, for example sporting bodies, wagering bodies, the pharmaceutical industry, regulators and law enforcement.

Consistent with Sport Integrity Australia's overall purpose, it will have the ability to disclose information to law enforcement and/or sports and/or regulators from time to time. Where the information is protected by separate secrecy provisions, then any disclosure by Sport Integrity Australia would need to be consistent with those laws. Similarly, if another body gives Sport Integrity Australia information on condition it not be further disclosed or used for other purposes, then Sport Integrity Australia would be obliged to respect those conditions in the usual way.

Other, less restrictive methods to achieve stated objective

As implicitly recognised by the recommendations of Wood Review, this is a necessary step to achieve the stated objective.

As discussed above, the designation of Sport Integrity Australia as an enforcement body will be relevant only to the extent Sport Integrity Australia engages in its enforcement related activities.

Eligible data breaches

This exception applies only to the extent notification to a subject would prejudice Sport Integrity Australia's enforcement related activities. It is not a general exemption from the data breach notification obligations.

Noting this notification obligation could affect investigations being conducted by agencies other than Sport Integrity Australia, it is appropriate and important this provision apply. A decision about further disclosure to an affected individual would be a matter for the Sport Integrity Australia CEO, taking into account the circumstances existing at the time.

The report also suggests Sport Integrity Australia, as an enforcement body, would not be required to give a person access to their personal information where to do so would be likely to prejudice one or more enforcement related activities conducted by Sport Integrity Australia. It suggests APP 12.3(i) is the source of that exception. I am advised APP 12.3 would have no effect on Sport Integrity Australia's obligations in this respect, because, as an agency, the applicable obligation falls under APP 12.2, which does not distinguish enforcement bodies from other agencies.

If access to personal information held by an organisation would prejudice enforcement activities conducted by or on behalf of Sport Integrity Australia, then the exception in APP 12.3(i) would be engaged. For the reasons outlined above, this is appropriate and necessary, so as not to undermine Sport Integrity Australia achieving its lawful objectives.

Safeguards to protect privacy of information shared with overseas entities

The Wood Review noted, by way of example of a match-fixing case in the Victorian Football Premier League, the transnational character of corruption. It was evidenced in this case by the corruption of players in a Victorian club involving athletes imported from the United Kingdom, Australian support staff and an international criminal syndicate based in Singapore and Hungary.

In a sporting sense, Australia is not an island. Most major sports have an international element and elite athletes train and compete overseas. Further, betting on Australian domestic sports is widespread internationally.

If it is accepted Sport Integrity Australia has a role in address threats to sports integrity, it is important Sport Integrity Australia is able to deal with its overseas counterparts on an equal footing in this vital area of exchanging information relevant to sport integrity threats with overseas bodies performing enforcement functions.

Thank you for raising this matter.

Yours sincerely

Richard Colbeck

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: IS20-000014

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 13 February 2020 requesting my response in relation to the human rights compatibility of the *Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019*.

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. I appreciate the extension until 6 March 2020 in which to provide the response.

Yours sincerely

03/03/20.

PETER DUTTON

Response to the Parliamentary Joint Committee on Human Rights – Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019

1.12 In order to assess whether the regulations, in providing for the expansion of the use of body scanners at domestic airports constitute a permissible limitation on the rights to privacy and freedom of movement, further information is required as to:

- **the nature of the image that would be produced by the body scanners which would be used in domestic airports (the provision of an example image would be most useful to illustrate this);**

In accordance with section 44 of the *Aviation Transport Security Act 2004,* a body scanner used for aviation security screening must only produce a generic image that is gender-neutral and from which an individual cannot be identified. The generic image (examples below) do not show specific anatomical detail or identifying information of the individual being screened. The image is the same for each person. Automated body scanner detection software identifies locations on the person that may require further investigation by a screening officer. These markers are generic and do not reveal the nature of the concern. As such, to the extent that a generic, non-specific image engages and limits the right to privacy in Article 17 of the *International Covenant on Civil and Political Rights*, the limitation is reasonable and proportionate to the legitimate objective of enhancing aviation security.

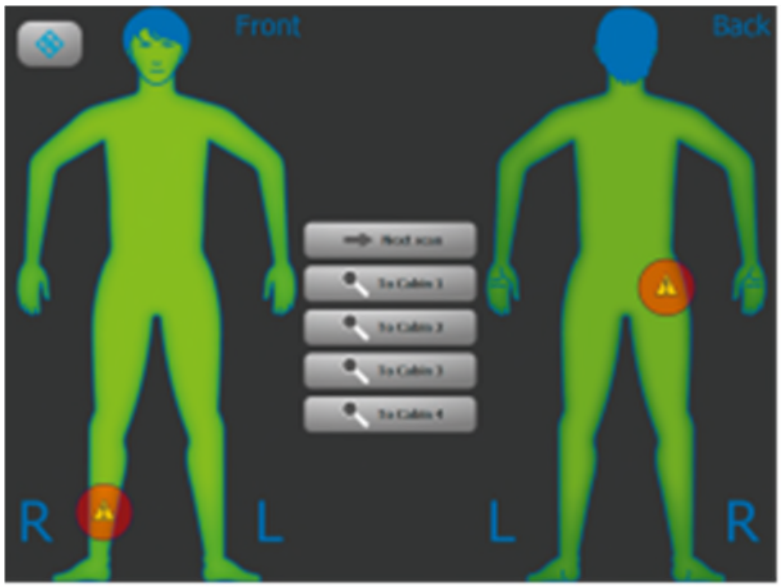

Image provided by Rapiscan Systems:
Rohde & Schwarz QPS 201 body scanner

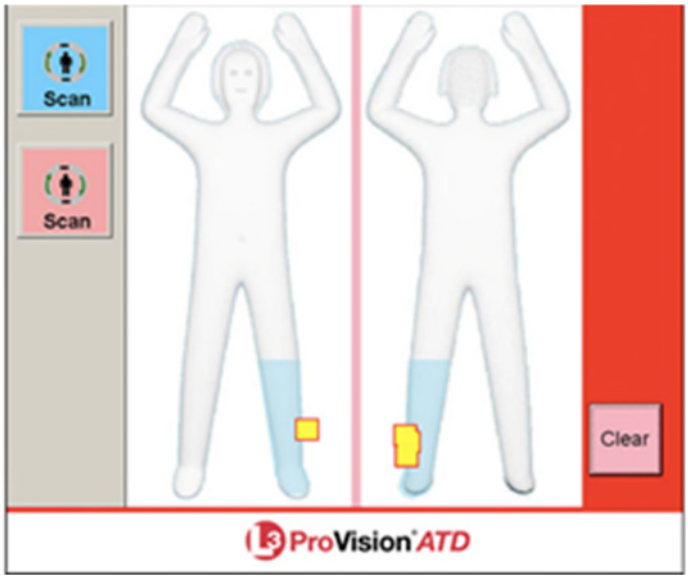

Image provided by L3 Harris: ProVision body scanner image.

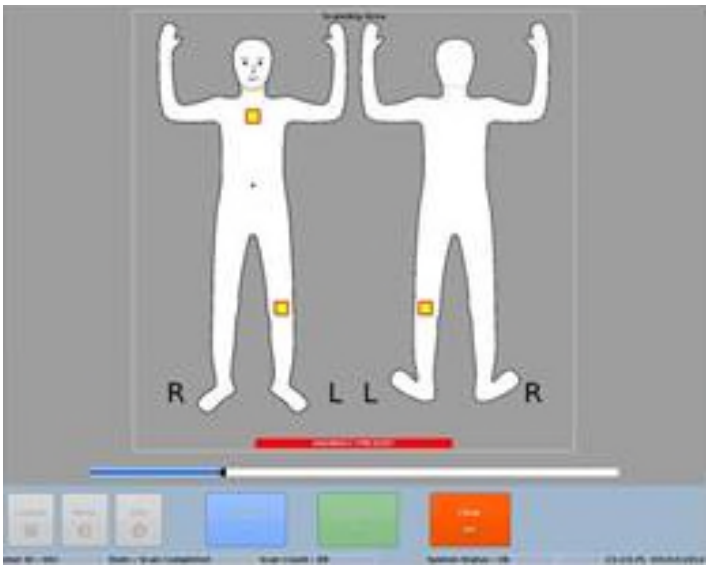

Image provided by Smiths Detection: eqo body scanner image.

- **evidence of the effectiveness of body scanner devices in detecting non-metallic improvised explosive devices and other weapons, including those which walk-through metal detectors cannot detect, and whether other existing security screening processes, including pat-downs, could also detect such devices and weapons;**

Equipment detection standards, which outline the effectiveness of body scanners, are classified and cannot be made public for national security reasons.

Based on testing and certification undertaken by United States Department of Homeland Security Transportation Security Administration (http://www.dhs.gov/science-and-technology/transportation-security-laboratory) and the European Civil Aviation Conference (https://www.ecac-ceag.org/security), the body scanners used at Australian airports are the

most advanced passenger screening technology available. Testing undertaken by these international bodies has proven that these systems are capable of detecting a range of sophisticated threats that other screening technologies, such as a walk-through metal detector cannot. These threats include non-metallic improvised explosive devices, weapons and prohibited items. Australia's current security environment is such that we are vulnerable to these types of threats.

The only alternative that offers an equivalent level of screening to a body scanner is an enhanced full body frisk search. This would involve a thorough frisk of the entire body, including sensitive areas, as well as the possible loosening and/or removing of some clothing. As this is very intrusive, the full body frisk search is not part of aviation security screening arrangements. Consequently, body scanners are the most reasonable and proportionate screening technology that are the least restrictive limitation on the right to privacy.

- **whether an individual who does not wish to undergo a body scan can request to undergo an alternative to the security screening procedure, and if not, why not (noting the importance of treating different cases differently when rights are limited); and**

As body scanners have significant security benefits, the Australian Government has a no opt-out policy for body scanner screening. An individual selected for a body scan, who is medically and physically able, will not be offered an alternative screening method as it is the most reasonable and proportionate screening option, providing the least intrusive means of screening a person for threat items. A less rights restrictive option is not available, as the only alternative is an enhanced full body frisk search, which is more intrusive and more rights restrictive (and consequently is not part of aviation security screening arrangements).

An individual with a medical or physical condition that prevents them from undertaking a body scan will be offered an alternative screening method suitable to their particular circumstances. This includes those who have disabilities, the elderly and people who rely on mobility equipment, who may not be able to stand for the required time, or hold the necessary pose to be screened successfully. A full Privacy Impact Assessment on the use of body scanners, including traveller selection and options for travellers with different needs, was conducted in 2012 and can be found at https://www.homeaffairs.gov.au/travelsecure-subsite/files/airport-body-scanners-privacy-impact-assessment.pdf.

- **what safeguards are in place to ensure that photographs are not taken of the digital images produced on the display screens of body scanner devices in airports.**

As discussed above, the image displayed by the body scanner is generic, gender-neutral and from which an individual cannot be identified, therefore safeguards that prevent a digital image being taken of the image displayed are not required. As such, while body scanner screening may engage a person's right to privacy, a digital image taken of the image displayed does not limit the person's right to privacy, as the person is not identifiable in any way.

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

MC20-009941

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

28 FEB 2020

Dear ~~Senator Henderson~~ Sue

Thank you for your correspondence of 6 February 2020 regarding issues raised in the Parliamentary Joint Committee on Human Rights' Report 1 of 2020 in relation the Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019 (the Bill).

The Government has committed to implementing the majority of the recommendations made in the final report of the Royal Commission into Trade Union Governance and Corruption. The Bill responds to recommendations 36 – 38 of the Royal Commission in relation to disqualification from office. The Government has also committed to amending the *Fair Work (Registered Organisations) Act 2009* to address matters regarding mergers of registered organisations and cancellation of registration of organisations. The Bill also delivers on these commitments.

My detailed response to each of the issues raised in your correspondence is attached. I trust the Committee will find the information useful.

Yours sincerely

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

Encl.

Detailed response to issues raised in Human Rights Scrutiny Report No. 1 of 2020 in relation to the Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019

Disqualification of individuals from holding office in a union

The committee asks:

- **how the measure is effective to achieve (that is, rationally connected to) its stated objective, noting in particular concerns regarding the impact of the measures on the right to strike, which union members may consider to be in their best interests; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the measure is the least rights restrictive way of achieving its stated objective; the extent of the limitation including in respect of the right to strike noting previous concerns raised by international supervisory mechanisms and the existence of relevant safeguards).**

Current provisions

Under the current provisions of the *Fair Work (Registered Organisations) Act 2009* (RO Act),[1] a person can be disqualified from office automatically where he or she has been convicted of:

- offences involving fraud, dishonesty, violence or property damage; or
- offences relating to the formation, registration or management of associations and elections within registered organisations.

In addition, the RO Act also includes a discretionary power for the Federal Court (the Court) to order disqualification from office where a person has contravened a civil penalty provision in the RO Act and the Court is satisfied that the disqualification is justified.[2]

There are currently no penalties (and thus no disincentives) for a person who is disqualified from holding office to continue to act as an official whilst they are disqualified.

Changes proposed

The Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019 (the Bill) expands the categories of offences for which a person can be automatically disqualified from holding office to include conviction of a serious offence, that is, an offence against any law in Australia carrying a penalty of five years' imprisonment or more.

On application by the Registered Organisations Commissioner (the Commissioner) only, the Court will also have the discretionary power to disqualify a person from office for a period the Court considers appropriate, in circumstances where one of the expanded grounds for disqualification exists and the Court does not consider it would be unjust to disqualify the person.

The Bill significantly lifts the threshold for when a Court can disqualify a person from holding office under the expanded discretionary disqualification regime in comparison with the previous iteration of the Bill, the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 (the previous Bill). This higher threshold enhances the Bill's compatibility with human rights obligations.

Under the Bill, for a relevant ground for disqualification to be made out in relation to 'designated findings', the person must have committed an offence against a range of workplace laws ('designated laws') or there must be orders for the person to pay a pecuniary penalty for the contravention of one or more civil penalty provisions of a designated law with combined maximum penalties of 180 penalty units within the last 10 years. The ground for multiple failures to prevent contraventions etc. by an organisation also provides that there must be orders for an organisation to pay a pecuniary

[1] Section 215 of the RO Act.
[2] Section 307A of the RO Act.

penalty for civil contravention breaches against at least two civil penalty provisions with a combined total of the maximum penalties of at least 900 penalty units within the last 10 years.

Engaging in action that may constitute an offence or civil contravention under a designated law is not a designated finding for the purposes of the Bill of itself unless and until a previous Court, following separate legal action by the appropriate regulator or person with relevant standing, has found that a person has committed a relevant offence, or imposed orders requiring the person to pay a pecuniary penalty for a relevant civil contravention.

As noted in the Human Rights Scrutiny Report No. 1 of 2020 (Scrutiny Report), the Bill includes a number of safeguards, including:

- limiting standing to only allow the Commissioner to make an application for disqualification;
- putting the onus on the Commissioner to satisfy the Court that disqualification would not be unjust, having regard to the nature of the matters, the circumstance and nature of the person's involvement and any other matters the Court considers relevant; and
- prohibiting the Court from making an order unless it is satisfied that disqualification would not be unjust, having regard to the gravity of matters constituting the ground.

Objectives

The objective of the Bill is to protect the interests of workers and ensure that they are represented by officers who demonstrate a willingness to uphold standards reasonably expected of a person with the responsibility of holding office within an organisation. As identified by the Scrutiny Report (p 23), this is a legitimate objective for the purposes of human rights law. The amendments to the existing disqualification regimes in the RO Act will be effective in achieving this objective.

The amendments to the disqualification provisions of the RO Act are in response to the recommendations of the Royal Commission into Trade Union Governance and Corruptions (Royal Commission) concerning the current disqualification regime. Recommendation 38 specifically recommended the RO Act be amended to insert a new provision giving the Court jurisdiction, upon the application of the regulator, to disqualify a person from holding any office if the person has been found to have contravened a civil remedy provision of the *Fair Work Act 2009* (Fair Work Act) or civil remedy provision of the RO Act or *Work Health and Safety Act 2011* (WHS Act).

In response to the Committee's specific concern, the Bill does not contain provisions circumscribing the right to strike as protected by the right to freedom of association. The Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences in Part 3-3 of the Fair Work Act for failures to comply with those provisions, dealing with industrial action.

In addition, even where a prima facie ground for disqualification is established, the Court still has a discretion not to disqualify a person where it would be unjust to do so.

Reasonableness and proportionality

The Bill seeks to achieve its objectives by providing appropriate mechanisms to disqualify a person from holding office in circumstances where a person has failed to uphold the standards expected of a person acting as an officer in an organisation. These mechanisms are administered and supervised by the Court, an impartial and independent judicial body.

The measures in the Bill are reasonable and proportionate methods of ensuring that officers who deliberately disobey the law are restricted in their ability to be in charge of registered organisations. This will serve to protect the interest of members and promote public order by ensuring the leadership of registered organisations act lawfully.

As already noted, the Bill does not restrict the right to strike as protected by the right to freedom of association. In addition, the various safeguards in the Bill, including the increased threshold that applies before the various designated finding grounds can be enlivened (s223(1)(b) and s223(3A)) ensure that the disqualification power is only exercised in appropriate circumstances. In this way, the Bill achieves its legitimate objective while ensuring that the no officer can be disqualified for inconsequential or minor misconduct.

Finally, union members and officers who act lawfully will not be affected by this Bill. This Bill provides that officers who repeatedly break the law may, if the relevant grounds are made out, the regulator decides to take action, and a court decides it would not be unjust to make the relevant order, be disqualified from their office as they do not demonstrate the standard expected of them to access the rights and privileges that come with holding office.

Cancellation of registration of registered organisations

The committee asks:

- **how de-registering an organisation, in addition to other sanctions for non-compliance with particular laws, including industrial relations laws, would achieve the stated objectives of 'protecting the interests of members' and promoting public order, noting in particular that many of the grounds for cancellation could relate to less serious contraventions of industrial law or taking unprotected industrial action, which members may have decided to be in their best interests;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objectives (in particular whether the grounds for cancellation of registration are sufficiently circumscribed); and**
- **the extent of the limitation in respect of the right to strike, noting previous concerns raised by international supervisory mechanisms.**

Current provisions

Under the current provisions of the RO Act,[3] the Court may make an order cancelling the registration of an organisation in limited circumstances, including where the conduct of the organisation or a substantial number of its members has prevented or hindered the intention or objects of the Fair Work Act or the RO Act. Cancellation by the Fair Work Commission (Commission) may also be effected on technical grounds.

Changes proposed

While the Bill includes a number of additional grounds for cancellation of registration, the 'obstructive industrial action' ground in s28G of the Bill has been a long-standing feature of the statutory framework, most recently included in the RO Act in current paragraphs 28(1)(b) and (c).

This ground can only arise where the organisation or a substantial number of its members has organised or engaged in unprotected industrial action that also has additional features. These features are that the action:

- has prevented, hindered or interfered with the activities of a federal system employer or the provision of any public service by the Commonwealth or a State or Territory or an authority thereof, or
- has had, or is having or is likely to have, a substantial adverse effect on the safety, health or welfare of the community of a part of the community.

[3] Section 323 of the RO Act.

To be clear, unprotected industrial action without these additional features cannot give rise to a ground for cancellation of registration under the Bill by a Court.

The Bill also significantly lifts the threshold for when a Court can deregister an organisation compared to the previous iteration of the Bill. For example, in determining whether the ground in s28C(1)(c) relating to the conduct of affairs resulting in a record of non-compliance with designated laws, only 'designated findings' and certain contempt orders are relevant. This will ensure an appropriately high threshold before the ground can be enlivened.

As with the disqualification provisions, additional safeguards in respect of the cancellation of registration provisions also include:

- limiting standing to only allow the Commissioner to make an application for deregistration;
- putting the onus on the Commissioner to satisfy the Court that deregistration would not be unjust having regard to the nature of the matters, the action (if any) that has been taken by or against the organisation or its members or officers in relation to those matters, the best interests of the members of the organisation as a whole, and any other matters the Court considers relevant; and
- prohibiting the Court from making an order unless it is satisfied that deregistration would not be unjust, having regard to the gravity of matters constituting the ground.

In response to the Committee's specific concern, the Bill does not contain additional provisions circumscribing the right to strike as protected by the right to freedom of association. As already noted, the provisions of the Bill allowing for an application for cancellation of registration to be made on the basis that an organisation, part of the organisation or a class of members, have engaged in obstructive industrial action effectively replicate the existing provisions of the RO Act.

Objectives

The objective of the Bill is to protect the interest of members and promote public order by ensuring that organisations are administered lawfully. As identified by the Scrutiny Report (p 27), the objective is a legitimate objective.

The Final Report of the Royal Commission identified numerous examples of organisations no longer serving the interest of their members because of pervasive breaches of duties by officers and widespread and repeated law-breaking by officials.

Deregistration is an appropriate sanction in particular cases. Courts have observed that some registered organisations appear to show contempt for the law and treat court fines as the cost of doing business. Where an organisation considers that breaking the law is their business model, this is not in the best interests of their members, nor the members of registered organisations more broadly. The grounds in the Bill target this behaviour to ensure that organisations do act in the best interests of their members.

The Bill pursues the legitimate objective by providing a clearer and more streamlined scheme for deregistration than currently contained in the RO Act. The cancellation provisions in the Bill make it abundantly clear to organisations, their officers and members which types of conduct could form grounds for deregistration.

Reasonableness and proportionality

The measures in Bill are reasonable and proportionate to achieving the objective, and compared to the previous Bill, set an even higher threshold before an organisation can be deregistered by the Court or

alterative orders made by the Court. For example, the changes to the ground in s28C(1)(c) (discussed above) before it can be enlivened.

Even the 'obstructive industrial action' ground in s28G will, in effect, be a higher bar, since even if the ground prima facie applies, the Commissioner must satisfy the Court that it would not be unjust to cancel the organisation's registration, and the Court is prohibited from cancelling an organisation's registration unless it is satisfied that, having regard to the gravity of the matters, cancellation would not be unjust. New subsection 28J(1) of the Bill also states the Court 'may' as opposed to 'must' (the latter being the terminology included in the previous Bill) deregister an organisation after considering it is not unjust. These measures have been included in the Bill to sufficiently circumscribe the proposed power.

In addition, the availability of alternative orders provides the Court with appropriate means of limiting the effect on members who have not been involved in activity that would ground an order for cancellation.

The cancellation and alternative measures in the Bill set a high threshold to ensure that the consequences of deregistration is only applied in serious cases. The Bill would not provide a Court with the means to dissolve registered organisation, rather, it would enable a Court to cancel the organisation's registration. The organisation will continue to exist as an employee or employer association, but would not enjoy the rights and privileges that come with being registered.

The grounds in this Schedule do not limit the right to strike as protected by the right to freedom of association. As discussed above, the obstructive industrial action ground is already contained in the current provision of the RO Act. These provisions have never been enlivened and the Bill does not broaden their scope or application.

Placing unions into administration

The committee asks:

- **how the measure is effective to achieve (that is, rationally connected to) the objective of protecting the interests of members (noting, for example, that members may have determined it was in their interests to take unprotected strike action, which could contravene a designated law); and**
- **whether the measure is proportionate to the objectives sought to be achieved, in particular, whether the grounds for placing organisations under administration are sufficiently circumscribed.**

Current provisions

Section 323 of the RO Act contains the current framework for dealing with organisational dysfunction and provides for applications to be made to the Court for a declaration in relation to an organisation or any part of it. If a declaration is made, the Court may approve a scheme for the taking of action to resolve the matters to which the declaration relates. The provision, as currently drafted, does not provide for remedial action to be taken if officers act in their own interests, break the law, or breach duties under the RO Act. The RO Act does not expressly provide for the appointment of an administrator.

Changes proposed

The Bill expands the categories of declaration for a remedial scheme in relation to an organisation to be approved by the Court to include:

- That one or more officers of an organisation or part of an organisation have engaged in financial misconduct in relation to carrying out of their functions or in relation to the organisation or part.
- That a substantial number of the officers of the organisation or part of an organisation have, in the affairs of the organisation or part, acting in their own interests rather than in the interests of members of the organisation or part as a whole.
- That affairs of an organisation or part of an organisation are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner that is contrary to the interests of the members of the organisation or part as a whole.

The Bill also amends the Court's power to approve a scheme consequent to the making of a declaration to expressly permit the appointment of an administrator, and the functions of the administrator will be clearly set out. The administrator will control and may manage the property and affairs of the organisation, or perform any functions or powers that the organisation or its officers would typically perform. Officers and employees must assist administrators and there are criminal penalties for failing to do so.

The Bill also expands the standing to apply for a declaration and order for a scheme, to include the Commissioner and the Minister.

In response to the Committee's specific concern, the Bill does not restrict the right to strike as protected by the right to freedom of association. Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for failures to comply with Part-3-3 of the Fair Work Act, dealing with industrial action.

Objectives

These measures have the objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus promotes public order.

The Final Report of the Royal Commission identified numerous examples of organisations no longer serving the interests of their members because of pervasive breaches of duties by officers and widespread and repeated law-breaking by union officials. The proposed changes will improve the effectiveness of the administration provisions by allowing the Court to take appropriate remedial and facilitative action to overcome such maladministration or dysfunction associated with a culture of lawlessness or financial maladministration.

The proposed changes pursue the legitimate objective of ensuring that organisations are functioning effectively to be able to serve the interests of their members. The amendments are rationally connected to this objective because the new grounds for a declaration are all instances of an organisation not acting in the interests of their members and therefore not functioning effectively.

Reasonableness and proportionality

The measures are reasonable and proportionate for the following reasons:

- The new grounds under which the Court may make a declaration are clearly set out and if present, indicate that an organisation is not serving the interests of their members and is not functioning effectively.
- The measures limit the effect on members who have not been involved in maladministration or unlawful activity by providing for orders to be limited to the part of the organisation that has conducted those activities.

- Relief is discretionary[4] and the Court may find that no action is necessary or justified.
- Consistent with the current administration provisions, the Court must be satisfied that an order (should it choose to make one) would not do substantial injustice to the organisation or any member of the organisation.[5]

In addition to the abovementioned safeguards, without limiting other measures in the Bill, in assessing whether an organisation or a part of an organisation has ceased to function effectively because officers of the organisation or a part of an organisation have contravened designated laws, the Bill directs the Court to consider multiple occasions of contravention.[6] However, as already noted, the Bill does not contain provisions circumscribing the right to strike as protected by the right to freedom of association and it does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for failures to comply with Part-3-3 of the Fair Work Act, dealing with industrial action.

Introduction of a public interest test for amalgamations of unions

The committee asks:

- **how each aspect of the application of the 'public interest' test is effective to achieve (that is, rationally connected to) the stated objectives;**
- **whether making amalgamations of an organisation subject to a public interest test is reasonable and proportionate to achieving the stated objective. In particular, more information is required as to whether the measure is the least rights restrictive way of achieving the objectives, is sufficiently circumscribed, and the extent of the limitation with respect to the right to strike (noting concerns raised by international supervisory mechanisms).**

Current provisions

The RO Act currently provides that once an application for amalgamation of organisations is lodged with the Fair Work Commission (FWC), the FWC must set a hearing date to approve the 'scheme of amalgamation'. Unless an exemption is granted, the FWC will then direct the Australian Electoral Commission to conduct a secret postal ballot of members of each of the organisations.

An amalgamations day will be fixed on which the new organisation will be the only registered organisation, and the amalgamated organisations will be deregistered, provided that: the ballot has no irregularities; the FWC is satisfied that there are no relevant pending proceedings against the existing organisations; and the newly amalgamated organisation will be bound by the obligation of the existing organisations.

Changes proposed

The existing framework in the RO Act does not require the FWC to decide whether an amalgamation is in the public interest when considering the amalgamation of two or more organisations.

In contrast to the previous Bill, the Bill will now not require that all proposed amalgamations be subject to a public interest test. The Bill now introduces as a threshold matter, a requirement for the FWC to decide whether a proposed amalgamation should be subject to a public interest test, based on the compliance history of the relevant organisations.

The FWC may only decide that the public interest is to apply if there is evidence that at least 20 compliance record events have occurred for at least one of the existing organisations in the last ten years. This is a significantly high threshold, and would require an organisation or its officers or

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[4] Proposed subsection 323A(1).
[5] Proposed subsection 323A(3).
[6] Proposed paragraph 323(4)(a).

members to have engaged in a significant amount of contraventions of the law – on average two each year. Compliance record events for an organisation would not pick up inadvertent or minor breaches of law. There must be a designated finding, a finding of contempt of court or obstructive industrial action.

If the FWC does decide that the public interest test is to apply, having regard to compliance record events, the FWC will be required to have consider to the incidence, age and gravity of compliance record events for each existing organisation, to determine whether the organisation has a record of not complying with the law. This is a comprehensive examination and inquiry by the FWC.

Objectives

The public interest test for amalgamations will improve organisational governance, protect the interests of members, ensure that organisations meet the minimum standards set out in the RO Act and address community concerns by creating a disincentive for a culture of "contempt for the rule of law" that has been identified amongst some registered organisations. As stated in the Scrutiny Report (p 33), this a pressing and substantial concerns and constitutes a legitimate objective.

The introduction of a public interest test for organisations that meet the statutory threshold, will be effective in meeting this objective as it will reduce the risk of an adverse effect of an amalgamation of existing organisations, where one organisation has a high number of compliance records events. This is because a culture of lawlessness in one or more amalgamating organisation will be prevented from pervading the other organisations involved in the amalgamation.

Importantly, the FWC will be required to consider as a preliminary matter whether a proposed amalgamation should be subject to a public interest test at all. This enhances compatibility with human rights by explicitly providing that the FWC may only decide that the public interest test if there is a significant history of law-breaking. In this way, the Bill would only affect those amalgamating organisation who demonstrate a pattern of not respecting the law. The introduction of a public interest test for organisations who meet the requisite threshold achieves the legitimate objective of protecting the interest of workers and ensuring that organisations meet the minimum standards of organisational behaviour set out in the RO Act.

Reasonableness and proportionality

The Bill ensures that the application of the public interest is reasonable and proportionate in that it is only applied to those amalgamations where at least one organisation has 20 or more compliance records events in the previous 10 years.

The requirement for the FWC to decide whether the public interest test is to apply, before applying the test, also ensures that the public interest case is not applied unnecessarily to all amalgamations. The amalgamating organisations that will be affected will be those with a history of breaking the law. The measures in the Bill are the least restrictive way of achieving the objective of protecting members from amalgamations that are not in their collective interests.

The measures in the Bill are sufficiently circumscribed as they do not limit the rights to freedom of association or the right to form associations of one's own choosing. The effect of the public interest test may be to prevent an amalgamation of organisations. However, organisations will not lose their registration or cease to exist if it is found that an amalgamation is not in the public interest.

Although the amalgamation process is a democratic process, in that members vote for an amalgamation, it is often the case that amalgamations can occur even if only a small portion of the members vote for the amalgamation. Under the current law, not all mergers go to a ballot of members. Those that do only require 25 per cent of members on the organisations' roll of voters to vote for the ballot to be valid. Only 50 per cent plus one of those voting need to vote yes for the amalgamation to go ahead. This means organisations could amalgamate if just over 12.5 per cent of members vote for it. The public interest test ensures that members do not find their organisation merged with an organisation who has a history of law breaking without consideration by an independent body.

Lastly, it is also important to note that judicial review applies to both FWC decisions about whether a public interest test should apply to a merger, and to the public interest test itself. As these decision will be made by a Full Bench of the FWC, they can be reviewed by the High Court under section 75(v) of the Constitution or the Federal Court under section 39B of the *Judiciary Act 1903*.

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

MC20-011476

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600
human.rights@aph.gov.au

03 MAR 2020

Dear ~~Chair~~

Thank you for your email of 6 February 2020 regarding the Parliamentary Joint Committee on Human Rights' Report 1 of 2020 and the *Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019*. I apologise for the delay in responding.

The Committee has requested further information in relation to the compatibility of the Certificate with the rights to freedom of expression and assembly. The Certificate itself is machinery in nature, extending the operation of the *Sydney Harbour Federation Trust Regulations 2001* for a further 24 months beyond their originally scheduled sunsetting day of 1 October 2019. It does not alter the arrangements in place under the Regulations, but, as the Committee notes, results in the Regulations' restrictions on public assembly continuing in effect until 1 October 2021 (unless repealed earlier).

Certificates of deferral enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. Deferrals are most commonly used to enable the effective review of the deferred legislative instruments' fitness for purpose in the existing legal environment, or the anticipated impact of broader legislative changes. In this case, the deferral has been made so that the Regulations and their enabling legislation can be considered as part of a broader independent review of the work of the Trust. The outcome of this review will inform the development of replacement regulations, which are anticipated to commence by 1 October 2021.

These particular Regulations commenced at a time when Trust land, which had formerly been Defence land, was still closed to the public. The lands are now public parkland and must be managed to ensure that public order is protected. Section 11 of the Regulations provides a similar mechanism for permitting public assemblies to that which applies generally in New South Wales, under the *Summary Offences Act 1988* (NSW). Whether the approach taken in section 11 of the Regulations remains appropriate will be considered during the review and as the replacement regulations are developed.

To avoid pre-empting this process, and acknowledging that the replacement regulations will face parliamentary scrutiny of their impact on human rights and freedoms, it is in my view appropriate that scrutiny of this Certificate should focus on the mechanism of deferral rather than engaging in a full analysis of the deferred Regulations.

Thank you again for bringing the Committee's concerns to my attention, and I trust this information is of assistance. As the Regulations are administered by the Minister for the Environment, I have copied her in to this response.

Yours sincerely

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

CC. The Hon Sussan Ley MP

The Hon Keith Pitt MP

Minister for Resources, Water and Northern Australia

MC20-002495

12 MAR 2020

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

Dear Senator Henderson

Thank you for the Joint Parliamentary Committee on Human Rights' consideration of the National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020.

I note the Committee has requested further information about the scope and nature of the government's engagement with Traditional Owners prior to the site for the National Radioactive Waste Management Facility (the facility) being identified, and the types of protections that will be afforded to cultural heritage, including under the *Environment Protection and Biodiversity Conservation Act 1999*.

The Committee has sought further information on how the measures that enable the acquisition of additional land are compatible with the rights to culture, self-determination and equality and non-discrimination.

Please find enclosed detailed responses to the Committee's questions.

I trust this information will be of assistance to the Committee.

Yours sincerely

Keith Pitt

Response to the Parliamentary Joint Committee on Human Rights comments on the National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020

Human Rights Scrutiny Report 3 of 2020

SPECIFICATION OF SITE FOR RADIOACTIVE WASTE DISPOSAL

1.13: The committee notes that the bill would enable the establishment of a national radioactive waste management facility at a specified location in South Australia. The committee notes the legal advice that as the site may have cultural significance for First Nations people the bill engages and may limit the right to culture and self-determination. In order to assess whether the bill engages and limits these rights the committee seeks the minister's advice as to:

- **What percentage of those who were eligible to vote in the community ballot were Indigenous;**

A range of inputs were considered to determine community sentiment at the site, including the District Council of Kimba Ballot, ballots of Traditional Owner groups' members, surveys of businesses and neighbours, a national submissions process, petitions and ministerial correspondence.

The District Council of Kimba Ballot was undertaken by the local council, in the local government area surrounding the Napandee site, following procedures consistent with standard council elections under the *Local Government (Elections) Act 1999* (SA) (LGE Act). Eligibility to vote in the ballot was based on the qualification criteria set out in section 14 of the LGE Act. A person's Indigenous status was not a determining factor in the ballot, and it is not possible to determine what percentage of eligible voters may have been Indigenous.

The ballot was well-advertised through public meetings, news print advertising, social media posts and mail outs, and all members of the local community were encouraged to check their availability and register if they were not currently listed on the voters roll. The District Council of Kimba also encouraged broad participation. Specifically, in a media statement:

If you aren't eligible to be on the House of Assembly roll but live in Kimba or own rateable property in the district, I encourage you to speak to Council staff to assess your eligibility to be included on the voters roll,", and "*It's vital that every eligible member of our community who*

is eligible gets to have a vote so the Minister can get a comprehensive picture on the amount of support for the facility being located at one of the two sites that have been nominated in Kimba".

The Barngarla Determination area, which came into effect on 6 April 2018, covers about 44,500 square kilometres of the Eyre Peninsula and includes the cities of Port Lincoln and Whyalla. The Gawler Ranges determination area, which came into effect in December 2011, covers about 34,000 square kilometres in the Gawler Ranges area and Lake Gardiner National Park. While Traditional owners are an important stakeholder to the Facility development program, there is no native title on the land parcel and immediate surrounds of the Napandee site.

The Barngarla People nominated the Barngarla Determination Aboriginal Corporation (BDAC) as their Registered Native Title Body Corporate to speak on heritage matters within the boundaries of their native title determination, and have a membership list of approximately 209 individuals.

The Gawler Ranges Aboriginal Corporation (GRAC) was incorporated on 16 December 2011. GRAC have a membership list of approximately 456 individuals. The GRAC wrote to the department in 2 October 2019, advising that, in their view, the Barngarla People are culturally responsible for area covering the nominated sites in Kimba, and that it was not culturally appropriate for them to comment on the proposal.

The department offered financial support to both entities (along with other Traditional Owner groups surrounding the shortlisted site at Wallerberdina Station), to assist them in undertaking a ballot or survey of their members.

The BDAC completed a ballot of its members through a private third party company (Australian Election Company) in November 2019. Of its 209 members who were eligible to vote in the ballot, 87 responded (41.62 per cent), 4 votes were rejected at preliminary scrutiny, the remaining 83 votes responded 'No' (100 per cent) to the question "Do you support the proposed National Radioactive Waste Management Facility being located at one of the nominated sites in the community of Kimba?"

In addition, submissions from a number of Traditional Owner representative groups were received and considered. Previous submissions by Traditional Owner representative groups, to the 2018 Parliamentary inquiry into the site selection process, were also considered.

- **What other consultation was held specifically with relevant Indigenous groups and what was the level of support for the site specification**

The department has sought to engage the Barngarla People throughout the site selection process. At the request of the BDAC, the department's engagement has primarily occurred through their legal representatives. The department has over 60 documented interactions with the BDAC or their legal representatives including:

- meetings with the BDAC board, to discuss the project and understand their views
- information sharing requests, including requests to distribute information to their members or enable the department to make presentations to, and answer questions of their members
- offers to conduct a cultural heritage assessment in collaboration with a working group of Barngarla knowledge holders - a preliminary desk-top assessment is available at https://www.industry.gov.au/data-and-publications/aboriginal-heritage-desktop-assessment-report-kimba
- offers of funding for BDAC to conduct a ballot to gauge its members views towards the National Radioactive Waste Management Facility (Facility), and
- offers of a funded trip for its board and interested members to visit the ANSTO's Lucas Heights facility to see how radioactive waste is currently managed.

In addition, in October 2019, prior to the Kimba community ballot, the department promoted specific information sessions for Barngarla and Gawler Ranges people, in Port Lincoln and Whyalla, where it is understood the majority of their members reside, to ensure convenience in accessing information and participating in the consultation process.

The Australian Government has also made available $3 million to support the economic and heritage development of the Barngarla people, to help ensure that they can maximise the benefits of the Facility development. The department has sought BDAC's participation in the development of an economic development plan for this purpose.

As noted above, the BDAC completed a ballot of its members through a private third party company (Australian Election Company) in November 2019. Of its 209 members who were eligible to vote in the ballot, 87 responded (41.62 per cent), 4 votes were rejected at preliminary scrutiny, the remaining 83 votes responded 'No' (100 per cent) to the question "Do you support the proposed National Radioactive Waste Management Facility being located

at one of the nominated sites in the community of Kimba?" Submissions from BDAC have also indicated a lack of support for the Facility at Kimba.

- **Once the radioactive waste facility is operational, if culturally significant findings are made on the site in future, how the *Environment Protection and Biodiversity Conservation Act 1999* would operate to ensure appropriate protection for cultural heritage.**

The *National Radioactive Waste Management Act 2012* expressly provides that the *Australian Radiation Protection and Nuclear Safety Act 1998*; the *Environment Protection and Biodiversity Conservation Act 1999* and the *Nuclear Non-Proliferation (Safeguards) Act 1987* cannot be overridden for purposes relating to the preparation and development of the Facility site, and to the operation and decommissioning of the Facility.

Before its establishment, the Facility must receive regulatory approvals under the *Environmental Protection and Biodiversity Conservation Act 1999* and the *Australian Radiation Protection and Nuclear Safety Act 1998*.

While there is no native title on the site and no registered heritage, the department, through its preliminary desktop study and engagement with BDAC and their legal representatives, is aware of the potential for Aboriginal cultural heritage to exist. The department will work with BDAC and the Department of Agriculture, Water and Environment to ensure that all relevant obligations under the *Environmental Protection and Biodiversity Conservation Act 1999* are met in relation to all aspects, including the protection of any identified cultural heritage.

Further activities the department will undertake in order to appropriately identify and manage cultural heritage, and achieve regulatory approvals include:

- undertaking a detailed cultural heritage assessment with qualified archaeologists and anthropologists, and
- the creation of a heritage management plan to minimise and mitigate any potential impacts to heritage.

The department has sought, and will continue to seek the involvement of the BDAC in these processes.

ACQUISITION OF ADDITIONAL LAND FOR EXPANSION OF SITE

1.23: The committee notes that the bill would enable additional land rights to be acquired or extinguished to allow for the expansion of the site or to provide all-weather access to the site. The committee notes the legal advice that as the site may have cultural significance for First Nations people and as native title may be extinguished by these provisions, the bill appears to engage and may limit the rights to culture, self-determination and equality and non-discrimination. In order to assess whether the bill engages and limits these rights the committee seeks the minister's advice as to:

- **Whether the additional land for the expansion of the site (the boundaries of which are specified in the bill) currently has native title rights attaching**
- **Whether the bill would enable native title rights to be extinguished without the full, free and informed consent of native title holders, and if so, how the rights to culture, self-determination and equality and non-discrimination will be protected**
- **Whether the requirement to consult with anyone with a 'right or interest' in the land includes those who may have cultural ties to the land (but not native title)**

Any native title over the site specified in the National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020 (the Bill), as well as the bounds of the additional land that may be acquired for the expansion of the site, has been extinguished. The Barngarla people's native title claim is set out in the determination of the Federal Court which came into effect on 6 April 2018.

The Bill provides that (unspecified) land may also be acquired for the purposes of providing all-weather road access to the Facility. While it is unlikely that all-weather road access, if required, would extend into any land with native title interests (which are sufficiently outside of the site boundary), the exact location of such a road would be determined by the regulators and cannot be anticipated at this stage.

As currently drafted, the Bill would provide the Minister with the ability to expressly exclude native title rights and interests (or any other rights or interests in the relevant land) from road access acquisitions, as it is not necessary for government to have exclusive rights and interests in supporting road infrastructure. Similar discretion is provided by the Act in its current form.

The Minister has received advice from the Attorney-General's Department and will act in accordance with the future acts regime under the *Native Title Act 1993*.

It is not the government's intention to extinguish native title rights or interests in the process of developing the National Radioactive Waste Management Facility, and amendments may be considered to make this clear.

In relation to land that may be acquired for all-weather road access, the Bill provides a mandatory consultation requirement which provides that the Minister must invite each person having a right or interest in the land to comment on the proposed acquisition, and must take all comments into account.

- **Why the consultation requirements set out in the bill are taken to be an exhaustive statement of the rules of natural justice, and what this means in practice**

The Bill has been introduced to give effect to the Government's commitment to establish a single, purpose built National Radioactive Waste Facility at Napandee, near Kimba in South Australia, and to provide certainty to impacted communities and other stakeholders regarding the location of the Facility.

Although the Bill would prescribe the location for the Facility, the Facility could not be established without the necessary regulatory approvals, licences and permits. In the process of applying for these, it may become necessary for the Commonwealth to acquire additional land to allow for further enabling works, cultural heritage protection, community research and development opportunities, and to accommodate site-specific designs for the Facility. Regulators may also require secondary or emergency all-weather road access to the site.

New sections 19A and 19B would allow for the Commonwealth to make the additional land acquisitions that may be necessary for the Facility to be established at Napandee. They provide further certainty to impacted communities by ensuring the Commonwealth is equipped to deal with critical issues that could be raised by regulators that have the potential to prevent the Facility from being established at Napandee, and the validity of these acquisitions could become critical to ensuring that the Facility is ultimately able to be established at Napandee.

New section 19C would provide an exhaustive statement of the requirements of the natural justice hearing rule in relation to additional land acquisitions made under new sections 19A

and 19B. At common law, the natural justice hearing rule broadly requires that a person 'be given a hearing before a decision is made that adversely affects a right, interest or expectation which they hold.'[1] The requirements in new section 19C embody this principle, insofar as they would require the Minister to:

- notify the community of any proposals to make acquisitions under section 19A or 19B;
- invite interested persons to comment on the proposed acquisition; and
- take into account any relevant comments received prior to making the acquisition.

This would operate in a similar manner to section 18 of the current Act, which also provides an exhaustive statement of the rules of natural justice with respect to site selection decisions under section 14 of the Act. Both these sections would be repealed as part of the broader repeal of the current framework for selecting a site.

New section 19C seeks to retain the key elements of the 'procedural fairness requirements' set out in section 18 of the current Act, however these requirements have been adjusted to account for the fact that the Minister will no longer be empowered to decide the primary location for the Facility. Under the amendments, the Minister[2] would only be making minor, ancillary acquisition decisions with respect to land nearby the area prescribed by new section 5. In light of this, the requirements imposed by new section 19C will be less onerous than those imposed by current section 18. Among other things, the Minister will now need to provide at least 30 days for interested parties to comment on a proposed acquisition, as opposed to the 60 minimum required under the current arrangements.

New section 19C would ensure fairness remains at the centre of any decision-making under section 19A or 19B, while also addressing the uncertainties that flow from continually-evolving common law conceptions of natural justice. The codification of the natural justice hearing rule in this respect serves the broader objects of the Bill – namely, to provide certainty to impacted communities and stakeholders. This is achieved by ensuring all parties are precisely aware of what is required to comply with the natural justice hearing rule, and to ensure additional land acquisitions are properly made.

New section 19C ensures an appropriate balance is struck between the rights of interested parties (to be heard before an additional land acquisition is made), and the need for

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[1] R Creyke & J McMillan, *Control of Government Action: Text, Cases and Commentary*, 3rd ed, 2012, p 629.
[2] In the case of an acquisition made under section 19A, in the Minister' s capacity as the rule maker for the regulations.

communities and stakeholders to have certainty about the Commonwealth's ability to establish the Facility at Napandee.

By codifying the requirements of the natural justice hearing rule in this way, new section 19C promotes confidence in the validity of any additional land acquisitions that may be required to establish the Facility at Napandee.

- **Why the bill enables the minister to make a notifiable instrument to prescribe additional land for all-weather access to the site (which is not subject to any form of parliamentary oversight)**

The provision to acquire additional land for all-weather road access exists in the current legislation. The specification of the site that would connect to such land, and requirement to make a notifiable instrument to prescribe such land, provides oversight beyond current provisions that enable a single minister to apply their absolute discretion to the land acquisition.

It is necessary to carry over a provision that provides that additional land may be acquired for these purposes to retain the ability to respond to regulatory requirements for access to the site.

The process to develop the National Radioactive Waste Management Facility is lengthy and complex, involving multiples phases of investigation and approvals. As part of the site selection process, the Commonwealth has undertaken 2 years of preliminary assessments and concept design of the site. Once the land described in new section 5 is acquired, the next phase involves further site investigations to support site-specific design development and regulatory approvals. While investigations to date have not identified the need for additional all-weather roads access, there remains the potential for such access to be required as a condition of the Australian Radiation Protection and Nuclear Safety Agency siting, construction and/or operational licenses. The Bill provides for this additional land to be acquired under s19B by notifiable instrument.

It is appropriate that this land be acquired through notifiable instrument rather than regulations, which would be subject to disallowance, as being unable to acquire this land at this point in the development process would adversely impact on the ability for the government to deliver the Facility which is necessary to support the nuclear medicine industry.

This is consistent with the approach in the *Lands Acquisition Act 1989* and *Land Acquisition Act 1969* (SA) both of which provide that land may be compulsorily acquired by government without Parliamentary oversight.

- **If native title is extinguished without the full, free and informed consent of the traditional owners, what remedies are available to affected persons for any contravention of their rights to culture, self-determination and equality and non-discrimination**

There is no native title or registered heritage at the site or bounds of additional land specified in the Bill, and the Australian Government has no intention to extinguish native title in the course of acquiring land for the purposes of providing all-weather road access to the site.

If the Facility requires an all-weather road to traverse native title land, the government will engage with Traditional Owners in accordance with the future acts regime under the *Native Title Act 1993.*

The department is aware of the potential for unregistered Aboriginal cultural heritage to exist in the area, and has sought, and will continue to seek, the involvement of the Barngarla Development Aboriginal Corporation in minimising potential impacts on cultural heritage. To this end, the department is seeking Barngarla involvement in conducting a detailed cultural heritage assessment with qualified archaeologists and anthropologists, and creating a heritage management plan to assist with minimising and managing any potential impacts to heritage.

Any acquisition of any additional land will require consultation in accordance with new section 19C. That section is similar in effect to existing section 18, which will be repealed, and continues those procedural fairness requirements. Any person with a right or interest in the land must be given an opportunity to comment on the proposed acquisition, and their comments must be taken into account.

In any acquisition of land, people with rights or interest in the land can claim reasonable compensation.

Minister for Resources, Water and Northern Australia

the Honourable Keith Pitt MP

Senator the Hon Michaelia Cash
Minister for Employment, Skills, Small and Family Business

Reference: MS20-000209

Senator the Hon Sarah Henderson
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
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Dear Senator

Thank you for your email of 27 February 2020 regarding the Parliamentary Joint Committee on Human Rights' (the Committee's) consideration of the National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020 (the Bill) outlined in the Human Rights Scrutiny Report 3 of 2020.

I appreciate the time taken to review the Bill and thank you for the opportunity to address the important issues raised by the Committee.

The necessity to disclose identifiable student data

The Committee sought advice on 'why it is necessary to disclose identifiable student data in all instances to all of the listed bodies, and whether some, or all, of the objectives of the measure could be achieved by disclosing de-identified student data'.

Identified data is required by the listed bodies in subsection 210A(1) in item 2 of Schedule 2 of the Bill in order to perform their core functions. Specifically, there are community expectations that the broad gamut of functions that a department undertakes will be cognisant of individual circumstances and that portfolio departments will not work in silos.

De-identified data is currently available to the listed bodies but they are unable to understand how a person moves across the tertiary system and into work, how outcomes can be improved for people with different needs and in different regions, and how to target funding and programs to match individual aspirations with the needs of the Australian labour market. By overcoming these evidence barriers, the Australian Government will be able to enhance the rights of individuals to work and pursue education.

To develop policies based on evidence and target services to assist those with different needs and circumstances, vocational education and training (VET) data will need to be linked with other data sets to enhance evidence about the employment, social and personal factors that affect a person's engagement with the VET system. The only way to form these datasets is to start with identified sensitive personal information, in order to understand the pathways and outcomes for different people including those with disability, Indigenous Australians and people for whom English is not their first language.

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Excluding this information may exacerbate disadvantage as policies and funding cannot be calibrated to meet the needs of all segments of Australian society. Any limitation of the right to privacy resulting from these provisions is offset by the legitimate objective of promoting and enhancing other human rights, including the right to education, the right to work, the right to social security, and the rights of people with disability.

I note the stringent requirements that are followed when data is linked, as overseen by the Cross Portfolio Data Integration Oversight Board. To link separate data sets, it is essential to begin with identified data. However, to ensure privacy is protected, once linked, the merged data set can be de-identified for analysis and research. The identifiers used to create the linkage (whether they are Unique Student Identifiers, names or something else) are stripped from the integrated analytical data set once the data has been successfully merged. This is referred to as the separation principle and Commonwealth data integration projects for statistical and research purposes adhere to this process.

In relation to the disclosure of VET data, I note that:

1. Students will be made fully aware of the use of their data. At the point that personal information is collected from VET students, they are made aware that their information will be shared with the National Centre for Vocational Education Research (NCVER) and authorised government agencies. All registered training organisations (RTOs) are required to issue a Privacy Notice to students that outlines how VET data may be used, and RTOs may be found in breach of their registration requirements if they do not comply. The Department of Education, Skills and Employment will review the minimum mandatory content of the Privacy Notice for VET on passage of the Bill.

2. Bodies accessing data will almost certainly be APP entities under the *Privacy Act 1988* or subject to similar requirements under state and territory legislation and as such will only be expected to request identified information where it is strictly necessary.

3. NCVER is purposely given discretion to exercise judgement over the release of identified data, providing an opportunity to assess whether identified data is indeed required for the purposes of the request. Identified data will not necessarily be disclosed by NCVER in all instances. However, there are critical public policy cases that require identified data, and more details on these are below. The Bill gives the NCVER the discretion (rather than a compulsion) to disclose data. It is expected that the entities listed in subsection 210A(1) will request particular data from NCVER, and list the specific data required and the purpose for the request. In line with arrangements already in place to ensure individuals' privacy is protected, NCVER will assess all data requests, giving consideration to a range of factors, and will not disclose identified data if de-identified or confidentialised data will achieve the relevant purpose.

Disclosure to bodies for the purposes of that body

The Committee sought advice on 'why it is necessary to enable the disclosure of personal information to each of the bodies listed, 'for the purposes of that body', rather than limiting the disclosure for the purposes of administering the VET sector'.

Generally, with around four million students per year participating in VET, the training sector touches all industries and aspects of the Australian economy. A narrow definition such as 'administering the VET sector' would preclude the value that all portfolios derive from the VET sector, whether they are directly administering the system, reliant on it for a skilled workforce or engaging with these same four million people and designing services around their lifelong learning journey. In this way, Commonwealth, state and territory bodies are able to work together to develop policy and programs that enhance the right to work and to education.

VET regulators require identified data to enable them to analyse student movements between RTOs and the actions of RTOs, in order to identify emerging risks and respond to issues, such as placing students of RTOs that cease trading.

I believe that while the purposes expressed in the Bill are broad, they are transparent and appropriate to the reach of the VET sector across public administration. Further, the protections conferred by privacy legislation and discretion by NCVER ensure that this identified data will only be used where necessary.

Department or another Commonwealth authority

The Department and other Commonwealth authorities listed under subsections 210A(1)(a) and (b) are generally bound by the *Privacy Act 1988* and the Australian Privacy Principles (APPs), ensuring a level of privacy protection for the information of individuals.

The purposes of these bodies are transparent, and are generally articulated in Corporate Plans and Annual Reports required under the *Public Governance Performance and Accountability Act 2013* and subject to Parliamentary scrutiny as they change, through the consideration of Appropriation Bills from time to time.

As noted above, there are a range of policy issues that are best explored through cross portfolio data integration. As an example, data about the demographics of people undertaking aged care training in VET disclosed to a Commonwealth authority tasked with the future development of the aged care workforce would be 'for the purposes of that authority' and also 'for the purposes of making VET policy' as well as 'the administration of VET'.

State or territory authority that deals with VET or VET regulator

Like Commonwealth authorities, state and territory authorities jointly responsible for VET and are also interested in examining VET's role broadly in the economy and community, and over the life-course of individuals. State and territory departments dealing with VET are also bound by jurisdiction privacy legislation, rules and public scrutiny. As the states and territories directly administer VET and report to ministers who are joint members of the NCVER company with the Commonwealth Minister, it is more than appropriate that they have access to the VET data collected by the NCVER. For the reasons outlined above, narrowing the purposes to 'the administration of VET' would not be appropriate.

In the case of a VET regulator, limiting disclosure to the 'purposes of that body' effectively limits disclosure to the purposes of administration and regulation of VET.

Information safeguard rules

The Committee sought advice as to 'why the Bill states that the Minister 'may' make information safeguard rules, rather than requiring the Minister to make such rules, and why such rules would only apply to disclosure to research bodies and not the broader range of disclosures under proposed subsection 210A(1)'.

As stated earlier, government bodies to which data may be released are already bound by various privacy legislation, rules and public scrutiny. Research bodies are not necessarily answerable in the same way and therefore it is appropriate that there be a capacity to specify rules with which they need to comply.

Appropriate levels of safeguards and guidance have been included on the face of primary legislation. For example, subsection 210A(2) ensures that NCVER only discloses to a person that is engaged by NCVER so as to support NCVER to carry out its research functions. This person would likely be someone that is contracted to NCVER to perform those functions, and would undergo various scrutiny measures to ensure the person engaged has the ability to fulfil the role and meets all requirements under that contract such as suitability checks and privacy considerations. The provision also supports current use of information processes by NCVER, and similarly when an Australian Government department engages a person by contract to carry out duties for that department. NCVER is an APP entity under the *Privacy Act 1988* and must already meet those collection, use or disclosure requirements, in particular under APP 6 – use or disclosure of personal information.

The proposed arrangements under subsection 210A(2) do not increase the risk of inappropriate disclosure of personal information and support NCVER's use of personal information where additional persons are engaged to assist NCVER to perform its functions.

The information safeguard rules add an additional layer of protection to those already included on the face of primary legislation for the specified bodies to satisfy. As the protection of an individual's personal information is a serious matter and if unforeseen issues were to arise, over time and with changing technological capabilities, the information safeguard rules give the Commonwealth Minister the power to respond to emerging issues in a manner appropriate and proportionate to the new circumstances.

I plan to draft information safeguard rules for consideration by the Ministerial Council. These rules will list the factors that should be considered before a decision is made by the NCVER or the Secretary to disclose identified personal information. These factors will include the purpose for the request, how the data will be used, and how privacy will be protected. They will also state that identified data should not be disclosed if de-identified or confidentialised data will achieve the relevant purpose.

I believe the extent to which measures in the Bill place a limitation on the right to privacy, such limitations are reasonable and proportionate to the benefits that will be achieved.

I thank the Committee for its interest and I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
12 / 03 / 2020

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MB20-000136

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

Dear Sarah Senator

Thank you for your letter of 6 February 2020 regarding the Parliamentary Joint Committee on Human Rights' (the Committee) consideration of the National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019.

My response in relation to the human rights compatibility of the legislation is enclosed.

Anne Ruston

Enc

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National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019

This responds to the Parliamentary Joint Committee on Human Rights' (the Committee) human rights analysis of the National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No.1) Rules 2019 (the Amending Rules) in its Report 1 of 2020.

Context

On 22 November 2019, the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 (the Rules) were amended to prescribe eight Queensland grammar schools as not being state institutions. These institutions operate independently from the Queensland Government and as such the Queensland Government indicated that it would not be opting the grammar schools into the National Redress Scheme for Institutional Child Sexual Abuse (the Scheme).

The Amending Rules

The Amending Rules prescribe that specific institutions are not State institutions for the purposes of section 111(2) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act). These institutions (collectively, the Queensland Grammar Schools) are:

- Brisbane Girls Grammar School
- Brisbane Grammar School
- Ipswich Girls' Grammar School including Ipswich Junior Grammar School
- Ipswich Grammar School
- Rockhampton Girls Grammar School
- The Rockhampton Grammar School
- Toowoomba Grammar School
- Townsville Grammar School
- A board of trustees for an institution mentioned above.

As acknowledged by the Committee, the statement of compatibility to the Amending Rules engages the rights of the child.

Page 44 of the Committee's Report 1 of 2020 seeks further information:

- in order to assess whether the prescription of the eight Queensland Grammar Schools as not being State institutions for the purposes of the National Redress Scheme limits the rights of any individuals to access an effective remedy for the purposes of international human rights law; and
- as to what other forms of redress (if any) are available for persons who may have suffered abuse at any of the prescribed institutions, including whether there are substantial differences between such remedies and the established redress scheme, particularly where other avenues would likely cause greater difficulty for the claimant to access the remedy.

It is the Government's view that the amendments do not limit the rights of a child to an effective remedy.

For a survivor to access redress under the Scheme an institution responsible for the abuse must be participating in the Scheme. Under the Act, participation is voluntary and the Government cannot compel state or non-government institutions to join.

Under section 115 of the Act the Minister for Families and Social Services may only declare a state institution to be participating in the Scheme with the agreement of that state. The Queensland Government has not agreed for the eight Queensland Grammar Schools to participate as state institutions as they operate independently of government control.

The amendments clarify that the Queensland Grammar Schools are not state institutions under section 111 of the Act. The power to prescribe that an institution is not a state institution allows the Scheme to deal with instances where it is more appropriate for an institution to pay redress for a person, rather than the State. This is especially beneficial where, for this reason, a state has not agreed to the institution participating in the Scheme, as required by section 115 of the Act.

The amendments enable the Queensland Grammar Schools to join the National Redress Scheme (the Scheme) as non-government institutions, providing opportunities for people who have experienced institutional child sexual abuse in these institutions to seek an effective remedy through the Scheme.

The Department of Social Services is actively engaging with institutions, including the Queensland Grammar Schools, to encourage them to join the Scheme.

It is anticipated that further amendments to the Rules will be required to clarify that other institutions (which may meet the definition of a state institution but similarly operate independently of government control) are not state institutions for the purposes of the Scheme. For example, when the relevant jurisdiction does not agree to the institution participating in the Scheme.

The Committee has requested further information as to what other forms of redress (if any) are available for persons who may have suffered abuse at any of the prescribed institutions identified in the Amending Rules. The Scheme offers people who have experienced institutional child sexual abuse by participating institutions an alternative to civil litigation, with a lower evidentiary burden and a high level of discretion. If a person chooses not to seek redress through the Scheme or is unable to do so due to not meeting the legislative requirements, for example, or the responsible institution does not participate in the Scheme, they are still able to seek a remedy through the civil justice system.

The amendment to the Rules are considered compatible with human rights, as they ensure that people who have experienced institutional child sexual abuse have access to a remedy. The amendment clarifies that the relevant institutions can participate in the Scheme in their own right, therefore the amendment facilitates access to redress.

The Government will continue to monitor and review the operation of the Scheme to ensure that the Scheme remains compatible with human rights.

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

MC20-009945

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

20 FEB 2020

Dear ~~Chair~~

Thank you for your correspondence of 6 February 2020 regarding the Parliamentary Joint Committee on Human Rights' Report 1 of 2020 and the Native Title Legislation Amendment Bill 2019. I appreciate the time the Committee has taken to review the Bill and thank you for the opportunity to address the Committee's report.

The Committee has sought my advice as to whether it would be appropriate to amend the Bill to require an evaluation to be conducted within an appropriate timeframe to assess the impact of the Bill on Indigenous peoples' rights to culture and self-determination. While I recognise the importance of ongoing engagement with stakeholders in order to understand and assess the practical impact of the Bill if passed, I do not consider the Bill requires amendment to include a formal evaluation mechanism as proposed.

The Bill follows an extensive period of consultation with a wide range of native title sector stakeholders, including public consultation on an options paper for native title reform from November 2017 to February 2018, and consultation on an exposure draft bill from October to December 2018. During these periods of consultation there was a specific focus on engagement with Indigenous people and their representatives, including through targeted meetings with native title and peak Indigenous representative groups. A technical working group was also convened by the Australian Government to assist with developing the Bill, and included representatives from the National Native Title Council (the peak body for native title representative bodies).

I and my department, together with the Minister for Indigenous Australians and his agency, remain committed to ongoing engagement with stakeholders, and in particular Indigenous peoples and their representatives, on native title issues. I am confident that existing formal and informal consultation mechanisms will provide ample opportunity for feedback to be received on the operation of the provisions of the Bill, once enacted. If such consultations indicate legitimate issues with the operation of measures in the Bill, further amendments will be considered.

I also acknowledge the Committee's observations with respect to the right to self-determination. I remain of the view that the Bill's measures with respect to the role of the applicant (contained in Schedule 1) are necessary and proportionate and, when taken in their totality, will facilitate native title groups' ability to collectively pursue the determination of their native title rights and their economic, social and cultural development. The right to self-determination in particular will be promoted by the ability of the native title claim group to exercise greater control and flexibility in defining the scope of the authority of the applicant.

Thank you again for the Committee's consideration of the Bill, and I trust this information is of assistance. As certain provisions of the Native Title Legislation Amendment Bill fall within the Minister for Indigenous Australians' portfolio responsibilities, I have copied him into this response.

Yours sincerely

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

CC. The Hon Ken Wyatt AM, MP, Minister for Indigenous Australians

The Hon Dan Tehan MP
Minister for Education

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Our Ref: MS20-000083

20 FEB 2020

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

Dear Senator Sarah,

Thank you for your email of 6 February 2019 regarding the *Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019*. Below are responses to the questions posed by the Committee with regard to this Bill:

1.185 The measures outlined in this bill engage and may limit the right to equality and non–discrimination, right to a fair hearing and right to freedom of expression. As discussed above, further information is required in order to conduct a full assessment of the potential limitations on each of those rights, in particular:

- whether any of the proposed criminal offences, or civil penalty provisions (or any part of the criminal offences or civil penalty provisions) will vary in operation depending on whether a person is an Australian citizen;

Response

For the vast majority of cases, there will be no difference in the application of the proposed criminal offence or civil penalty provisions to Australian citizens or non-Australian citizens. This is dependent on the circumstances of each individual case and the applicability of the various constitutional bases supporting the provisions.

Section 114A of the Bill provides that, if an academic cheating service provides cheating services to students at a registered Australian higher education provider, that conduct will be prohibited by the Bill. This provision draws on the 'corporations' and 'territories' heads of power set out in section 8 of the TEQSA Act. Generally, if the academic cheating service is provided to a student (regardless of whether the student is an Australian citizen) at a registered Australian higher education provider, that conduct will be prohibited by section 114A.

Section 114C of the Bill provides alternative constitutional bases, including the 'aliens' power, for the operation of sections 114A and 114B where the main authority is not able to be drawn on. This might be necessary if it is not possible to identify a specific higher education provider that is impacted by the cheating service for the purposes of section 114A. In limited circumstances, the 'aliens' power may be relied upon to capture cheating services providing services to non-Australian citizens. As poor English language skills are the biggest single risk factor for cheating behaviours, international students have been a key target for the promotion of cheating services. Ensuring all such services are at risk of detection and prosecution will be a key deterrent factor in the legislation's operation.

Section 114B of the Bill prohibits advertising, publishing or broadcasting advertisements for academic cheating services. It is anticipated that the vast majority of these advertisements will use some form of communication service (for example, telephone, social media or email). In practice, this similarly makes it very unlikely that section 114B will vary in its operation depending on whether a person is an Australian citizen. In summary, it is anticipated that the 'aliens' power listed in section 114C of the Bill would only be drawn upon in very limited circumstances, where the other constitutional bases do not apply.

In practice, therefore, while it is very unlikely that sections 114A and 114B will vary in operation depending on whether a person is an Australian citizen, the possibility of prosecution that drawing on the 'aliens' power provides is an important element of the Bill's potential to deter the offering and provision of cheating services to a key target market.

- if the proposed criminal offences or civil penalty provisions would treat Australian citizens and (or 'aliens') differently, whether that differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective;

Response

As outlined in the previous response, there are very limited circumstances in which it is anticipated that activation of the criminal offence or civil penalty provisions in the bill would require drawing on the Commonwealth's power to make laws with respect to 'aliens'. The penalties faced by an Australian citizen or an alien who commits an offence under the legislation will be exactly the same. I consider that the very small number of situations where drawing on the aliens' head of power might be necessary to give effect to the new law are reasonable and proportionate; but important to achieving the overall objectives of the Bill. It is a legitimate objective for the Bill to deter the provision of cheating services to non-Australian citizens who are Australian higher education students. It is also appropriate to deter any non-Australian citizens from offering, providing or facilitating academic cheating services, where other constitutional powers may not be able to be called on.

- how the civil penalties in the bill are compatible with criminal process rights, including whether any limitations on these rights are permissible;

Response

The civil penalties contained in the Bill are compatible with the processes used in criminal law. This includes the right to the presumption of innocence, and the right to a fair trial. I note the Committee's point that the significant civil financial penalty could be interpreted as 'criminal' for the purposes of international human rights law. Whilst I acknowledge that the pecuniary penalty is intended to be deterrent in nature, the penalty provision is, properly characterised, a civil penalty provision for the purposes of human rights law. The amount of the pecuniary penalty that may be imposed under the Bill is not punitive having regard to the nature of the industry sought to be regulated (namely, commercial providers and advertisers of higher education academic cheating services) and having regard to the relative size of the civil pecuniary penalties that may be imposed in comparable corporate settings. The civil penalty provision is also strictly confined to a specific regulatory or disciplinary context, namely providers of cheating services within the higher education sector, and does not apply to the public in general.

Given the need for a strong deterrent to academic cheating service provision and advertising, I believe that the level of the penalty is justified. The penalty is also in line with other similar offences, such as dealing in fraudulent identity information, or knowingly providing false or misleading information, or providing a false or misleading document to a Commonwealth entity. I acknowledge the Committee's request that the statement of compatibility with human rights for the Bill explain how the civil penalties are compatible with criminal process rights.

I will give consideration to having this document updated.

- whether and how the proposed offence or civil penalty for advertising an academic cheating service and the injunction power are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.

Response

The proposed offence and civil penalty provisions for advertising an academic cheating service are an essential part of the deterrent effect that this Bill is intended to have, and are necessary to protect vulnerable students, in particular students for whom English is not their first language.

Promotion of cheating services to students takes a number of forms, and the use of social media for promotion of cheating services has become prevalent. Students have reported being inundated with unsolicited emails for such services, as well as advertisements and personal messages received through social media platforms. There have even been reports of cheating services setting up 'information booths' on university campuses during orientation week to trick students into believing these services are a legitimate part of the university's operations. Some cheating services have been reported as recruiting current students as 'agents' to gain access to university web chat rooms to promote their services directly to other students via ostensibly legitimate channels.

These various advertising and promotion channels target vulnerable students who might be struggling to meet academic requirements, by highlighting ease of access, low cost and low risk of detection, all the while playing down the ethical dishonesty involved. Many cheating services promote their services as altruistic enterprises, looking to help students under academic stress. Stressed students who might reach out to friends and family for support through social media can subsequently be targeted by cheating service providers. Students can be especially vulnerable if they are experiencing ill health, or are struggling with the academic demands of certain subjects. The consequences of failing, such as putting their student visa and family honour at risk can be emphasised by those targeting particular students. Academic cheating services exploit these students and may convince them that what they are doing is acceptable under the circumstances.

Having significant penalties in place for advertising academic cheating services will create a strong deterrent, and protect those at risk of being preyed upon by opportunistic cheating service providers.

The injunctions power is another significant mechanism to help reduce the ease of access to cheating services, lower their visibility and minimise the negative impact they might have on the reputation of Australia's higher education sector. Web-based cheating services are the prevalent model of paid academic cheating service operation. A large number of cheating service providers operate across international borders and are located across multiple countries, which will create challenges for Australian authorities wishing to prosecute the activity directly. Research from 2019 looking at the provision of cheating services on a freelance basis, found over 5,000 contractors were offering academic writing services on one 'auction' style website alone; and noted that a high proportion of these contractors were from one overseas country.

The ability to seek injunctions to block cheating websites from appearing in web searches or being available through Australian internet service providers will reduce the visibility of, and ease of access to, overseas websites that provide or advertise cheating services, and will reduce their availability and impact. At the very least, users searching for these websites would need to take deliberate action to circumvent such blocks in order to access a blocked online location. Some universities have already implemented a localised version of this approach, by blocking cheating websites from appearing in internet searches by students using university computer networks.

The ability to block websites will also provide another layer of protection for students from mistakenly thinking they are accessing a legitimate student support or tutoring service.

Thank you for the opportunity to respond to these matters.

DAN TEHAN

THE HON MICHAEL SUKKAR MP

Minister for Housing and Assistant Treasurer

Ref: MS20-000332

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

Dear Senator Henderson,

I am writing in response to a letter from the Parliamentary Joint Committee on Human Rights (the Committee) requesting information in relation to issues raised in the Committee's *Report 1 of 2020* regarding the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 and related Bills.

The Committee has sought advice in relation to the proposed disclosure framework in the Bills, specifically as to:

a) what is meant by the term 'public benefit' in relation to the disclosure of information by the registrar in accordance with the disclosure framework, and whether it would constitute a legitimate objective for the purposes of international human rights law;

b) the nature and scope of the personal information which is likely to be collected and disclosed under the new regime;

c) whether the disclosure framework set out in clause 16 of the Commonwealth Registers Bill 2019 is sufficiently circumscribed and accompanied by adequate safeguards;

d) whether there exists a detailed outline of the proposed disclosure framework insofar as it relates to the right to privacy; and

e) any other matters relevant to the adequacy of safeguards in relation to the collection, use, disclosure and detention of personal information pursuant to this suite of Bills.

I note the Committee's concerns relating to the disclosure framework. I consider that the disclosure framework is sufficiently circumscribed and accompanied by adequate safeguards

As the Committee notes, under clause 60 of the Commonwealth Registers Bill 2019 (and the equivalent provisions in the associated bills), the registrar may only authorise the disclosure of registry information under the disclosure framework where it is satisfied that the benefits of disclosure outweigh the risks, after those risks have been mitigated. Those risks include privacy risks.

The information to be collected by the new regime comprises that currently related to 34 existing business registers currently kept by Australian Securities and Investments Commission and the Australian Business Registrar. A significant proportion of the information to be collected by the new Commonwealth registries regime is information that is collected by Commonwealth bodies and is already made publicly searchable.

By way of example of where such a public benefit may exist, in relation to disclosure within Government is registry information that is required for the administration of other Australian laws. This disclosure supports a report-once, use-often approach by Government, reducing red tape and compliance costs for business.

Additionally, the framework could allow a trusted user (for instance a university whose IT systems, processes and staff have been vetted) to access information that may not be appropriate for wider dissemination where a social benefit exists and appropriate undertakings are made.

This approach to disclosure aligns with the Productivity Commission's 2017 recommendation in their report on Data Availability and Use to take a more principled approach to the release of Government data. In particular, the Commission recommended that Government data be able to be released publically where the benefits of the release outweigh the risks involved (including privacy risks) after those risks have been mitigated to the extent practicable. The reforms are consistent with the Government's broader reforms to data sharing and release.

I also note that to the extent that information collected is personal information there are additional safeguards contained in the bill to protect an individual's right to privacy.

Firstly, the disclosure framework will be subject to a privacy impact assessment under the *Privacy Act 1988*.

Secondly, the Bill allows a person to apply to the registrar to prevent an inappropriate disclosure of registry information that relates to them.

Thirdly, in making the disclosure framework, the Registrar is appropriately empowered to place limits and controls on the disclosure of information. This includes the circumstances in which information must not be disclosed without consent of the person to whom it relates, and circumstances in which enforceable confidentiality agreements are required for the disclosure of information. To support the effectiveness of the disclosure framework in relation to circumstances in which confidentiality agreements are required for the disclosure of registry information, penalties can apply to a person who contravenes such an agreement.

Finally, the disclosure framework will be developed by the Commonwealth body that is appointed Registrar should the Bill become law. The disclosure framework will be a disallowable instrument and will therefore be subject to proper Parliamentary oversight. In addition to Parliamentary oversight, the disclosure framework is subject to the consultation requirements contained in the *Legislation Act 2003*.

Thank you for bringing these concerns to my attention.

The Hon Michael Sukkar MP