Ministerial responses — Report 12 of 2021[1]

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Ministerial responses, *Report 12 of 2021*; [2021] AUPJCHR 127.

The Hon David Littleproud MP

Minister for Agriculture and Northern Australia
Deputy Leader of the Nationals
Federal Member for Maranoa

Ref: MCS21-007610
30 September 2021

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Via email: human.rights@aph.gov.au

Dear Dr Webster

I write in response to the observations of the Parliamentary Joint Committee on Human Rights (the Committee) on the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 (the Bill) in *Human rights scrutiny report – Report 11 of 2021* (the Report).

To support the Committee's consideration of the human rights implications of the Bill, I provide the following advice on matters requested by the Committee at paragraph [1.36] of the Report. This advice has been prepared in consultation with officials from the Department of Health, noting that the Minister for Health and Aged Care also has responsibility for the *Biosecurity Act 2015* (the Biosecurity Act).

a) Why the legislation does not require that if an officer is made aware of a disability that would affect a person's ability to comply with the direction, that they must consider making an exemption

The intention of new section 108M of the Bill is to minimise the risk of contagion of a listed human disease, through the wearing of appropriate protective clothing and equipment, and appropriate instruction in its use. A chief human biosecurity officer or human biosecurity officer may exempt an individual from the requirement to wear protective clothing or equipment under new subsection 108M(3). As the Committee has noted, the legislation does not separately require the officer, if made aware of a disability, to consider making an exemption under subsection 108M(3). The reasons for this approach are threefold.

First, the present drafting of the exemption in subsection 108M(3) provides greater flexibility to appropriately respond in the circumstances of each individual case. Decisions that are made in relation to exemptions will draw upon the officer's clinical expertise or qualifications, taking into account each individual's specific medical needs, the particular epidemiology of the infectious disease and the evolving operational context in which the human biosecurity group direction is given. A requirement to consider the exemption once aware of a disability would be too prescriptive, and it would not be possible to exhaustively state all the specific circumstances or operational contexts that might give rise to an exemption.

Second, further safeguards in the Bill already ensure that chief human biosecurity officers and human biosecurity officers will properly apply the biosecurity measure in section 108M and will grant exemptions under subsection 108M(3) where appropriate in the circumstances.

In particular, officers must be satisfied that the inclusion of a requirement under section 108M in a human biosecurity group direction would contribute to managing the risk of contagion of a listed human disease, or the risk of a listed human disease entering, emerging, establishing itself or spreading in Australian territory (see new subsection 108B(6)). Further, before making a decision in relation to a biosecurity measure that is included in the group direction (including under section 108M), subsection 34(2) also requires the officer to be satisfied of a number of important considerations. These include that the measure is likely to be effective in managing such risks; that it is appropriate and adapted to manage such risks; that the circumstances are sufficiently serious to justify the measure; that the manner in which the measure is to be imposed is no more restrictive or intrusive than is required in the circumstances; and that the period of the measure is only as long as is necessary.

For example, if a human biosecurity officer is satisfied that a disability would affect a person's ability to comply with the measure under section 108M to wear protective clothing or equipment, then the officer would already be required to consider, among other things, whether this measure would be appropriate or adapted to manage the risk of contagion of the listed human disease. If the officer is not satisfied that the considerations in subsection 34(2) could be met unless an exemption is granted under subsection 108M(3), then that would be the appropriate course of action. Further, this Bill also does not affect the application of any other Australian law, for example, the *Disability Discrimination Act 1992*, that may also be relevant in the clinical decision making and operational application of these provisions.

Finally, the exemption in subsection 108M(3) strikes the right balance between flexibility in clinical decision-making to meet individual needs and the core objective of human biosecurity group directions in managing the human health risks posed by a class of individuals.

The new human biosecurity group direction mechanism is intended to fill a gap in the Commonwealth's biosecurity framework to manage a group of individuals for preliminary assessment and management of risks to human health, for example, where a number of passengers onboard a large incoming cruise vessel have signs or symptoms of a listed human disease. In the context of such time-critical decision-making processes, where there are potentially a large number of individuals to be assessed and contagion risks to be managed, further mandatory decision-making considerations (in addition to subsection 108B(6) and subsection 34(2) identified above) are not considered necessary.

b) Why there is no legislative criteria as to the type of examinations that will require consent (e.g. anything invasive) and a specific requirement that such examinations be undertaken with regard to the dignity, and where necessary, privacy, of the person being examined

It is not considered necessary to include further specific legislative criteria in the Bill in relation to examinations conducted under section 108N. This is because the existing legislative criteria in the Bill in relation to examinations are already sufficient to ensure informed consent and to safeguard an individual's rights to dignity and, where necessary, privacy. There are a number of reasons for this.

First, the decision of the chief human biosecurity officer or human biosecurity officer to impose a biosecurity measure to undergo an examination under section 108N, and to determine how consent is to be given, will be informed by clinical knowledge and expertise. In order to accommodate the dynamic context of human biosecurity risk, including novel and emerging infectious diseases and rapidly changing medical technology used in examinations for diagnostic purposes, it is necessary for section 108N to be appropriately flexible to meet future needs of managing human health risks.

Second, clinical decisions made in relation to the requirement to undergo an examination under section 108N would also be subject to a number of significant safeguards, which limit measures to only those that are appropriate and adapted to achieving the legitimate objective of protecting human health. As discussed above, subsections 108B(6) and subsection 34(2) require the chief human biosecurity officer or human biosecurity officer to be satisfied of several important considerations before including a biosecurity measure under section 108N in a human biosecurity group direction. For example, if temperature checks are considered to be effective in managing the risk of contagion of a listed human disease by identifying those individuals with a fever, the officer would then need to consider whether the manner in which the requirement for a temperature check is imposed (including whether and how consent is to be given) is no more restrictive or intrusive than is required in the circumstances, and whether it is appropriate and adapted to managing the risk. In some circumstances, the officer may decide that certain examinations would be inappropriate or too intrusive if there is no consent, in which case they can require that consent must be given before undergoing the examination, and also determine how consent can be given.

A further safeguard in new section 108R stipulates that examinations must be carried out in accordance with appropriate medical standards or other relevant professional standards. The chief human biosecurity officer or human biosecurity officer will make the decision on what examination needs to be undertaken in accordance with the human biosecurity group direction. The Medical Board of Australia sets out a code of conduct for all doctors in Australia. It is not envisaged that the chief human biosecurity officer or human biosecurity officer will always personally undertake the examinations. It is likely they will instruct other medical professionals to undertake those tasks. Appropriate medical and professional standards would apply. This standard usually means the degree of care and skill of the average health care provider who practices in the provider's specialty, taking into account the medical knowledge that is available in the field, or the level at which the average, prudent provider in a given community would practice or how similarly qualified practitioners would have managed the patient's care under the same or similar circumstances. This means the ‘standard’ is not static but evolves over time as evidence emerges and practice changes. The process must be carried out in accordance with the medical ‘standard of the day’. It is important to note that some states and territories have their own legislation governing medical and professional standards. Given that there may be many different types of medical professionals who may need to conduct examinations under new section 108R in different states and territories, it would be too cumbersome to list exactly which standards apply, based on the speciality.

Further, proposed section 108S would ensure that there be no use of force against an individual to require the individual to comply with a biosecurity measure, including an examination under section 108N.

With regard to personal privacy, there are further measures in place to protect the personal information of relevant individuals (for example, in relation to personal medical details disclosed during an examination). Part 2 of Chapter 11 of the Biosecurity Act already contains a detailed regime for the use, record or disclosure of information under the Biosecurity Act, and further protections are afforded to "protected information" which is defined in section 9 as including "personal information" as defined under the *Privacy Act 1988* (Cth). Breaches of the obligations regarding protected information are subject to stringent penalty provisions under section 585 that deals with the unauthorised use, record or disclosure of protected information.

c) Why there is no flexibility for officers to grant exemptions from the requirement to undergo certain examinations

The Bill already contains a number of mechanisms to allow individual circumstances to be taken into account in relation to an examination conducted under new section 108N. In the event that consent is required for the examination, but the individual does not wish to provide such consent, then that requirement would not apply to the individual (subsection 108N(3)), and there is no need to provide a separate exemption. In other situations where the chief human biosecurity officer or human biosecurity officer decides that it is not appropriate for an individual to undergo a certain examination, alternative measures may be considered.

In particular, under existing Part 3 of Chapter 2 of the Biosecurity Act, a human biosecurity control order may be imposed on an individual to manage the risks posed to human health. The order could, for instance, provide for an alternative biosecurity measure, which could be tailored to suit the individual's circumstances, while also achieving the objective of managing human health risks. In this context, the existence of a human biosecurity group direction would not limit the imposition of a human biosecurity control order (see subsection 108J(1)). Further, new subsection 108J(2) would apply so that if an individual in a class specified in the human biosecurity group direction is subject to a human biosecurity control order, the group direction would cease to be in force in relation to that individual. Safeguards already apply for the imposition of a human biosecurity control order, including the general protections under section 34. In addition, relevant medical and other professional standards apply in relation to any alternative examinations conducted under section 90, and also include that there be no use of force against an individual to require the individual to comply with such a biosecurity measure (see sections 94 and 95).

The availability of existing Part 3 human biosecurity control orders therefore creates a flexible mechanism to, in effect, 'carve out' an individual from the application of a human biosecurity group direction. This regime permits consideration of the circumstances of a particular individual, adheres with other relevant obligations in the Biosecurity Act, and upholds medical and professional standards, whilst also securing the legitimate objective of managing the human health risks of a listed human disease.

d) Why the bill provides no guidance as to when body samples must be destroyed (for example, once testing has been completed), noting that body samples can contain sensitive personal information

Under new subsection 108P(1), an individual who has undertaken an examination under section 108N may be required to provide specified body samples for the purposes of determining the presence of certain listed human diseases.

Pursuant to subsection 108P(2), an individual is only required to provide a body sample if the individual consents to do so in the manner specified in the direction as required by subsection 108P(3). Subsection 108P(4) then provides that the regulations must prescribe requirements for taking, storing, transporting, labelling and using body samples provided under subsection 108P(1).

The current framework in subsection 108P(4) of the Bill to allow the requirements for body samples to be prescribed in the regulations offers suitable flexibility for the administrative and procedural nature of such matters, while still retaining suitable clarity and transparency. The prescription of such matters in the regulations is also consistent with the equivalent provisions in the Biosecurity Act for the requirements for body samples in relation to human biosecurity control orders (see subsection 91(3)). Further, the provision of body samples is already subject to the safeguard in new section 108R that the biosecurity measures must be carried out in a manner consistent with appropriate medical standards and other relevant professional standards. As noted above, some states and territories have their own legislation governing medical and professional standards, which extends to standards in relation to the destruction of body samples. In light of the existing framework in the Bill and the relevant standards, it is not considered necessary to exhaustively set out the circumstances in which body samples must be destroyed, and would in fact create the potential for duplicative or conflicting standards.

Additional safeguards apply through the regime in Part 2 of Chapter 11 of the Biosecurity Act for the use, record or disclosure of information. As discussed above, “protected information” is defined in section 9 of the Biosecurity Act as including “personal information” as defined under the *Privacy Act 1988* and is afforded additional protections. To the extent that the body samples collected under section 108P contain personal information, then this will be dealt with as ”protected information” for the purposes of the Biosecurity Act. Additional protections would apply under this framework, together with significant penalties for the unauthorised use, record or disclosure of protected information under section 585. Given the current regime for the confidentiality of information under the Biosecurity Act, it is not considered necessary to impose separate requirements for handling personal information collected in body samples.

e) How empowering an accompanying person of a ‘child or incapable person’ to give consent on their behalf to undergo examinations and provide body samples, without requiring any consideration as to the wishes of the child or incapable person, is compatible with the rights of the child and the rights of persons with disabilities.

The application of the general protections in section 34 to decisions concerning the human biosecurity group direction would provide for consideration of the rights enshrined in the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disability*, and the personal protections enshrined in the International Health Regulations. In making such a direction, and including relevant biosecurity measures, subsection 34(2) requires that further consideration be given to a range of important considerations (discussed above), which seeks to balance the seriousness of the circumstances as well as the public interest in giving a direction or including a measure, against the public interest in upholding an individual’s liberty or other rights to ensure that appropriate protections are considered. As noted above, the Bill does not affect the application of any other Australian law that may be applicable in the context, for example the *Disability Discrimination Act 1992*.

Section 40 of the Biosecurity Act is intended to provide an additional mechanism for an accompanying person (such as a family member and guardian) to provide consent on behalf of a child or incapable person, when the child or person cannot provide consent on their own behalf. This mechanism would be subject to appropriate medical and other professional standards, including the usual practice of assessing the ability of a child or person to provide consent on their own behalf. This is given effect through the requirement in section 108R that appropriate medical and other professional standards apply in relation to examinations conducted under section 108N and for the provision of body samples under section 108P. The clinical expertise and training of the medical professional who is conducting the examination or requesting the body samples would ensure that procedures requiring consent are undertaken in a manner consistent with the rights of the child and persons with a disability. Further, an additional protection is provided in new section 108S, which stipulates that there be no use of force against an individual to require the individual to comply with a biosecurity measure. Where a chief human biosecurity officer or human biosecurity officer decides that it is not appropriate for an individual (including a child or incapable person) to undergo a certain procedure, alternative measures may be considered.

The proposed approach to consent to human biosecurity group directions for a child or incapable person would also promote internal consistency in the statutory framework of the Biosecurity Act concerning children and incapable persons. For example, the proposed approach for the human biosecurity group direction is consistent with the existing provision of consent under section 40 by an accompanying person for a child or incapable person in respect of a human biosecurity control order under Part 3 of Chapter 2 of the Biosecurity Act.

I have copied this letter to the Hon Greg Hunt MP, Minister for Health and Aged Care.

I thank the Committee for raising these issues for my attention.

Yours sincerely

DAVID LITTLEPROUD MP

cc: The Hon Greg Hunt MP
Minister for Health and Aged Care

Senator the Hon Michaelia Cash
Attorney-General
Minister for Industrial Relations
Deputy Leader of the Government in the Senate

Reference: MC21-044752

Dr Anne Webster MP
Chair Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

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

Dear Dr Webster

Thank you for your email of 16 September 2021 seeking further information regarding the Crimes Amendment (Remissions of Sentences) Bill 2021 (the Bill).

Currently, some prisoners in Victoria are receiving substantial discounts off their sentences, which have not been anticipated or considered by the courts in sentencing. The granting of significant numbers of emergency management days is inappropriate, as it interferes with, and undermines, careful and considered sentencing decisions made by the court. Sentencing courts undertake a complex and detailed consideration of these individual circumstances in determining the appropriate sentence for offenders, informed by precedent and sentencing principles.

Significant sentence discounts applied to serious offenders undermines the seriousness of the conduct to which the sentences relate. In extreme cases, where a court has crafted a sentence to ensure a federal offender is able to access offence-specific rehabilitation programs in prison, such as sex offender treatment, the application of emergency management days may mean that the offender is unable to complete that program in custody. That offender would then be released into the community without the benefit of treatment designed to reduce the risk that they pose to community safety.

These sentence discounts also pose significant operational challenges for intelligence and law enforcement authorities, particularly for managing high risk terrorist offenders. Shifting and shortening sentence expiry dates is unpredictable, and can impact the post-sentence management options for offenders who are eligible for a continuing detention order (CDO) under Division 105A of the *Criminal Code Act 1995* (the Criminal Code) or a control order under Division 104 of the Criminal Code.

The removal of the ability to confer significant sentence discounts in this manner is appropriate. It does not impose any additional punishments on federal offenders, and does not interfere with the sentence fixed by the court. The measures in the Bill simply restore the sentence that was justly set down by the court. These principles have been upheld in other criminal justice contexts.

Perth
44 Outram Street, West Perth WA 6005
Ph 08 9226 2000

Canberra
Parliament House, Canberra ACT 2600
Ph 02 6277 7300

For example, the High Court, in the matter of *Kevin Garry Crump v the State of New South Wales [2012] HCA 20*, determined that amendments made to NSW legislation to make it more difficult for the plaintiff to be released on parole did not interfere with the original sentence, or the order made in relation to the plaintiff declaring a minimum term he was required to serve before being eligible for release on parole. The majority considered that the relevant NSW law 'did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty.'[1]

The Committee correctly notes that 'Mitigating risks to community safety is a legitimate objective for the purposes of international human rights law'. The measures in the Bill are proportionate to achieving the legitimate objective of the Bill, which is to protect the community from the risks posed as a result of significant and unpredictable reductions to the head sentences of federal offenders.

Limiting the application of the amendments to remissions that may be granted in the future does not address the risks to community safety posed by the significant reductions in sentences for offenders currently in custody. For this reason, the provisions need to have limited retrospective application.

The measures are proportionate, in that they apply to all federal offenders and do not seek to remove remissions granted to offenders who have already been released from custody.

Thank you for providing the opportunity to respond to concerns raised about the measures in the Bill. I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash

29/07/2021

[1] *Kevin Garry Crump v the State of New South Wales [2012] HCA 20*, para 60

The Hon Andrew Gee MP
Minister for Veterans' Affairs
Minister for Defence Personnel

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7820
Our Ref: MS21-002328

The Secretariat
Parliamentary Joint Committee on Human Rights
Parliament House
Canberra ACT 2600

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

Dear Secretary

Thank you for your email of 26 August 2021 (received by my office on 29 September 2021) regarding the *Human rights scrutiny report 10 of 2021* - Defence Legislation Amendment (Discipline Reform) Bill 2021. I appreciate the time you have taken to bring this matter to my attention.

To assist the Committee in forming a view on the human rights implications of the proposed s.48A cyber-bullying service offence, namely the proportionality of this provision with Defence members right to freedom of expression, the following additional information is provided in support of responses to the specific matters set out in paragraph 1.31 of the Committee's Report. This additional information may assist the Committee's consideration of the purpose and unique nature of the *Defence Force Discipline Act 1982* (DFDA) to maintain and enforce the high level of discipline required by the Australian Defence Force to ensure operational readiness and effectiveness and the requirement for proscribing cyber-bullying conduct as a service offence. The purpose of the DFDA is distinct from the criminal law.

The objective of the proposed s.48A service offence (and complementary proposed s.84A Removal order and s.48B Failure to comply with a removal order) is to prevent members of the Defence Force from engaging in cyber-bully by providing command with an effective and efficient means to deal with cyber-bullying via social media that can adversely impact the good order and discipline of the Defence Force. Collectively, the cyber-bullying offences have a rational connection to the maintenance and enforcement of good order and discipline in the Australian Defence Force, which the High Court has consistently held as the purpose of the discipline system under the DFDA. It will also send a strong message to the 'predominately digitally literate young adult demography' of the Australian Defence Force (source: Inspector-General of the Australian Defence Force submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee) that cyber-bullying of any form is not tolerated and that such behaviour is not consistent with the Defence Value of *Respect.*

Proportionality

The High Court in *McCloy v State of NSW* [2015] HCA 34 established a 'proportionality' test which deals with a legislative measure that may restrict a freedom, and is addressed below.

Suitability: *is there a rational connection to the legitimate purpose of the provision?* Yes, the s.48A 'offensive' cyber-bullying offence is directly related to the purpose of the provision which is to prevent members of the Defence Force from engaging in cyber-bully by providing command with an effective and efficient means to deal with cyber-bullying by social media that can adversely impact the good order and discipline of the Defence Force.

Necessary: *is there an obvious or compelling alternative reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom?* No there is not. Administrative sanctions (see below response to question (e)) lack an immediate and public deterrent effect for maintaining or enforcing service discipline nor preventing the misuse of social media as proscribed by s.48A.

Adequate in its balance. Only defined aspects of the freedom of expression will be limited. The limited aspects are necessary and reasonable within a disciplined Defence Force. Consider for example a social media post that made 'offensive' comments (applying the reasonable person test), concerning the commanding officer of a unit – the social media post being visible to the commanding officer's unit. The importance of the restrictive measure by application of s.48A will enable the maintenance and enforcement of discipline where a reasonable person (service tribunal) determines that the use of social media etc. is regarded as 'offensive'. S.48A does not restrict the freedom of expression in all circumstances, but for social media use that is reasonably regarded in the circumstances as 'offensive'. An interpretive provision dealing with 'offensive' modelled on s.8 of the *Online Safety Act 2021* and s.473.4 of the *Criminal Code* will be included.

The scope of s.48A extends to cyber-bullying by a Defence member to *another person*, meaning that cyber-bullying can include any person. To the extent that such behaviour could amount to conduct undertaken after hours by a Defence member or beyond the scope of defence duty, it is appropriate and relevant to note what McHugh J said in *Re Aird; ex parte Alpert* (with whom Gleeson CJ, Gummow and Hayne JJ agreed), a case which involved a member of the Army who was off-duty on recreational leave in another country who challenged his prosecution before a superior service tribunal:

> *'A soldier who… undermines the discipline and morale of his army…does so whether he is on active service or recreation leave.'*[1]

In the present context, the reference to the offence can be readily substituted with the proposed cyber-bullying offence.

I am satisfied, and the Committee can be satisfied that s.48A and its element of 'offensive' social media use, meets the criteria of proportionality test as laid down by the High Court in *McCloy*, and as a consequence does not exceed the implied limitation on freedom of speech.

Additionally I consider that the Full Court of the Federal Court decision in *Chief of the Defence Force v Gaynor* (2017) 344 ALR 317 suggests that the courts recognise that reasonable restrictions can be placed on a Defence member's use of social media where

[1] *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 314, 324, 325 and 356 – (21004) 220 CLR 308 at 314, 324, 325 and 356; cited with approval in Cowen per Keiffel CJ; Bell and Keane JJ)

that use would compromise their capacity to be a member of, undermine the reputation of, the Australian Defence Force.

Furthermore the decision of *Comcare v Banerji* (2019) 372 ALR 42 suggests that the High Court itself is not unsympathetic to constraints on social media communications where that is reasonably necessary to protect the integrity and good reputation of public institutions such as the Australian Defence Force.

However, noting the issues raised by the Committee I believe the Bill would benefit from a suitable interpretive provision in relation to offensive behaviour in a similar manner to its depiction in the *Online Safety Act 2021* s.8 and the *Criminal Code* s.473.4.

The DFDA

The DFDA provides a system of military discipline that applies to members of the Defence Force at all times, whether they are deployed on operations or exercises within Australia or overseas, in times of peace, conflict and war. The purpose of the DFDA is to enable the Chief of the Defence Force, through delegated command authorities, to enforce and maintain discipline within the Defence Force. The legitimacy of legislation for the purposes of military discipline has been consistently upheld by the High Court of Australia.[2]

Disciplinary breaches under the DFDA. The DFDA regulates three kinds of disciplinary breaches:

a. **Disciplinary infringements:** examples include absence without leave, absence from duty, disobeying a lawful command. These are minor forms of disciplinary breaches.

b. **Service offences:** examples include assaulting a superior officer, theft of service property, alteration / falsification of service documents, conduct relating to operations against an enemy force. Some service offences have elements that are the same or similar to a civilian offence.

c. **Territory offences:** these are service offences applicable by virtue of the incorporation of the law of the Australian Capital Territory and certain Commonwealth law into the DFDA through s.61. With some exceptions, generally only superior tribunals may deal with these offences.

Service tribunals. An offence under the proposed s.48A may only be prosecuted before a Summary Authority (being either a Commanding Officer or Superior Summary Authority) or a superior service tribunal (being either a General or Restricted Court Martial or a Defence Force magistrate).

Breaches of military discipline. The DFDA must deal with a wide range of breaches of military discipline at various levels or ranges of seriousness and in a wide variety of circumstances, not just those that cross the criminal threshold and in a benign domestic setting. It must be effective when it is most needed, when units are deployed on operations and in situations of conflict. As far as possible breaches must be dealt with by the appropriate commander in the theatre of operations.

[2] See *Private R v Cowen* [2020] HCA 31. The exception to this line of authority is *Lane v Morrison* (2009) 239 CLR 230 which unanimously found that the establishment of the Australian Military Court as a legislative court operated outside of the traditional system of military justice supported by s51(vi) of the Constitution.

Punishments. The DFDA provides for a number of punishments (14 in total) that may be imposed by a service tribunal ranging from receiving a reprimand to imprisonment for life. This range of punishments is subject to limitations dependent upon the service tribunal determining the matter and the rank of the convicted Defence member.

A Summary Authority cannot impose a punishment of imprisonment. Examples of the punishments that a Summary Authority may impose include: extra duties, stoppage of leave, a fine (up to specified limits, normally 7 days pay), forfeiture of seniority and for members below non-commissioned rank, a period of detention (see Schedule 2 Part 2 of the Bill).

A Restricted Court Martial and Defence Force magistrate cannot impose a punishment of imprisonment greater than 6 months. Only a General Court Martial can impose a punishment of imprisonment greater than 6 months.

While the maximum punishment for the proposed s.48A is 2 years imprisonment, only a General Court Martial can impose such a punishment and this would be for the most serious of matters. The majority of prosecutions against the proposed s.48A would occur before a Summary Authority who cannot impose a punishment of imprisonment as noted above.

As a service offence the proposed s.48A is able to be applied in a wide range of circumstances as there is a requirement to allow offending to be dealt with at an appropriate level while sending a clear message that cyber-bullying is treated seriously. Offences attracting greater than 2 years maximum imprisonment are prescribed offences and cannot be dealt with by a Summary Authority. Alignment with the maximum punishment available as a criminal matter is available as a Territory Offence under DFDA s.61, such as s.474.17 Misuse of a carriage service, but this can only be dealt with by a superior service tribunal.

It is also important to note that in determining what punishment to impose and / or order to make on a convicted Defence member a service tribunal must have regard to the principles of sentencing applied by the civil courts, from time to time and the need to maintain discipline in the Defence Force (see DFDA s.70). A prosecution before a civilian court following conviction and punishment, does not have regard to the need to maintain discipline in the Defence Force.

Protections - review and appeal. All proceedings before a service tribunal resulting in a conviction are subject to an automatic review by command (a Reviewing Authority (a senior ranking member of the Defence Force appointed by the Chief of the Defence Force or a Service Chief)) which is supported by a report on the proceedings provided by a legal officer (see DFDA ss.152 and 154). A Reviewing Authority is bound by an opinion on a question of law in the legal report (see DFDA s.154(2)). The Reviewing Authority may refer the issue on a question of law to the Judge Advocate General for an opinion (see DFDA s.154(3)).

A Reviewing Authority has the power to quash a conviction on specified grounds and, in undertaking their review, may take into account credible and admissible evidence that was not reasonably available during the proceedings (see DFDA s.158); order a new trial (see DFDA s.160); substitute a conviction for an alternative offence to the [original] service offence (see DFDA s.161); and quash a punishment and / or revoke an order and substitute the punishment and / or order with a different, but no more severe, punishment and / or order (see DFDA s.162).

Defence members convicted either before a Summary Authority or a superior service tribunal have the right to petition a Reviewing Authority for a review of their conviction (see

DFDA s.153) in addition to the 'automatic' review mentioned above. They also may petition the Chief of the Defence Force or a Service Chief for a 'further' review of their conviction following either the 'automatic' review or review on petition to a Reviewing Authority (see DFDA s.155).

Defence members convicted before a superior service tribunal may appeal to the Defence Force Discipline Appeal Tribunal (see *Defence Force Discipline Appeals Act 1955* s.20) or to the Federal or High Court.

Oversight of military discipline. In addition to the 'protections' mentioned above, the operation of the military discipline system is overseen by the Judge Advocate General and the Inspector-General of the Australian Defence Force who both provide annual reports to Parliament on the operation of the DFDA and military justice as a whole. The Inspector-General conducts regular 'military justice audits' which include surveys of Defence members on issues relating to the application of discipline. The results of those surveys are provided to senior command of the Defence Force and published in Annual Reports.

Policy and procedural guidance. To support the administration of discipline as provided by the DFDA, Defence has comprehensive policy guidance and procedural forms.

The purpose of the policy guidance is to provide procedural and practical guidance to those members of the Defence Force involved in the disciplinary process from the initial investigation of a service offence, determination of whether or not to charge a Defence member with a service offence, determination of whether a charge should be referred to a Summary Authority for prosecution or to the Director of Military Prosecutions for consideration of prosecution before a superior tribunal, and guidance for Summary Authorities trying a service offence.

The policy guidance includes:

a. *Commanders' Guide to Discipline* – issued by the Chief of the Defence Force.

b. *Summary Discipline Manual* – issued by the Vice Chief of the Defence Force.

Specific questions raised by the Committee

(a) what type of use is likely to be considered 'offensive' for the purposes of proposed section 48A;

The purpose of the proposed s.48A cyber-bullying offence is to prevent defence members from using a social media service or relevant electronic service (as defined within s.48A(2)), in a way that a reasonable person would regard as offensive or as threatening, intimidating harassing or humiliating another person. As presently drafted, there is no explanatory provision within the Bill or the Act regarding the meaning of 'offensive' generally, or specifically in aid of s.48A.

I recognise that one of the benefits of the proposed s.48A cyber-bullying offence is that there are many and varied circumstances of social media etc. use that s.48A will deal with. On one level, s.48A as drafted, does not require further detail or explanation.

But overall, on balance and having regard to the questions raised by the Committee, I believe all Defence members should be fully aware of what is to be considered 'offensive' social media use, contrary to s.48A.

In response to the Committee's questions, I consider that the Bill would benefit by including interpretative guidance of the use of a social media service etc. in a way that a reasonable person would regard as "offensive". The 'reasonable person' should be I believe be guided in the legislation in making this assessment. This guidance would be achieved by including within the Bill an interpretive provision along similar lines to s.8 of the *Online Safety Act 2021* and s.473.4 of the *Criminal Code* (which deals with 'offensive' use of social media and telecommunication services respectively), and which could be suitability modified for inclusion within the DFDA to address the meaning of 'offensive' social media etc. use for the purpose of s.48A. This will require further drafting instructions to the Office of Parliamentary Counsel (OPC), a revised Explanatory Memorandum and Additional Legislative Approval process. I have instructed Defence to proceed with instructions to OPC for an interpretive clause for inclusion within s.48A as follows:

> 48A (xx) Determining whether social media etc. use is offensive
> (1) The matters to be taken into account in deciding for the purposes of this Part whether a reasonable person would regard a particular use of a social media service or relevant electronic service, as being, in all the circumstances, offensive, include:
> (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
> (b) the literary, artistic or educational merit (if any) of the material; and
> (c) the general character of the material (including whether it is of a medical, legal or scientific character).

Appropriate policy guidance will be provided in the *Summary Discipline Manual* to assist an 'authorized member' to determine if there are reasonable grounds for believing that a Defence member has committed the service offence of 'cyber-bullying' and cause the person to be charged.

This policy guidance will also assist a Summary Authority trying a charge against s.48A.

At all times legal advice, provided by Australian Defence Force legal officers is available to assist those involved in either the investigation or prosecution of a cyber-bullying matter. This provision of legal advice also extends to an accused person.

(b) is it intended that the term 'offensive' will be considered together with the terms 'threatening, intimidating, harassing or humiliating', or is it intended to have a stand-alone meaning, and, if so, is it intended that this would capture uses that a reasonable person would merely find offensive, without necessarily any profound and serious effects;

The term 'offensive' is intended to stand-alone and capture social media use that a reasonable person would regard as offensive without the requirement of any 'profound or serious effects' (see proposed interpretive provision for s.48A above).

The maintenance and enforcement of discipline requires that Defence must be able to deal with cyber-bullying as defined by any of the elements within s.48A. This is essential to maintaining discipline, morale, protecting other Defence members and maintaining the reputation of Defence by upholding the Defence Value of *Respect*.

Defence must be able to deal with cyber-bullying on a number of levels. It is envisaged that the majority of matters would be for lower level offending and be tried before a Summary Authority where appropriate. More serious offending or complicated matters would be referred to the Director of Military Prosecutions for determination of prosecution before a superior tribunal either under proposed s.48A or as a Territory offence (i.e., relevant *Criminal Code* offence) or for referral to civilian authorities as is the practice for other service offences of a serious nature.

(c) could this service offence apply to ADF members in their personal capacity where the offensive use has no, or little, link to their ADF service;

Yes. It is possible for members of the Australian Defence Force to be prosecuted for a service offence (including a Territory offence) committed in circumstances which have little link to their service in the Defence Force (see *Private R v Cowen* [2020] HCA 31), other than the offence being committed as a Defence member.

Conduct of the kind proscribed by the proposed offence impacts upon the discipline of the Defence Force regardless of the identity or status of the victim or whether it occurs within or outside regular hours of duty. Australian Defence Force personnel are required to maintain a high standard of personal behaviour at all times and conduct of this kind is inimical to a disciplined force.

(d) what safeguards are in place to ensure the proposed service offence does not unduly restrict an ADF member's freedom of expression; and

A Defence member's freedom of expression is not unduly restricted by the proposed s.48A, but will be restricted only to the extent that a reasonable person in the circumstances would regard the member's social media use as 'offensive or as threatening, intimidating, harassing or humiliating another person'.

(e) what other, less rights restrictive approaches would be available to achieve the stated objective. In this respect, further information is required as to the approach currently taken to deal with cyber-bullying in the ADF and why this has proved not to be effective to achieve the objective of maintaining military discipline.

Defence has in place a Media and Communication Policy including Personal / Private Social Media Policy which places the following restrictions upon members of the Defence Force:

> 7.11 Private social media profiles of Defence personnel must not use any Defence branding, logo, official title, position or organisational grouping connected to or representing Defence. The exception is LinkedIn, where personnel are permitted to reflect their role within Defence, provided no operational or classified information is contained in the profile.
> 7.12 If a profile appears to be representing Defence, and is administered by Defence personnel, all content and activity will be deemed departmental public comment and that individual will be accountable for compliance with the requirements of this policy.
> 7.13 Defence personnel using social media in a private capacity must not:
> a. join or remain a member of a group, forum, site or discussion that is involved in or promotes behaviour that is exploitative, objectifying or derogatory or in any other way breaches any relevant legislation or Defence policies;
> b. post any defamatory, vulgar, obscene, abusive, profane, threatening, racially or ethnically hateful or otherwise offensive or illegal information or material;
> c. criticise the work or administration of the Department, Group or Service; and must professionally and impartially serve the government of the day;
> d. forecast, announce or promote Defence activities that have not been disclosed previously in the public domain;
> e. use imagery of Defence activities that is not cleared for public release or represents Defence negatively in the public domain; or
> f. claim or appear to represent Defence as an official spokesperson.

Currently breaches of the policy may be dealt with by way of administrative action, which may include termination of the member's service in the Australian Defence Force pursuant to the relevant Defence regulation (see for example *Chief of the Defence Force v Gaynor* (2017) 344 ALR 317). Administrative action by a decision-maker does not address legislative

requirements of DFDA s.70, which includes the need to maintain discipline in the Defence Force which follows a conviction for a service offence (such as the proposed s.48A) and consideration of punishment action, including specific and general deterrence (see DFDA Part IV).

The deterrent effect of being able to deal with breaches of military discipline swiftly under the provisions of the DFDA are not able to be achieved through administrative action, such as termination, formal warning or censure. While administrative action may be appropriate in certain circumstances, it is not an effective means of promptly addressing instances of cyber-bullying which may occur in operational environments such as overseas deployments or in close quarter environments such as on-board Navy ships.

I have enclosed a copy of the proposed Supplementary Memorandum addressing the issues raised in the Committee's Report.

I have informed Senator Abetz, Chair Foreign Affairs Defence and Trade Legislation Committee regarding amendment of the Bill to include an interpretive clause for 'offensive' within the proposed s.48A.

Thank you again for raising the issues identified by the Committee for my attention. I trust the information I have provided both generally and in response to the Committee's specific questions is of assistance.

Yours sincerely

ANDREW GEE

7 / 10 2021

The Hon Andrew Gee MP
Parliament House CANBERRA ACT 2600 | 02 6277 7820 | Minister@dva.gov.au
PO Box 673 ORANGE NSW 2800 | PO Box 54 BATHURST NSW 2795

THE HON BEN MORTON MP
MINISTER ASSISTING THE PRIME MINISTER AND CABINET
MINISTER FOR THE PUBLIC SERVICE
SPECIAL MINISTER OF STATE

Reference: MC21-003148

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Dr Webster

Thank you for your correspondence dated 26 August 2021 on behalf of the Parliamentary Joint Committee on Human Rights requesting further information regarding human rights issues in relation to the *Electoral Legislation Amendment (Party Registration Integrity) Bill 2021* (the Bill). As you would be aware, the Bill was passed by the Parliament on 26 August 2021 and received Royal Assent on 2 September 2021.

The Government introduced the Bill to increase the member requirement for political party registration to 1,500 members to strengthen the integrity of Australia's electoral framework, by ensuring parties maintain a genuine level of community support.

If a group has a genuine base of community support, meeting the requirement for 1,500 unique members should not be onerous or a barrier to the formation of new political parties.

The Joint Standing Committee on Electoral Matters (JSCEM) recommended that the membership requirements for political party registration be increased to 1,500 unique members in its report on the 2013 federal election. JSCEM also recommended an increase in party membership requirements in its 2016 report.

To the extent that the Bill engages and limits the right of citizens to take part in the conduct of public affairs, it is proportionate to the legitimate end sought and is reasonable and necessary in the circumstances.

The member requirements for non-parliamentary parties have not increased since they were first introduced in 1984. As noted in the Explanatory Memorandum, the increase to 1500 unique members is proportionate to the increase in Australia's national voting population since that time (currently approximately 17 million people). This threshold is also proportionally less restrictive than equivalent thresholds under State electoral laws, and does not prevent candidates from an unregistered party from standing for election as 'Independent' candidates.

The Bill clarifies the existing requirement for parties to rely on 'unique' members of for the purposes of registration. This requirement has been in the *Commonwealth Electoral Act 1918* since 2000. It is an important safeguard against potential fraud and ensures that political parties have a genuine base of community support. The limitation of the right is therefore consistent with Article 25 of the International Covenant on Civil and Political Rights.

The Australian Electoral Commission (AEC) manages the registration and membership requirements of all federal political parties. As per the *Party Registration Guide* and membership testing methodology at the time, the AEC required parties to provide a list of 500-550 members. The AEC has no line of sight to membership beyond this. Further information as to which non-parliamentary parties meet the requirement of 1,500 members will be available once new party membership lists are reviewed by the AEC.

Thank you again for writing. I trust that this information will assist you in finalising your consideration of the Bill.

Yours sincerely

BEN MORTON

/ / 2021

Senator the Hon Anne Ruston

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

Ref: MC21-007420

Dr Anne Webster MP
Chair of Parliamentary Joint Committee on Human Rights
Member for Mallee

Human.Rights@aph.gov.au

Dear Dr Webster

Thank you for your letter dated 26 August 2021, concerning the Joint Committee on Human Rights' Scrutiny Report No. 10 of 2021, which requested information in relation to the Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021.

Please find enclosed a response to the Committee in relation to the issues identified.

I trust the additional information provided will be of assistance.

Yours sincerely

Anne Ruston

9 / 9 / 2021

Enc.

Suite MG.60, Parliament House, Canberra ACT 2600 Tel: 02 6277 7560 Email: minister@dss.gov.au

Response to the Parliamentary Joint Committee on Human Rights

Human rights scrutiny report – Report 10 of 2021

Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021

Compatibility of the measure with human rights, including the rights to social security, adequate standard of living, health, maternity leave, equality and non-discrimination, the rights of the child and the right to protection of the family

Committee comment

1.65 In order to assess the compatibility of this measure with international human rights law, further information is required, in particular:

- **(a) noting the disproportionate impact on certain groups, particularly women, how does the measure promote general welfare for the purpose of constituting a legitimate objective under international human rights law**
- **(b) since 2018, how many individuals have been subject to the newly arrived resident's waiting period and of those individuals, how many have made applications for exemptions and of those applications, how many have been granted or denied**
- **(c) what assistance, if any, is provided to migrants subject to the waiting period to help them to understand and navigate the waiting period exemptions process;**
- **(d) what review and oversight mechanisms are available in relation to decisions not to grant an exemption for the waiting period;**
- **(e) how is the measure the least rights restrictive approach to achieving the stated objectives; and**
- **(f) have alternative measures been considered rather than restricting access to social security payments in the context of Australia's use of its maximum available resources, and if so, why are those alternative measures not appropriate.**

Response

Data on how many people have been granted or denied an exemption from the NARWP since 2018 is not available in the timeframe requested by the Committee. All people who have become a permanent visa holder under the Migration Program since 2018 are subject to the NARWP and must serve the relevant waiting period, unless they meet criteria for an exemption.

Purpose and nature of Australia's welfare payment system

The primary purpose of Australia's welfare payment system – encompassing social security, family assistance and paid parental leave payments – is to provide financial support to individuals and families who are unable to fully support themselves. Payment settings are designed to target payments to those most in need and encourage people to support themselves where they are able.

Unlike most other countries, Australia's system is a non-contributory, residence-based system, which is funded from general revenue. For this reason, the settings for most payments include both ongoing residence requirements and residence-based waiting or qualification periods, including the Newly Arrived Resident's Waiting Period (NARWP).

These settings contribute to the overall sustainability of the welfare payment system by appropriately directing resources to where they are needed in line with the broader purpose and principles of the system.

Purpose of the NARWP and proposed changes

The NARWP is a longstanding policy in the Australian welfare payment system. It reflects the expectation that new migrants seeking to settle permanently in Australia will make plans for their own support during their initial settlement period.

The NARWP applies primarily to new migrants settling permanently in Australia under the skilled and family streams of the Migration Program. These visa holders are generally well placed to support themselves and their families, through existing resources, work or support from family. In applying for a relevant visa, applicants are generally required to acknowledge there is a waiting period for most welfare payments. Visa grant letters also remind individuals about this waiting period. This ensures visa applicants and holders are aware of the expectations and rules that apply to them.

Since 2019, the NARWP has been four years for most working age income support payments, such as JobSeeker Payment, Parenting Payment and Youth Allowance, and concession cards, such as the Commonwealth Seniors Health Card and Low Income Health Care Card. The Australian Government considers four years to be an appropriate period for new permanent migrants to be self-reliant before seeking to access the Australian welfare payment system.

Increasing the existing NARWP for carer and family payments to four years brings these payments into line with the four-year NARWP that already exists for most other payments and concession cards. This will standardise the rules across payments and ensure they more consistently reflect the existing expectations underpinning the NARWP.

The changes are connected to both the legitimate objective of the NARWP and the broader residence-based nature of the Australian welfare payment system.

Exemptions and safeguards available

The carer and family payments subject to this measure are not specifically for women. However, it is acknowledged that women are more likely to access these payments, as they are often more likely to assume caring responsibilities for children and/or family members with a disability. This is the case for the general Australian population, not just migrants.

There is a comprehensive list of exemptions from the NARWP, including for carer and family payments, and all of these existing exemptions are being maintained under this measure. A number of these exemptions are targeted at and/or particularly benefit migrants with caring and/or parental responsibilities.

These exemptions provide safeguards that enable new permanent migrants, especially women, to access support through the welfare payment system in circumstances where it is not (or is no longer) appropriate for the objectives and expectations of the NARWP to apply.

For example, holders of certain Carer visas (subclasses 116 and 836) are exempt from the NARWP for Carer Payment and Carer Allowance and have immediate access to these payments, where eligible. This reflects the specific nature of these visas, which are for people coming to Australia to care for a family member with no other reasonable care options. As such, holders of these visas are not expected to support themselves through work or to rely on their family member who may have limited capacity to provide financial support due to their disability. Those granted Carer Payment are automatically exempt from the NARWP for Family Tax Benefit and can access this additional assistance where eligible if they have children.

In addition, migrants who experience a substantial change in circumstances after coming to Australia can be exempt from the NARWP for Special Benefit. A substantial change in circumstances may include illness, injury, job loss, family and domestic violence, or having new or increased caring responsibilities for a child or adult with disability. This exemption recognises that migrants in these circumstances may no longer be able to support themselves as they had originally planned and provides a mechanism for them to access financial support if in need and otherwise eligible. Those granted Special Benefit are automatically exempt from the NARWP for Family Tax Benefit and Carer Allowance and can access this additional assistance where eligible if they have children and/or other caring responsibilities.

New permanent migrants also have access to other services and supports outside of the welfare payment system, where eligible, including Medicare, schools, tertiary education, employment services, settlement services, the National Disability Insurance Scheme and carer supports and services, including through the Carer Gateway.

Access to these services and supports will not change under this measure and is not dependent on being granted an exemption from the NARWP for a particular payment. New permanent migrants will continue to be able to access broader services and supports while they are serving the NARWP for welfare payments.

People do not have to apply for an exemption to the NARWP. Eligibility for an exemption is assessed when a person lodges a claim for payment with Services Australia. The claim form asks for information that enables Services Australia to determine if the person should be exempt from any waiting period as part of assessing the claim. If the person is exempt, and they meet all other requirements for the payment, their claim for payment will be granted.

These processes are well established within Services Australia and are complemented by other processes for ensuring individuals get the support they need. For example, in cases involving family and domestic violence, individuals are automatically referred to a Services Australia social worker.

Communication and appeal rights

Migrants can refer to a range of resources to become familiar with the NARWP rules. The general information on the Department of Home Affairs website in relation to certain visa types notes waiting periods for payments may apply and links to more detailed information on the Services Australia website.

The detailed information on the Services Australia website is available at www.servicesaustralia.gov.au/individuals/topics/newly-arrived-residents-waiting-period/30726. This page also links to information about the exemptions available depending on the person's circumstances or visa class.

Information on the existing waiting periods is also available on the Department of Social Services website at www.dss.gov.au/about-the-department/international/policy/social-security-payments-residence-criteria and information on the proposed changes is at www.dss.gov.au/living-in-australia-and-overseas/recent-and-upcoming-policy-changes.

Existing websites and communication products will be updated and further information on the changes, including details on the exemptions, will be distributed to key audiences, subject to passage of the legislation.

Migrants can also contact Services Australia to obtain advice specific to their individual circumstances. This includes advice on any applicable waiting periods and exemptions.

Existing review and appeal processes will remain in place and apply to decisions on eligibility for payment, including whether a waiting period applies and whether a person meets the criteria for an exemption. These processes include internal review by an Authorised Review Officer and further avenues of appeal to the Administrative Appeals Tribunal. A person's review and appeal rights, and the associated processes are clearly outlined in decision notices issued by Services Australia and on the Services Australia website at www.servicesaustralia.gov.au/individuals/topics/reviews-and-appeals/34676.

Conclusion

The targeting of welfare payments is an essential strategy for managing the distribution of available resources. It promotes general welfare by ensuring the welfare payment system supports those who need it most while remaining sustainable for current and future generations. Residence- based waiting and qualification periods, including the NARWP, play a crucial role in targeting immediate access to welfare payments.

This measure is designed to standardise the current duration rules of the NARWP and provide a consistent approach across income support, family assistance, paid parental leave payments and concession cards. This will better enable the NARWP to achieve its intended purpose of ensuring migrants support themselves and their families when first granted permanent residency. This supports the broader principles underpinning Australia's welfare payments system, including it is appropriately and effectively targeted.

This measure is the least restrictive approach to achieving these objectives. It does not introduce new principles or settings to the welfare payment system, rather it applies the existing principles and settings consistently across payment types. It also ensures current safeguards are maintained.

As noted in the Statement of Compatibility with Human Rights, to the extent this measure places a limitation on human rights, this limitation is reasonable and proportionate in the context of achieving the objectives outlined above, while ensuring a safety net remains available for those in need, including through a comprehensive range of exemptions and rights of review and appeal.

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-025224

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600
human.rights@aph.gov.au

28 SEP 2021

Dear Chair

Thank you for your correspondence of 5 August 2021 seeking additional information to inform the deliberations of the Parliamentary Joint Committee on Human Rights (Committee) about the extension to the Governor-General's declaration that a human biosecurity emergency exists.

The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Declaration) commenced on 18 March 2020 and has been extended six times, with the most recent extending the Declaration until 17 December 2021.

This is in a context where the COVID-19 situation continues to escalate both globally and within the Australian community, particularly as new variants emerge. As at 3 September 2021, there have been over 218,960,000 cases of COVID-19 reported globally, including approximately 4,550,000 deaths.

In Australia, as at 1200 hrs, 3 September 2021, there have been 58,210 cases of COVID-19 reported, including 1,032 deaths. Of particular concern is the New South Wales Delta variant outbreak. New South Wales, Victoria and the Australian Capital Territory are in lockdown to help reduce the number of daily infections.

Safeguards and controls for the use human biosecurity emergency powers

Chapter 8 of the *Biosecurity Act 2015* (Act) provides that the Governor-General may declare that a human biosecurity emergency exists following a recommendation by me as the relevant Minister for Health and Aged Care. This Declaration may be extended for a period of up to three months following a similar recommendation.

With this Declaration in place, I am then able to make any necessary emergency determinations to support the implementation of urgent public health measures to address COVID-19.

My recommendations and decisions must be informed by public health advice, which is provided to me by the Chief Medical Officer (CMO), and / or the Australian Health Protection Principal Committee (AHPPC).

Recommendations to declare or extend a human biosecurity emergency

Before I can make a recommendation to the Governor-General, I must first be satisfied of the following matters:

- a listed human disease is posing a serious and immediate threat, or is causing harm, to human health on a nationally significant scale
- the Declaration is necessary to prevent or control:
    - the entry of the listed human disease into Australian territory or part of Australian territory
    - the emergence, establishment or spread of the listed human disease in Australian territory or part of Australian territory.

These considerations provide a number of safeguards and controls on the use of emergency powers. For example, a decision must be in relation to a "listed human disease" which is a disease that may be communicable and cause significant harm to human health. A listed human disease must be determined in writing by the Director of Human Biosecurity (who is the CMO) in consultation with the Chief Health Officer for each state and territory and with the Director of Biosecurity (who is the Secretary of the Department of Agriculture, Water and the Environment).

A further requirement for recommending a human biosecurity emergency declaration is that I must also consider the period that it is necessary to prevent or control the entry, or the emergence, establishment or spread, of the listed human disease. I also note declarations are limited and must not be longer than three months.

Exemptions process for the Overseas Travel Ban Determination

The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Overseas Travel Ban Determination) restricts Australian citizens and permanent residents from travelling outside of Australia by air or sea, subject to limited exceptions.

I have consulted with the Department of Home Affairs, who has advised me on the following responses.

Applications for exemptions

The number of applications for travel exemptions that have been granted, between the introduction of the travel ban on 25 March 2020 and 31 July 2021 is as follows:

- 397,905 requests[1] for an outwards travel exemption were received[2]
- 189,336 requests for an outwards travel exemption were approved
- 109,789 requests for an outwards travel exemption were refused.

[1] Requests prior to 1 August 2020 may include more than one person, and individuals may have submitted more than one request

[2] The sum of approved and refused requests may not equate to the total number of requests received in the same period, as requests may be otherwise finalised (persons found to meet an already exempt category, withdrawn requests, or requests that did not contain sufficient information for referral to a decision maker); or received or finalised outside the reporting period

Reasons for exemptions

The categories for travel exemption requests by reporting category is detailed in the following table, which was for the period between 25 March 202 and 31 July 2021.

Category	Approved	Refused
Response to the COVID-19 outbreak	837	207
Critical industries and businesses	26,470	9,356
Urgent medical treatment	1,366	1,445
Travelling overseas for a compelling reason for at least 3 months	95,996	31,235
Urgent and unavoidable personal business	14,066	8,754
Compassionate and compelling grounds	48,039	58,690
National interest	2,562	102
Total	189,336	109,789

Note that the sum of approved and refused requests may not equate to the total number of requests received in the same period, as requests may otherwise by finalised outside of the reporting period.

Countries with approved exemptions

Between 1 August 2020 and 31 July 2021, the following destination countries received the most approvals for exemption requests under the Overseas Travel Ban Determination

1. United Kingdom – 17,003
2. China – 16,538
3. United States of America – 15,520
4. India – 12,956
5. Pakistan – 5,893
6. New Zealand – 5,345
7. Singapore – 4,575
8. Canada – 4,155
9. Papua New Guinea – 4,144
10. Japan – 4,129
11. Germany – 3,201
12. Indonesia – 2,806
13. Hong Kong – 2,751
14. Ireland – 2,742
15. Thailand – 2,634
16. France – 2,583
17. Lebanon – 2,577
18. United Arab Emirates – 2,397
19. Republic of Korea – 2,140
20. Malaysia – 2,007

This data includes individuals who may have submitted more than one request, and the countries are listed as declared by the applicant on the travel exemption request.

Papua New Guinea and India

Australia has expressed concerns about the slow rate of the vaccination rollout in Papua New Guinea, as well as the potentially catastrophic impact of the Delta variant. In response, Australia has implemented policy settings to help manage the impact of potential transmission of COVID-19 as a result of travel between the two countries.

The *Biosecurity* (Human Biosecurity Emergency) (human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 (High Risk Country Travel Pause Determination) commenced on 3 May 2021 and remained in force until it repealed itself at the start of 15 May 2021. At the time, there was approximately 400,000 new cases of COVID-19 and almost 4,000 deaths reported on one day in India. As a result, overseas travellers who had acquired a COVID-19 infection in India and were returning to Australia were putting pressure on Australia's public health system. The temporary pause was used to allow case numbers in quarantine to stabilise and ensure the integrity of the quarantine system.

Controls on decision-making and access to review

Quality assurance reviews of decisions are regularly undertaken to ensure travel exemptions are in line with policy guidelines. The travel exemption program includes senior officers who review feedback from individuals dissatisfied with the travel exemption decision making process through the Global Feedback Unit. Individuals who have had a decision denied may also request an internal review.

Further, I note that public scrutiny of the Government's response to COVID-19, including implementation and management of the travel exemptions program, remains ongoing through regular Senate Estimates and Senate Select Committee hearings on Australian Government's response to the COVID-19 pandemic.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-028545

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
human.rights@aph.gov.au

27 SEP 2021

Dear Chair

I refer to your correspondence of 26 August 2021 concerning seeking additional information to inform the deliberations of the Parliamentary Joint Committee on Human Rights (Committee) about the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Amendment No 1 Determination 2021* (Amendment Determination).

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Overseas Travel Ban Determination) was enacted under subsection 477(1) of the *Biosecurity Act 2015* on 25 March 2020. The Overseas Travel Ban Determination prevents Australian citizens and permanent residents from leaving Australian territory, with the exception of direct travel to New Zealand, unless an exemption applies.

On 11 August 2021, the Amendment Determination removed the automatic exemption for Australian citizens and permanent residents ordinarily resident in a country other than Australia contained in paragraph 6(a) of the Overseas Travel Ban Determination.

I have answered the Committee's questions as detailed below.

How many times was the automatic exemption used?

The number of Australia citizens or permanent residents ordinarily residing in a country other than Australia who relied on an automatic exemption under paragraph 6(1)(a) to leave Australia cannot be quantified due to the nature of the exemption. As the exemption is automatic there is no application process required of the traveller, and no obligation for the Australian Border Force (ABF) to record the number of persons who have made use of the exemption.

How many times has a person subsequently returned after using the automatic exemption and for what reasons?

As noted above, there is no obligation for the ABF to record the number of persons using the automatic exemption, and it follows that there would be no record of the reasons for returning as these did not need to be provided under the automatic exemption.

Reduction of public health risk

Managing travel volume is one of the few effective ways the Government has been able to manage pressures on Australia's quarantine and health system capacity and is an important mechanism for controlling the spread of COVID-19 in the Australian community.

The automatic exemption for permanent residents under the Overseas Travel Ban was designed to allow Australian citizens and residents ordinarily resident in another country to leave Australian territory to return to their usual country of residence. Given the length of time that the automatic exemption operated (from commencement of the Overseas Travel Ban in March 2020 to August 2021), sufficient time was provided for persons falling into this category and wishing to return to their usual place of residence to do so.

As COVID-19 continues to pose an ongoing threat to the health of Australians, it is critical to manage the number of people leaving Australia who may then return to ensure flight and quarantine availability is prioritised for individuals who have been stranded overseas for some time.

Less restrictive ways to achieve the stated objective

Before I make any emergency requirement determination, I must first be satisfied under paragraph 477(4)(d) of the *Biosecurity Act 2015* that the requirement is no more restrictive or intrusive than is required in the circumstances. The recent COVID-19 outbreaks in the community, particularly involving the Delta strain of the virus which was introduced into Australia by travelers arriving from overseas, has posed a significant risk to the health of the Australian community. The Determination, as amended, is necessary to reduce the risk of bringing overseas-acquired cases of COVID-19 into Australia and thereby prevent or control the spread of COVID-19 in Australia.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

THE HON ALEX HAWKE MP
MINISTER FOR HOME AFFAIRS

Ref No: MS21-002027

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

by email: human.rights@aph.gov.au

Dear Dr Webster

Thank you for your correspondence of 26 August 2021 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), with regard to the *Migration Amendment (Merits Review) Regulations 2021* [F2021L00845].

In the Committee's Report 10 of 2021, the Committee requested further information in order to assess the compatibility of the measure with the right to a fair hearing and the prohibition on expulsion of aliens without due process.

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

Yours sincerely

ALEX HAWKE

5 / 10 / 2021

Response to the Parliamentary Joint Committee on Human Rights (PJCHR) Scrutiny Report 10 of 2021

Migration Amendment (Merits Review)

Regulations 2021 [F2021L00845]

Rights to a fair hearing and prohibition against expulsion of aliens without due process

Committee Comment

The Committee noted at paragraph 1.109 that to the extent that increasing review application fees as a result of the *Migration Amendment (Merits Review) Regulations 2021* has the effect of preventing some individuals in Australia from having their visa decision reviewed in the Administrative Appeals Tribunal (AAT) due to an inability to pay the application fee, it may engage and limit the right to a fair hearing and the prohibition against expulsion of aliens without due process.

At paragraph 1.108, the Committee requested further information in order to assess the compatibility of this measure with these rights, specifically:

a) for those financially unable to make an application and therefore unable to access review in the AAT, is any consideration given to providing a full financial waiver of the application fees;
b) what other safeguards, if any, would operate to assist in the proportionality of this measure for those in financial hardship;
c) why the application fee for review of migration decisions is considerably higher than the standard application fee for all other AAT matters, and what implications does this have for the right of equal access to courts and tribunals; and
d) whether other less rights restrictive alternatives were considered (such as raising revenue in some other way) and if so, what those alternatives are.

Response

(a) for those financially unable to make an application and therefore unable to access review in the AAT, is any consideration given to providing a full financial waiver of the application fees

Most migrants are expected to have the financial capacity to support their stay in Australia, and the fee increase for certain applications for review would represent only a small additional impost in the totality of expenses associated with temporary or permanent migration to Australia (such as travel and accommodation). In considering the impact of this fee increase, it is important that the Committee be mindful of the predominant cohorts of applicants that would be affected.

Of the 15,969 applications lodged in the Migration and Refugee Division (MRD) of the AAT between 1 July 2020 and 30 June 2021:

- 66 per cent related to protection visas and would not be subject to the fee increase
- 9 per cent were related to visitor visas
- 6 per cent were related to temporary work and skilled related visas
- 4 per cent were nomination and sponsorship refusals
- 3 per cent were related to family visas

Notwithstanding the limited pool of applicants affected by the fee increase, it is acknowledged that paying the fee of $3000 within statutory time limits may cause financial distress to a small number of applicants, and in this circumstance, the AAT member may reduce the fee payable by up to 50 per cent ($1500).

Generally, for those not in immigration detention, the statutory timeframe to lodge a review application is 28 days from the date of being deemed notified of the department's decision to refuse a visa application. Should a person be financially unable to afford the maximum reduced rate of $1500 upon this notification, the 28 day period provides an opportunity to secure the funds required to lodge an application for merits review. If securing the necessary minimum $1500 is not achievable, than an application may not be made.

Nevertheless, maintaining the existing fee structure in the *Migration Regulations 1994* for applications for review under Part 5 of the *Migration Act 1958* (the Act) ('*Part 5 reviewable decisions')*, including the 50 per cent cap in discounting the fee, should be considered reasonable in balancing the additional benefits of the package, in providing additional resources to the AAT and the Federal Circuit Court (FCC) to address migration related backlogs, against the associated costs. Please refer to the following link for further information concerning the AATs funding and application related revenue: www.transparency.gov.au/annual-reports/administrative-appeals-tribunal/reporting-year/2019-20-26. In this context, it should be noted that an application for merits review in the MRD is an independent review conducted by a Tribunal Member, and that in the 2019-20 financial year, applications lodged in the MRD made up 55% of all matters received in the AAT.

(b) what other safeguards, if any, would operate to assist in the proportionality of this measure for those in financial hardship

In addition to the above, many applicants affected by the increased fee will have had the ability to work in Australia while awaiting the Department's visa decision, and will likely retain the ability to work during the statutory timeframe to lodge a review of a visa refusal or cancellation decision and throughout the period of the review.

In the circumstance of an applicant who is awaiting their review decision and holds a bridging visa without permission to work, if they are suffering financial hardship they may apply to change their bridging visa conditions, seeking to be granted permission to work so that they may support themselves in Australia.

(c) why the application fee for review of migration decisions is considerably higher than the standard application fee for all other AAT matters, and what implications does this have for the right of equal access to courts and tribunals; and

(d) whether other less rights restrictive alternatives were considered (such as raising revenue in some other way) and if so, what those alternatives are.

As highlighted previously, MRD matters make up more than 50% of all applications for review lodged with the AAT. In addition to this volume, migration matters are often highly complex and decisions often rely on subjective criteria. Whilst applications in some divisions of the AAT do not attract a fee, such as review of a National Disability Insurance Scheme decision, or may be subject to a full fee waiver, such as successful reviews of protection visa decisions, the present fee amendment should be viewed within the specific context of the service sought by the review applicant (that of merits review of a migration matter), and the costs of providing that service.

As mentioned in the 2021-22 Federal Budget, the increase to the fee is part of a funding package for the AAT and the FCC that provided additional resources to the AAT and the FCC to reduce the migration related backlogs that have developed.

Raising the fee for *Part 5 reviewable decisions* made under the Act ensures a direct link between the benefits of this package and the cohort impacted by the fee increase. Relevantly, while the package benefits review applications made under Part 7 of the Act (certain protection visa decisions – '*Part 7 reviewable decisions'*), the fee increase does not affect them. It should be noted that imposing a fee increase to *Part 7 reviewable decisions* could have resulted in a lower overall increase per application required to offset the costs of the package. However, even though a *Part 7 reviewable decision* does not attract a fee unless the review matter is unsuccessful, it was considered that imposing the fee increase upon this cohort ran a higher risk of causing financial hardship and may increase the risk of non-compliance with *non-refoulement* obligations. Additionally, this could have included those who may already be receiving financial support under the Status Resolution Support Services program.

For these reasons, it is clear that through only applying the fee increase to *Part 5 reviewable decisions,* the amendments took into account the potential financial vulnerability of applicants of *Part 7 reviewable decisions* in delivering a funding package that is proportionate and reasonable. It is also clear that in the context of the specific cohort of those affected by these amendments, the fee remains reasonable and does not fetter an individual's existing right to submit reasons and have their case reviewed by a competent authority, and that the associated package should result in a more timely assessment of these claims.

THE HON ALEX HAWKE MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: MS21-002004

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

by email: human.rights@aph.gov.au

Dear Dr Webster

Thank you for your correspondence of 26 August 2021 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), regarding the *Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021* [F2021L01030].

In the Committee's Report 10 of 2021, the Committee requested further information in order to assess the compatibility of this instrument with the right to privacy and has asked for a response in relation to six specific questions.

My response for the Committee's consideration is attached. I appreciate the extension until 23 September 2021 in which to provide the response.

Yours sincerely

ALEX HAWKE

30/9/2021

Response to the Parliamentary Joint Committee on Human Rights (PJCHR) Scrutiny Report 10 of 2021

Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030]

Rights to just and favourable conditions of work; privacy

Committee Comment

The Committee noted at paragraph 1.117 that the instrument raises questions as to the proportionality of the potential interference with the right to privacy. The Committee suggests that even though the only identifying information may be an individual's name, the effect on the right to privacy and reputation may be considerable.

Further, at paragraph 1.119, the Committee raised concerns that an employer's right of reply (including a requirement to provide reasons for the proposed listing) is not set out in the instrument and raises questions as to the sufficiency of review options once a decision has been made to list an employer.

The Committee requested advice from the Minister as to the compatibility of this instrument with the right to privacy and asked for further information on the following six specific matters:

a) why the instrument does not set out the factors the minister can take into account when deciding to list an employer, and why it is proposed that the minister can take into consideration convictions which have been quashed (that is, set aside by a court on the basis that the conviction was wrong) or pardoned;

b) whether the minister could take into consideration other matters (beyond previous convictions), such as untested allegations of health and safety issues made against an employer, in deciding to list an employer;

c) why the legislative instrument does not require that the minister must provide employers who are being considered for listing under this measure with reasons for the proposed listing, and a right of reply before such a listing is made;

d) what mechanism, if any, could an employer use to seek review of the decision to list them, or to otherwise request the removal of their listing;

e) why other, less rights restrictive alternatives (such as providing visa holders with information about how to access information about potential employers, rather than publicly listing employers) would be ineffective to achieve the stated objective; and

f) what other safeguards (if any) would protect the right to privacy and reputation of employers?

Response

(a) why the instrument does not set out the factors the minister can take into account when deciding to list an employer, and why it is proposed that the minister can take into consideration convictions which have been quashed (that is, set aside by a court on the basis that the conviction was wrong) or pardoned;

As stated in the Explanatory Statement, the changes made by the *Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021* (the Regulations) aim to promote the clear message that any exploitation of working holiday maker (WHM) visa holders is totally unacceptable and will not be tolerated. The Regulations do not set out the factors the Minister can take into account when deciding to list an employer because the aim of the amendment is to provide powers which are broad in scope, as necessary to allow the Minister to respond to the broad type of potential abuse or exploitation faced by WHM visa holders that could jeopardise the overall reputation of the WHM visa program.

Before listing an employer in a legislative instrument, the Minister may consider the full circumstances of an employer, including convictions as well as allegations and previous relevant police charges. This enables the Minister to review, as comprehensively as possible, the suitability of an employer, including whether the employer has shown a history of behaviours that pose health and safety risks. The Explanatory Statement accompanying the Regulations confirms that the Minister can take into consideration convictions which have been quashed to the extent permitted by the *Crimes Act 2014*. However, the Explanatory Statement further clarifies that it is not envisaged that the Minister would in fact do this, but would focus on more recent offending:

> *"To the extent that the Crimes Act 2014 permits the Minister to take into account previous convictions, including convictions that have been quashed/pardoned or convictions for less serious offences that would usually be prohibited from use and disclosure under the Commonwealth Spent Convictions scheme, it is not envisaged that this would occur. The exercise of the discretion to list a business in a legislative instrument would be focussed on recent offending that suggests a current risk to working holiday makers."*[1]

(b) whether the minister could take into consideration other matters (beyond previous convictions), such as untested allegations of health and safety issues made against an employer, in deciding to list an employer;

In deciding to list an employer the Minister may consider untested allegations of health and safety issues made against an employer in order to identify a pattern of behaviour.

The intention of regulation 1.15FB is that the Minister may specify an employer to be an excluded employer if the Minister is satisfied that either the employer themselves (under reg 1.15FB(2)(a)) or the performance of the work in the employment of the employer (under reg 1.15FB(2)(b)) poses a risk to the safety or welfare of the WHM visa holder. The instrument therefore provides for the Minister to take into consideration other matters beyond previous convictions. For example, an exclusion under regulation 1.15FB(2)(a) could be associated with the criminal record of the

---

[1] See Explanatory Statement to the *Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021*, page 10 under Item [2].

employer while an exclusion under regulation 1.15FB(2)(b) could occur because of health and safety issues at the employer's workplace.

This is to further the broad aim of the amendments which is to assist WHM visa holders in finding employment with safe and healthy working conditions by dissuading them from commencing or continuing employment with an employer who may pose a risk to their safety or welfare, if they wish to apply for a subsequent WHM visa.

(c) why the legislative instrument does not require that the minister must provide employers who are being considered for listing under this measure with reasons for the proposed listing, and a right of reply before such a listing is made;

Employers will be provided with an opportunity to make submissions prior to listing in a legislative instrument, in accordance with the principles of common law procedural fairness. The Minister would consider the full circumstances of every case, including by providing a right of reply, before listing a business in a legislative instrument.

Before the Minister declares a person to be an excluded employer, the Minister must give the person a written notice:

(a) stating that the Minister proposes to make such a declaration and the reasons for it; and

(b) inviting the person to make a written submission to the Minister, within the period covered below, setting out reasons why the Minister should not make the determination.

The employer will have an opportunity to correct any incorrect information and outline any extenuating circumstances for consideration during this period (known as the 'show cause' period).

The 'show cause' period will be either;

(a) 28 days after the day the person is given notice by the Minister; or

(b) the period stated in the notice for the making of a written submission (whichever is the greater period for the employer).

If the Minister declares a person to be an excluded employer, the Minister must, as soon as reasonably practicable, give the person notice of that decision.

The exclusion comes into effect from the time the exclusion is published. The exclusion has effect during the period specified in the instrument (unless revoked sooner).

(d) what mechanism, if any, could an employer use to seek review of the decision to list them, or to otherwise request the removal of their listing;

As noted above, the exclusion comes into effect from the time the exclusion is published and has effect during the period specified in the instrument (unless revoked sooner).

The employer will have had an opportunity to correct any incorrect information and outline any extenuating circumstances for consideration during the 'show cause' period outlined above in answer to question (c).

There is no provision for an employer to seek merits review of the Minister's decision to list a business in a legislative instrument.

The effect of the listing is that working holiday maker visa holders cannot count future work for the employer towards eligibility for a second or third WHM visa. Nevertheless, a WHM visa holder may freely choose or accept to continue working for an employer who is included on the legislative instrument.

The decision to exclude merits review of the Minister's decision to list an employer is consistent with the established grounds for excluding merits review set out in the Administrative Review Council guidance document: *What decisions should be subject to merit review?*[2] The decision to list an employer has a somewhat limited impact as it does not directly preclude an employer from continuing to operate their business or be an employer. Rather, only those employees who are WHM visa holders may be directly impacted by the listing of an employer, and even then, the WHM visa holder is not precluded from continuing with that employment. On balance the government does not consider that merits review is appropriate in this context, as the amendments do not prevent the individual or business from continuing to operate, or from employing other workers.

(e) why other, less rights restrictive alternatives (such as providing visa holders with information about how to access information about potential employers, rather than publicly listing employers) would be ineffective to achieve the stated objective;

In order to support the safety and wellbeing of WHM visa holders and minimise the likelihood of them choosing to work for employers who may pose a risk, it is necessary to use legislation to restrict excluded employers from offering work that qualifies as specified work.

The measure is intended to enhance protection of WHM visa holders by identifying certain employers and regulating that working for such employers will not count as specified work for the purposes of eligibility for a subsequent WHM visas.

It should be noted that the information that may result in the listing of an employer is often in the public domain already, including in media reports. However, the Government considers it appropriate to additionally put in place a public and concise listing of excluded employers by way of legislative instruments made under the Regulations. The existence and accessibility of such a listing assists to protect the overall international reputation of the WHM visa program. To provide this information to just WHM visa holders via less restrictive alternatives (such as just informing visa holders how to access information about potential employers) would only assist on a specific individual level for WHM visa holders. It would be ineffective in achieving the wider objective of strengthening the overall international reputation of the WHM visa program and encouraging employers of WHM visa holders to maintain the highest standards in their employment practices.

(f) what other safeguards (if any) would protect the right to privacy and reputation of employers?

Subregulation 1.15FB(3) ensures that the Minister has flexibility to identify a business by any appropriate means, which include the specified methods of (1) listing the name of the person, partnership or unincorporated association, or (2) the Australian Business Number, or (3) any other information that identifies the person, partnership or unincorporated association.

---

[2] Administrative Review Council booklet (1999): *Administrative Review Council What decisions should be subject to merit review?* Access online from AG website (refer paragraphs 4.56 and 4.57).

As noted in the Statement of Compatibility with Human Rights, the identification and outlining of these three categories of 'information' has been included so that the minimum personal information is disclosed whilst ensuring that cases of 'wrong identity' do not occur. Importantly, the listing instrument itself will not specify why the Minister has determined that an employer has been included. Such omission protects the employer's right to privacy. Inclusion on the instrument will only occur after Ministerial consideration of the full circumstances and where it is necessary to ensure the protection and safety of WHM visa holders and proportionate to potential privacy risks.

This approach has been adopted to ensure that the Minister has the flexibility to ensure that the relevant employers are clearly identifiable to WHM visa holders. The power would be exercised by the Minister having regard to privacy considerations and, wherever possible, would avoid naming individuals. An individual would only be named if no other means of identifying the employer was possible. It is anticipated that specifying an individual by name in the legislative instrument would be a rare occurrence.