Ministerial responses — Report 5 of 2022[1]

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Ministerial responses, *Report 5 of 2022*; [2022] AUPJCHR 42.

The Hon Clare O'Neil MP
Minister for Home Affairs
Minister for Cyber Security

Ref No: MS22-002429

Mr Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Burns Josh

Thank you for your correspondence of 8 September 2022 on behalf of the Parliamentary Joint Committee on Human Rights concerning the *Migration (Daily maintenance amount for persons in detention) Determination (LIN 22/031) 2022* [F2022L00877], the *Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022* [F2022L00541] and the *Migration Amendment (Postgraduate Research in Critical Technology - Student Visa Conditions) Regulations 2022* [F2022L00866].

In its *Report 3 of 2022*, the Committee requested further information about human rights issues in relation to the above legislative instruments. Please find attached for the Committee's consideration the responses to the Committee's questions.

I appreciate the extension until 26 September 2022 in which to provide the response.

I have copied this letter to the Minister for Immigration, Citizenship and Multicultural Affairs, the Hon Andrew Giles MP, as the responsible Minister for the *Migration (Daily maintenance amount for persons in detention) Determination (LIN 22/031) 2022*.

Yours sincerely

CLARE O'NEIL

26 / 9 / 2022

Response to Parliamentary Joint Committee on Human Rights

Report 3 of 2022 – *Migration (Daily maintenance amount for persons in detention) Determination (LIN 22/031) 2022*

In its *Report 3 of 2022*, the Parliamentary Joint Committee on Human Rights (the Committee) sought further information from the Minister in relation to the *Migration (Daily maintenance amount for persons in detention) Determination (LIN 22/031) 2022* [F2022L00877].

LIN22/031 increases, from 1 July 2022, the daily amount that certain detainees will owe the Commonwealth for the cost of their immigration detention, from $456.23 to $490.69.

Committee View

The committee considers further information is required to assess the compatibility of this measure with the right not to be punished twice and the right to humane treatment in detention, and as such seeks the minister's advice in relation to:

(a) whether the imposition of liability for the costs of immigration detention (and an increase in that cost) amounts to a criminal penalty for the purposes of international human rights law, in particular:

> (i) what is the intention of imposing the charge on the detained person;
>
> (ii) the average, and longest, length of time people who have been convicted of people smuggling or illegal foreign fishing offences (and are therefore liable for the cost of their immigration detention) have been held in immigration detention;
>
> (iii) if the imposition of this charge were to be classified as a criminal penalty, whether this would impermissibly limit the right against double punishment; and

(b) whether imposing a daily charge (including increasing it) limits the right to humane treatment in detention.

Minister's response

(a) whether the imposition of liability for the costs of immigration detention (and an increase in that cost) amounts to a criminal penalty for the purposes of international human rights law, in particular:

(i) what is the intention of imposing the charge on the detained person

Immigration detention in Australia is administrative in nature and is not a punishment. Detention of unlawful non-citizens is required under s189 of the *Migration Act 1958* (the Act).

The primary intention of making certain cohorts liable for the cost of their immigration detention is to recoup the significant financial impost detaining such persons represents to the Commonwealth. As the Committee notes, the *Migration Amendment (Abolishing Detention Debt) Act 2009* (the 2009 Act) amended the Act to remove the liability for the cost of their detention for all detainees

apart from convicted people smugglers and illegal foreign fishers. The then Minister for Immigration summarised the rationale and noted that the Bill aimed to strike:

> an appropriate balance by abolishing an ineffective system that penalises former detainees with enormous debt burdens, while ensuring that liability for detention costs remains a deterrent in relation to convicted illegal foreign fishers and people smugglers.

The explanatory memorandum accompanying the 2009 Act similarly stated "These provisions are being retained in response to the serious nature of the offences covered by section 262 of the Migration Act and in recognition of the need for a significant deterrent to apply to these offences."

These documents make it clear that the retention of the liability for detention costs for these particular cohorts was also intended to act as a deterrent due to the seriousness of these activities often perpetrated by recidivist offenders.

The individual and the master, owner, agent and charter of the vessel on which the person travel to Australia are jointly and severally liable for the costs of the individual's immigration detention.

The period subject to immigration detention debt does not include time spent in criminal custody. A person is not detained in immigration detention in relation to conduct for which they have been convicted of a criminal offence, rather it relates to their status as an unlawful non-citizen (generally after, and in some cases before, their criminal custody).

(ii) the average, and longest, length of time people who have been convicted of people smuggling or illegal foreign fishing offences (and are therefore liable for the cost of their immigration detention) have been held in immigration detention

An immigration detainee who has exhausted visa options to remain in Australia must be removed from Australia as soon as reasonably practicable, subject to some exceptions relating to removal to a person's country of origin that give effect to Australia's *non-refoulement* obligations. The Department seeks to effect the removal of unlawful non-citizens who were convicted of people smuggling offences and illegal foreign fishers promptly after the conclusion of their criminal custody. The time an individual spends in immigration detention depends on a range of factors, including the complexity of their case, the legal processes they pursue and whether they voluntarily choose to leave Australia.

The Department has issued detention debt liability notifications for fewer than five individuals in total for the financial years from 2018/19 until 2022/23. A notice in respect to detention, removal or deportation costs is to be handed to an unlawful non-citizen once estimated costs of detention, removal or deportation are known. The notice advises the unlawful non-citizen that the costs are an estimate only and that final costs will be sent to them via an invoice once the removal is completed.

(iii) if the imposition of this charge were to be classified as a criminal penalty, whether this would impermissibly limit the right against double punishment

The liability for detention costs is not a criminal penalty under the Act. Subsection 262(3) of the Act provides that the sum a person who is liable for in relation to their immigration detention cannot be more than the cost to the Commonwealth of detaining that person. It is clear from this wording that the amount imposed under the Act can only be for the actual cost of detention and cannot be a punitive measure. It is therefore not a punishment as the Act does not allow the Commonwealth to do so. Also, as noted above, the immigration detention debt does not relate to the conduct for which the person was convicted of a criminal offence. The person is therefore not charged for detention that relates to their conviction and the detention debt is not intended to amount a criminal

penalty for the purposes of international human rights law or to the person being punished twice for their offence.

(b) whether imposing a daily charge (including increasing it) limits the right to humane treatment in detention.

All persons detained administratively under the Act have the same rights to humane treatment in immigration detention regardless of whether they are liable for the cost of their immigration detention.

The Government is committed to ensuring all detainees in immigration detention are provided with high quality services commensurate to Australian standards and that the conditions in immigration detention are humane and respect the inherent dignity of the person.

The Department invests a significant amount of resources to provide high quality facilities and amenities, a broad range of services and activities within the immigration detention network and to ensure safety and security within the centres. All people in immigration detention are accommodated in facilities most appropriate to their needs and circumstances, are able to access legal representation and are provided with the means to contact family, friends and other support.

Internal assurance and external oversight processes are in place to ensure that the health, safety and wellbeing of all immigration detainees is maintained.

Immigration detainees have access to appropriate food (accommodating dietary and cultural requirements), educational programs, cultural, recreational and sporting activities, internet and computer facilities, televisions, and clean, comfortable sleeping quarters.

Health care services for immigration detainees are generally commensurate with those available to the Australian community under the Australian public health system and as clinically indicated and with the person’s consent.

The imposition of a detention debt in relation to some immigration detainees does not limit their access to the above services or limit their rights to humane conditions of detention.

Response to Parliamentary Joint Committee on Human Rights

Report 3 of 2022 – *Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022* and *Migration Amendment (Postgraduate Research in Critical Technology – Student Visa Conditions) Regulations 2022*

In its *Report 3 of 2022*, the Parliamentary Joint Committee on Human Rights (the Committee) sought further information from the Minister in relation to the *Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022* [F2022L00541] and the *Migration Amendment (Postgraduate Research in Critical Technology – Student Visa Conditions) Regulations 2022* [F2022L00866] (together, the PACT Regulations).

The PACT Regulations amend the *Migration Regulations 1994* (Migration Regulations) in relation to visa applicants and visa holders who may pose an unreasonable risk of unwanted critical technology knowledge transfer. Those amendments:

- Create a new Public Interest Criterion (PIC) by which the Minister can refuse to grant certain visas if there is an unreasonable risk of unwanted transfer of critical technologies;
- Insert a condition for Subclass 500 (student) visa holders requiring screening and approval from the Minister where a student visa holder intends to undertake critical technology related study in the postgraduate research sector; and
- Provide a new ground for cancellation where the Minister is satisfied that there is an unreasonable risk of unwanted transfer of critical technology by the visa holder.

Committee view

The Committee requires further information in order to assess the compatibility of this measure with the rights to education, work, freedom of expression and equality and non-discrimination.

The Committee requested advice from the Minister as to:

(a) what types of technology will be specified for the purposes of the definition of 'critical technology' and when;

(b) what is meant by 'indirect' transfer of critical technology or communication of information about critical technology in subsection 1.15Q(1), and examples of the circumstances this is intended to address;

(c) whether the objective these legislative instruments seek to achieve is an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights, including whether there have been prior instances in which unwanted

communication of technology intended to be captured by these measures has occurred; and

(d) whether there are certain nationalities in relation to whom these provisions may operate more frequently in practice, and if so, whether this differential treatment is based on reasonable and objective criteria.

Minister's response

(a) what types of technology will be specified for the purposes of the definition of 'critical technology' and when?

The amendments made by the PACT Regulations provide that the Minister may, by legislative instrument, specify kinds of technology as critical technology in regulation. The Minister for Home Affairs is yet to make this instrument. The Department has undertaken extensive consultation with affected stakeholders in the higher education sector and industry groups on the list of technologies to be specified—informed by the Department of the Prime Minister and Cabinet's 2021 *List of critical technologies in the national interest*[1].

As at September 2022, the following list of classes of technologies has been provided to affected stakeholders for consultation for the purpose of the visa screening framework:

- Advanced materials and manufacturing technology
- Artificial intelligence, computing and communications technology
- Biotechnology, vaccines and gene technology
- Energy and environment
- Sensing, timing and navigation technology
- Transportation, robotics and space
- Quantum technology

The amendments made by the PACT Regulations commenced in part on 1 July 2022—amending the Migration Regulations to introduce the PIC for the Student visa subclass and applying the new Student visa condition. While they have been made, the amendments made by the PACT Regulations will not be operational (in effect, visa screening will not 'go live') until the Minister has specified the kinds of critical technology for the purpose of the regulations.

The application of the PIC to additional visa subclasses and the operation of new cancellation ground will commence no later than 6 October 2022. These mechanisms will similarly not be 'operational' until the kinds of critical technology have been specified.

The Department will draft a proposed legislative instrument and explanatory statement for the Minister's consideration in Q4 2022. The final content of the specification, and its timing, is at the discretion of the Minister.

[1] https://www.pmc.gov.au/sites/default/files/publications/ctpco-critical-tech-list-of-63.pdf

(b) what is meant by 'indirect' transfer of critical technology or communication of information about critical technology in subsection 1.15Q(1), and examples of the circumstances this is intended to address?

These grounds are modelled after grounds outlined in section 121.1 of the *Criminal Code* in relation to information causing harm to Australia's interest (paragraphs (a), (b), (c) and subparagraph (d)(i)) and the grounds upon which the Defence Minister determines whether the supply of certain technologies would prejudice the security, defence or international relations under section 25A of the *Defence Trade Controls Act 2012* as prescribed in section 8 of the *Defence Trade Controls Regulation 2013* (subparagraphs (f)(ii) and (iii)).

An 'indirect' transfer of critical technology or communication of critical technology, for the purposes of the Migration Regulations, is a transfer or communication that would indirectly result in harm or prejudice to the security or defence of Australia, or to the health or safety of the Australian public, or interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of Commonwealth offences, or harm Australia's international relations.

'Indirect' transfer of critical technology is intended to capture conduct that would facilitate or contribute to the unwanted transfer of critical technology, including transfer of underlying research and other enablers.

(c) whether the objective these legislative instruments seek to achieve is an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights, including whether there have been prior instances in which unwanted communication of technology intended to be captured by these measures has occurred.

Enhanced visa screening protects Australia's world-class science and technology institutions from malicious activities. Technological advances drive productivity, growth and improved living standards; however, they also have the potential to harm our national security and undermine our democratic values and principles. University, industry and research sectors are key to our economic success and national security; however, some countries may seek to undermine Australia's interests through foreign interference in these sectors.

These threats are sophisticated, enduring and pervasive, with our higher education institutions at particular risk of unwanted transfers of critical technology to malicious actors. Such activities can result in the transfer of knowledge or theft of intellectual property, undermining Australia's strategic and commercial advantages. Effectively managing these risks is vital to maintaining Australia's status as a secure destination of choice for students and skilled workers.

The new visa screening framework will strengthen Australia's ability to identify and manage risks associated with the unwanted transfer of critical technologies. The following case studies illustrate the observed extant risk to critical technologies through the visa program.

Case Study 1:

- A foreign national applied for a Temporary Work visa, at an Australian university to research a critical technology, as per the *List of critical technologies in the national interest*. The technology is of significance to 'game changing' military strategies within a global context.
- The Department of Home Affairs identified that a foreign military-linked laboratory was funding the individual. The research conducted at the foreign laboratory was

indistinguishable from the research at the Australian university. The foreign national's research conducted at the foreign laboratory indicated links to top-secret research for the military, meaning their research likely has links to military technologies.

- The foreign national may have intended to come to Australia to inform foreign military-related research, with a high likelihood this technology would be used to advance the foreign defence technologies.

Case Study 2:

- A foreign national, holding a Global Talent visa returned to Australia to seek employment in a critical technology field. They had completed their PhD at a top Australian university with highly-developed defence priority technologies, specifically in this field. The foreign national's PhD was funded by a foreign government scholarship program. Their PhD and research assistance experience in Australia has direct correlation to a technology category identified in the *List of critical technologies in the national interest* that is also a priority of the foreign national's Government.
- The foreign national stated that they had interviews lined up in Australia for work in a critical technology field. However, the foreign national also stated they would continue to work remotely in Australia for a foreign state-owned company developing critical technologies.
- Australian Border Force Officers observed that the foreign national only became nervous when asked about how their return to Australia may be in conflict with obligations under the foreign government scholarship funding.
- Less than 24 hours after arriving in Australia, the foreign national departed for their home country. The Department of Home Affairs assesses that the individual may have become aware of the heightened awareness of critical technology-related issues and sensitivities in the Australian border environment.

Case Study 3:

- A foreign national lodged a Temporary Activity visa application to travel to Australia as a visiting PhD student for one year in an Australian research institution. The foreign national intends to study a technology identified in the *List of critical technologies in the national interest*. The applicant intends to be under the supervision of a highly renowned professor in that field, who has collaborated with multiple foreign universities linked to defence research. Defence application of research in this field is of high strategic interest globally.
- The foreign national intends to apply their theory to the professor's projects, and subsequently take their learnings back to their home country. The foreign national's host university is considered a very high-risk institution for its involvement in economic espionage and very high level of defence research. The foreign national's specific line of research is under a designated defence research area of their host university.
- The foreign national is also funded by a foreign government scholarship program, where an obligation is to return to their home country for a period after completing their degree. Links to defence research areas for the foreign national and professor, combined with foreign government funding, indicate this foreign national may be intending to advance interests of their state in a manner that may be against Australia's national interest.

(d) whether there are certain nationalities in relation to whom these provisions may operate more frequently in practice, and if so, whether this differential treatment is based on reasonable and objective criteria.

The amendments made by the PACT Regulations do not differentiate on the basis of nationality and the provisions can be applied to non-citizens of any nationality, depending on their individual circumstances and on the assessed threat environment – which may change over time. This allows the Department to respond to the rapid pace of critical technology development, and to shifts in the geopolitical environment and foreign interference risks. Those countries which are high threat vectors for the unwanted transfer of Weapons of Mass Destruction intellectual property are also relevant in the critical technology transfer environment.

In practice, visa applicants and visa holders with affiliations with countries that present greater threat of critical technology transfer will be more likely to be affected by these provisions. However, the decision as to whether a visa applicant or visa holder may present an unreasonable risk of an unwanted transfer of critical technologies will depend on their individual circumstances such as their field of study, the foreign institutions with which they are affiliated and how their research is being funded—informed by available intelligence about risks to Australia's national security that these factors may indicate. Therefore, any differential impact on citizens of some countries would be on the basis of reasonable and objective factors in their individual circumstances, with decisions by the Minister (or her delegate) being informed by intelligence from a range of Australian government sources.

The Hon Amanda Rishworth MP

Minister for Social Services

Ref: MC22-010055

The Hon Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
Human.rights@aph.gov.au

Dear Mr ~~Burns~~ Josh

Thank you for your email dated 8 September 2022, concerning the Parliamentary Joint Committee on Human Rights Report 3 of 2022 (the Report) in relation to the *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022* (the Bill).

I have had an opportunity to review the Report and would like to address the Committee's concerns by answering the questions raised by the Committee as set out below.

(a) What objective is being sought to be achieved by compulsorily transitioning certain participants from the CDC program to the income management regime and why it is necessary to achieving the stated objective of abolishing the CDC program?

The Government's objective is to implement voluntary income management (IM) regime in the near future. One step in achieving this overall objective is abolishing the Cashless Debit Card (CDC) program, which has now been achieved, and reforming the existing IM regime.

To this end, in the near future I intend to introduce a further Bill to facilitate the transition of IM to a voluntary regime. This further Bill will be introduced once I have had a sufficient opportunity to adequately consult with affected communities and individuals about what support is required, and to ensure appropriate support systems are in place before the transition occurs.

As addressed in detail further below, I have undertaken consultation on these reforms with affected individuals and communities. Following these consultations, the Government has considered how best to operationalise its commitment to abolish the CDC and reform the existing IM regime.

The option of abolishing CDC on a single date this year was considered but ultimately regarded as unsuitable for a number of reasons. The Government considered that a phased transition to a voluntary IM regime is the best option to ensure that individuals receive the support they require, noting that many individuals have received welfare payments through IM (and/or CDC once it became operational) arrangements for over 10 years. These individuals would likely be significantly disadvantaged by a sudden cessation of all cashless welfare arrangements, and will require time and appropriate support to move towards managing their welfare payments if they choose not to participate in the voluntary IM regime.

(b) Why are CDC participants in the Northern Territory being treated differently from participants in other geographical areas?

In the Northern Territory, a different approach is required to other existing CDC program areas because the Northern Territory is the only area in which an individual has been able to elect to move from IM to CDC. If individuals who voluntarily transitioned to CDC from IM were transitioned off CDC without restrictions on how they receive their welfare payments, they would face different arrangements to people who chose to stay on IM (who would continue to have their welfare payments restricted). This would have the effect of treating those individuals who chose to transfer to CDC differently to those that did not. To ensure fair and equivalent application of cashless welfare arrangements across the Northern Territory, it was decided that CDC program participants residing in the Northern Territory should transition to a form of IM upon closure of the CDC program. The amendments the Government introduced to this Bill addressed many of the Committee's overarching concerns relating to the Northern Territory.

(c) For those participants in the Northern Territory who would be required to transition to the income management regime, will a request to the Secretary to cease participation in the CDC program prevent a participant being subjected to mandatory income management?

The amendments to the Bill which passed both houses of parliament on 28 September 2022 address these concerns. Under the amended Bill, to ensure fairness to those in the Northern Territory who elected to remain on IM rather than transitioning to CDC, Northern Territory CDC participants will not be able to opt-out.

(d) Why are certain participants being compulsorily transitioned to the income management regime, rather than being able to voluntarily opt-in to the regime or, at a minimum, subjecting participants to the regime based on individual circumstances

In most circumstances, current CDC program participants will cease to be subject to any cashless welfare arrangements before the CDC program is legislatively closed. These individuals will be able to volunteer for IM if they choose to do so. There are two exceptions to this general circumstance, namely individuals residing in the Northern Territory and the Cape York area.

The compulsory transition from CDC to IM in the Northern Territory is addressed above.

The mandatory transition of individuals from CDC to IM in the Cape York area recognises the important role of the Family Responsibilities Commission (FRC) in supporting individuals within its jurisdiction. This will ensure the FRC can continue to exercise all powers available to it under its originating legislation and continue its work unchanged.

While voluntary CDC participants will automatically transition to IM, they will have the ability to opt-out.

(e) What is the nature of the consultation that was undertaken with affected communities and individuals regarding the measure to compulsorily transition certain participants to income management, and what were the outcomes of such consultation?

I have personally visited and spoke with communities in Ceduna, the East Kimberley, Cairns and the Northern Territory. Assistant Minister Elliot visited and spoke with communities in Bundaberg and Hervey Bay, Cape York and the Goldfields region. I have consulted not only with these broader communities, but also with individual CDC program participants and key stakeholders in the communities including First Nations leaders, service providers, healthcare workers, and police.

The discussions undertaken as part of these consultations have been focused on understanding:

- what services are needed to address social issues within communities and to drive economic independence.
- what supports people may need while transitioning off the program.
- what the future of IM may look like and what other supports that may be needed to operationalise this.

Outcomes of the consultations undertaken are detailed throughout this correspondence.

(f) Was consideration given to less rights restrictive ways to achieve the stated objective, and what other safeguards will operate to assist the proportionality of transitioning individuals to compulsory income management?

The staged reform of welfare management, through the abolition of CDC and reforms to the IM regime, has been and will continue to be developed in consultation with affected communities and other stakeholders, including First Nations leaders. Several options have been mooted over time including full abolition. The Government considers that our chosen pathway is the most appropriate way to implement changes and remove or lessen restrictions with minimal disruption to accepted arrangements that have helped people to meet their priority needs.

The government is introducing a range of safeguards to support the transition away from CDC and, ultimately, to a voluntary scheme. These include tailored community support and engagement with services delivered to individual participants.

This process remains ongoing and, as with all successful policies, will adapt and may be revised as the pathway to voluntary arrangements gets underway.

(g) Will participants who will be subjected to the income management regime have an opportunity in the future to opt-out of this regime or cease their participation in mandatory income management

The Government is committed to abolishing the mandatory CDC program and to instead support communities to make their own decisions about the way forward. As noted above, the Government's intention is to transition away from existing cashless welfare arrangements to a voluntary regime over coming years.

In order to best achieve this while ensuring affected individuals receive the support they require, a stepped approached is preferred by the Government and affected communities. This will involve initially abolishing the CDC program and reforming the IM regime, followed by further amendments to complete the transition to a voluntary regime.

I trust the above answers your queries, and am pleased to have been of assistance to you on this occasion.

Yours sincerely

Amanda Rishworth MP

4/10/2022