# Chapter 2

## Concluded matters

2.1 This chapter considers responses to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

## Bills

## Export Control Amendment (Streamlining Administrative Processes) Bill 2022[2]

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|---|---|
| **Purpose** | This bill seeks to amend administrative and authorisation processes relating to the Department of Agriculture, Fisheries and Forestry, including by making information-sharing provisions relating to export control more flexible |
| **Portfolio** | Agriculture, Fisheries and Forestry |
| **Introduced** | House of Representatives, 30 November 2022 |
| **Right** | Privacy |

2.3 The committee requested a response from the minister in relation to the bill in *Report 1 of 2023*.[3]

### Information-sharing between government agencies and other bodies

2.4 This bill seeks to amend the *Export Control Act 2020* (Export Control Act) to alter information-sharing provisions relating to government agencies and other bodies. The bill would provide that 'entrusted persons' (which would include any level

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Export Control Amendment (Streamlining Administrative Processes) Bill 2022, *Report 2 of 2023* [2023] AUPJCHR 21.

3 Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023), pp. 13–17.

of departmental officer and certain contractors)[4] would be permitted to use or disclose 'relevant information' in relation to a range of matters.[5] 'Relevant information' would be defined to mean 'information obtained or generated by a person in the course of or for the purposes of: performing functions or duties, or exercising powers, under the Export Control Act; or assisting another person to perform functions or duties, or exercise powers, under the Act'.[6]

2.5 Entrusted persons would be permitted to use or disclose relevant information in the course of, or for the purposes of, performing functions or duties under the Export Control Act.[7] They would also be permitted to use or disclose relevant information for twelve other purposes,[8] including: to a foreign government for the purposes of managing Australian international relations in respect of trade;[9] to the Australian Federal Police if the person reasonably believed that this was necessary for the enforcement of a criminal law;[10] and for the purposes of other Acts administered by the relevant minister (this would include the *Biosecurity Act 2015*),[11] or a law of a state or territory.[12]

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Right to privacy*

2.6 By facilitating the use and disclosure of personal information this measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[13] It also includes the right to control the dissemination of information about one's private life.

4 Schedule 1, Item 4, section 12. 'Entrusted persons' would mean any of the following: the minister; the Secretary; an Australian Public Service employee in the department; any other person employed or engaged by the Commonwealth to provide services to the Commonwealth in connection with the department; any other person employed or engaged by the Commonwealth or a body corporate that is established by a law of the Commonwealth, and who falls within a class of persons specified by rules.

5 Schedule 1, Item 12, proposed section 388–397F.

6 Schedule 1, item 6.

7 Schedule 1, item 12, proposed section 388.

8 Schedule 1, item 12, proposed sections 389–397C.

9 Schedule 1, item 12, proposed section 389.

10 Schedule 1, Item 12, proposed section 393.

11 Schedule 1, Item 12, proposed section 390.

12 Schedule 1, Item 12, proposed section 397C.

13 International Covenant on Civil and Political Rights, article 17.

The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. The United Nations (UN) Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[14]

2.7 The stated objective of the measure appears capable of constituting a legitimate objectives for the purposes of international human rights law, and the measure is rationally connected to that objective, but questions remain regarding proportionality.

***Committee's initial view***

2.8 The committee noted that the proposed statutory authorisations for sharing information are generally aimed at the legitimate objective of supporting the management of the export control framework and the effective operation and enforcement of the Export Control Act, and sought further information to assess the proportionality of the measure with the right to privacy, in particular:

(a) what kinds of personal information may be disclosed and used pursuant to the proposed authorisations, including examples of such information and the contexts in which the information may be disclosed;

(b) the person or body to whom relevant information may be disclosed for the purposes of the Act (proposed section 388) or other Acts (proposed section 390) and managing severe and immediate threats (proposed section 397D)—noting that in these circumstances, it is not clear to whom the information may be disclosed;

(c) why it is necessary to allow all information obtained using powers under the Act to be shared for law enforcement purposes, unrelated to managing risks that arise in connection with export operations or the administration of the Act;

(d) why the potential safeguards identified in the statement of compatibility in respect of these proposed authorisations are not set out in the bill itself; and

14 *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

(e) what other safeguards, if any, would operate to protect personal information disclosed or used pursuant to these proposed authorisations.

2.9 The full initial analysis is set out in *Report 1 of 2023*.

## Minister's response[15]

2.10 The minister advised:

> *a) What kinds of personal information may be disclosed and used pursuant to the proposed authorisations, including examples of such information and the contexts in which the information may be disclosed;*
>
> The proper, effective and efficient performance of functions or duties, or the exercise of powers under the Export Control Act will often involve the use or disclosure of relevant information which may include personal information. For that reason, the authorisations set out in proposed new Division 2 of Part 3 of Chapter 11 of the Act are clearly defined and aimed at the legitimate objective of supporting the effective operation and enforcement of the Act.
>
> These authorisations allow for the use or disclosure of relevant information in certain circumstances, including in the course of, or for the purposes of, the performance of functions or duties, or the exercise of powers under the Act (new section 388), or for research, policy development or data analysis to assist the Department of Agriculture, Fisheries and Forestry (new section 394). They also include the disclosure of statistics (new section 395) and disclosure to a foreign government, an authority or agency of a foreign government or an international body of an intergovernmental character, for the purposes of the export of goods from Australia, managing Australia's international relations in respect of trade or giving effect to Australia's international obligations (new section 389).
>
> The kinds of personal information that may be used and disclosed pursuant to the proposed authorisations is constrained by the operation of the Act, whereby relevant information is limited to information collected for the purposes of performing functions or duties, or exercising powers, under this Act. This may include information used to meet obligations or requirements under the Act, such as personal information contained in applications or other submissions under the Act. The types of personal information collected may include, but is not limited to, an applicant's name; address; business associates and interests; details of intended export operations; previous convictions; or orders to pay a pecuniary penalty under relevant legislation.

15 The minister's response to the committee's inquiries was received on 21 February 2023. This is an extract of the response. The response is available in full on the committee's website.

Relevant information that is also personal information may be used or disclosed to other Commonwealth entities under proposed sections 391 (disclosures to Commonwealth entities) or 393 (disclosure for the purposes of law enforcement), for example in circumstances where export information is requested in support of investigating suspected criminal activity or undertaking surveillance operations. For example, the Australian Federal Police or Australian Border Force may request personal information from the department relating to an exporter or export operations, in specific cases concerning a port of export, or an export vessel that may be under suspicion. These entities may request information relating to any prior convictions, as well as known business associates or interests.

Several of the authorisations impose specific measures to limit or prevent the sharing of relevant information that may contain personal information. For example, the authorisation to use or disclose relevant information for the purposes of research policy development or data analysis requires reasonable steps to be taken to de-identify personal information, wherever possible, and to otherwise minimise the amount of personal information disclosed. The authorisation to use or disclose statistics can only be used for statistics that are not likely to enable the identification of a person. Authorisations to disclose information to a State or Territory body require an agreement to be in place between the Commonwealth and that State or Territory body before the relevant information may be disclosed, which may include requiring the State or Territory body to confirm that any personal information that is disclosed will be subject to appropriate safeguards.

> *b) The person or body to whom relevant information may be disclosed for the purposes of the Act (proposed section 388) or other Acts (proposed section 390) and managing severe and immediate threats (proposed section 397D)—noting that in these circumstances, it is not clear to whom the information may be disclosed;*

While the proposed authorisations for the disclosure of information under proposed section 388, section 390, and section 397D, do not list the persons to whom disclosures may be made, the persons to whom relevant information can be disclosed are necessarily limited by the requirement that the disclosure be for the purpose of a function, duty or power under the Act or export control rules, or the administration of portfolio Acts, or for the specific purpose of managing severe and immediate threats.

Section 388 would authorise the use or disclosure of relevant information for the purposes of performing functions or duties, or exercising powers, under the Act or export control rules, or assisting another person to perform or exercise such functions, duties or powers. The disclosure of information is governed and limited by the functions, duties, and powers under the Act. For example, an approved auditor who has collected information in conducting an audit (which is a function or duty under the Act) may share that information with administrative staff who are assisting the approved auditor to carry out their function of providing an audit report.

Proposed section 390 provides for information to be disclosed for the purposes of the administration of the Act, or other portfolio Acts. This allows for best practice and streamlined information sharing, and by definition limits the persons to whom disclosure of relevant information is allowed, as there must be a clear connection between the disclosure and the specific legislative purpose of the relevant Act. This authorisation would, for example, enable information that is collected in the course of performing a function under the Act that may be relevant to the administration of the *Biosecurity Act 2015* (the Biosecurity Act), such as information relating to a pest incursion, to be efficiently shared for the purposes of managing the incursion under that Act.

Proposed section 397D would authorise the disclosure of relevant information where there is a reasonable belief that it is necessary to manage severe and immediate threats that arise in connection with exports or that could cause harm on a nationally significant scale. Proposed section 397D does not limit to whom any such disclosures may be made, as flexibility under the authorisation is necessary and reasonable in responding to circumstances in which a severe and immediate threat exists. It is anticipated that this authorisation will be used rarely, as there is a high threshold that must be met in order to rely on this authorisation – that is, that there is a severe and immediate threat which either relates to exports or has the potential to cause harm on a nationally significant scale. The fact that the power is given to the Secretary and cannot be subdelegated below SES level is a further safeguard on the exercise of this power.

In relation to protected information, there are sanctions for unauthorised use or disclosure. The offence in subsection 397G is triggered if certain persons who obtained or generated protected information in the course of, or for the purposes of, performing functions or duties, or exercising powers, under the Act (or assisting another person to perform such functions or duties, or exercise such powers), use or disclose protected information, and the use or disclosure is not required or authorised by a Commonwealth law or a prescribed State or Territory law (and where the good faith exception in subsection 397G(4) does not apply). The *Privacy Act 1988* regulates disclosures of personal information about an individual.

> *c) Why it is necessary to allow all information obtained using powers under the Act to be shared for law enforcement purposes, unrelated to managing risks that arise in connection with export operations or the administration of the Act;*

Section 393 would authorise the disclosure of information for the purposes of law enforcement to certain Commonwealth, State or Territory bodies which have a law enforcement or protection of public revenue function. Relevant law enforcement purposes may include the investigation of offences under the *Crimes Act 1914*.

A robust and effective framework for information sharing for the purposes of law enforcement is a matter of public interest. The amendments address

the need to simplify and clarify the current information sharing regime, and allow a key element of best practice, that is, the ability to share information for law enforcement purposes when it is in the public interest to do so.

This would better enable enforcement decisions to be informed by proper investigation of differing, intersecting issues and information, before an effective enforcement decision can be made.

Under these proposed amendments, where information is proposed to be disclosed to a State or Territory body or a police force or police service of a State or Territory, an agreement is required to be in place between the Commonwealth and that body in which the relevant body has undertaken not to use or further disclose the information except in accordance with that agreement. This provides some certainty as to the use and onward disclosure of the information provided.

The amendments outlined in the Bill align with similar changes to the Biosecurity Act agreed to by the Parliament in passing the *Biosecurity Amendment (Strengthening Biosecurity) Act 2022* in November 2022. As noted above, the Biosecurity Act is another key Act regulating the supply chain and administered by the department, and alignment across this authorisation provides consistency and predictability for stakeholders. This amendment is also consistent with the way information sharing regimes are framed in other legislation, for example the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* and the *Industrial Chemicals Act 2019*.

The enforcement of Australian laws is an appropriate framing for the authorised disclosure of relevant information, as it is a matter of public interest. I consider that there are sufficient checks and balances on the use of such information and the authorisation allows the Commonwealth to make a judgement about the necessity of sharing for any proposed purpose.

> *d) Why the potential safeguards identified in the statement of compatibility in respect of these proposed authorisations are not set out in the bill itself;*

The proposed authorisations for sharing information are aimed at the legitimate objective of supporting the management of the export control framework and for the effective operation and enforcement of the Act. In support of this, the Bill contains safeguards that are reasonable, necessary, and proportionate to meeting this objective.

As identified in the statement of compatibility, it would be consistent with the legislation to also apply additional safeguards when disclosing relevant information, however, it would not be possible and practical to impose all these requirements in the Bill itself because flexibility is required in their application. For example, an agreement between the Commonwealth and a State or Territory body may sometimes prohibit the onward disclosure of information or require that information may only be used for a specific purpose, while in other situations the agreement may impose limitations on onward use or disclosure rather than prohibitions. In some circumstances,

it may be clear that the relevant state or territory legislative framework already sufficiently governs the onward use and disclosure of the information, making it unnecessary to impose restrictions as part of the agreement.

Similarly, whether conditions should be placed on the use and onward disclosure of relevant information, and if so, the specific conditions that are required, need to be adapted to the particular circumstances of the initial disclosure, which should not be limited to specific conditions set out in the Bill. For example, where information is being disclosed to another Commonwealth officer for the purposes of the Biosecurity Act, the use or disclosure of that information would be governed by the equivalent information management provisions in that Act and further conditions would be unnecessary. Similarly, disclosures to other Commonwealth entities would be governed by the *Privacy Act 1988* and unauthorised disclosure that could cause harm may breach existing offence provisions in the Criminal Code. Where a disclosure to a person outside the Commonwealth is made, there may already be arrangements in place, for example, by way of conditions imposed through an instrument of authorisation made under section 291 of the Act.

As discretion is required, it is not necessary to reference these safeguards in the Bill itself as there is no need for legislation to specify that something may be done if it would not otherwise be prohibited.

Similarly, the need to create tailored authorisations to govern the use or disclosure of relevant information in the rules, which impose appropriate limitations on the use or disclosure of the information, has been recognised in the formulation of proposed section 397E. It would not be possible to set out these limitations in the Bill because the limitations will need to be tailored to the particular authorisations prescribed in the rules. Rules made under section 397E are disallowable and will be subject to parliamentary oversight.

The following safeguards mentioned in the statement of compatibility have been included in the Bill:

- The ability for disallowable rules made under proposed section 397E to be tailored to particular circumstances by allowing the rules to prescribe the kinds of relevant information that may be used or disclosed, the classes of person who may use or disclose the information, the purposes for use or disclosure and limitations on the use or disclosure of the relevant information
- Section 394 would require reasonable steps to be taken to de-identify personal information, wherever possible, and for personal information to otherwise be minimised
- Section 395 would allow the use or disclosure of statistics only if they are not likely to enable the identification of a person

- Authorisations such as proposed new sections 393 and 397C require an agreement to be in place between the Commonwealth and a State or Territory body before the relevant information may be disclosed
- The legislation makes clear by way of a note that the Commonwealth can make agreements or other arrangements to impose conditions on the use or disclosure of relevant information.

Further, as mentioned in response to point (b) above, where additional safeguards have not been included in an authorisation, this is because the authorisation by definition, limits the persons to whom information can be disclosed, for example, because the use or disclosure must be for the purpose of performing or exercising a function, duty or power under the Act or for the administration of a portfolio Act. Appropriate safeguards have been included in each authorisation that are proportionate and adapted to the purpose of the use or disclosure permitted by that authorisation.

In addition to the offence and penalties set out in proposed new section 397G of the Act for the unauthorised use or disclosure of protected information, the *Privacy Act 1988* applies in relation to personal information about individuals.

Other safeguards such as departmental policies and procedures regarding the proposed authorisations, are appropriately not set out or referenced in the Bill itself. These authorisations can and will provide additional safeguards around what information can be shared and by whom. Further information is provided in the response to e) below.

*e) What other safeguards, if any, would operate to protect personal information disclosed or used pursuant to these proposed authorisations.*

The department maintains robust policies and procedures to protect any personal information which it holds, as documented in the department's Privacy Policy at agriculture.gov.au/about/commitment/privacy. As part of these processes, personal information is held in accordance with the collection and security requirements of the Australian Privacy Principles, the department's policies and procedures and the Australian Government Protective Security Policy Framework. Should personal information held by the department be subject to unauthorised access or disclosure, the department has procedures in place to assess the incident and mitigate any harm that may have been caused and considers the incident in accordance with its responsibilities under the privacy Act and requirements under the Notifiable Data Breach Scheme to notify the Office of the Australian Information Commissioner of any potential eligible data breaches.

Many of the authorisations impose specific measures to prevent the sharing of relevant information that may also be personal information. For example, new section 394 requires reasonable steps to be taken to de-identify (as defined in section 12 of the Act) personal information, wherever possible, before relevant information is disclosed for the purposes of research, policy

development or data analysis. New section 395 also limits the use or disclosure of statistics to where those statistics are not likely to enable the identification of a person.

Authorisations such as new sections 393 (disclosure for law enforcement purposes) and 397C (disclosure to State or Territory body) will require an agreement to be in place between the Commonwealth and a State or Territory body before the relevant information may be disclosed to that body. This may include for example, requiring the State or Territory body to confirm that any personal information that is disclosed will be subject to appropriate safeguards.

In addition, relevant departmental policies and procedures, which can be implemented on a case-by-case basis, include the following:

- application of additional restrictions, including via protective marking, to limit the clearance level for access of personal information
- notifying particular affected parties of a particular disclosure or use, if appropriate
- entering into agreements with other parties, which as noted above is required for certain authorisations, will set out use, handling and storage requirements of personal information; and
- ensuring the storage of personal information meets best practice protocols and is in line with Commonwealth record-keeping obligations.

## Concluding comments

### *International human rights legal advice*

2.11 To assess whether the proposed limitation on the right to privacy is proportionate, further information was sought regarding the breadth of the measure, particularly in relation to the persons to whom, and the bases on which, information may be disclosed under the information management framework. While the measure mostly provides for who may use the relevant information (namely, an entrusted person), and the persons to whom information may be disclosed, there are some circumstances where this is not the case.[16] In particular, sections 388, 390 and 397D authorise the disclosure of relevant information for specified purposes without limiting to whom any such disclosures may be made. The minister advised that disclosure of information under these sections is governed and limited by the functions, duties and powers under the Act and other relevant legislation such as the *Privacy Act 1988*, as well as the fact that disclosure must be for the specified legislative purpose under which it operates. The effect of this would be to confine disclosure to persons who would legitimately require the information to achieve and manage one of the listed purposes in the relevant legislation. In relation to proposed section 397D

16 See Schedule 1, item 12, proposed sections 388, 390, 395 and 397D.

(disclosure of relevant information where there is a reasonable belief that it is necessary to manage severe and immediate threats), the minister advised the provision does not limit to whom any such disclosures may be made, as flexibility under the authorisation is necessary and reasonable in responding to circumstances in which a severe and immediate threat exists. The minister further noted that recipients of relevant information under these sections will be governed by other legislation, such as state and territory laws if the recipient was a state or territory body.

2.12 It is noted that sections 388, 390 and 397D place limitations regarding the persons who are authorised to disclose relevant information (namely, entrusted persons) and the purposes for which information may be disclosed, which could, as the minister suggests, have the effect of limiting the persons to whom information may be disclosed. However, without limiting to whom information may be disclosed in the text of the legislation itself, it remains unclear how broadly this power would be exercised. For example, in the case of disclosing information for the purpose of managing exports, it appears possible that information could be disclosed to a broad range of front-line workers, private companies and contractors, such as airport staff and transport workers. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary and legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.[17]

2.13 As to the bases on which information may be disclosed, further information was sought as to why it is necessary to allow all information obtained using powers under the Act to be shared for law enforcement purposes, unrelated to managing biosecurity risks or the administration of the Act (as permitted under section 393). The minister advised that the amendments are intended to reflect best practice by sharing information for law enforcement purposes when it is in the public interest to do so. The minister stated that a robust and effective framework for information sharing for law enforcement is a matter of public interest. The minister noted this would better enable enforcement decisions to be informed by proper investigation of differing, intersecting issues and information, before an effective enforcement decision can be made.

2.14 However, questions remain as to whether sharing all information obtained by officials using powers under the *Export Control Act 2020* to enforce any other law, unrelated to any exports or for the administration of the *Export Control Act 2020*, will be proportionate in practice, noting that the adequacy of the public interest justification will depend on the circumstances of each case. It is noted that the personal information that may be shared may include sensitive information such as information relating to prior convictions or pecuniary penalties and known business associates or interests. Given the breadth of this information-sharing power and the corresponding considerable extent of the potential interference with the right to

17 *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

privacy, it is critical that the measure is accompanied by stringent safeguards to ensure any limitation on the right to privacy is proportionate.

2.15 In this regard, the minister notes there are a number of safeguards in the bill that would assist with proportionality, including:

- requiring reasonable steps to be taken to de-identify personal information in the context of information used or disclosed for research, policy development or data analysis (but not other purposes);[18]
- permitting the use or disclosure of relevant information that is statistical information that is not likely to enable the identification of a person;[19]
- requiring an agreement to be in place between the Commonwealth and a state or territory body before the relevant information may be disclosed to the body. The agreement may include a requirement that the state or territory body confirm any personal information disclosed is subject to appropriate safeguards;[20]
- the discretion of the Commonwealth to make an information sharing agreement or impose conditions on the use or disclosure of relevant information shared under this division;[21] and
- the prohibition on unauthorised use or disclosure of protected information.[22]

2.16 As to why the safeguards identified in the statement of compatibility that could apply are not set out in the bill itself, the minister advised that it would not be possible or practical to impose additional safeguards in the bill, because flexibility is required in their application. The minister gave the example that sometimes agreements between Commonwealth and state and territory bodies may prohibit the onward disclosure of information, whereas on other occasions it may limit the disclosure rather than prohibit it, and that any conditions imposed need to be adapted to the particular circumstances of the disclosure. However, it is not clear why the legislation could not set out a list of safeguards that the entrusted person must consider when determining whether to disclose information: for example, requiring the de-identification of personal information where appropriate; requiring

18 Schedule 1, item 12, proposed section 394.

19 Schedule 1, item 12, proposed section 395.

20 Schedule 1, item 12, proposed sections 393 and 397C.

21 Schedule 1, item 12, Note 2 to proposed section 387 provides that nothing in this Part would prevent the Commonwealth from making agreements or other arrangements to impose conditions on the use or disclosure of relevant information by a body or person who obtains the information as a result of an authorised disclosure.

22 Schedule 1, item 12, proposed section 397G, which would apply a fault-based offence, civil penalty provision and strict liability offence to the unauthorised use or disclosure of protected information which is obtained or generated under the *Export Control Act 2020*.

decision-makers to consider the effect on privacy of disclosing the information; or requiring the decision-maker to consider, before personal information is shared, if the individual or entity it is sharing it with has appropriate processes in place to protect the information. This would still allow the decision-maker the flexibility to determine what safeguards are applicable, but would provide legislative guidance as to the type of matters the decision-maker must turn their mind to when authorising disclosure.

2.17 As to the existence of other safeguards, the minister referred to the department's Privacy Policy and the Australian Government Protective Security Policy Framework. The minister further noted that certain departmental policies and procedures can be applied on a case-by-case basis, such as requiring the mandatory destruction of personal information after an agreed timeframe and in an agreed manner or applying additional restrictions to limit the clearance level for access to personal information.

2.18 The above safeguards would assist with proportionality, although it is noted that discretionary safeguards are less stringent than the protection of statutory processes as there is no requirement to follow them. However, given the breadth of the measure, including the absence of a limit on the persons to whom information may be disclosed in certain circumstances and the type of information that may be shared for law enforcement purposes, there is a risk that the existing safeguards may not be adequate in all circumstances so as to ensure that any limitation on the right to privacy will be proportionate in practice.

## Committee view

2.19 The committee thanks the minister for this response. The committee considers that authorising the use and disclosure of personal information engages and limits the right to privacy.

2.20 The committee considers that the measure pursues the legitimate objective of supporting the management of the export control framework and the effective operation and enforcement of the *Export Control Act 2020*. The committee considers that the measure is accompanied by a number of important safeguards that will help to ensure any interference with the right to privacy is only as extensive as is strictly necessary. However, given the breadth of the measure, there is a risk that the existing safeguards may not be adequate in all circumstances so as to ensure that any limitation on the right to privacy will be proportionate in practice.

**Suggested action**

2.21 The committee considers the proportionality of this measure may be assisted were Schedule 1, item 12 of the bill amended to provide that when an entrusted person is considering disclosing information under this Division they must consider:

- the effect of any such disclosure on the privacy of individuals;

- if the objective of the disclosure can be served without identifying individuals, and if so, consider de-identifying all personal information unless unreasonable or impracticable to do so;
- whether, before personal information is shared, the individual or entity it is sharing it with has appropriate processes in place to protect the information.

2.22 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.23 The committee draws these human rights concerns to the attention of the minister and the Parliament.

# National Reconstruction Fund Bill 2022[1]

| | |
|---|---|
| **Purpose** | A bill for the establishment of a National Reconstruction Fund Corporation |
| **Portfolio** | Industry, Science and Resources |
| **Introduced** | House of Representatives, 30 November 2022 |
| **Right** | Privacy |

2.24 The committee requested a response from the minister in relation to the bill in *Report 1 of 2023*.[2]

## Disclosure of official information

2.25 The bill seeks to establish a National Reconstruction Fund Corporation (Corporation), which would provide finance to constitutional corporations, other entities, and state and territories in priority areas (as declared by ministers).[3]

2.26 Subclause 85(1) would provide that a Corporation official may disclose 'official information' (not including national security information or sensitive financial intelligence information) to an agency, body or person, including if the disclosure will enable or assist the agency, body or person to perform or exercise any of their functions or powers. This would include disclosure to an Australian Public Service departmental employee, and the government of a state or territory. The term 'official information' means information that was obtained by a person in their capacity as a Corporation official; and which relates to the affairs of a person other than a Corporation official.[4] The term 'person' would include an individual.[5]

2.27 Subclause 85(3) would provide that a Corporation official may disclose 'official information' that is national security information or sensitive financial intelligence information to entities, including a national security agency, including if the disclosure will facilitate the performance of the Corporation's investment functions, or will enable or assist the agency, body or person to perform or exercise any of their

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Reconstruction Fund Bill 2022, *Report 2 of 2023*; [2023] AUPJCHR 22.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023), pp. 18–21.

3 See, clauses 6 and 63.

4 Clause 5.

5 Clause 5, by reference to section 2C of the *Acts Interpretation Act 1901*.

functions or powers. Clause 5 defines 'national security information' to mean information the publication of which is likely to prejudice national security.

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Right to privacy*

2.28 Permitting the disclosure of 'official information' (being information that relates to the affairs of a person) may engage the right to privacy if 'official information' includes personal information.

2.29 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[6] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective. In assessing whether a measure constitutes a proportionate limit on the right to privacy, it is necessary to consider several factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

2.30 If clause 85 may permit the disclosure of personal information (and so engage and limit the right to privacy), further information would be required to establish whether this would constitute a permissible limitation on the right.

### *Committee's initial view*

2.31 The committee considered further information is required to assess the compatibility of this measure with the right to privacy, and sought the minister's advice in relation to:

(a) what type of information may be disclosed under clause 85 and whether this could include personal information; and

(b) if personal information may be disclosed:

(i) what is the objective sought to be achieved by permitting the disclosure of information to a broad range of entities (including separately permitting disclosure under subclauses 85(1) and 85(3));

(ii) how this proposed measure would be rationally connected to (that is, capable of achieving) that objective;

6 International Covenant on Civil and Political Rights, article 17.

(iii) whether the disclosure power is sufficiently circumscribed (having regard to the breadth of entities to which disclosure may be permitted under subclause 85(2));

(iv) what safeguards would operate to protect any personal information disclosed pursuant to clause 85; and

(v) whether any less rights restrictive alternatives (for example, the prescription of specific entities under subclause 85(2) rather than broad classes of entity) could achieve the same stated objective.

2.32 The full initial analysis is set out in *Report 1 of 2023*.

## Minister's response[7]

2.33 The minister advised:

**Disclosure of personal information**

I confirm that the official information that may be disclosed by the Corporation under clause 85 of the Bill, including national security information, may include personal information, and may therefore engage the right to privacy. The information that would be provided to the Corporation would typically be provided by businesses seeking investment, and could contain some limited personal information, such as the names and contact details of senior officers in the business for the purpose of the Corporation making investments.

The intention of clause 85 is not to be generally permissive but to provide for the Corporation's ability to share information, particularly national security information or sensitive financial intelligence information in a narrow set of circumstances, to facilitate the effective and efficient performance of the Corporation's investment functions.

**Compatibility with the right to privacy**

The Australian Privacy Principles (APPs) as provided for by the *Privacy Act 1988* authorise the disclosure of personal information where the disclosure is authorised by or under an Australian law (APP 6.2(b)). Clause 85 provides such an authorisation for the provision of information about the affairs of a person (including personal information) to limited classes of recipients to enable appropriate sharing of information in limited circumstances where it will facilitate the exercise of the Corporation's investment functions or enable the receiving entity to perform or exercise any of its functions.

It is the Government's intention that subclause 85(1) could be used, for example, to:

7 The minister's response to the committee's inquiries was received on 22 February 2023. This is an extract of the response. The response is available in full on the committee's website.

(a) enable sharing of information between the Corporation and its subsidiaries; and

(b) enable the provision of information by the Corporation to its administering Commonwealth departments;

without requiring the express consent of every individual whose information is contained in the material or the redaction of large amounts of material. The alternative would directly impinge on the effective and efficient performance of the Corporation's investment functions where this performance relies on the Corporation's ability to disclose official information as appropriate.

The Bill also authorises the sharing of information for national security or financial intelligence purposes under subparagraph 85(3)(a)(iii), such as where information is referred to the Australian Transaction Reports and Analysis Centre to investigate potential money-laundering, provided that this information is shared to facilitate the performance of the Corporation's investment functions or to enable the recipient to exercise their functions or powers (clause 85(3)(a) refers). Sharing information for those purposes is broadly consistent with the *Privacy Act 1988*, in particular APP 6.2(e), which permits the disclosure of information where it is reasonably necessary for one or more enforcement related activities conducted by or on behalf of an enforcement body.

Furthermore, the scope of the Corporation's financing remit includes investment in defence capabilities as well as critical technologies in the national interest. It is important that any concerns that may arise in the course of the Corporation exercising its investment functions (including matters that arise during due diligence and negotiation) are able to be shared with relevant national security or intelligence bodies. To the extent that personal information is shared with an intelligence or national security body under subclause 85(3)(a)(iii), that sharing would be proportionate to the essential public interest of enabling this intelligence or national security body to perform its functions.

The proposed measure is therefore directly connected to its objective of facilitating the effective and efficient performance of Government functions. Moreover, it is the Government's view that any risks related to limiting the right to privacy in the manner this provision does are commensurate and proportionate to the necessity of the provision to achieving this objective.

**Entities to whom official information may be disclosed**

The disclosure powers under clause 85 are also sufficiently circumscribed when considered in the context of the limited classes of recipients that may receive official information under subclauses 85(2) and 85(4) of the Bill. I note that the classes of entities listed under subclauses 85(2)(a), 85(2)(b) and 85(2)(c), including any subsidiaries the Corporation establishes, would themselves subject to the APPs and, as such, would be required to keep any

personal information received confidential. Most state and territory governments (subclause 85(d) refers), where they are not subject to the APPs, have equivalent legislation which cover their public sector agencies. Furthermore, any rules made by the Ministers prescribing a further agency, body or person under subclause 85(2)(e) would be subject to disallowance.

It is the Government's view that it would be inappropriate to prescribe specific entities under subclause 85(2), rather than broad classes of entity, since the specific entities the Corporation may be required to interact with in order to exercise its investment functions may reasonably be expected to change over time.

## Concluding comments

### *International human rights legal advice*

2.34 As the minister has advised that the official information that may be disclosed by the Corporation in this bill, including national security information, may include personal information, this therefore engages and limits the right to privacy.

2.35 The minister states that the objective of the measure is to facilitate the effective and efficient performance of the Corporation's investment functions. In relation to the sharing of national security information the minister has advised that it is important that any concerns that may arise in the course of the Corporation exercising its investment functions are able to be shared with relevant national security or intelligence bodies. Facilitating the effective performance of the Corporation's functions is likely to be a legitimate objective for the purposes of international human rights law, and the measure would appear to be rationally connected to (that is, effective to achieve) this objective.

2.36 In relation to proportionality it is important to consider the extent of the interference with human rights. In this regard the minister advised that the type of information that may be shared would typically be provided by businesses seeking investment, and could contain limited personal information, such as the names and contact details of senior officers in the business for the purpose of the Corporation making investments. As such, it appears that any limitation on the right to privacy would be minimal. Further, the minister has set out the safeguards that would apply, including that the bill sets out who the information may be disclosed to and the listed class of entities would themselves be subject to the Australian Privacy Principles (as is the Corporation). On the basis of the information provided it appears that the bill does not arbitrarily limit the right to privacy.

## Committee view

2.37 The committee thanks the minister for this response. The committee considers that while the disclosure of official information by the Corporation limits the right to privacy, on the basis of the information provided the committee considers this to be a marginal, and non-arbitrary, limitation on the right to privacy.

2.38 The committee notes that had this information been provided initially in the statement of compatibility it would not have been necessary for the committee to raise this matter further.

**Suggested action**

2.39 The committee recommends that the statement of compatibility be updated to reflect the information provided by the minister.

2.40 The committee considers that its concerns have been addressed, and makes no further comment in relation to this bill.

# Referendum (Machinery Provisions) Amendment Bill 2022[1]

| | |
|---|---|
| **Purpose** | This bill seeks to amend the *Referendum (Machinery Provisions) Act 1984* to ensure that referendums reflect contemporary federal election voting processes and extends transparency and integrity measures in the *Commonwealth Electoral Act 1918* (the Electoral Act). In particular it seeks to:<br>• modernise postal voting in referendums;<br>• promote operational efficiencies in the sorting and counting of votes in referendums;<br>• update authorisation requirements to align with recent changes to the Electoral Act;<br>• amend the financial disclosure and foreign donation restrictions framework for referendum campaigning;<br>• require 'designated electors' to cast a declaration vote in referendums; and<br>• enable the Electoral Commissioner to make modifications to certain aspects of a referendum during a declared emergency. |
| **Portfolio** | Finance |
| **Introduced** | House of Representatives, 1 December 2022 |
| **Rights** | Freedom of expression; freedom of association; privacy; equality and non-discrimination |

2.41 The committee requested a response from the minister in relation to this bill in *Report 1 of 2023*.[2]

## Prohibition on foreign campaigners engaging in certain referendum conduct

2.42 This bill seeks to prohibit foreign campaigners from authorising referendum matters, being matters communicated, or intended to be communicated, for the dominant purpose of influencing the way electors vote at a referendum.[3] A 'foreign campaigner' means a person or entity who is not an elector, an Australian citizen, an

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Referendum (Machinery Provisions) Amendment Bill 2022, *Report 2 of 2023*; [2023] AUPJCHR 23.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023), pp. 22–31.

3 Schedule 3, item 2, proposed section 3AA and item 12, proposed section 110CA. The meaning of 'referendum matter' is consistent with the current definition of 'electoral matter'.

Australian resident,[4] or a New Zealand citizen who holds a Subclass 444 (Special Category) visa.[5] The prohibition would cover the production or distribution, and approving the content, of referendum advertisements; or approving the content of referendum matters in the form of a sticker, fridge magnet, leaflet, flyer, pamphlet, notice or poster.[6] However, exceptions would apply where the referendum matter forms part of opinion polls or research relating to voting intentions at a referendum; personal or internal communications; and certain communications at meetings.[7] Contravention of this prohibition would attract a civil penalty of 120 penalty units ($33,000).[8]

2.43 The bill also seeks to prohibit the provision and receipt of foreign donations of at least $100 for the purposes of referendum expenditure as well as prohibit foreign campaigners from directly incurring referendum expenditure in a financial year equal to, or more than, $1,000.[9] Referendum expenditure means expenditure incurred for the dominant purpose of creating or communicating a referendum matter.[10] The prohibition extends to conduct that occurs in and outside Australia.[11] Contravention of these provisions attracts the higher of a civil penalty of 200 penalty units ($55,000) or three times the value of the donation or expenditure if calculable, or, in the case of foreign donations, a criminal penalty of 100 penalty units ($27,500).[12] Additionally, where the Electoral Commissioner has reasonable grounds to conclude that a person is conducting a scheme for the purpose of avoiding these provisions, they may issue a

4 Section 287 of the *Commonwealth Electoral Act 1918* defines an 'Australian resident' as a person who holds a permanent visa under the *Migration Act 1958*. Subsection 30(1) of the *Migration Act 1958* defines a 'permanent visa' as a visa to remain in Australia indefinitely.

5 *Commonwealth Electoral Act 1918*, sections 287 and 287AA. 'Foreign campaigner' has the same meaning as 'foreign donor', as defined in section 287AA of the *Commonwealth Electoral Act 1918*.

6 Schedule 3, item 12, proposed section 110CA.

7 Schedule 3, item 12, proposed subsection 110CA(2).

8 Schedule 3, item 12, proposed section 110CA.

9 Schedule 4, item 3, proposed sections 109J and 109L.

10 Schedule 4, item 2, proposed section 3AAA. 'Referendum matter' is defined in proposed subsection 3AA(1).

11 Schedule 4, item 3, proposed subsections 109J(8) and 109L(2).

12 Schedule 4, item 3, proposed subsections 109J(6)–(8) and 109L(1). Depending on the size of the donation or expenditure, the potential civil penalty of three times the value of the donation or expenditure could, in practice, amount to a substantial pecuniary penalty. Were this to be the case, it may be necessary to consider whether the civil penalty could be considered criminal in nature for the purposes of international human rights law. See Parliamentary Joint Committee on Human Rights, *Guidance Note 2: offence provisions, civil penalties and human rights* (2014).

written notice requiring the person not to enter into, not to begin to carry out, or not to continue to carry out the anti-avoidance scheme.[13]

2.44 Further, the bill would empower the Electoral Commissioner to obtain information and documents from persons to assess compliance with new Part VIIIA, which relates to disclosure of referendum expenditure and gifts, including by foreign campaigners.[14] Failure to comply with a notice to provide information or documents is an offence punishable by six months imprisonment or 10 penalty units or both.[15] The Commissioner may inspect, make copies of and retain for as long as is necessary, any documents provided.[16]

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Rights to freedom of expression, freedom of association, privacy, and equality and non-discrimination*

2.45 Noting this bill applies to foreign persons only, it is important to note at the outset that Australia's human rights obligations apply to all people subject to its jurisdiction, regardless of whether they are Australian citizens. This means that Australia owes human rights obligations to everyone in Australia, including foreign persons who are not citizens or permanent residents.[17] While many foreign campaigners would not fall within Australia's jurisdiction for the purposes of international human rights law, there are likely to be some foreign persons residing in Australia who are owed human rights obligations and whose rights may be impacted by this bill.[18]

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13 Schedule 4, item 3, proposed section 109M. Paragraph 109(1)(b) includes proposed sections 109J and 109L. Failure to comply with the written notice attracts the higher of a civil penalty of 200 penalty units ($55,000) or three times the amount that was not prohibited as a result of the anti-avoidance scheme (e.g. the amount donated or expenditure incurred).

14 Schedule 4, item 3, proposed section 109N.

15 Schedule 4, item 3, proposed subsection 109N(5).

16 Schedule 4, item 3, proposed sections 109P and 109Q.

17 Australia's obligations under the International Covenant on Civil and Political Rights are applicable in respect of its acts undertaken in the exercise of its jurisdiction to anyone within its power or effective control (and even if the acts occur outside its own territory). See United Nations Human Rights Committee, *General Comment No.31: The nature of the general legal obligation imposed on States Parties to the Covenant,* CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136 [107]–[111].

18 It is noted that the committee considered similar issues in the context of the Electoral Legislation Amendment (Foreign Influences and Offences) Bill 2022. See Parliamentary Joint Committee on Human Rights, *Report 2 of 2022* (9 February 2022) pp. 13–21.

2.46 By prohibiting foreign persons authorising the production or distribution, and approving the content, of a referendum matter, as well prohibiting donating or directly incurring referendum expenditure, the measure interferes with these persons' right to freedom of expression, particularly their right to disseminate ideas and information.[19] The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice, including online platforms.[20] It protects all forms of expression, including political discourse and commentary on public affairs, and the means of its dissemination, including spoken, written and sign language and non-verbal expression (such as images).[21] International human rights law has placed particularly high value on uninhibited expression in the context of public debate in a democratic society.[22]

2.47 To the extent that the restriction on foreign persons donating or incurring referendum expenditure interferes with the ability of a political association to carry out its activities, it may also engage and limit the right to freedom of association. The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[23] This right prevents States parties from imposing unreasonable and disproportionate restrictions on the right to form associations, including imposing procedures that may effectively prevent or discourage people from forming an association. For instance, the European Court of Human Rights has found that legislation prohibiting a French political party receiving

19 The European Court of Human Rights has found that legislation restricting persons from incurring electoral expenditure in the weeks prior to an election amounted to a restriction on the right to freedom of expression. See *Bowman v The United Kingdom*, European Court of Human Rights (Grand Chamber), Application No. 141/1996/760/961 (1998), particularly [33]. Further, it is noted that the right to take part in public affairs and elections is not directly engaged by this measure as this right only applies to citizens. See International Covenant on Civil and Political Rights, article 25.

20 International Covenant on Civil and Political Rights, article 19(2). See also UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, UNHRC Res. 20/8 (2012).

21 UN Human Rights Committee*, General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11]–[12].

22 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [34], [37] and [38]. The UN Committee has previously raised concerns about certain restrictions on political discourse, including 'the prohibition of door-to-door canvassing' and 'restrictions on the number and type of written materials that may be distributed during election campaigns'.

23 International Covenant on Civil and Political Rights, article 22.

funding or donations from foreign entities interfered with its right to freedom of association by impacting its financial capacity to carry on its political activities.[24]

2.48 In addition, by prohibiting individuals from engaging in certain conduct in the private sphere, such as incurring referendum expenditure, and by expanding the Electoral Commissioner's information-gathering powers, the measure also engages and limits the right to privacy. The statement of compatibility partly acknowledges this, noting that information gathered by the Electoral Commissioner may contain personal information.[25] The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.[26] It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy also includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.

2.49 Further, noting the measure applies to foreign persons, treating such persons differently from others on the basis of their nationality engages and may limit the right to equality and non-discrimination.[27] This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[28] While Australia maintains a discretion under international law with respect to its treatment of non-citizens in the context of the electoral process, Australia also has obligations under article 26 of the International Covenant on Civil and Political Rights not to discriminate on grounds of nationality or national origin.[29]

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24 *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v France*, European Court of Human Rights, Application No. 71251/01 (2007) [43]–[44]. Ultimately the Court concluded at [51] that 'the impact of the measure in question on the applicant party's ability to conduct its political activities is not disproportionate. Although the prohibition on receiving contributions from the Spanish Basque Nationalist Party has an effect on its finances, the situation in which it finds itself as a result is no different from that of any small political party faced with a shortage of funds'.

25 Statement of compatibility, p. 8.

26 International Covenant on Civil and Political Rights, article 17; UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4].

27 International Covenant on Civil and Political Rights, articles 2 and 26.

28 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

29 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens* (2004).

Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria.[30]

2.50 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[31] In relation to the rights to freedom of expression and freedom of association, a legitimate objective is one that is necessary to protect specified interests, including the rights or reputations of others, national security, public order, or public health or morals.[32]

2.51 Seeking to maintain the integrity of electoral processes has been recognised as a legitimate objective for the purposes of international human rights law.[33] To the extent that prohibiting foreign campaigners from engaging in certain conduct relating to referendums would reduce the threat of foreign influence in Australia's democracy and maintain the public's confidence in the integrity of the referendum process, the measure appears rationally connected to (that is, effective to achieve) the stated objectives. A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought.

***Committee's initial view***

2.52 The committee acknowledged the important objective of this measure in seeking to prevent foreign state players maliciously interfering with our referendum processes. However, the committee considered further information was required to assess the compatibility of this measure with the rights to freedom of expression, freedom of association, privacy and equality and non-discrimination, and sought the minister's advice in relation to:

(a) why the bill does not allow for an individualised assessment of the threat posed by the foreign person or the form of expression sought to be prohibited;

(b) why it is necessary for proposed subsection 3AA(4) to be framed as a rebuttable presumption rather than the obligation being placed on the

30 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

31 Regarding limitations on the right to privacy see, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, A/HRC/13/37 (2009) [15]–[18]. Regarding limitations on the right to freedom of expression see, UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

32 International Covenant on Civil and Political Rights, article 19(3) and article 22(2). See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32]–[35].

33 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [37].

Electoral Commissioner to establish that the communication is a prohibited form of expression;

(c) why it is necessary for it to be an offence, punishable by six months imprisonment, to not comply with the Electoral Commissioner's expanded information-gathering powers (under proposed section 109N);

(d) would a person be able to refuse to provide information to the Electoral Commissioner on the grounds that it might make them liable to a civil penalty under the new provisions, and if not, is the limitation on the right to privacy by requiring the production of the information or documents proportionate to the objective sought to be achieved;

(e) would the implied freedom of political communication, protected by proposed section 109ZA, operate to safeguard the rights of foreign persons to freedom of expression in this context, and if so, how;

(f) what other safeguards accompany the measure; and

(g) whether consideration was given to less rights restrictive ways of achieving the stated objectives, and if so, why these alternatives were considered inappropriate.

2.53 The full initial analysis is set out in *Report 1 of 2023*.

## Minister's response[34]

2.54 The minister advised:

**Application of the foreign campaigner provisions**

The Bill would amend the Referendum Act to prevent foreign campaigners authorising referendum matter, and fundraising or directly incurring referendum expenditure in a financial year equal to or more than $1,000. This is consistent with the Electoral Act and recognises that the threat of foreign influence in democratic referendums, perceived or actual, has the potential to erode democracy by compromising trust in voting results and trust in political participants.

The Committee has asked why the Bill does not allow for an individualised assessment of the threat posed by the foreign person or the form of expression sought to be prohibited. In the lead up to a referendum, including where a referendum is held on the same day as an election, campaigns on the proposed alteration may result in a high volume of communication of referendum matter and referendum expenditure. Requiring the AEC to conduct an individualised assessment of the threat posed by each foreign person or kind of referendum communication would

34 The minister's response to the committee's inquiries was received on 7 March 2023. This is an extract of the response. The response is available in full on the committee's website.

be impracticable due to the complexity, volume of material and cost. The individualised assessments would not be completed prior to the polling day, diminishing the value of that approach and the integrity of the poll.

Instead, by aligning the foreign campaigner provisions across the Electoral Act and Referendum Act, the Bill will ensure a common approach to foreign campaigners across Commonwealth electoral events and provide the AEC with the mechanism to respond to foreign interference, further supporting Australians' trust in democratic processes. For donors and recipients the alignment of requirements to the extent practicable will also minimise compliance burden and risk.

I consider that the foreign campaigner framework proposed in the Bill provides an appropriate framework to safeguard integrity and trust in referendum events. I further note the circumscribed nature of the foreign campaigner provisions, which expressly exclude Australian permanent residents and New Zealand Citizens who hold subclass 444 (Special Category) visas, and also excludes communications for academic, educative and artistic purposes, news content and private communications to ensure the requirements are appropriately confined.

**Reversal of the burden of proof**

You have requested further advice in relation to the necessity for a rebuttable presumption that matter that expressly promotes or opposes a proposed law for the alteration of the Constitution, to the extent that it relates to a referendum, is a 'referendum matter'.

The Bill inserts new section 3AA into the Referendum Act, with new subsections 3AA(1) and (2) defining "referendum matter" based on the definition of "electoral matter" in the Electoral Act, adapted to a referendum context. Proposed subsection 3AA(6) provides exceptions for matter that is not "referendum matter''.

Where contravention of the authorisation of referendum matter is raised, the Bill would require a person or entity to raise specific defences. This because these exemptions are matters that would be peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. This approach is consistent with the guidance provided by the Guide to Framing Commonwealth Offences.

The matters in proposed subsection 3AA(6) go the intended communication of the matter, for example if the dominant purpose of the communication was intended to be private communication, or satirical (see proposed subsections 3AA(6)(b) and (c)). As detailed in paragraph 73 of the Explanatory Memorandum to the Bill.

This approach is consistent with the Guide to Framing Commonwealth Offence as these are matters that would be peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to prove than for the defendant to establish the matter.

As such the offence-specific defences in the Bill are appropriate, and I do not consider that it necessary to amend the Bill to provide that these matters are specified as elements of the offence.

**Information-gathering powers**

The Bill would establish an offence for non-compliance with a notice issued by the Electoral Commissioner, seeking information relevant to assessing compliance with the financial disclosure obligations proposed in the Bill, under proposed section 109N. This will support the ability of the AEC to investigate and address non-compliance.

This offence and related penalty provisions replicate the equivalent provisions of the Electoral Act. This replication provides consistency across the Electoral Act and Referendum Acts and supports understanding of those offences by those engaging in both electoral and referendum expenditure.

Exercise of the information-gathering powers is appropriately circumscribed. This includes a requirement that the Electoral Commissioner may only issue a notice where they reasonably believe the person or entity has information or documents relevant to an assessment of their compliance with Part XIIIA of the Bill. Further, before issuing a notice, the Electoral Commissioner is required to have regard to the costs a person would bear in complying with that notice. A person may also request, and must be granted, a review of the Electoral Commissioner's decision to issue a notice.

Proposed section 109Z further protects the privacy of information provide in compliance with a section 109N notice where this does not relate to a contravention of the civil penalty provisions of the Act. I also note the privilege against self-incrimination applies unless explicitly abrogated, which the Bill does not propose.

I am satisfied that the offence provisions are a necessary part of the establishment and enforcement of the financial disclosure obligations provided for in the Bill.

**Safeguards**

The Bill includes a range of safeguards to ensure the foreign campaigner provisions do not apply broadly, and that the Electoral Commissioner's information-gathering powers proposed in the Bill are exercised subject to reasonable limitations. These are outlined above.

The High Court of Australia has held that an implied freedom of political communication exists as part of the system of representative and responsible government created by the Australian Constitution. Proposed section 109ZA of the Bill provides that proposed Part XIIIA of the Bill (Referendum financial disclosure) does not apply to the extent that any constitutional doctrine of implied freedom of political communication would be infringed. The operation of the implied freedom is a matter for the High Court in each case.

**Consideration of alternatives**

The restrictions imposed by the Bill on foreign campaigners engaging in Australian referendums are proportionate to achieving the legitimate objective of safeguarding the integrity of referendums by ensuring that only those with a legitimate connection to Australia are able to influence Australian referendums. A less-restrictive approach may result in increased foreign campaigning activity which may undermine trust in the referendum process, and the ability to regulate compliance with the foreign campaigner provisions.

Referendums were the subject of the Standing Committee on Social Policy and Legal Affairs' 2021 Inquiry in the constitutional reform and referendums. That inquiry recommended the Referendum Act be updated to prohibit referendum campaign organisations from receiving gifts or donations of $100 or more from foreign donors, consistent with the Electoral Act (recommendation 8). The Committee recommended that the referendum process more generally is modernised (recommendation 10). That Committee accepted public submissions, conducted hearings, and considered previous reports related matters. The Bill responds to those recommendations.

The Bill was also referred to the Joint Standing Committee on Electoral Matters (JSCEM) for inquiry. That Inquiry received submissions on the Bill, and on 13 February 2022 JSCEM released its advisory report on the Bill. That report recommended that, subject to recommendations about strengthening enfranchisement opportunities and the provision of clear, factual, and impartial information, the Bill be passed.

In summary, I consider the Bill provides an appropriate framework for the regulation of foreign campaigners in referendums and the exercise of information gathering powers in relation to compliance with financial disclosure obligations proposed in the Bill. This framework replicates the existing provisions in the Electoral Act and will operate to prevent foreign donations and restrict foreign individuals and entities from exerting political influence in Australian referendums.

## Concluding comments

### *International human rights legal advice*

2.55 In relation to why the bill does not provide for an individualised assessment of the threat posed by foreign campaigners, the minister advised that there may be a high volume of communication of referendum matters and expenditure and requiring the Australian Electoral Commission (AEC) to conduct an individualised assessment would be impracticable due to the complexity, volume of material and cost. The minister advised that the individualised assessment would not be completed prior to the polling day which would diminish the value of that approach and the integrity of the poll, and that this is consistent with the approach taken in the *Commonwealth Electoral Act 1918* (Electoral Act). The minister also stated that the provisions are

circumscribed as they do not apply to Australian permanent residents or certain New Zealand citizens and excludes communications for academic, educative and artistic purposes, news content and private communications.

2.56 Ensuring consistency with the Electoral Act would not appear to provide a sufficient justification for limiting human rights, noting that the committee has also raised human rights concerns with the same provisions in the Electoral Act.[35] Further, the main justification for not providing for an individualised assessment appears to be that this would be impracticable and time-consuming for the AEC. However, administrative inconvenience or a lack of resources, in itself, is unlikely to be a sufficient basis for not including effective safeguards in laws that seek to limit human rights. It is noted that to impose the proposed civil penalty on an individual the AEC would need to conduct an assessment of the referendum communication or expenditure to determine whether it was made by a foreign campaigner and if it meets certain other specific requirements.[36] It is therefore not clear why it would be impracticable for the AEC to also conduct an individualised assessment of whether the foreign campaigner has a genuine, legitimate stake in the outcome of the referendum process and whether the conduct engaged in by the foreign campaigner is likely to threaten the integrity of the referendum process, before seeking such a penalty. Further, if it is accepted that it is not possible to complete such an assessment prior to polling day, a somewhat less rights restrictive approach may be to enable the Electoral Commissioner to apply for an injunction pending consideration of the imposition of a final penalty.[37]

2.57 As such it has not been established that restricting all persons who are not citizens or permanent residents,[38] including those living in Australia and who may have a genuine connection with Australia, from campaigning on referendums or incurring referendum expenditure is a proportionate limit on the right to freedom of expression. As set out above, the UN Human Rights Committee has stated that restrictions on expression must not be overly broad, and if States parties wish to take measures restricting the right to freedom of expression they must demonstrate the precise nature of the threat that needs to be addressed and establish a direct and immediate connection between the expression and the threat.[39] This has not been established in this case as the measure does not allow for an individualised assessment of the threat

35 Parliamentary Joint Committee on Human Rights, , *Report 2 of 2022* (9 February 2022) pp. 13–21.

36 As set out in Schedule 3, item 12, proposed section 110CA and Schedule 4, item 3, proposed sections 109J and 109L.

37 See Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014*.

38 Or New Zealand citizens who hold subclass 444 (Special Category) visas.

39 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]–[35].

posed by either the foreign person or the particular expression in question. It is therefore not clear that all forms of expression prohibited by this bill would necessarily pose a threat to Australia's democracy and referendum processes in practice. For example, it may be that it would be a proportionate limit on the right to freedom of expression to prohibit a well-funded campaign from an individual with no real connection to Australia that is designed to skew the results of the referendum in a way that benefits a foreign country. However, it appears unlikely to be proportionate to prohibit an individual living for many years in Australia, for example on a student or spouse visa, who has a genuine connection to Australia, from organising the distribution of pamphlets setting out their views on an upcoming referendum.

2.58 As such, the measure appears to be overly broad as the blanket prohibition provides no flexibility to treat different cases differently. There would also appear to be a less rights restrictive option available – that is, to narrow the scope of the prohibition by enabling an exception for those who can establish a genuine connection to Australia and a consideration of the specific nature of the threat posed.

2.59 In relation to the meaning of a 'referendum matter', proposed subsection 3AA(4) provides that the dominant purpose of the communication or matter that expressly promotes or opposes a proposed referendum is presumed to be for the purpose of influencing the way electors vote at a referendum, unless the contrary is proved. The minister was asked why this was framed as a rebuttable presumption rather than the obligation being on the Electoral Commissioner to establish that the communication is a prohibited form of expression. The minister advised that this is because this is a matter 'peculiarly within the knowledge of the defendant' and significantly more difficult and costly for the 'prosecution' to disprove, and this is consistent with the Guide to Framing Commonwealth Offences. However, it is noted that this rebuttable presumption does not relate to the elements of a criminal offence. Rather it relates to what constitutes a 'referendum matter'. It remains unclear why the Electoral Commissioner would be unable to establish that the relevant material was for the dominant purpose of influencing the way electors vote at a referendum.

2.60 Further, the measure not only prohibits individuals from engaging in certain conduct, but it also empowers the Electoral Commissioner to require individuals to give information or produce documents that are relevant to assessing compliance with these prohibitions. The Commissioner could require individuals to provide personal information, including in relation to their own compliance with the Act. The minister advised that these provisions are consistent with the Electoral Act and the powers are appropriately circumscribed because the Electoral Commissioner may only issue a notice where they reasonably believe a person or entity has relevant information or documents and must have regard to the costs a person would bear in complying with the notice, and review mechanisms are available. While access to review mechanisms would assist with the proportionality of the measure, consideration of whether a person has the relevant information or documents, and the costs that may be

applicable, offers a limited form of a safeguard for the right to privacy. The minister also lists as a safeguard that only the names of persons subject to a contravention or 'potential contravention' of a civil penalty provision are to be published in a report provided to the minister, and tabled in Parliament. However, it is not clear that publishing the names of such persons in a public report would be a proportionate limit on the right to privacy.

2.61 The minister also advised that the privilege against self-incrimination applies unless expressly abrogated and the bill does not propose to do this, and that he is satisfied that the offence provisions are necessary. However, it is noted that the prohibitions on foreign campaigning and expenditure are subject to civil penalties, and not criminal penalties. From research, it appears that there is a common law privilege to refuse to answer questions or provide information on the ground that to do so might tend to expose the party to the imposition of a pecuniary penalty (even if not a criminal offence),[40] which may operate as a safeguard. However, it is not clear if the Commissioner's request to produce information or documents makes it clear that people are not required to produce information or documents if to do so might expose them to a penalty.

2.62 Noting the concerns about the breadth of the measure, as currently drafted it does not appear to be a proportionate limit on the rights to freedom of expression, association, privacy or equality and non-discrimination.

## Committee view

2.63 The committee thanks the minister for this response. The committee reiterates it acknowledges the important objective of this measure in seeking to prevent foreign state players maliciously interfering with our referendum processes. The committee considers the measure pursues the legitimate objective of protecting the integrity of Australia's electoral system and reducing the threat of foreign influence on Australia's elections.

2.64 However, the committee considers it has not been established that the measure is a proportionate limit on the rights to freedom of expression, privacy and equality and non-discrimination, as it does not allow for an individualised assessment of the threat posed by particular campaigning or expenditure by foreign nationals, and provides broad information-gathering powers. While the committee appreciates that requiring an individualised assessment of risk may be more time-consuming for the AEC to establish, administrative inconvenience is not a sufficient basis on which to limit human rights.

40 See *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 336 and *Australian Competition and Consumer Commission v FFE Building Services Ltd* [2003] FCAFC 132 at [12]–[13].

**Suggested action**

2.65 The committee considers the proportionality of this measure would be assisted were the bill[41] to be amended to require the Electoral Commissioner to consider:

(a) whether the foreign campaigner has a genuine connection to Australia; and

(b) the extent of the campaigning, gift, expenditure or fundraising undertaken by the individual.

2.66 The committee draws these human rights concerns to the attention of the minister and the Parliament.

41 Schedule 3, item 12, proposed section 110CA and Schedule 4, item 3, proposed sections 109J and 109L. The committee notes that Schedule 4, item 4 could also be amended, if considered necessary, to apply Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014*, relating to injunctions, to these provisions.

# Legislative instruments

## Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 [F2022L01457][1]

| | |
|---|---|
| **Purpose** | This legislative instrument makes provision for the Code of Conduct for Aged Care and its enforcement, establishes that certain information must be included in the register of banning orders, and makes provision for matters relating to accessing, correcting information in, and publication of, the register of banning orders. |
| **Portfolio** | Health and Aged Care |
| **Authorising legislation** | Aged Care Quality and Safety Commission Act 2018 |
| **Last day to disallow** | 15 sitting days after tabling (tabled in the House of Representatives and the Senate on 21 November 2022). |
| **Rights** | Health; privacy and reputation; and rights of persons with disability |

2.67 The committee requested a response from the minister in relation to the legislative instrument in *Report 1 of 2023*.[2]

### Information gathering powers and other compliance action powers

2.68 This legislative instrument amends the Aged Care Quality and Safety Commission Rules 2018 to establish the Code of Conduct for Aged Care (Code of Conduct).[3] The Code of Conduct establishes minimum standards of conduct for approved providers and their aged care workers and governing persons (such as treating people with dignity and respecting their rights, providing appropriate care and supports and acting with integrity).

2.69 It also provides (section 23BD) that the Aged Care Quality and Safety Commissioner (the Commissioner) may take certain actions in relation to compliance with the Code of Conduct, including in relation to compliance by an individual who is,

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 [F2022L01457], *Report 2 of 2023*; [2023] AUPJCHR 24.

2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023), pp. 37–45.

3 Item 2 and Schedule 1.

or was, an aged care worker or a governing person of an approved provider. The Commissioner may take various actions, including: discussing compliance issues with any person; requesting information or documents from any person; carrying out an investigation; referring information about the compliance to another person or body; and taking any other action considered reasonable in the circumstances.[4] It appears the Commissioner's powers under section 23BD of this instrument may not be enforceable under this instrument – but the *Aged Care Quality and Safety Commission Act 2018* makes it an offence for a person to fail to comply with a notice given by the Commissioner to answer questions or provide information or documents.[5]

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Right to health; rights of persons with disability; and right to privacy*

2.70 Insofar as taking action in relation to compliance with the Code of Conduct helps to ensure that aged care workers provide care, support and services in accordance with the Code, this measure appears to promote the rights to health and, as many people in aged care live with disability, the rights of persons with disability. The right to health is the right to enjoy the highest attainable standard of physical and mental health. The right to health requires available, accessible, acceptable and quality health care. The right to be free from all forms of violence, abuse and exploitation in article 16 of the Convention on the Rights of Persons with Disabilities requires that States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse. Further, '[i]n order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities'.

2.71 However, by providing that the Commissioner may take compliance action that includes carrying out an investigation and requesting information or documents, this measure also engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.

2.72 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the

4 Section 23BD.

5 See Part 8A, Division 3 of the *Aged Care Quality and Safety Commission Act 2018*.

measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

2.73 Protecting the safety of vulnerable aged care recipients is a legitimate objective for the purposes of international human rights law, and taking action to enforce the Code of Conduct appears to be rationally connected to (that is, likely to be effective to achieve) that objective. The key question is whether the information gathering measures are proportionate.

***Committee's initial view***

2.74 The committee considered that taking action to ensure compliance by aged care workers and providers with the Code of Conduct promotes the rights to health and, as many people in aged care live with disability, the rights of persons with disability. The committee considered that establishing broad information gathering and sharing powers for the Commissioner to enforce the Code also engages and limits the right to privacy, and sought the minister's advice in relation to:

(a) whether and how these information gathering powers would be circumscribed;

(b) what threshold would be required to be met before the Commissioner may exercise these powers;.

(c) what safeguards would apply to protect information that has been collected and shared (including what happens once personal information has been collected and shared, how it is required to be stored, and whether it is required to be destroyed after a certain period); and

(d) whether other, less rights-restrictive alternatives would be effective to achieve the same objective.

2.75 The full initial analysis is set out in *Report 1 of 2023*.

## Minister's response[6]

2.76 The minister advised:

> *Whether and how these information gathering powers would be circumscribed*
>
> The Code of Conduct for Aged Care (Code) began on 1 December 2022. The Code, contained within the Code and Banning Orders Instrument, sets out the minimum standards of behaviour for approved providers, their aged care workers and governing persons in order to help build confidence in the

6 The minister's response to the committee's inquiries was received on 24 February 2023. This is an extract of the response. The response is available in full on the committee's website.

safety and quality of care for older Australians. The Commission is responsible for monitoring and compliance of the Code.

As the committee notes, protecting the safety of vulnerable aged care recipients is a legitimate objective for the purposes of international human rights law, and taking action to enforce the Code is rationally connected to that objective.

The Aged Care Quality and Safety Commissioner (Commissioner) may become aware of issues relating to compliance with the Code through a range of different mechanisms, including complaints processes, SIRS reportable incident notifications and referrals from other regulators (for example the National Disability Insurance Scheme Quality and Safeguards Commission (NDIS Commission) and the Australian Health Practitioner Regulation Agency).

Once a decision has been made that a particular action, such as the use of information gathering powers, is appropriate in the circumstances to deal with compliance with the Code, the Commission will, as always, ensure that all relevant legislative requirements are adhered to in exercising powers or functions. This includes having due regard to procedural fairness, in accordance with section 23BG of the Code and Banning Orders Instrument and administrative law principles, to ensure that any action can be effectively taken and is legally defensible. For example, decision makers will make their decisions based on relevant considerations, will act in a manner that affords procedural fairness to those affected by a decision, and will explain those decisions in a clear way that people can understand.

The Department has advised that Section 23BG was inserted following consultation on the exposure draft of the Code and Banning Orders Instrument and explicitly states that the Commissioner must have due regard to the rules of procedural fairness in taking action under Division 3 of the Code and Banning Orders Instrument.

These provisions provide acceptable legislative safeguards for approved providers, their aged care workers and governing persons throughout a Code compliance investigation and any other regulatory action that may be taken as a result of the outcome of such an investigation. This is supported by the Commission's internal operational policies and processes, which outline what decision-makers should consider in deciding whether to exercise a power or function, as well as any mandatory requirements or preferred/expected policy positions relating to the exercising of a specific power or function.

Section 76(1B) of the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) provides that the Commissioner must not delegate a function or power to a person under section 76(1) or (1A) unless the Commissioner is satisfied that the person has suitable training or experience to properly perform the function or exercise the power. Having regard to the requirement in section 76(1B) of the Commission Act, the Commissioner

has delegated their power under section 23BE of the Aged Care Quality and Safety Commission Rules 2018 (Commission Rules) to Senior Executive Service Band 1, Executive Level 2 and Executive Level 1 Commission staff only. Through appropriate recruitment and performance management processes, there is ongoing oversight to ensure officers at these levels have suitable training and experience to perform their function.

The Commissioner's information gathering powers are also circumscribed by the Commission's statutory obligations under the *Privacy Act 1988* (Privacy Act) and the Australian Privacy Principles (APPs). The Commission's Privacy Policy (Privacy Policy) states that the Commission will only collect the information it needs for the function or activity being carried out, in accordance with APP 3. Further, in compliance with APP 6, the Privacy

Policy provides that the Commission will generally only use and disclose personal information for the particular purpose for which it was collected and will not otherwise use or disclose personal information for another purpose unless the person's consent has been obtained, or the use or disclosure is permitted under the Privacy Act.

*What threshold would be required to be met before the Commissioner may exercise these powers*

The Commission manages non-compliance and potential non-compliance with the Code in accordance with the Commission's Compliance and Enforcement Policy. Consistent with this policy, the Commission takes a risk-based approach and responds in a way that is proportionate to the risks that the non-compliance or potential non-compliance poses to the safety, health, wellbeing and quality of life of aged care recipients.

The Commission's Compliance and Enforcement Policy notes that when potential noncompliance is identified, there may not initially be enough evidence to determine whether there is compliance or non-compliance, the extent of the non-compliance and/or the appropriate compliance response. In such circumstances, it may be necessary and appropriate for the Commission to use its information gathering powers, including those under section 23BD of the Code and Banning Orders Instrument, to obtain further information to be able to make a determination about non-compliance with the Code. This process supports procedural fairness as the worker will be offered an opportunity to respond to the matter. Decision-makers are responsible for determining all material questions of fact and basing each finding of fact on relevant supporting material.

Disclosure by the Commission of personal information relating to compliance with the Code may be necessary and appropriate, for example, because the personal information:

- promotes the safety and rights of other persons
- relates to the regulatory functions of another entity (for example another regulator

- such as the NDIS Commission) and is required by the other entity to exercise their powers or perform their functions
- is required by an approved provider to take appropriate action in relation to compliance with the Code by their aged care worker or governing person (as authorised by section 23BD(3)(a) of the Code and Banning Orders Instrument).

*What safeguards would apply to protect information that has been collected and shared (including what happens once personal information has been collected and shared, how it is required to be stored, and whether it is required to be destroyed after a certain period)*

The Commission has statutory obligations that it must comply with in relation to the collection, use, storage and disclosure of personal information under the Privacy Act, the APPs and the Archives Act 1983. The Privacy Policy outlines the personal information handling practices and expectations.

As noted above, the Privacy Policy states that the Commission will generally only use and disclose personal information for the particular purpose for which it was collected. The Commission also states in its Privacy Policy that it will not otherwise use or disclose personal information for another purpose unless it obtains the person's consent, or the use or disclosure is permitted under the Privacy Act. This is all in accordance with APP 6.

In relation to the storage and security of personal information, the Privacy Policy outlines the safeguards implemented by the Commission to protect personal information in its holdings against misuse, interference and loss, and from unauthorised access, modification or disclosure. The Privacy Policy also notes that when no longer required, the Commission destroys or archives personal information in a secure manner and as permitted by relevant legislation, including the Privacy Act and the *Archives Act 1983*. These personal information handling practices of the Commission are in compliance with its obligations under APP 11.

Further, as noted in the explanatory statement, the Commission and its staff are bound by legislative provisions in the Commission Act that regulate handling of 'protected information' collected by the Commission in carrying out its functions. All personal information, including sensitive information, acquired under or for the purposes of the Commission Act or the *Aged Care Act 1997* (Aged Care Act) is protected information for the purposes of those Acts. A breach of the protected information provisions under either Act is an offence, punishable by 2 years imprisonment. The existing penalties for misuse and unauthorised disclosure of protected information under the Commission Act and the Aged Care Act will protect and ensure safe handling of the information collected by the Commission.

*Whether other, less rights-restrictive alternatives would be effective to achieve the same objective*

The collection, use and disclosure of personal information relating to compliance with the Code is necessary and appropriate because the personal information:

- is directly related to the performance of the Commissioner's Code functions under section 16(da) of the Commission Act (and more broadly, the Commissioner's function under section 16(a) to protect and enhance the safety, health, wellbeing and quality of life of aged care recipients). The Code functions of the Commissioner are outlined in section ISA of the Commission Act and provide a function for the Commissioner to take action in relation to compliance with the Code by approved providers, and their aged care workers and governing persons, and to do anything else relating to that matter as specified in the Commission Rules
- the use of the personal information will relate to an actual, alleged or suspected instance of non-compliance with the Code by an approved provider or their aged care worker or governing person.

It is important for the Commissioner to be able to collect, use and disclose information, including personal information, as part of investigating alleged breaches of the Code in order to be able to effectively investigate and ascertain whether a breach has occurred and where a breach has occurred, to ensure that appropriate action is taken to protect aged care recipients.

The Commissioner's discretion in taking certain actions (including information gathering and sharing) in relation to compliance with the Code is necessary to ensure that the Commissioner can take the most reasonable action allowable to protect the health, safety and wellbeing of aged care recipients, noting that any actions are in accordance with the Commission Rules, the Commission Act, other relevant legislation and the principles of administrative law. If the Commissioner's discretion was limited, the Commissioner's ability to protect the health, safety and wellbeing of aged care recipients could be limited and could potentially cause harm.

The Commission's information gathering and sharing powers under the Code and Banning Orders Instrument are therefore proportionate having regard to the above. There are no effective less rights-restrictive alternatives available for the Commission to achieve the same objective.

## Concluding comments

### *International human rights legal advice*

2.77 A key factor in assessing proportionality is whether the information gathering measures are sufficiently circumscribed.[7] In this regard, the minister advised that the Commissioner will exercise their powers in accordance with all relevant legislative requirements and have due regard to procedural fairness and administrative law principles. The minister stated that the Commission's internal operational policies and processes outline what decision-makers should consider in deciding whether to exercise a power or function as well as any mandatory requirements or preferred/expected policy positions relating to the exercise of a specific power or function. The minister also stated that the Commissioner's information gathering powers are circumscribed by the Commission's statutory obligations under the *Privacy Act 1988* (Privacy Act) and the Australian Privacy Principles (APPs) as well as the Commission's privacy policy.

2.78 The minister advised that the information-gathering powers may be exercised when a potential non-compliance with the Code is identified and the Commissioner requires further information to determine compliance, the extent of any non-compliance and/or the appropriate compliance response. The circumstances when disclosure of personal information relating to compliance may be necessary and appropriate include: to promote the safety and rights of other persons; where another entity, such as the NDIS Commission, requires the information to exercise their powers or perform their functions; or where an approved provider requires the information to take appropriate action in relation to the non-compliance.

2.79 The Commission's internal operational policies and processes may assist to circumscribe the Commissioner's information-gathering powers in practice. For example, the Commission's Compliance and Enforcement Policy appears to provide the Commissioner with some guidance as to the scope and manner in which the information-gathering powers should be exercised. It states that the 'question to be decided is whether, based on logically supporting material, the decision-maker is reasonably satisfied that the provider has not complied with the Code or is not complying with one or more of its responsibilities'.[8] However, the circumstances in which the information gathering powers should be exercised, and the threshold that is required to be met, before the Commissioner takes action in relation to compliance, are not specified in the legislative instrument itself. There is no requirement in the

7 International human rights law jurisprudence states that laws conferring discretion on decision-makers must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise. See, e.g. *Hasan and Chaush v Bulgaria,* European Court of Human Rights App No.30985/96 (2000) [84].

8 Commission, *Compliance and Enforcement Policy*, p. 8.

instrument, for example, for the Commissioner to reasonably suspect non-compliance before exercising their information gathering powers. As it is currently drafted, the measure confers on the Commissioner a broad discretion to take any action they consider reasonable in the circumstances in relation to compliance by an approved provider or an individual who is or was an aged care worker or governing person of an approved provider (noting there is no time limit restricting how long ago a person may have been employed in the aged care sector and remain liable to such action).[9] The measure empowers the Commissioner to, among other things, discuss the compliance with any other person, request documents or information from any person and refer that information to another person or body. Given the broad terms in which the information-gathering powers are drafted and noting that discretionary safeguards are less stringent than the protection of statutory processes (as they may be amended or revoked at any time and there is no requirement to follow them) there is some risk that, depending on how the Commissioner's powers are exercised in practice, the measure may not be sufficiently circumscribed.

2.80 As to the existence of safeguards, the minister advised that the collection, use, storage and disclosure of personal information is in compliance with the Privacy Act, the APPs and the Commission's privacy policy. The latter provides that the Commission will only collect information that is necessary for the function or activity being carried out, and will only use and disclose personal information for the particular purpose for which it was collected, unless the person to whom the information relates provides their consent or the use or disclosure is permitted under the Privacy Act. The privacy policy also outlines how personal information is to be stored, providing that when the information is no longer required, the Commission should destroy or archive the information in a secure manner. Further, the minister advised that the Commission and its staff are bound by the Commission Act, which makes it an offence, punishable by two years imprisonment, to use or disclose protected information unless authorised to do so under the Act.[10] The minister stated that these protected information provisions will protect and ensure safe handling of personal information collected by the Commission.

2.81 Prohibiting the unauthorised use or disclosure of personal information collected by the Commissioner may assist with proportionality to the extent that it restricts interference with privacy beyond what is strictly necessary. However, having regard to the breadth of the measure, it is not clear that the Commission's privacy policy would adequately limit the scope of personal information which may be collected and the purposes for which it may be used and disclosed. Further, the committee has previously noted that while compliance with the Privacy Act and APPs may offer some safeguard value, it is not a complete answer to concerns about

9 Section 23BC and subsection 23BD(1), noting paragraph (f).

10 *Aged Care Quality and Safety Commission Act 2018*, section 60.

interference with the right to privacy for the purposes of international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose, including where its use or disclosure is authorised under an Australian law,[11] which may be a broader exception than permitted in international human rights law. There is also a general exemption in the APPs regarding the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[12]

2.82 A further safeguard identified by the minister is section 23BG of the Code, which provides that the Commissioner must have due regard to procedural fairness. The minister stated that decision-makers will make their decisions based on relevant considerations, will act in a manner that affords procedural fairness to those affected by a decision, and will explain those decisions in a clear way that people can understand. Affording procedural fairness assists with the proportionality of the measure.

2.83 Finally, the minister advised that there are no effective less rights-restrictive alternatives available for the Commission to achieve the same objective. The minister stated that the Commissioner's discretion to take certain actions in relation to compliance, including gathering and sharing information, is necessary to ensure the Commissioner can take the the most reasonable action allowable to protect the health, safety and wellbeing of aged care recipients. The minister noted that if this discretion was limited, the Commissioner's ability to protect the health, safety and wellbeing of aged care recipients could be limited and could potentially cause harm. While acknowledging the importance of taking compliance action to protect the safety of aged care recipients, questions remain as to whether there are less rights restrictive ways of achieving this legitimate objective. For example, the potential interference with the right to privacy may be lessened if the measure was more narrowly circumscribed (for instance, by including in the legislative instrument itself the threshold that is required to be met before the Commissioner takes action in relation to compliance).

2.84 In conclusion, protecting the safety of vulnerable aged care recipients is a legitimate objective for the purposes of international human rights law, and taking action in relation to compliance with the Code of Conduct appears to be rationally connected to (that is, likely to be effective to achieve) that objective. However, noting the breadth of the measure and that many of the accompanying safeguards are discretionary, there is some risk that, depending on how the Commissioner's powers are exercised in practice, the measure may not be proportionate in all circumstances.

11 APP 9; APP 6.2(b).

12 APP; 6.2(e).

## Committee view

2.85 The committee thanks the minister for this response. The committee notes that taking action to ensure compliance by aged care workers and providers with the Code of Conduct promotes the rights to health and, as many people in aged care live with disability, the rights of persons with disability. The committee also notes that establishing broad information gathering and sharing powers in relation to compliance also engages and limits the right to privacy.

2.86 The committee considers that protecting the safety of vulnerable aged care recipients is an important and legitimate objective for the purposes of international human rights law and taking action in relation to compliance is likely to be effective to achieve this objective. The committee notes the minister's advice that conferring discretion on the Commissioner to take compliance action is necessary to ensure the most reasonable action is taken to protect the health, safety and wellbeing of aged care recipients. The committee considers that the measure is accompanied by some safeguards that may assist with proportionality. However, noting the breadth of the measure and that many of the accompanying safeguards are discretionary, the committee considers that, depending on how the Commissioner's powers are exercised in practice, there is some risk that the measure may not be a proportionate limit on the right to privacy in all circumstances.

**Suggested action**

2.87 The committee considers that the proportionality of the measure may be assisted were the legislative instrument amended to include in more detail the circumstances in which the Commissioner's information gathering powers may be exercised and the threshold that should be met before the Commissioner takes action in relation to compliance.

2.88 The committee recommends that the statement of compatibility with human rights be updated to reflect the information provided by the minister.

2.89 The committee draws these human rights concerns to the attention of the minister and the Parliament.

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## Publication of a register of banning orders

2.90 The legislative instrument establishes additional provisions relating to the register of banning orders. Banning orders prohibit or restrict specified activities, including those of current and former aged care workers.[13] The *Aged Care Quality and Safeguard Commission Act 2018* requires that a register of banning orders must

13 Aged Care Quality and Safety Commission Act, section 74GB.

include: the relevant individual's name; Australian Business Number (if any); and details of the banning order (including any conditions to which the order is subject).[14] This instrument provides for additional matters that must be included on the register, stating that the register must include the state or territory, suburb and postcode of an individual's last known place of residence; and if the Commissioner considers that further information is necessary to identify the individual the register can include further information that the Commissioner considers is sufficient to identify the individual.[15]

2.91 The instrument also provides that an individual may request access to information about themselves that is included in the register and may seek the correction of such information. The instrument provides that the Commissioner may (and in some cases must) correct information that is included in the register of banning orders.[16] Further, the instrument provides that the register of banning orders may be published on the Commission's website. However, a part of the register must not be published if the Commissioner considers that its publication would be contrary to the public interest or the interests of one or more care recipients.[17]

## Summary of initial assessment

### *Preliminary international human rights legal advice*

*Right to health; rights of persons with disability; and right to privacy and reputation*

2.92 Insofar as the register of banning orders helps to ensure that unsuitable people who may present a risk to aged care recipients are not engaged in the provision of their care, this measure appears to promote the rights to health and, as many people in aged care live with disability, the rights of people with disability, as set out at paragraph [2.4].

2.93 However, by providing that the register of banning orders may be made public, including the names and other identifying information in relation to the individuals subject to those orders, the measure also engages and limits the right to privacy. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation. It includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.

14 Aged Care Quality and Safety Commission Act, section 74GI.

15 Section 23CB.

16 Sections 23CE-CF.

17 Section 23CG.

2.94 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, be rationally connected to that objective and proportionate to achieving that objective.

2.95 Protecting the safety of vulnerable aged care recipients is a legitimate objective for the purposes of international human rights law. Making information about banned individuals accessible to the public, including future employers, is likely to be effective to achieve that objective. The key question is whether the measure is proportionate.

***Committee's initial view***

2.96 The committee considered that publishing a register of persons who have been banned from providing aged care services is directed towards the extremely important objective of protecting vulnerable older Australians and ensuring that persons found to be unsuitable to provide aged care services are not employed in the sector in future. This committee considered that this measure promotes the rights to health and, as many people in aged care live with disability, the rights of persons with disability. The committee considered publishing this data also limits the right to privacy, but the measure is clearly directed towards a legitimate objective, and publishing this information is likely to be effective to achieve this objective.

2.97 However, the committee required further information to determine whether the measure constitutes a proportionate limit on the right to privacy and sought the minister's advice in relation to:

(a) whether any less rights restrictive alternatives to publicly publishing the register (including the register being available only to employers, or on request) would not be effective to achieve the objective of this measure;

(b) whether it is intended that the date of birth of each person subject to a banning order will be published as a matter of routine, and if so why; and

(c) why the instrument does not *require* the Commissioner to correct inaccurate or misleading information on the register (when brought to their attention) in all instances.

## Minister's response[18]

2.98 The minister advised:

> *Whether a less rights restrictive alternatives to publicly publishing the register including the register being available only to employers, or on request) would not be effective to achieve the objective of this measure*

18 The minister's response to the committee's inquiries was received on 24 February 2023. This is an extract of the response. The response is available in full on the committee's website.

While the majority of aged care workers exceed expectations in their care of older Australians/ like in all industries, there will be occasions when individuals are not suited to this highly trusted work. The Code and Banning Orders Instrument ensures that the Aged Care Quality and Safety Commission is able to consider matters as they arise, investigate if required and respond to ensure ongoing compliance. This approach upholds principles of safety and dignity for both the workforce and care recipients. The introduction of the Code and Banning Orders Instrument is a positive step forward for the sector and will support aged care providers, their governing persons and aged care workers to deliver safe and quality care to older Australians.

Banning orders are considered one of the Commission's most serious enforcement actions and will only be appropriate for the most serious cases of poor conduct. This can be evidenced in only four banning orders having been made since 1 December 2022. Those named are currently subject to criminal justice processes in relation to alleged fraud and acts of physical violence directly involving care recipients. With approximately 380,000 people working in aged care this is a very small proportion of the workforce who may find themselves subject to a banning order. Never-the-less, the Government takes seriously the need for quality and safety in aged care and this regulatory option is an important tool in the suite of safeguards being delivered in line with the Royal Commission's recommendations.

In order to ensure that the register of banning orders (Register) functions properly, it is considered necessary for the personal information of banned individuals to be made public.

This is due to the importance of preventing banned individuals from working in the aged care sector and the potential significant consequences for public health and safety if this does not happen.

This aims to ensure the safety of aged care recipients by providing future employers notice of individuals who were found unsuitable to provide aged care or specified types of aged care services.

The Department has advised this provision aligns with the approach taken under the National Disability Insurance Scheme (see section 73ZS of the *National Disability Insurance Scheme Act 2013*].

The Australian Government is seeking to align worker regulation arrangements across the aged care and disability support sector where it is reasonable and practical to do so. Worker screening is an area where the Australian Government is seeking alignment. While worker screening has not yet been expanded to aged care, individuals with an NDIS worker screening clearance can rely on this clearance to work in the aged care sector. This has the effect of preventing banned individuals from working in either the aged care sector or in the National Disability Insurance Scheme.

The publication of the Register is also intended to act as a deterrent to individuals from engaging in conduct that could result in the issuing of a banning order.

Publication of this information is considered reasonable, necessary and proportionate in order to protect the safety of vulnerable older Australians.

*Whether it is intended that the date of birth of each person subject to a banning order will be published as a matter of routine, and if so why*

It is not intended that the date of birth of each person subject to a banning order will be published as a matter of routine. The Commission will consider whether there is a concern about misidentification for each person subject to a banning order, noting that the inclusion of additional identifying information is to safeguard the identities, reputations, and rights of third parties with similar names. The date of birth will only be added where misidentification is of sufficient concern. The date of birth information previously published has been removed and this will not be standard practice.

*Why the instrument does not require the Commissioner to correct inaccurate or misleading information on the register (when brought to their attention) in all instances*

Under subsection 74GI(4) of the Commission Act, the Commissioner must ensure that the Register is kept up to date. Sections 23CE and 23CF of the Code of Conduct and Banning Order Instrument are consistent with APP 13 in Schedule 1 to the *Privacy Act 1988*. APP 13 sets out minimum procedural requirements for correcting personal information an entity holds about an individual.

The Commission undertake their functions in accordance with APP 13. It further operates on the basis that there is nothing in APP 13 which excludes information contained in a Commonwealth record (such as APP 11. 2(c) which relates to the destruction or deidentification of personal information). The Commission understands information contained in records in its possession or control would also be a Commonwealth record and subject to the requirements of the *Archives Act 1983*.

As noted by the committee, the Commissioner's general discretion under section 23CF of the Instrument to correct information in the Register is a safeguard in terms of ensuring that the content of the register is accurate. The Commissioner's discretion, rather than obligation, to correct personal information in the Register is consistent with APP 13, which does not impose an obligation on APP entities (such as the Commission) to correct personal information in all instances. Rather, APP 13 requires that APP entities must take reasonable steps to correct an individual's personal information, and must only do so if it can be satisfied that the information is incorrect. The level of discretion afforded to the Commissioner under section 23CF of the Instrument is therefore appropriate having regard to the requirements of

APP 13. The discretion also takes into account that there may be other legal obligations in certain circumstances (for example, where a family and domestic violence protection order is in place) which may prevent the Commissioner from publishing certain information to the register.

APP 13 operates alongside and does not replace other informal or legal procedures by which an individual can seek correction of their personal information, including under the *Freedom of Information Act 1982*.

## Concluding comments

### *International human rights legal advice*

2.99 As to whether any less rights restrictive alternatives to publicly publishing the register (including the register being available only to employers, or on request) would not be effective to achieve the objective of this measure, the minister stated that banning orders are considered one of the Commission's most serious enforcement actions and will only be appropriate for the most serious cases of poor conduct. The minister stated that a small number of banning orders (four) have been made since December 2022, relative to the number of employees in the aged care sector (380,000 people). The minister also stated that it is considered necessary for the personal information of banned individuals to be made public to ensure consistency with the approach taken in relation to the NDIS banning order register. Lastly, the minister stated that the publication of the register is to enable a banning order to serve as a deterrent from engaging in conduct that could result in such an order.

2.100 It remains unclear, on the basis of this advice, as to whether publishing the banning order on a publicly accessible website is the least rights restrictive approach, such as to ensure any limitation on privacy is proportionate to the objective sought to be achieved. It is not clear that the approach taken in relation to NDIS banning orders is directly comparable. It appears that aged care sector workers would be employed by aged care providers, and not by aged care recipients directly. By contrast, it appears that NDIS workers may be engaged directly by NDIS participants as part of their NDIS plan. As such, the fact that a particular person is subject to an aged care sector banning order would appear to be of most immediate regulatory significance to an aged care service provider screening prospective staff, rather than to aged care recipients themselves. Aged care service providers would be required to screen employees prior to their employment, including by reference to the banning order register. It is not clear why the register cannot be made available to all aged care providers, and any other organisation employing workers in the aged care sector, without the need to make the register publicly available. Further, it is not clear that publication of a banning order would be necessary to serve as a deterrent, noting that conduct giving rise to such an order may give rise to criminal charges, and being on the banning register (whether it be publicly available or not) results in a person not being eligible for employment as an aged care worker. Consequently, it has not been established that a less rights restrictive alternative (such as limiting access to employers via a

secure database or access by request) would not be as effective in achieving the objective of protecting the safety of vulnerable aged care recipients.

2.101 In addition, is noted that the banning order register was previously included on the departmental website as a PDF attachment,[19] and did not seem to appear when a person named on the register was searched via a web search, such as google. However, it appears that the register has since been embedded as text on a departmental web sub-page, and if someone conducts a general google search of a person's name, for purposes unrelated to checking the banning order register, the listing on the banning order will appear. Inclusion of the public register would, therefore, appear to constitute a greater interference with the right to privacy than previously. No information has been provided to explain why this has changed.

2.102 With respect to the inclusion of a person's date of birth on the register, the minister stated that it is not intended that the date of birth of each person subject to a banning order will be published as a matter of routine. The minister stated that the Commission will consider whether there is a concern about misidentification for each person subject to a banning order, and that a person's date of birth will only be added where misidentification is of sufficient concern. With respect to the version of the register of banning orders published online at the time of the initial consideration of the rules (which included the date of birth of the only listed individual, and included a column that suggested a date of birth would be included as a matter of course), the minister stated that the date of birth information previously published has been removed and this will not be standard practice. It assists with the proportionality of the measure that a person's date of birth will not be included on the register as a matter of course. In instances where it may be included, seeking to ensure that persons with the same name as someone subject to a banning order are not misidentified as being subject to the order is clearly an important consideration. However, the countervailing consideration is that inclusion of a person's date of birth in such circumstances will likely exacerbate the interference with the named person's privacy. In this regard, it is unclear why this information was initially included on the register itself, and whether there were sufficient internal guidelines in place to ensure that such information was only included in accordance with the considerations the minister has outlined.

2.103 As to why the instrument does not require the Commissioner to correct inaccurate or misleading information on the register (when brought to their attention) in all instances, the minister stated that this requirement is consistent with Australian Privacy Principle (APP) 13 – the 'minimum procedural requirements' for correcting personal information held about an individual. APP 13 requires that relevant entities must take reasonable steps to correct an individual's personal information, and must

19 At February 2023, when these rules were initially considered. See, Parliamentary Joint Committee on Human Rights, *Report 1 of 2023* (8 February 2023), pp. 37-45.

only do so if it can be satisfied that the information is incorrect. The minister further stated that there may be other legal obligations in certain circumstances (for example, where a family and domestic violence protection order is in place) which may prevent the Commissioner from publishing certain information to the register. However, it remains unclear why establishing an obligation to correct personal information (subject to certain exceptions, such as where there is a risk to personal safety) would not be appropriate, particularly noting the minister's advice that APP 13 constitutes only the minimum relevant procedural requirement.

## Committee view

2.104 The committee thanks the minister for this response. The committee considers that publishing a register of persons who have been banned from providing aged care services is directed towards the extremely important objective of protecting vulnerable older Australians and ensuring that persons found to be unsuitable to provide aged care services are not employed in the sector in future. In doing so, the committee considers that this measure promotes the rights to health and, as many people in aged care live with disability, the rights of persons with disability.

2.105 However, the committee considers that publishing a register of persons subject to a banning order also limits the right to privacy. The right to privacy may be limited if it is demonstrated it is reasonable and necessary to do so. The committee considers the measure is directed towards this important and legitimate objective of protecting vulnerable older Australians. However, the committee considers it has not been demonstrated that publishing the banning order register on a publicly available website (that means that the names of those on the register will appear in a general google search) constitutes a proportionate limit on the right to privacy. In particular, the committee considers that it is not clear that making the register available as an online resource accessible via a secure portal by aged care providers would not be as effective to achieve the objective of protecting vulnerable older Australians.

### Suggested action

2.106 The committee considers that the proportionality of this measure may be assisted were the instrument amended to:

(a) ensure the register of banning orders is made readily available to all aged care providers but not published on a public website; and

(b) require the Commissioner to correct inaccurate or misleading information on the register (when this has been brought to their attention), subject to a discretion to not make such a correction where there are extenuating circumstances such as a risk to a person's safety.

2.107 The committee notes the minister's advice that the register has been amended since the committee's initial consideration of these rules, specifically the removal of the date of birth of one person listed where it would appear there was

no basis for its inclusion. The committee recommends the department's internal guidelines relating to the permissible inclusion of information on the register to be reviewed in light of this.

2.108 The committee recommends that the statement of compatibility with human rights be updated to reflect the information provided by the minister.

2.109 The committee draws these human rights concerns to the attention of the minister and the Parliament.

**Mr Josh Burns MP**

**Chair**