Ministerial responses — Report 6 of 2023[1]

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Ministerial responses, *Report 6 of 2023*; [2023] AUPJCHR.60.

The Hon Amanda Rishworth MP

Minister for Social Services

Ref: MB23-000399

Mr Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600
human.rights@aph.gov.au

Dear Mr Burns

Thank you for your email dated 10 May 2023, concerning the Committee's human rights scrutiny report 5 of 2023 (Minister's response required by 24 May 2023).

In the report, the Committee requested further information about:

- Social Services Legislation Amendment (Child Support Measures) Bill 2023 and the compatibility of a measure affecting the issuing of a departure authorisation certificate with the right to freedom of movement

- Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023 and the compatibility of intercountry adoption with the rights of the child and right to protection of the family.

This information, and answers to the Committee's specific questions, are set out below.

Social Services Legislation Amendment (Child Support Measures) Bill 2023

As you know, the measure amends the *Child Support (Registration and Collection) Act 1988* and would expand the circumstances in which a child support debtor who is subject to a departure prohibition order (restricting them from leaving Australia) may be refused a departure authorisation certificate (which would allow them to leave Australia for a foreign country).

It would provide the Child Support Registrar with an ability to refuse a departure authorisation certificate where a person offers security, but the Registrar is not satisfied that arrangements will likely be made to wholly discharge the relevant outstanding child support or carer liability.

In this way, the measure engages a person's right to freedom of movement.

(a)(i) Whether the measure addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right

The measure reinforces the efficacy of Part VA, which itself addresses an issue of public concern that is pressing and substantial enough to warrant limiting the right.

As noted by the Committee, the measure will only affect approximately 110 parents with a child support debt of $43,500 each, on average. In view of this, the Committee has queried whether the small number of affected persons constitutes an issue of public or social concern that is pressing and substantial enough to warrant limiting the right.

Parents who persistently and without reasonable grounds fail to pay their child support debt present an issue of public concern that is pressing and substantial to warrant limiting that parent's right of freedom of movement. It is for this reason the Registrar can prevent a person from departing Australia by making departure prohibition orders under Part VA.

(a)(ii) Whether the circumstances contemplated by this measure would meet the threshold requirement of being 'exceptional circumstances' such as to warrant limiting the right to freedom of movement

In this case, there are exceptional circumstances that warrant the limitation on the right to freedom of movement.

The Commonwealth faces an existing problem with a cohort of parents that persistently, and without reasonable grounds, fail to pay their child support debt. These parents have the means to discharge that debt. They have the means to travel overseas. They also have the means to give security to obtain a departure authorisation certificate that would enable them to do so (section 72L).

For this cohort of parents, the restriction on their freedom of movement occurs in exceptional circumstances and only in a limited way so as to protect the rights and freedoms of others.

The extent of the limitation on the parent's right to freedom of movement is marginal. A parent affected by the measure is already subject to a departure prohibition order preventing them from leaving Australia for a foreign country (section 72D). That order could be revoked if the person made arrangements for the child support liability to be discharged (and the measure only affects those with the means to pay that liability) (paragraph 72I(1)(a)). This would also assist an application for a departure authorisation certificate (subparagraph 72L(2)(a)(ii)).

(b) Whether (or to what extent) preventing a parent from leaving the country will result in more timely payment of child support debt

Preventing a parent from departing Australia is one way the Commonwealth encourages a parent to pay their child support debt when they persistently, and without reasonable grounds, fail to do so.

For example, Part VA requires a parent to arrange for their child support liability to be discharged to avoid the making of orders prohibiting them from departing Australia (paragraph 72D(1)(b)). Part VA also provides an incentive for parents to arrange for their child support liability to be discharged so that their travel may be authorised by a departure authorisation certificate (subparagraph 72L(2)(a)(ii)).

Without the measure, the parent can simply give security for their return to Australia, and depart for a foreign country (subsection 72K(3)) with the child support debt unpaid.

(c) Why the legislation does not provide that a departure prohibition order is only to be used as a last resort if it is intended that the measure operates this way in practice

Although not expressly stated, when read as a whole, Part VA and the measure is circumscribed.

As noted by the Committee, in the second reading speech I observed departure prohibition orders prevent parents who do not pay child support on time from leaving Australia, in extreme cases after other avenues have failed. The Committee has raised its concern that, because this is not set out in the legislation, the measure is not circumscribed.

While the legislation does not expressly state departure prohibition orders are a last resort, Part VA operates to do so when viewed as a whole. For example, before making departure prohibition orders, the Registrar must have regard to action taken to recover the debt (paragraph 72D(2)(b)). The Registrar must also be satisfied the parent has persistently and without reasonable grounds failed to pay their child support debt (paragraph 72D(1)(c)).

The measure does not create broad unfettered discretion. It is an additional criterion to guide the Registrar's decision to issue a departure authorisation certificate. It would only affect a person already restricted from leaving Australia.

The measure also provides sufficient flexibility to treat different cases differently. The Registrar's decision to make a departure prohibition order is discretionary (paragraph 72D(1)(c)). In doing so, the Registrar must have regard to the person's individual circumstances (subsection 72D(2)). Once a person is prohibited from departing Australia, the Registrar's decision to then allow a person to depart Australia and issue a departure authorisation certificate is also discretionary (subsection 72L(2)). If the Registrar is not satisfied the person meets the criteria – including because of the measure proposed in this Bill, the Registrar may nevertheless issue a certificate on humanitarian grounds (paragraph 72L(3)(i)). In this way, the measure does not impose a blanket policy without regard to the merits of an individual case.

Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023

(a) Whether the adoption laws of the Republic of Korea and Taiwan are compliant with the Hague Convention and the Convention on the Rights of the Child, and how the government confirms this compliance

The Department of Social Services (the department), in its role as the Australian Central Authority (ACA) for intercountry adoption, is required to review the ongoing compliance of Australia's intercountry adoption programs with partner countries against the *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (Hague Convention) every two years (*Commonwealth–State Agreement for the Continued Operation of Australia's Intercountry Adoption Program*, Part IV, section 16).

Through this review process, the department has determined that the intercountry adoption programs between Australia and the Republic of Korea and Taiwan operate in compliance with the principles and obligations of the Hague Convention.

The Hague Convention reinforces the *United Nations Convention on the Rights of the Child* (Article 21) and seeks to ensure that intercountry adoptions are only conducted when in the best interest of the child and with respect of their fundamental rights. Through the department's review process, compliance with the Hague Convention also indicates compliance with the *United Nations Convention on the Rights of the Child.*

The Country Program Review (CPR) process

Review of Australia's intercountry adoption partner programs is an ongoing process, involving systematic review of intercountry adoption frameworks, safeguards, legislation, regulation, policy and practice, incorporating independent validation of local adoption practices, and close consultation with State and Territory Central Authorities (STCAs).

The purpose of the CPR is to assess the operation of each program, including its compliance against the Hague Convention, and highlight any issues or concerns raised by STCAs. Along with detailed information on local circumstances and identification of issues and challenges facing the program, the CPR also includes a finding or findings on the suitability of the partner's (known under the Regulations as the prescribed overseas jurisdiction) intercountry adoption framework, which is the basis for ongoing program operation.

The ACA undertakes the CPR process for each of its intercountry adoption partner programs, including the Republic of Korea and Taiwan. Although not Hague Convention signatories (or in the case of the Republic of Korea, a signatory, but not yet ratified), intercountry adoptions from the Republic of Korea and Taiwan conducted under the established bilateral arrangements are deemed to demonstrate practical compliance with the Hague Convention principles and standards via the CPR assessment process.

In addition to the CPR process, the ACA communicates with partner Central Authorities on an ongoing basis, including engagement on program operation and individual cases.

Republic of Korea Program status

The Republic of Korea signed the Hague Convention in 2013 and is expected to ratify as early as 2025.

Australia has had a bilateral arrangement with the Republic of Korea since 2014.

There is no formal Central Authority as appointed under the Hague Convention, however, the Ministry of Health and Welfare is the authority in charge of adoption.

Intercountry adoptions under the bilateral arrangement demonstrate practical compliance with the Hague Convention principles and standards. To maintain this arrangement, the ACA enters into annual agreements with Eastern Social Welfare Society (ESWS), the adoption agency with which Australia works in the Republic of Korea. The agreement is made on behalf of the ACA and all STCAs, and secures cooperation in intercountry adoption with adherence to the principles, safeguards and procedures set out by the Hague Convention.

Republic of Korea CPR

The most recent Republic of Korea CPR was endorsed by STCAs in September 2021.

The review found the Program to implement sufficient safeguards, meaning the Republic of Korea operates in compliance with the Hague Convention. The review demonstrated that based on legislation, communication and in-practice examples, the Republic of Korea program operates in compliance with both the principles and obligations of the Hague Convention.

The Republic of Korea CPR is due for review and update in September 2023.

Taiwan Program status

Taiwan is not a signatory to the Hague Convention. Although Taiwan is not a Member State, the Competent Authorities, the Taiwanese Ministry of Health and Welfare and Social and Family Affairs Administration confirm that the operation of intercountry adoption in Taiwan strictly follows the principles and standards of the Hague Convention. In addition, the October 2018 International Social Service Country Situation Report found Taiwan to be consistent against the standards and principles of the Hague Convention.

Australia has had a bilateral arrangement with Taiwan since Australia established the former *Family Law (Bilateral Arrangements – Intercountry Adoption) Regulations 1998.*

Adoptions under this bilateral arrangement demonstrate practical compliance with the Hague Convention principles and standards. For example, consistent with the subsidiarity principle under the Hague Convention, Taiwan must have exhausted all options to place a child with a family in Taiwan before determining a child is eligible for intercountry adoption.

All Taiwan-Australia Program adoptions are facilitated by the appointed accredited bodies in Taiwan, the Child Welfare League Foundation (CWLF) and Chung Yi Social Welfare Foundation (Chung Yi). Both agencies have responsibility for the day to day management of intercountry adoption, including, but not limited to, determining children in need of intercountry adoption, counselling of biological families and the children, preparation of adoption and medical checks.

The ACA exchanges working agreement letters with CWLF and Chung Yi that set out the basis for the working relationship. New working agreements were signed by CWLF, Chung Yi and the ACA (on behalf of Australian STCAs) in September 2021. These agreements will continue until replaced with a new agreement, or until terminated by either party giving 6 months' written notice.

Taiwan CPR

The most recent Taiwan CPR was endorsed in September 2022.

The review found that Taiwan has a suitable intercountry adoption framework, meaning the program holds a low risk for children adopted through it. There are little to no issues present in the program.

The Taiwan CPR is due for review and update in September 2024.

(b) What safeguards are in place to ensure that intercountry adoptions facilitated under bilateral arrangements with overseas jurisdictions that are not party to the Hague Convention are nevertheless compliant with international human rights law, and why such safeguards are not contained in the legislation itself

CPR Methodology

The department, as the ACA, assesses intercountry adoption partner programs against key principles and standards set out in the Hague Convention for a 2-year period of operation.

These reviews rely on the following:

- the Implementation and Operation of the 1993 Hague Intercountry Adoption Convention Guide to Good Practice;
- examination of partner's legislation and any available policy papers;
- independent advice from the non-government organisation, International Social Service (ISS) – primarily, Country Situation Reports. These reports involve systematic review of legislation, regulation, policy and practice (including the *United Nations Convention on the Rights of the Child*), as well as independent validation of local adoption practices. ISS updates Country Situation Reports on an as needed basis. For example, if there is a significant change to legislation or practice, or if alerted to issues of concern. Therefore, the ISS reports can be taken as current regardless of publication date;
- advice from Australian STCAs (including in-practice examples of compliance and/or non-compliance with Hague Convention principles); and
- comprehensive media scans to identify any issues impacting partner programs, including significant changes to legislation or practice, or relevant socio-economic or other environmental issues.

Assessment of the Partner Country Framework

The CPR contains a comprehensive section considering compliance of the relevant intercountry adoption program with key principles and standards established by the Hague Convention. Hague Convention principles, requirements and obligations are categorised and rated across 3 tables:

- Table 1: Compliance with Principles
  (Rating options: Principle in place in law/in practice – Yes/No/Not Applicable)

- Table 2: Compliance with obligations on all Contracting States
  (Rating options: Obligation in place in law/in practice– Yes/No/Not Applicable)

- Table 3: Obligation on State of Origin
  (Rating options: Obligation in place in Law/Practice – Yes/No/Not Applicable)

Ratings are accompanied by a detailed explanation containing excerpts from and references to relevant legislation, civil codes, constitutions, international treaties, ISS Country Situation Reports, media articles or academic papers, and in-practice examples (including specific operational or case details) provided by STCAs and the ACA.

Prior to finalisation, the draft CPR is circulated to all STCAs for input. STCAs provide feedback on any changes in process, procedures or issues that arise in their day-to-day activity working with partner authorities, changes to state or territory intercountry adoption legislation, and any advice directly received from overseas adoption agencies or from individuals undergoing, or having completed, the intercountry adoption process.

As the relevant safeguards are comprehensive and process-driven, they are not currently contained in the legislation for which the department is responsible, including the *Family Law (Bilateral Arrangements—Intercountry Adoption) Regulations 2023*.

(c) Noting that the Commonwealth-State Agreement says that the Commonwealth will provide states with a statement outlining partner countries' compliance with the requirements of the Hague Convention, are such statements publicly available, and if not, why.

CPRs are not publicly available at the present time.

Since its inception, the CPR has been viewed as an internal management document between the ACA and STCAs, intended to inform policies, procedures, arrangements and future decisions on Australia's intercountry adoption partner programs. Input is provided by STCAs on this basis.

In-practice, case-specific information provided by STCAs is de-identified, however, due to the low numbers of intercountry adoptions that occur in Australia each year, the information is considered sensitive as it could potentially be used to identify adoptees and/or families involved. CPRs also contain commentary that is potentially critical of overseas authorities, their policies and practices.

The ACA could consider making the findings of the CPR publicly available in the future, however, further consideration would be required (for example, in respect of privacy issues), and agreement would need to be sought from STCAs.

I appreciate you bringing this matter to my attention.

Yours sincerely

[redacted]

Amanda Rishworth MP

24 / 5 / 2023

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

Ref No: MS23-000870

Mr Josh Burns MP
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Mr ~~Burns~~ Josh

Migration (Regional Processing Country – Republic of Nauru) Designation (LIN 23/017) 2023 [F2023L00093] – PJCHR: Report 4 of 2023

Thank you for your correspondence of 30 March 2023 requesting information about human rights issues in relation to the above instrument.

Please find attached a response to your request, including advice in relation to the specific matters raised at paragraph 1.48 of the above report.

I hope this information assists the Committee in its consideration of this instrument.

Yours sincerely

[redacted]

CLARE O'NEIL

11 / 5 / 2023

Attorney-General

Reference: MC23-017658

Mr Josh Burns MP
Member for Macnamara
Chair of Parliamentary Joint Committee on Human Rights

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

Dear Chair

I refer to the Parliamentary Joint Committee on Human Rights' (the Committee) request in *Report 5 of 2023* for further information on the Crimes and Other Legislation Amendment (Omnibus) Bill 2023 (the Bill).

I appreciate the time the Committee has taken to consider the Bill. Please find below my response in relation to the questions raised by the Committee.

Amendments to the *Witness Protection Act 1994*

Suspension of protection and assistance

In order to assess the compatibility of these amendments with human rights, the Committee has requested further information regarding the items listed below.

a) *What types of actions or circumstances would limit the Australian Federal Police's (AFP) ability to provide adequate protection or assistance to a participant*

In order to exercise its powers and functions, such as providing protection and assistance to participants under the National Witness Protection Program (NWPP), the AFP must have legal jurisdiction to do so. Any activities that restrict or impede the AFP's ability to control or intervene in a situation could limit the AFP's ability to provide adequate protection or assistance. For example, if a participant were to put themselves in a situation that would place them outside the AFP's jurisdiction.

b) *Why it is appropriate that a participant's protection and assistance be suspended where they do something that 'limits' the AFP's ability to provide protection and whether this threshold should be higher, such as 'significantly limits'*

Whilst voluntary, participation in the NWPP is undertaken to provide protection and assistance to witnesses who are identified as having a significant level of threat to their safety. Any restrictions placed on participants are to protect their health, safety and wellbeing. As such, any limitation of the AFP's ability to provide protection and assistance is significant as it could have serious consequences (for example, result in death or serious injury to the participant).

The purpose of the suspension provisions in proposed sections 17A and 17B is to provide an alternative solution to terminating a participant from the NWPP in circumstances where the AFP

is unable to provide adequate protection and assistance, as a result of the participants' actions or future actions. Temporarily suspending protection and assistance is significantly less restrictive for the participant than having to terminate the individual's participation in the NWPP entirely, as it allows for protection and assistance to be reinstated as soon as the circumstances limiting the AFP's ability to provide this protection and assistance are resolved.

c) *Why it is necessary for the Commissioner's power to suspend protection and assistance to extend to possible future actions of a participant*

Extending the ability to suspend protection and assistance to cover possible future actions of participants ensures that, in the event the AFP is aware that the participant intends to do something that may limit the AFP's ability to provide adequate protection and assistance, the AFP is able to take steps to respond to the emerging circumstances. For example, in cases where the AFP becomes aware that a participant intends to put themselves outside the AFP's jurisdiction. In these circumstances, the Commissioner may decide to temporarily suspend the participant's protection and assistance for the period of time that the AFP is unable to provide protection and assistance.

As outlined in paragraph 268 of the notes on clauses in the Explanatory Memorandum, suspension of protection and assistance takes effect at a time determined by the Commissioner, or at a time the Commissioner decides to suspend the protection and assistance. This allows for the decision maker to respond appropriately to operational circumstances that may warrant either an immediate or delayed commencement of the suspension of protection and assistance.

When making a decision about whether to suspend protection or assistance for a participant, proposed subsection 17B(1) appropriately requires that the AFP Commissioner must be satisfied that the circumstances of the case warrant the suspension of protection and assistance.

d) *How the Commissioner would assess an appropriate time period for the suspension to have effect and whether the Commissioner would be required to regularly review the case to assess whether circumstances have changed such that protection and assistance should be reinstated*

It is anticipated that the majority of suspensions under proposed sections 17A and 17B will be for short periods of time and will depend on the circumstances of each case. Proposed subsection 17B(3) requires that the duration of a suspension must be reasonable in all circumstances and the decision may be revoked if the Commissioner is satisfied that paragraph 17B(1)(a) or (b) no longer applies. Once the reason for suspension has ceased, these provisions would support the rapid reinstatement of protection and assistance for that participant.

e) *Why decisions to suspend protection or assistance made by the Commissioner personally are not reviewable, noting the importance of the availability of review as a safeguard and the potentially significant consequences for a participants' rights of such a decision*

As outlined in paragraph 280 of the Explanatory Memorandum, it is already the case under the Witness Protection Act that some decisions made personally by the Commissioner are not subject to merits review. One example of this is the Commissioner's power under paragraph 18(1)(a) to terminate an individual's participation in the NWPP.

Consistent with this approach, it is my view that decisions made personally by the Commissioner under new subsection 17A(1), should not be subject to merits review, as decisions to suspend the provision of protection and assistance at the request of the participant are unlikely to have a significantly adverse impact on the rights and interests of the individual.

For suspension decisions made under new section 17B of the Bill, in situations where protection and assistance may be suspended as a result of the actions (or intended actions) of the participant, I consider it is appropriate to provide for internal review of these decisions. I will undertake to amend the Bill to ensure these decisions may be subject to internal review. Further, I note that in these circumstances, external merits review would not be appropriate due to the need to limit knowledge of a participant's individual circumstances and the broader administration of the NWPP.

f) Whether any less rights restrictive alternatives could achieve the same stated objective

Currently, in situations where the AFP's ability to provide protection or assistance may be limited, participants must be considered for termination from the NWPP and may be required to undertake a full re-assessment process to re-enter the program. This process can be both time and resource intensive.

The intended purpose of proposed sections 17A and 17B is to create flexibility in how the AFP can respond to participants' actions (or intended actions) where these limit the AFP's ability to provide them with protection and assistance under the NWPP. Temporarily suspending the provision of protection and assistance is significantly less restrictive for the individual than terminating their participation in the NWPP. Further, proposed subsections 17A(6) and 17B(6) allow for protection and assistance to be provided, regardless of a suspension, if the Commissioner is satisfied that, in the circumstances, it is necessary and reasonable to do so.

I trust this information is of assistance.

Yours sincerely

[redacted]

THE HON MARK DREYFUS KC MP
19 / 5 /2023