Ministerial responses — Report 8 of 2023[1]

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THE HON TONY BURKE MP
ACTING MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY

MS23-001105

Mr Josh Burns MP
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Dear Chair Josh

I refer to the matters raised by the Parliamentary Joint Committee on Human Rights (the Committee) in the Committee's Report 7 of 2023, in relation to the Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023 (the Bill), and the Committee's request for further advice. I welcome the opportunity to respond to the Committee's comments, as outlined below.

The Bill amends the *Inspector-General of Live Animal Exports Act 2019* (the Act) to expand the office of the current Inspector-General of Live Animal Exports to provide an enhanced focus of animal welfare in relation to livestock exports. The Bill includes additional animal welfare related objects and functions, and also renames the current office of the Inspector-General of Live Animal Exports as the 'Inspector-General of Animal Welfare and Live Animal Exports' (Inspector-General), to reflect this expansion.

The likely type or scope of personal information that may be obtained, used or disclosed by the Inspector-General in the performance of their functions

The Committee has noted that:

> *by expanding the matters in relation to which the Inspector-General may conduct a review, and conferring ancillary powers on them to do all things necessary or convenient to be done for, or in connection with, the performance of their expanded functions, the measure would have the effect of expanding the scope of information, including personal information, that may be obtained, used and disclosed by the Inspector-General.*

It is likely that the type and scope of personal information that may be obtained, used or disclosed by the Inspector-General in the performance of their expanded functions will be substantially similar to what the Inspector-General of Live Animal Exports currently collects, which is described below.

Currently, the type and scope of personal information collected by the Inspector-General of Live Animal Exports includes names and contact details received through submissions from stakeholders made as part of a review process, and information regarding officials and exporters during the undertaking of a review, which may include the names of contact details of

officials and exporters. Additionally, under the Act, the Inspector-General can compel any person (excluding a foreign person or body) to provide information or documents relevant to a review. There are appropriate safeguards around how information is handled, which are discussed below.

The Bill expands both the functions of the Inspector-General and the objects of the Act. The effect of this is that the Inspector-General may conduct reviews on a wider range of matters, all of which are critical to the performance of functions by the Inspector-General in that office's role to provide additional assurance and oversight on animal welfare within the livestock export industry.

As the Statement of Compatibility of the Bill acknowledges, the expansion of the Inspector-General's functions (and therefore the expansion of the reviews the Inspector-General may conduct) may require the provision of information or documents from various persons.

However, whilst the Bill proposes to expand the functions of the Inspector-General, they are exhaustively delineated in new subsection 10(1) of the Bill. Further, each function is necessarily constrained by its express terms in subsection 10(1). Therefore, whilst the Inspector-General would be able to undertake reviews into an expanded set of matters (which may require the provision of personal information), the scope of those reviews are reasonably, appropriately and proportionately constrained by the Bill's provisions. This would, in turn, mean that any information collected as part of a review would be in pursuance of a legitimate objective and would similarly be reasonably, appropriately and proportionately constrained.

The ancillary powers under subsection 10(2A) of the Bill may only be exercised if necessary or convenient for, or in connection with, the performance of the Inspector-General's functions. As such, any ancillary powers may only be exercised in pursuance of the exhaustively defined functions, which are limited in scope in the legislation.

Further, the Bill provides expanded objects for the Act under new section 3. Similarly, these objects are exhaustively delineated and are to be achieved with a view to ensuring that the animal welfare and live animal export legislation and standards in relation to the export of livestock are complied with. As such, the performance of the Inspector-General's functions and the exercise of the Inspector-General's powers under the Act are by necessity reasonably, appropriately and proportionately constrained by the objects of the Act and may only be performed or exercised in pursuance of these objects.

The Bill does not impact on how the Inspector-General may conduct a review and does not specifically outline what specific information may be collected as it would not be appropriate to do so.

Therefore, it is unlikely that the proposed new objects and functions, and ancillary powers, will result in significantly different types, or a significantly different scope, of information being collected by the Inspector-General compared to what is currently collected.

The specific safeguards in the Privacy Act and in the information management framework under the current Act that would operate to protect the right to privacy in the context of this measure.

The Committee has requested advice on specific safeguards in the *Privacy Act 1988* (Privacy Act), and on the existing information management framework under the Act, that would operate to protect the right to privacy in the context of this Bill.

As noted in the Explanatory Memorandum, any information or documentation, required by the Inspector-General to be provided in order to conduct a review (including personal information), will be managed in compliance with both the Act and the Privacy Act.

The Act contains an existing information management framework in sections 23 to 31 which provide robust protection for information provided under or in accordance with the Act (defined as "protected information"). Protected information includes personal information collected under, or in accordance with, the Act. The Act's information management framework allows only for limited disclosure of protected information, for the below specified purposes and circumstances:

- for the purposes of performing functions or exercising powers under the Act (section 24)
- for the purposes of law enforcement or court proceedings (sections 25 and 26)
- where required to do so by an Australian law (section 27)
- with the consent of the person to whom the information relates (section 28)
- to the person who gave the information (section 29).

The effect of the Act's information management framework is that protected information may only be used or disclosed for, and in, these exhaustively delineated and limited purposes and circumstances. The framework is further supported by an offence provision for unauthorised use or disclosure (described below). This provides robust protection. Further, the purposes for which, and the circumstances in which, disclosure of protected information may occur are reasonable, appropriate and proportionate. They are also in pursuance of legitimate objectives – for example, where information is ordered to be disclosed by a court as it is relevant for proceedings, or where the information is reasonably necessary for, or directly related to, one or more enforcement related activities being conducted by, or on behalf of, that enforcement body.

Section 30 of the Act provides that rules (made by the Minister under section 41) may authorise a person to use or disclose the information for purposes other than those referred to in sections 24 to 29, however there are currently no rules made pursuant to section 30. If the Minister does make rules pursuant to section 30, such rules will be subject to Parliamentary scrutiny and may be disallowed, as provided by the *Legislation Act 2003*, as the rules are to be made by legislative instrument under section 41.

Section 31 of the Act contains an offence provision for the unauthorised disclosure of protected information. A person who contravenes this provision may face a maximum of 2 years imprisonment or a penalty of 120 penalty units, or both. As such, the Inspector-General's ability to use and disclose personal information will be constrained by both the Act and the Privacy Act.

It is not appropriate to further constrain the Inspector-General's management of information, without adversely impinging on the office's independence which is critical for the performance of its functions under the Act.

Relevantly, the Privacy Act also provides specific protections under the following Australian Privacy Principles (APPs):

- APP 5 – notification of the collection of personal information. APP 5 requires that entities must take reasonable steps to notify the individual on a number of matters as applicable in the circumstances in relation to the collection of personal information, including the purpose for which the entity collects the personal information.
- APP 6 – use or disclosure of personal information. If an entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless, relevantly:
    - the individual has consented to the use or disclosure of the information; or
    - one of the following exceptions applies:
        - the individual would reasonably expect the APP entity to use or disclose the personal information for the secondary purpose and the secondary purpose is related to the primary purpose.
        - the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order.
        - the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

  While other exceptions are provided by the Privacy Act under APP6, they would not generally be applicable in the context of the Inspector-General undertaking a review.

From a broader perspective, APP 1 also requires entities to take reasonable steps to implement practices, procedures and systems that will ensure compliance with the APPs and enable them to deal with enquiries or complaints about privacy compliance. In line with APP 1, the Inspector-General of Animal Welfare and Live Animal Exports will need to conduct an assessment of the impact of reviews and review reports on the privacy of individuals (beginning with preliminary or threshold assessment) to ensure that any impact on the privacy of individuals are appropriately managed to minimise or eliminate that impact. This will help ensure that the impact of any proposed disclosure of personal information is minimised or eliminated, while ensuring that the objects of the Act are met. For example, anonymous or redacted personal information in review reports could be effective safeguards where appropriate.

Whether, where a report relating to a review conducted by the Inspector-General is required to be published, it would be publicly available, and if so, whether it would contain personal or identifying information

Currently, the Inspector-General publishes reviews on their website, at iglae.gov.au. This is in line with requirements under the Act, including reports under subsection 10(3) (the Inspector-General must publish a report on each review conducted). This requirement under the Act would continue to apply.

Furthermore, the information management provisions under the Act, and the Privacy Act, as outlined above, would also apply to these published reviews. This would include with respect to personal or identifying information.

I thank the Committee for its consideration of this important Bill and trust this information will be of assistance.

Yours sincerely

[redacted]

TONY BURKE 3 / 7 / 2023

Attorney-General

Reference: MC23-021195

Mr Josh Burns MP
Chair
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By email: human.rights@aph.gov.au

Dear Mr Burns

Thank you for your letter of 22 June 2023 in relation to the Parliamentary Joint Committee on Human Rights' *Report 7 of 2023*. I thank the Committee for its consideration of the Extradition (Republic of North Macedonia) Regulations 2023.

I note that a detailed Statement of Compatibility with Human Rights was prepared to accompany the Regulations, in accordance with section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The enclosed response to the Committee's request for further advice expands upon that statement.

I trust this information is of assistance.

Yours sincerely

[redacted]

THE HON MARK DREYFUS KC MP
3 / 7 /2023

Encl. *Attachment A – Response to Committee's request for further advice*

Attachment A – Response to the Committee's request for further advice

The Attorney-General's Department welcomes the opportunity to provide advice following the Parliamentary Joint Committee on Human Rights' consideration of the Extradition (Republic of North Macedonia) Regulations 2023 (the Regulations).

This document responds to the matters listed in *Report 7 of 2023*, on which the Committee sought the Attorney-General's response in order to assess the measure's compatibility with human rights.

The response is consistent with, and expands on, the Statement of Compatibility with Human Rights that was prepared to accompanying the Regulations in accordance with section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[1] It is the Department's understanding that the Regulations are not exempt from disallowance under the *Legislation Act 2003*, as suggested in paragraph 1.45 of the Committee's report.

The Department also wishes to clarify the effect of the Regulations. The purpose of the Regulations is to reflect the official name change of the Republic of North Macedonia, which was known as the Former Yugoslav Republic of Macedonia prior to 14 February 2019. The Former Yugoslav Republic of Macedonia was prescribed as an 'extradition country' for the purposes of section 5 of the Act in 2009. There is otherwise no change to the political institutions or territorial boundaries of the country. Australia has been able to consider and progress extradition requests from the Republic North Macedonia since the official name change in 2019, however, before the Regulations came into effect, doing so would likely have required providing evidence as part of the extradition proceedings to demonstrate that the country is the same as the Former Yugoslav Republic of Macedonia.

The Regulations therefore regularise the change of name, rather than enable Australia to consider and progress extradition requests from the Republic of North Macedonia, as suggested by paragraph 1.13 of the Committee's report. Neither do the Regulations have the effect of extending Australia's extradition framework, as suggested in paragraph 1.44 of the report.

Responses to the Committee's specific questions are outlined below.

(a) whether the statutory requirements in the Act meet Australia's obligations under international human rights law with respect to the death penalty, and whether and how compliance with diplomatic assurances relating to non-use of the death penalty are monitored in practice;

As the Committee has noted, Australia is a party to the *International Covenant on Civil and Political Rights* (ICCPR) and its Second Optional Protocol, which obliges it to ensure that no person within its jurisdiction is executed and that the death penalty is abolished. Article 6 of the ICCPR contains an implied *non-refoulement* obligation (to refrain from removing persons from Australia to another country) where there are substantial grounds for believing that there is a real risk of the person being subjected to the death penalty.

The Extradition Act requires the Attorney-General to consider death penalty risks before determining whether to surrender a person in response to an incoming extradition request. Paragraph 22(3)(c) of the Extradition Act provides that a person is only able to be surrendered for an offence that carries the death penalty if the requesting country provides an undertaking

[1] See Explanatory Statement to the Extradition (Republic of North Macedonia) Regulations 2023, available online: https://www.legislation.gov.au/Details/F2023L00447/Explanatory%20Statement/Text

that either the person will not be tried for the offence; or if the person is tried for the offence, the death penalty will not be imposed; or if the death penalty is imposed on the person, it will not be carried out. This practically operates as a mandatory ground for which the Attorney-General must otherwise refuse extradition, and implements Australia's non-refoulement obligations under Article 6 of the ICCPR. Where a person elects to waive the extradition process, paragraph 15B(3)(b) of the Extradition Act also provides a safeguard by stipulating that the Attorney-General may only make a surrender determination where satisfied that there is no real risk that the death penalty will be carried out on the person in relation to any offence should they be surrendered to the extradition country.

The use of death penalty undertakings is a well-established tool in international extradition. Undertakings are written government assurances and a breach of an undertaking would have serious consequences for both Australia's extradition relationship and broader bilateral relationship with the relevant foreign country. Breach of an undertaking may also have reputational consequences and negatively impact the relevant foreign country's law enforcement relationship with other countries. It is the Australian Government's long-standing experience that undertakings in relation to the death penalty in extradition cases have always been honoured.

The Attorney-General considers the reliability of any death penalty undertaking on a case by case basis, in line with the test for an acceptable death penalty undertaking in the Full Federal Court decision of *McCrea v Minister for Justice and Customs*.[2] The test requires that the Attorney-General be satisfied that 'the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the death penalty would not be carried out'.[3] If, notwithstanding the receipt of an undertaking, the Attorney-General considered that a real risk remained that the person will be subject to the death penalty, it would be open to the Attorney-General to refuse extradition as an exercise of the general discretion under paragraph 22(3)(f) of the Extradition Act.

Given the public nature of extradition, the Australian Government would most likely be made aware of a breach of a death penalty undertaking. The Australian Government monitors compliance with undertakings through the Department of Foreign Affairs and Trade. Australia also monitors Australian citizens who have been extradited through its consular network, in accordance with the Vienna Convention on Consular Relations.

The Attorney-General's Department has provided information on extradition matters in its annual reports to Parliament since the establishment of the Extradition Act, including whether there have been any breaches of undertakings by a foreign country in relation to a person extradited from Australia. No breaches of death penalty undertakings have been recorded to date.

Further detail on the monitoring of Australian citizens who have been extradited is outlined at paragraphs 40-41 of the Statement of Compatibility with Human Rights.

(b) whether the measure is consistent with Australia's obligations under article 7 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture, and why the Act does not explicitly prohibit extradition where there is a risk of cruel, inhuman or degrading treatment or punishment;

Both the measure and the Extradition Act more broadly are consistent with Australia's *non-refoulement* obligations under Article 3 of the Convention against Torture (CAT) and Article 7 of the ICCPR in relation to torture and cruel, inhuman or degrading treatment or

[2] (2005) 145 FCR 269.
[3] Ibid, 275.

punishment (CIDTP). The measure does not change the substance of Australia's existing extradition regime nor its consistency with obligations under the CAT or the ICCPR.

Torture

Paragraphs 15B(3)(a) and 22(3)(b) of the Extradition Act provide that the Attorney-General may only surrender a person if, among other things, the Attorney-General does not have substantial grounds for believing that, if the person were surrendered, they would be in danger of being subjected to torture.

When making a decision under section 15B or subsection 22(3) of the Extradition Act, the Attorney-General may consider all material reasonably available to assist in determining whether the person may be subjected to torture. This may include relevant international legal obligations, any representations or assurances from the requesting country, country-specific information, reports prepared by government or non-government sources, information provided through the diplomatic network and those matters raised by the person who is the subject of the extradition request.

Therefore, the decision on whether to surrender a person is made by the Attorney-General on a case-by-case basis, in accordance with the safeguards in the Extradition Act which are consistent with Australia's international obligations in Article 3 of the CAT and Article 7 of the ICCPR, with respect to torture.

CIDTP

As the Committee has noted, Australia also has *non-refoulement* obligations under Article 7 of the ICCPR in relation to CIDTP.

Although the Extradition Act does not explicitly reference CIDTP, the Attorney-General practically considers risks of CIDTP when determining whether to surrender a person under the Extradition Act. In particular, the Attorney-General's general discretion under subsection 15B(2) and paragraph 22(3)(f) of the Extradition Act provides a basis to refuse extradition where the Attorney-General has concerns based on CIDTP considerations.

The Extradition Act does not contain an exhaustive list of circumstances in which the Attorney-General may refuse surrender or factors that the Attorney-General must consider. This ensures that decisions can be made on a case-by-case basis. In relation to paragraph 22(3)(f), the Federal Court of Australia has held that the Attorney-General's discretion 'is unfettered, and the Minister may, in the exercise of the discretion, take into account any matters, or no matters, provided that the discretion is exercised in good faith and consistently with the objects, scope and purpose of the [Extradition] Act.'[4]

The Attorney-General therefore makes surrender determinations on a case-by-case basis in accordance with the safeguards in the Extradition Act and in line with Australia's international legal obligations, including under Article 7 of the ICCPR. Subsection 15B(2) and paragraph 22(3)(f) therefore provide a mechanism for compliance with Australia's international obligations in relation to CIDTP.

[4] *Rivera v Minister for Justice and Customs* (2007) 160 FCR 115, 119 [14] (Emmett J, with whom Conti J agreed). This position has been subsequently affirmed by the Full Court of the Federal Court of Australia: *Snedden v Minister for Justice (Cth) & Anor* (2014) 145 ALD 273, 297 [150] (Middleton and Wigney JJ).

(c) whether the Act is consistent with the right to fair trial and fair hearing, and in particular:

(i) why the Act does not include an extradition objection if, on surrender, a person may suffer a flagrant denial of justice in contravention of article 14 of the International Covenant on Civil and Political Rights;

Article 14 of the ICCPR sets out fair trial rights and a number of specific minimum guarantees in criminal proceedings.

As the Committee has noted, the UN Human Rights Committee has not yet provided views on whether Article 14 engages non-refoulement obligations.[5] Scholars, such as Manfred Nowak, note that in the ICCPR context, it is well accepted that the principle against *refoulement* applies to Articles 6 and 7, with no consistent opinion as to the application to Article 14.[6]

It is the Australian Government's view that Article 14 of the ICCPR does not extend to an obligation not to return a person to a country where they face a real risk of an unfair trial which could breach the obligations under Article 14. In other words, the Australian Government considers that Article 14 does not contain *non-refoulement* obligations and therefore is not engaged in the context of Australia potentially surrendering a person to another country under the Extradition Act.

Nonetheless, as noted above, the Attorney-General has a general discretion to refuse surrender under subsection 15B(2) and paragraph 22(3)(f) of the Extradition Act. This enables the Attorney-General to consider fair trial or other human rights concerns where these arise. Considerations may include whether an extradited individual would have access to a fair trial or whether to surrender a person convicted *in absentia* (and whether a person tried *in absentia* will have an opportunity to be retried). It is therefore not necessary to include an explicit extradition objection for this concern.

Further detail on the protections under the Extradition Act relevant to fair trial protections is outlined at paragraphs 66-71 of the Statement of Compatibility with Human Rights.

(ii) whether, not requiring any evidence to be produced before a person can be extradited, and preventing a person subject to extradition from producing evidence about the alleged offence is compatible with the right to a fair trial and fair hearing; and

The guarantee to a fair and public hearing by a competent, independent and impartial tribunal under Article 14(1) of the ICCPR is not engaged in relation to extradition proceedings in Australia, including in relation to the evidentiary standard that magistrates and eligible Judges apply to determine surrender eligibility under section 19 of the Extradition Act. This is because extradition is not a criminal process or trial designed to assess guilt or innocence, but rather an administrative process to determine whether a person in to be surrendered to face justice in the Requesting Party.

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[5] As noted by the Committee in footnote 21 of their report, the question of whether Article 14 contains a *non-refoulement* obligation has been raised in multiple complaints to the UN Human Rights Committee, and each time the Committee has make their decision on other bases. The question was raised in the Australian immigration context in *Kwok v. Australia* UN HRC No. 1442/2005 (2009) "Having found a violation of article 9, paragraph 1, with respect to the author's detention, and potential violations of article 6 and article 7 … the Committee does not consider it necessary to address whether the same facts amount to a violation of article 6, paragraph 2, article 9, paragraph 4, or article 14 of the Covenant" [9.8]

[6] Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, ed William A. Schabas (N.P. Engel, 2019), 48.

The United Nations Human Rights Committee has noted in its General Comment No. 32 that the right to a fair hearing by a court or tribunal under Article 14(1) of the ICCPR does not apply to extradition proceedings (amongst other types of proceedings) as, in these circumstances, there is no determination of criminal charges nor presence of a suit at law.[7]

However, the United Nations Human Rights Committee noted that other procedural guarantees may apply in extradition proceedings, including judicial review by an independent and impartial tribunal and, in these circumstances, guarantees of impartiality, fairness and equality as provided for in the first sentence of Article 14(1) of the ICCPR.[8] The availability of independent judicial review under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution at various stages of the extradition process satisfies these requirements.

(iii) whether section 45 of the Act, in applying absolute liability, is consistent with the right to be presumed innocent;

Section 45 of the Extradition Act enables the Attorney-General to consent to the prosecution of a person in Australia for conduct constituting an offence in another country where Australia has refused extradition. This is consistent with the principle that States should prosecute a person who has committed serious crimes in lieu of extradition (this exists as an obligation under a range of multilateral treaties for specific offences).

It also assists in preventing Australia from becoming an attractive safe haven for fugitives from countries whose criminal justice systems might give rise to grounds for refusal under the Extradition Act.

To achieve this, subsection 45(1) creates an offence to facilitate a person's prosecution in Australia. In order to establish this offence, the prosecution must prove that the person has been remanded in a State or Territory by order of a magistrate under section 15 of the Extradition Act (paragraph 45(1)1(a)). This establishes a nexus to the extradition process, as remand can only occur pursuant to section 15 if a person is arrested under an extradition arrest warrant issued in response to a request made by a foreign country.

Second, the prosecution must prove that the person has engaged in conduct outside Australia at an earlier time (paragraph 45(1)(b)), which would have constituted an offence had the conduct or equivalent conduct occurred in Australia (paragraph 45(1)(c)). This is referred to as the 'notional Australian offence'.

Subsection 45(2) provides that absolute liability attaches to the conduct described in paragraphs 45(1)(a) and 45(1)(b) and to the circumstances in paragraph 45(1)(c). This means that the prosecution need not prove that the person was reckless as to the elements required to establish the offence under subsection 45(1). These paragraphs are effectively factual pre-conditions for the existence of the offence. This ensures that the prosecution is not required to prove that the person intended to engage in conduct outside Australia at an earlier time or that the person was reckless as to whether that conduct would have constituted an offence in Australia had the conduct or equivalent conduct occurred in Australia.

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[7] Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN HRC, 90th session, UN Doc CCPR/C/GC/32 (23 August 2007), para 17.

[8] Ibid, para 62. See further: Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, ed William A. Schabas (N.P. Engel, 2019), 362-363; *Griffiths v Australia*, Communication No. 1973/2010, Views adopted 21 October 2012, UN Doc CCPR/C/112/D/1973/2010, paragraph 6.5

However, the prosecution is still required to establish physical and fault elements to make out the offence, in line with subsection 45(3).

Subsection 45(3) provides how the prosecution is to prove the notional Australian offence. Paragraph 45(3)(a) requires the prosecution to prove the physical and fault elements applicable to the notional Australian offence, which are the physical and fault elements for the relevant offence in the State or Territory in which the person is on remand. Paragraph 45(3)(b) provides that any defences or special liability provisions that apply in relation to the notional Australian offence will have effect.

The use of absolute liability in this provision is consistent with the right to the presumption of innocence. As noted above, the relevant paragraphs in section 45 attracting absolute liability are factual pre-conditions rather than substantive elements of the offence. There is still a requirement to establish the relevant physical and fault elements of the notional Australian offence.

This approach is consistent with the Guide to Framing Commonwealth Offences, which notes that strict or absolute liability may be appropriate for certain kinds of physical elements, such as jurisdictional elements which link the offence to the relevant legislative power of the Commonwealth.[9]

(d) noting that extradition largely results in the detention of a person pending extradition and often lengthy detention in the foreign country while awaiting trial, whether allowing the extradition and detention of someone without first testing the basic evidence against them, is consistent with the right to liberty;

Australia has an obligation under Article 9(1) of the ICCPR to protect the right to freedom from arbitrary detention. Further, Article 9(4) of the ICCPR imposes an obligation on States to ensure that persons who are arrested and detained are entitled to take proceedings before a court to decide the lawfulness of their detention.

As a matter of law, Australia considers the determining factor for arbitrary detention is not the length of the detention, but whether the grounds for detention are justifiable.

The test for whether detention is arbitrary under Article 9(1) of the ICCPR is whether, in all the circumstances, detention is reasonable, necessary and proportionate to the end that is sought.[10] Factors relevant to assessing whether detention is arbitrary include the existence of avenues of review on the appropriateness of detention, as well as whether less intrusive alternatives to detention have been considered.[11]

An assessment of the compatibility of extradition detention with Article 9 of the ICCPR is set out below in response to paragraph (e) of the Committee's request.

(e) whether the presumption against bail except for in 'special circumstances' is a permissible limit on the right to liberty;

The presumption against bail as currently in place in the Extradition Act is reasonable, necessary and proportionate to the achieve the purposes of the Extradition Act and to comply with Australia's international obligations.

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[9] Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, page 21.
[10] See, for example *A v Australia,* Communication No 560/1993, Views adopted 30 April 1997, UN Doc CCPR/C/59/D/560/1993, paragraph 9.2.
[11] *Bakhtiyari v Australia*, Communication No. 1069/2002, Views adopted 29 October 2003, UN Doc CCPR/C/79/D/1069/2002, paragraphs 9.2-9.4.

Bail is available as a statutory right at each stage of the extradition process, namely under section 15, subsection 18(3), subsection 19(9), paragraph 21(6)(f) and section 49C of the Act. At each stage, the test for grant of bail is whether there exist 'special circumstances' justifying release on bail. Where a person has elected to waive the extradition process, bail is not available, noting that a waiver will typically be chosen by the individual to facilitate return as soon as possible to the requesting country.

As outlined in paragraphs 51 to 63 of the Statement of Compatibility with Human Rights, the 'special circumstances' test is clearly defined in case law and is applied by decision-makers on a case-by-case basis, where the decision-maker is required to carefully consider whether the circumstances relied upon by a person, either individually or in combination, meet the test. Notwithstanding the nature of the 'special circumstances' test, bail is available as a statutory right at various stages of the extradition process[12] and applicants can and do successfully obtain bail in Australia during the extradition process. The bail test is necessary as the 'special circumstances' test for bail upholds Australia's international obligations to secure the return of alleged offenders to face justice, given the serious flight risk posed in many extradition matters.

The case-by-case nature of these decisions, as well as the established review mechanisms, ensure that the bail test is reasonable, necessary and proportionate to the overall legitimate objective of facilitating the apprehension and surrender of individuals for the purposes of criminal prosecution or to serve a prison sentence in another country, upholding Australia's international legal obligations and ultimately combatting serious transnational crime. Accordingly, the bail test ensures that detention is not arbitrary for the purposes of Article 9(1).

The Extradition Act and the Regulations are therefore consistent with the right to freedom from arbitrary detention in Article 9 of the ICCPR. To the extent that the Extradition Act and the Regulations may limit these rights, any limitation is reasonable, necessary and proportionate to achieve the legitimate objectives of the Extradition Act and Australia's extradition regime.

(f) whether the measure is consistent with the right to equality and non-discrimination, including why the Act does not permit an objection to extradition where a person may be persecuted because of personal attributes set out in international human rights law, including disability, language, opinions (other than political opinions), or social origin.

The Extradition Act is consistent with Australia's obligations under Articles 2 and 26 of the ICCPR to respect the right to equality and non-discrimination.

The Extradition Act contains safeguards to protect rights of equality and non-discrimination. Sections 7(b) and 7(c) set out that there is an 'extradition objection' in relation to an extradition offence for which a person's surrender is sought if:

- the person is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions; or

[12] In addition to the statutory rights to bail under the Extradition Act, the Australian Government recognises that the Federal Court of Australia has the power to grant bail in the context of proceedings for judicial review of an extradition decision under section 39B of the *Judiciary Act 1903*. This power arises by virtue of section 23 of the *Federal Court Act 1976* (as confirmed in *Adamas v The Hon Brendan O'Connor (No 3)* [2012] FCA 365, [16]-[17] (Gilmour J)). Further, the High Court of Australia has the power to grant bail in extradition proceedings as an incident of its appellate jurisdiction granted by section 73 of the Constitution (as confirmed in *Cabal,* 182-183 [44] (Gleeson CJ, McHugh and Gummow JJ)).

- the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions.

The presence of an extradition objection, including on the grounds listed above, has the effect of preventing both a finding by a magistrate or eligible Judge that a person is eligible for surrender pursuant to paragraph 19(2)(d), and a surrender determination by the Attorney-General pursuant to paragraph 22(3)(a) in those circumstances.

While the Extradition Act does not provide an extradition objection where a person may be persecuted because of other personal attributes set out in international human rights law, including disability, language, opinions (other than political opinions), or social origin, the Attorney-General would practically consider all relevant protected attributes when determining whether to surrender a person under the Extradition Act, including when exercising the general discretion in paragraph 22(3)(f).

Further, any person subject to extradition has an opportunity to make representations to the Attorney-General on any matter before the Attorney-General makes a surrender determination, including in relation to any of the protected attributes in Article 26 of the ICCPR, so that such matters can be taken into consideration before reaching a decision.

As noted above in response to paragraph (b) of the Committee's request, paragraph 22(3)(f) provides the Attorney-General 'unfettered' discretion when determining whether to surrender a person, and provides an appropriate mechanism to consider any factor relevant to the individual case at hand. The Extradition Act is therefore consistent with the rights of equality and non-discrimination, notwithstanding that all protected attributes are not expressly listed in the Extradition Act.

The Hon Amanda Rishworth MP

Minister for Social Services

Ref: MC23-006749

Mr Josh Burns MP
Chair
Parliamentary Joint Committee on Human Rights
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Dear Mr Burns Josh

Social Services Legislation Amendment (Child Support Measures) Bill 2023

Thank you for your letter of 15 June 2023, about the Parliamentary Joint Committee on Human Rights (the Committee) *Human rights scrutiny Report 6 of 2023* of 14 June 2023.

In the report, the Committee requests further information about the 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.

The Committee first sought information about the compatibility of the measure with a person's freedom of movement in *Report 5 of 2023* of 9 May 2023. My letter of 25 May 2023 provided answers to the committee's questions (**Attachment A**).

Responses to the Committee's further questions are provided below.

Departure authorisation certificate
The measure amends the *Child Support (Registration and Collection) Act 1988* (the Act) to 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 (the certificate being necessary for them to leave Australia for another country).

The measure engages with the person's right to freedom of movement because the amendment provides 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.

a. **What other steps are taken to recover a debt while a departure prohibition order is in place?**
While a departure prohibition order is in place, Services Australia will continue to pursue collection of outstanding amounts owed by the debtor using a range of powers, including:

- negotiated arrangements for voluntary payment by instalments;
- deducting child support from a parent's salary or wage;
- intercepting tax refunds;
- collecting via third parties such as banks;
- deducting payments from social security and other government payments;
- litigation action to recover the debt in any court with family law jurisdiction.

b. **If a debt is likely to be deemed, within a period that the Registrar considers appropriate, to be irrecoverable, why the debtor would also need to provide a security to be allowed to leave Australia?**
In some cases, a person applies for a departure authorisation certificate (section 72K) before the Registrar has made a decision about whether a departure prohibition order must be revoked (section 72I) on the basis the liability is completely irrecoverable (paragraph 72I(1)(c)). The Registrar may require a person to give security for their return to Australia to guard against that person departing Australia with a child support liability that is not completely irrecoverable.

The Registrar may consider it *likely* (but not certain) that they will be required to revoke a departure prohibition order in the future (paragraph 72L(3)(a)(i)). The requirement to give security for the person's return to Australia (paragraph 72L(3)(a)(ii)) provides for this uncertainty. Note, the Registrar may decide a security is not required if satisfied the person is likely to comply with the requirements of the departure authorisation certificate, if issued (paragraph 72L(2)(b)).

Otherwise, if the Registrar is satisfied that a person's child support liability *is* completely irrecoverable, then the Registrar must revoke the person's departure prohibition order (paragraph 72I(1)(c)). If the Registrar revokes the departure prohibition order, the person need not apply for a departure authorisation certificate to depart Australia for a foreign country (subsection 72K(1)) negating the need to provide security.

c. **Noting that security is not currently accepted when the debtor borrows the money to pay the security, how is requiring the security to only be paid by the debtor effective to achieve the objective of encouraging payment of the debt (noting they would appear not to have the money available to raise a security)?**
The Registrar is able to accept security where that security is raised by way of borrowed funds. Policy guidance is provided in Chapter 5.2.11 of the Child Support Guide which states "Security can be given by a bond or a deposit or by other means".

The Registrar will only accept a security that:

- is in a form that is readily convertible to cash, for example, bank cheque
- is offered by the debtor rather than third parties on the debtor's behalf
- is generally not significantly less in value than the amount of the debt owing.

Note: Security arising from a loan obtained by a debtor from a financial institution or a third party is not considered to be a payment from a third party.

d. What other steps must be taken to recover a child support debt prior to making a departure prohibition order?

The making of a departure prohibition order will only be considered by the Registrar once all other collection avenues have been investigated. This includes, but is not limited to the actions set out in the response to (a) above.

In addition, the Registrar also undertakes action to ensure the accuracy of the debt prior to making a departure prohibition order, including, but not limited to:

- resolving outstanding applications or changes that may affect the debt;
- ascertaining more accurate incomes for both parents;
- determining if a residence decision is required to be made; and
- advising the parent of their appeal rights if they disagree with a decision that led to the creation of the debt.

e. What is the average length of time that a departure prohibition order remains in place?

As at 23 June 2023, the average period of time a departure prohibition order was or has been in force (for all departure prohibition orders issued between 2017-18 and 2021-22) is:

- 463 days for departure prohibition orders which have been revoked.
- 1,275 days for departure prohibition orders which are still in force.

f. Noting the importance of recovering child support debts in order to provide maintenance for dependent children, where repayments are made towards a debt whether those repayments are directed first towards the outstanding maintenance amount or towards late penalties, and if the order remains in place if the debt mainly consists of late payment fees?

When Services Australia receives a payment towards a child support parent's child support debt, the payment is allocated in priority to the debt first, and only then will any remainder be applied to late payment penalties or any other debt to the Commonwealth.

g. Whether the average debt amount indicated in the explanatory materials include late penalties, and if so, what is the average debt excluding such penalties?

The average debt amount indicated in the Explanatory Memorandum was inclusive of penalties, costs and fines. The average amount owed by a child support debtor subject to a departure prohibition order exclusive of penalties is **$27,320** (as at 23 June 2023).

h. What threshold is applicable in determining when a child support debt is irrecoverable, and the circumstances in which a child support debt has been determined to be irrecoverable where a departure prohibition order is in place?

Paragraph 72I(1)(c) of the Act provides that the Registrar must revoke a departure prohibition order in respect of a person if 'the Registrar is satisfied that the liability is *completely* irrecoverable.' The word 'completely' presents a high threshold to be satisfied (*Naboush and Child Support Registrar* [2014] AATA 930 (15 December 2014), at [13]).

The Administrative Appeals Tribunal applied Naboush and expanded the test in *Peters and Child Support Registrar* (Child support second review) [2019] AATA 1719 (5 July 2019) (at [27] to [28]).

> *A debt is completely irrecoverable when there is no prospect that the debtor will be able to make any payment towards it. A high threshold must be satisfied to prove that a debt is completely irrecoverable. Even where a debtor has not received any income from work or income support payments for many years, their debt will not be regarded as completely irrecoverable if it is possible that the debtor could obtain work or financial assistance at some time in the future to meet at least part of the debt.*
>
> ...
>
> *The test is whether the liability is "completely irrecoverable" and is not whether the total amount can be recovered.*

i. Whether the denial to issue a departure authorisation certificate has a disproportionate impact on persons on the basis of nationality who may have a greater need to travel to or from Australia for family reasons.

As outlined in the response to question (b) above, the Registrar may permit a person subject to a departure prohibition order to travel on a number of grounds. The amendments made by the *Social Services Legislation Amendments (Child Support Measures) Act 2023* do not substantively alter the existing provisions of the Act. That is, the nationality of a parent is not a relevant consideration in determining whether to revoke a departure prohibition order or issue a departure authorisation certificate.

Further, while some parents may have a greater need to travel due to their nationality, relevant considerations apply no more or less strenuously to those parents and do not operate, in intent or practice, to limit their travel more than any other parent.

The intent of the amendments, particularly those to subsection 72L(3) of the Act, is to prevent parents with financial means from exploiting a loophole of providing security to travel despite making no suitable arrangements to discharge their debt, and then having that security returned to them upon their return to Australia. The Act already permits the Registrar to issue a departure prohibition order upon a child support debtor limiting their right to freedom of movement; as such, these amendments do not create new restrictions on travel. Rather, they provide the Registrar greater discretion to consider the likelihood that the parent will discharge, or at least make suitable arrangements to discharge their debt when their travel concludes.

I appreciate you bringing this matter to my attention.

Yours sincerely

[redacted]

Amanda Rishworth MP

7 / 7 / 2023

Enc.

Attorney-General

Reference: MS23-000757

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

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

Dear Chair

Thank you for your letter of 15 June 2023, seeking further information to assist in the Parliamentary Joint Committee on Human Rights Committee's (the Committee) consideration of the Telecommunications (Interception and Access) (enforcement Agency – NSW Department of Communities and Justice) Declaration 2023 [F2023L00395].

I appreciate the Committee's consideration of the Declaration and trust the following advice in response to the questions posed to me in *Report 6 of 2023* is of assistance to the Committee.

As you are aware, illicit mobile phones, particularly those that are fully encrypted, pose a particular and unique threat within correctional facilities. They are used to organise escape attempts, threaten the safety of victims and witnesses, organise trafficking of contraband, and facilitate behaviour contrary to national security interests. Telecommunications data is especially vital to Corrective Services NSW in establishing the ownership or location of mobile phones being used to communicate to or from a correctional facility, confirm associations between inmates, inmates and staff, inmates and those in the community; and to inform and assist intelligence and investigative functions, including safeguarding the good order of the correctional facility, community safety and national security.

It is also worth noting that as part of his Comprehensive Review of the Legal Framework of the National Intelligence Community, Dennis Richardson AO recommended that consideration should be given to corrective services authorities being granted the power to access telecommunications data, if the relevant state or territory government considered it to be necessary.

Question a: Why it is not sufficient for Corrective Services NSW to seek access to telecommunications data via NSW law enforcement agencies?

While NSW Police are able to access telecommunications data when the statutory threshold prescribed under the TIA Act is met, there are a number of reasons why it should not be relied on to seek access to telecommunications data on behalf of Corrective Services NSW.

Corrective Services NSW plays a critical role in the detection, investigation and prosecution of serious crime and corruption under State and Commonwealth legislation, as well as the detection and disruption of terrorist activity. Direct access to telecommunications data and information, as facilitated by enforcement agency status under the TIA Act, is of immeasurable importance to the agency in supporting these functions and ensuring the good order and security of the correctional system.

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Access to this critical information may be required within very tight timeframes, as it could mean the difference between a successful escape from custody, or violent/terrorist attack. Relying on NSW Police to access telecommunications data on behalf of Corrective Services NSW would result in further privacy intrusions and cause unnecessary delays.

Such a process would require the resources of both NSW Police and Corrective Services NSW to request and access the relevant telecommunications data, and Corrective Service NSW investigations would be at the mercy of the knowledge, workload and priorities of the NSW Police.

NSW Police makes on average approximately 100,000 authorisations under the TIA Act annually and a particular officer may not have the ability to appropriately prioritise requests for data from Corrective Services NSW over its own agency activity at any given time. This may result in a significant delay in Corrective Services NSW accessing the required data, resulting in harm to an inmate, the good order of the correctional facility, or members of the community.

Further, the doubling handling of a request could result in further privacy intrusion, as a police officer who would not otherwise require knowledge of the Corrective Services NSW investigation would become privy to the details of that investigation, and the personal details and telecommunications data of the target.

Accordingly, I consider that it is appropriate for Corrective Services NSW to have the ability to access telecommunications data directly from a telecommunications service provider.

Question b: How many times has telecommunications data been accessed by Corrective Services NSW since it was declared to be an enforcement agency for the purposes of the TIA Act?

Corrective Services NSW has accessed telecommunications data twice since February 2022, with one authorisation currently on foot. Corrective Services NSW has advised that the ability to access telecommunications data continues to be necessary to support its law enforcement, intelligence and investigative functions as set out above.

Corrective Services NSW has advised its judicious use of telecommunications data to date has been limited due to a number of factors. In particular, the February 2022 declaration was the first time Corrective Services NSW had been an enforcement agency in 7 years and required processes, policies, procedures and training to be developed, tested and refined to ensure the appropriate use of the powers.

As part of that process, the Office of the Commonwealth Ombudsman (OCO) undertook a health check of those processes, policies and procedures. Corrective Services NSW advised it took about 6 months for the OCO's recommendations to be actioned, approved, and fully implemented. Corrective Services NSW also advised that it did not use its powers, on the advice of the OCO, until those recommendations had been implemented. Corrective Services NSW was also delayed in its use of the powers as it needed to negotiate arrangements with service providers to be able to access such data.

With these matters now settled, Corrective Services NSW advises it is now in a strong position to use the powers when necessary and appropriate.

Further, the number of times that telecommunications data has been accessed and used is not reflective of the need for Corrective Services NSW to be able to seek access for operational and safety reasons.

Use of this power correlates directly to illegal (or suspected) activity by staff and inmates. For example, there may be periods where such activity is minimal and can be addressed by existing, and less intrusive, search and intelligence capacity.

Conversely, there may be periods where such activity is high in volume, cannot be supported by existing intelligence capacity and access to telecommunications data may be required. As noted, telecommunications data is especially vital in establishing the ownership, use and location of mobile phones which cannot easily be established via other methods.

I do not consider Corrective Services NSW's judicious use of the powers to be reflective of a lack of utility and consider it appropriate for Corrective Services NSW to have authority to access telecommunication data when the relevant thresholds are met.

Question c: Why are all staff of Corrective Services NSW declared as able to access telecommunications data, rather than the declaration being restricted to only those staff members who require access to telecommunications data to perform their functions?

Under sections 5AB and 178 of the TIA Act, the ability to authorise the release of telecommunications data is limited to senior officers authorised by the Secretary of the NSW Department of Communities and Justice (NSW DCJ). As of 28 June 2023, the Secretary of the NSW DCJ has declared six senior Corrective Services NSW positions that can authorise access to telecommunications data, significantly limiting the scope of access. Further, Corrective Services NSW has advised the ability to access and use telecommunications data is limited to two specific units within the organisation which have a specific need for the data.

In addition, and as noted above, Corrective Services NSW has also undergone a health check by the Commonwealth Ombudsman. This health check examined the policies and procedures in place to limit and guide the authorisation, access and use of telecommunications data. Corrective Services NSW has implemented all of the Ombudsman's recommendations.

The declaration of all members of Corrective Services NSW as 'officers' for the purposes of the TIA Act is consistent with the approach taken in the TIA Act for other agencies. For example, the definition of 'officer' in paragraph 5(c) of the TIA Act in relation to a police force of a state or territory includes all officers of the police force. However, agencies limit this through internal policies and procedures to ensure only appropriate personnel can make authorisations and access data.

Thank you for seeking my advice on this matter. I trust this information is of assistance.

Yours sincerely

[redacted]

THE HON MARK DREYFUS KC MP
7 / 7 /2023

Response to the Parliamentary Joint Committee on Human Rights

Report 6 of 2023 – *Migration (Specification of evidentiary requirements—family violence) Instrument (LIN 23/026) 2023* [F2023L00382]

In Report 6 of 2023, the Parliamentary Joint Committee on Human Rights (the Committee) sought further information from the Minister in relation to the *Migration (Specification of evidentiary requirements—family violence) Instrument (LIN 23/026) 2023* [F2023L00382].

The purpose of LIN 23/026 is to specify the type and number of items of evidence, for the purposes of paragraph 1.24(b) of the *Migration Regulations 1994* (the Migration Regulations).

The Migration Regulations provide special provisions relating to family violence (Division 1.5 in Part 1 of the Migration Regulations), including when an application for a visa is taken to include a non-judicially determined claim of family violence (subregulations 1.23(8) and (9)). For an application for a visa to be taken to include a non-judicially determined claim of family violence under subregulation 1.23(9), various requirements must be met including:

- the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence (paragraph 1.23(9)(a)); and
- the alleged victim is a person described in paragraph 1.23(9)(b); and
- the alleged victim, or another person on the alleged victim's behalf, has presented evidence in accordance with regulation 1.24 (paragraph 1.23(9)(c)).

Regulation 1.24 provides that the evidence mentioned in paragraph 1.23(9)(c) is a statutory declaration by or on behalf of the alleged victim (paragraph 1.24(a)) and the type and number of items of evidence specified by the Minister by instrument in writing (paragraph 1.24(b)).

The special provisions relating to family violence are generally known as the family violence provisions.

Evidence of family violence

The Committee considered that the rights to equality and to non-discrimination in Articles 2 and 26 of the *International Covenant on Civil and Political Rights* are relevant.

Committee view

The Committee relevantly stated:

1.45 The Committee notes that restricting the types of evidence which will be accepted as evidence of family violence to official sources of information, within the context of applications for a visa, engages and may limit the right to equality and non-discrimination, noting that applicants from non-English speaking backgrounds or certain cultural backgrounds may face more difficulties in obtaining such evidence.

1.46 The Committee considers further information is required to assess the compatibility of this measure with the right to equality and non-discrimination right, and as such seeks the Minister's advice in relation to:

(a) why applicants are required to provide a minimum of two pieces of evidence from two separate categories;

(b) why there is no discretion to permit the consideration of 'non-official' sources of information (for example, statutory declarations from a neighbour or friend);

(c) why the measure does not provide the decision-maker with the discretion to consider a range of evidence provided to them about alleged family violence and make a case-by-case determination; and

(d) whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice.

Minister's response

The Australian Government is committed to supporting victims of family violence. The *National Plan to End Violence against Women and Children 2022-2032*, released in October 2022, notes particular vulnerabilities facing migrant and refugee women, including those on temporary visas.

With the renewed focus of Government on this important issue, the Department of Home Affairs (the Department) undertook a comprehensive review of the instrument *Migration Regulations 1994—Evidentiary Requirements—IMMI 12/116*, which specified the evidence that must be provided for a non-judicially determined claim of family violence to meet the requirements of the family violence provisions. IMMI 12/116 had been in place for 10 years and in that time had not been reviewed to ensure it continued to meet community and stakeholder expectations.

LIN 23/026, which is intended to simplify and streamline the process for providing non-judicial evidence, came into effect on 31 March 2023.

LIN 23/026 was drafted based on feedback from around 40 experts from across the family violence and support and legal sectors who witness first-hand the challenges vulnerable victims face in providing evidence to meet the requirements of the family violence provisions. LIN 23/026 improves accessibility to the family violence provisions by increasing flexibility around the evidence that applicants must provide in order to make a non-judicially determined claim of family violence. Changes to LIN 23/026 included adding additional types of professionals and services that can provide evidence, removing the requirement for some professionals to provide a statutory declaration and allowing evidence to be provided in different formats.

Answers to the specific questions raised by the Committee are provided below.

(a) why applicants are required to provide a minimum of two pieces of evidence from two separate categories;

The requirement for applicants to provide a minimum of two pieces of evidence from two separate categories has been in place since November 2012, when IMMI 12/116 was implemented.

Given the extensive changes implemented with LIN 23/026 and the removal of the requirement for professionals and service providers to provide a statutory declaration, the Department considers maintaining the requirement for two pieces of evidence to provide the appropriate balance between providing more flexibility to applicants and retaining some basic integrity settings. Requiring evidence from two separate categories ensures the evidence is from at least two independent sources, who are employed or suitably trained in identifying family violence. LIN 23/026 is expected to make it easier for applicants to obtain evidence from professionals and service providers that they are already engaged with, rather than having to seek out specific services to provide evidence for the purposes of the instrument, potentially at added expense and potential re-traumatisation. It may also encourage applicants who are not already engaged with services to come forward to seek assistance from suitably qualified professionals and service providers who can help them to access appropriate support and assistance. Other people such as friends and neighbours may not be able to do this.

Where the applicant has not engaged with such professionals and service providers, the intent is for the applicant to engage with two independent sources who are employed or suitably trained in identifying family violence, to produce evidence that supports their claims.

The professionals and service providers listed against LIN 23/026 are employed in the family violence sector, or in health, policing and education roles where they may encounter or identify family violence. The Department must make a determination on whether family violence occurred, and evidence from two separate sources supports this assessment.

The Government has committed to a further review of LIN 23/026 in the next 12 months to ensure it continues to reflect community expectations and address any issues raised by stakeholders and applicants. The Department has been monitoring feedback from stakeholders and any impacts on caseload processing since the commencement of LIN 23/026. Some stakeholders have raised that the requirement to provide evidence from two separate categories may present a challenge for some applicants. As such, concerns regarding the requirement for applicants to provide a minimum of two pieces of evidence from two separate categories will be considered as part of this review.

(b) why there is no discretion to permit the consideration of 'non-official' sources of information (for example, statutory declarations from a neighbour or friend);

Applicants are able to provide additional information to support their non-judicial family violence claim, as long as the minimum evidentiary requirements are met. This additional information must be taken into consideration by the decision-maker as part of a holistic assessment of the evidence.

The Department needs to maintain basic integrity settings and give decision-makers confidence in the evidence before them. Any widening of the instrument to include ‘non-official’ sources has been considered against expected uptake of this evidentiary pathway by applicants and impact on the assessment process. In practice, widening the scope may nullify the current intent of LIN 23/026.

A widening of the scope of evidence in the instrument to ‘non-official’ sources would need to be balanced against decision-makers being satisfied of family violence. While decision-makers are suitably trained in visa processing and sensitivities attached to family violence claims, they are not family violence professionals.

Consistent with paragraph 1.23(10)(c), if the Minister is not satisfied that the alleged victim has suffered the relevant family violence, the Minister must seek the opinion of an independent expert. Consideration must therefore be given to financial constraints of the current contract with the independent expert that is utilised where the decision-maker is unable to be satisfied family violence has occurred based on the evidence before them. The number of referrals to the independent expert and consequently costs to the Commonwealth could be expected to increase with a widening of scope.

On balance, the above factors are mitigated by relying on professionals and services providers listed against LIN 23/026 who are employed or suitably trained in identifying family violence.

The Department’s Procedural Instruction *[Div1.5] Division 1.5 – Special provisions relating to family violence* provides information and guidance to decision-makers on assessing family violence claims under the family violence provisions. This includes instructions on considering additional evidence that may have been submitted as part of the claim (section 3.12.3).

The Department’s website has recently been updated to advise applicants that they can provide other evidence to support their non-judicial family violence claim, in addition to the minimum evidentiary requirements. For more information see Family Violence Provisions (homeaffairs.gov.au)

(c) why the measure does not provide the decision-maker with the discretion to consider a range of evidence provided to them about alleged family violence and make a case-by-case determination; and

Decision-makers do have discretion to consider a range of evidence and all decisions are made on a case-by-case basis. Decision-makers are required to consider all evidence provided by the applicant as part of a holistic assessment of the evidence.

As noted above, the Department's Procedural Instruction *[Div1.5] Division 1.5 – Special provisions relating to family violence* provides information and guidance to decision-makers on assessing family violence claims under the family violence provisions. This includes instructions on considering additional evidence that may have been submitted as part of the claim (section 3.12.3).

> 3.12.3. Additional evidence
>
> Under policy, any other evidence may also be provided in support of a non-judicial family violence claim, so long as the minimum evidentiary requirements prescribed above *[a statutory declaration by the alleged victim and at least two prescribed documents in accordance with the current legislative instrument]* are met.
>
> If relevant, additional evidence may be taken into consideration by the decision maker and given appropriate weighting (depending on the type and quality of the evidence provided) at the stage at which the decision maker must determine whether they are satisfied that relevant family violence did in fact take place.
>
> Evidence by objective, official and credible sources should be given more weight than more subjective forms of evidence, such as letters and testimonies from friends and relatives.

(d) whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice.

The Department is unable to confirm whether people from non-English speaking backgrounds are more frequently unable to provide evidence of non-judicially determined family violence in practice.

Under policy, decision-makers should be mindful of the sensitivity of family violence claims and the complexity of obtaining required evidence when deciding how to proceed with cases that do not appear to meet the evidentiary requirements.

Where an applicant has submitted a non-judicial family violence claim that does not meet the evidentiary requirements, decision-makers must notify the applicant and give them the opportunity to submit further evidence consistent with the requirements of LIN 23/026 or to make a judicial claim under one of subregulations 1.23(2), (4) or (6). Decision-makers are also encouraged to be flexible in offering reasonable extensions of time to provide evidence.

In recognition of some of the additional challenges faced by applicants from non-English speaking or certain cultural backgrounds, the Department added 'community, multicultural or other crisis support services providing domestic and family violence assistance or support' to LIN 23/026 as part of the category of 'Family violence support service provider'. This category in IMMI 12/116 was limited to 'women's refuge or family/domestic violence crisis centre'. This has been well received by stakeholders.

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC23-000157

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

Dear Mr Josh Burns

I am writing in response to the further information requests raised by the Parliamentary Joint Committee on Human Rights in the Human Rights Scrutiny Report no 6 of 2023 in respect of the Public Service Regulations 2023. I appreciate the opportunity to respond to the matters raised by the Committee. Please find a response below.

Direction to attend medical examination

(a) why is it necessary to provide the Agency Head with information in relation to an employee's state of health and what is the pressing or substantial concern this seeks to address; (b) how is this measure effective to achieve the objective being sought
Agency Heads have a duty of care under the *Work Health and Safety Act 2011* towards their employees and must comply with the *Safety, Rehabilitation and Compensation Act 1988*. The power to direct an employee to attend a medical examination is necessary to give effect to the duties and obligations under both Acts.

Some of the circumstances where it is necessary to provide an Agency Head with information in relation to an employee's state of health include:

- if the employee presents with a severe injury and/or the employee has limitations for work capacity;
- if clarification is required about the employee's physical/mental capabilities and any activities that must be avoided;
- if there is medical evidence suggesting a possibility of re-injury at work;
- where there is conflicting medical information particularly in relation to an employee's work capacity and treatment;
- factors in the work environment, including any perceived or actual adverse relationships with supervisors or co-workers;
- if the injury is slow onset and the symptoms have developed over a period of time;
- if there is a significant change in the employee's certified capacity for work or participation in rehabilitation;

- uncertainty on diagnosis of the employee's condition;
- there is insufficient or conflicting medical evidence;
- the treatment being received does not appear to be clinically justified and/or an opinion on treatment needs is required;
- an employee has developed a new or secondary condition (that may, or may not be, related to their work environment);
- an employee has submitted a claim, including for permanent impairment (subject to the use and application of powers in the SRC Act with respect to the claim);
- concerns about the current medical evidence;
- the condition seems to have stabilised; or
- recovery has stalled.

For example, an Agency Head may direct an employee to attend a medical examination following an extended absence from the workplace. The medical examination will provide the Agency Head with information to develop a return to work plan that may include recommendations on modified duties or a modified work pattern. The information from the medical examination assists the Agency Head to address the pressing or substantial concern to meet their duty of care and ensure the employee is able to return to the workplace successfully. If an employee makes a claim, this is likely to be in conjunction with the powers in the SRC Act, and Comcare publishes guidance on the use of those powers on its website (https://www.comcare.gov.au/scheme-legislation/src-act/guidance).

An Agency Head may also direct an employee to attend a medical examination where the employee has notified the Agency Head that they have a medical condition influencing their ability to undertake their duties. In this situation, the Agency Head may direct the employee to attend a medical examination to ensure the employee remains safe in the workplace. The medical examination will ensure the Agency Head has the necessary information to understand the type of support required, or any changes required to the employee's role and address the pressing or substantial concern to make reasonable accommodation for the employee. This may include providing the employee with modified duties or, in consultation with the employee, moving them to an alternative role that is more suited to their current needs. This can be particularly pertinent in dangerous work environments, noting the public service undertakes a diverse range of roles across a breadth of work environments and workplaces, for example, abattoirs, national parks, the Antarctic, ports, wharfs, ships and vessels, and so forth.

The examples described above on the use of the power to attend a medical examination serve a legitimate objective, to assist Agency Heads to meet their duty of care towards employees under the WHS Act. They are rationally connected to that objective, and are a proportionate means of achieving that objective. Likewise, the ability to direct an employee to attend a medical examination is instrumental to supporting the effective operation of the SRC Act in parallel to the powers in the Regulations.

(c) what considerations would an Agency Head take into account in forming a belief that an employee's health may be affecting their work performance or standard of conduct, for example, how would an Agency Head measure whether an employee's work performance is 'affected'

In determining whether an employee's heath may be affecting their work performance or standard of conduct, an Agency Head will usually make this determination following information received from the employee. An employee may volunteer this information with the aim of seeking support or assistance, or following a performance or conduct discussion, an employee may provide a health concern as the explanation for their behaviour. Where an employee raises their health as the explanation for a performance concern, a medical examination will assist an Agency Head to ensure any action taken is reasonable. For example, if a medical examination demonstrated an employee's underperformance may be attributable to, or the result of, a medical condition.

(d) whether the written notice directing an employee to undergo a medical examination sets out the reasons underpinning the decision to issue such a direction in sufficient

detail such that the employee may challenge the decision and effectively seek review, and why this requirement is not provided for in the regulations
All ongoing, non-ongoing and casual APS employees (other than SES employees) can seek review of certain decisions or actions that relate to their employment. This right to seek a review is an entitlement built into section 33 of the *Public Service Act 1999*.

A written notice under section 11 must be a lawful and reasonable direction. Procedural fairness necessitates that where an Agency Head provides written notice to an employee to attend a medical examination they must include a reason for the decision.

However, should an Agency Head not provide sufficient detail in the written notice, this would not limit the employee's ability to seek a review in accordance with the review provisions in the Regulations.

(e) why is it necessary for the medical examination to be undertaken by a medical practitioner nominated by the Agency Head and is it possible for an employee to choose an alternative practitioner of their choice and (f) whether it is possible for an employee to submit to an Agency head a shadow report from a medical practitioner of their choice
The ability to nominate the medical practitioner who will undertake a medical examination does not limit an Agency Head from nominating a practitioner of the employee's preference. However, there are circumstances where an Agency Head may wish to nominate an alternative practitioner. For example, in circumstances where the information provided by an employee's preferred medical practitioner does not align with the information provided by the employee, an Agency Head may need to seek further guidance from an independent medical practitioner.

For example, where an employee informs the Agency Head that the reason for their underperformance is due to a medical condition an Agency Head may ask for evidence from the employee's doctor. However if the employee's doctor confirms that the employee's medical condition should not impair the employee's performance but the employee still maintains their performance is impacted by their medical condition, the Agency Head may wish to seek an independent medical examination prior to deciding whether to commence an underperformance process. The Regulations do not limit an employee from providing a shadow medical report to the Agency Head. A shadow report would form part of the materials for consideration by an Agency Head prior to undertaking any action.

(g) how will the information contained in the medical report be used by the Agency Head and what are the potential consequences of the medical examination and report, for example, is termination a possibility
The information in the medical report will inform the Agency Head in decisions made relating to the employee. For example in the development of a return to work plan or a return to full time duties plan. The information could determine whether alternative duties or workplace support is necessary. While termination is possible, to terminate an employee on the ground of inability to perform duties because of physical or mental incapacity, the Agency Head would also need to ensure they have met their obligations under all relevant laws, including for example the *Disability Discrimination Act 1992* and SRC Act. This includes taking all reasonable steps to provide the injured employee with suitable employment or to assist the injured employee to find such employment. Therefore, information contained in the medical report would not be sufficient in isolation to terminate an employee's employment.

Use and disclosure of personal information

(a) why is it necessary to authorise the use and disclosure of personal information and what is the pressing or substantial concern this seeks to address;
The Commonwealth is the sole employer of Australian Public Service employees regardless of which agency engages them. Under section 20 of the *Public Service Act 1999*, Agency Heads have all the rights, duties and powers of an employer in respect of employees in their agency. However, the *Privacy Act 1988* treats each APS agency as a wholly separate entity for the purposes of handling personal information. This means that sharing personal

information about APS employees between Commonwealth agencies—for example, when a staff member moves between agencies, or when a person applies for a job in another agency— would be a disclosure for the purposes of the Privacy Act. Historically this created significant administrative difficulty for Agency Heads to perform and give full effect to their employer powers for the benefit of both their employees, and the Commonwealth.

As a result, the PS Act and Regulations provide for authorised disclosures in certain circumstances between APS agencies under section 9.2. This ensures a common understanding of employment-related personal information disclosure across the APS. This expanded in 2013 to enable Agency Heads to use or disclose personal information necessary or relevant to any of their employer powers under the PS Act.

Section 103 is therefore an authorising provision for the purposes of the Privacy Act, to enable sharing of personal information where appropriate between and within agencies.

The personal information records of employees can transfer with the employee from one agency to another for a range of ordinary employer purposes:

- recruitment, including promotion decisions;
- movements within agencies under a Machinery of Government process pursuant to section 72 of the PS Act;
- permanent or temporary transfers pursuant to section 26 of the PS Act;
- case management and provision of rehabilitation services to ill or injured employees;
- remuneration, tax, superannuation and other financial administration purposes; and
- where Code of Conduct or other personnel management processes might require appropriate disclosure to and use by non-employing agencies.

All APS employees must comply with common standards of behaviour through the APS Values, Employment Principles, and Code of Conduct, which reflect the expectations the Commonwealth has of APS employees in respect of their performance and behaviour, and ultimately maintain public confidence in the integrity of the APS.

Public confidence is likely to be undermined if Agency Heads are not able to manage APS employees in a practical, sensible way and consistent with the common standards set by Parliament in the PS Act. Should information about employee behaviour calling into question their adherence to the common standards come to the attention of the Commonwealth, it is appropriate that the agency responsible for managing that employee consider and address it. Employees should have a reasonable expectation that this will occur, and the broader community would expect that public servants be treated fairly and not be protected by technical procedural requirements.

The provision also has the effect of providing clarity for employees seeking to report suspected misconduct, including suspected corruption. There is an expectation across the APS that employees will report behaviour suspected of breaching the Code of Conduct, or suspected breaches of other legislation, such as work health and safety or anti-discrimination law. Staff and agencies need assurance that making such a report within an agency, or to another agency, constitutes a disclosure or use of information that is 'required or authorised' by law.

(b) to whom may an Agency Head, the APS Commissioner and the Merit Protection Commissioner disclose personal information, and why do the regulations not limit to whom information may be disclosed;

An Agency Head, the APS Commissioner, and the Merit Protection Commissioner may disclose information both within and outside the Commonwealth. In practice, this includes their delegates and authorised employees who may exercise their relevant powers, functions or duties. In some circumstances, Agency Heads may need to consider disclosing personal information to a member of the public, for example to a non-APS complainant regarding the outcome of their complaint. The Commission has provided guidance to agencies on disclosing

information to complainants (Circular 2008/3: Providing information on Code of Conduct investigation outcomes to complainants: currently under review).

Authorised use and disclosure of personal information under section 103 must still be consistent with the Privacy Act in all other respects. This includes notification to employees upon engagement of how their agency may disclose and use their personal information, in accordance with Australian Privacy Principle 5.

(c) what other safeguards, if any, accompany the measure.
I expect that APS agencies have regard to Australian Public Service Commission guidance in considering employment actions and decisions. The Commission has issued guidance, after consultation with the Office of the Australian Information Commissioner, on the application of section 103 of the Regulations (which is unchanged in substance from regulation 9.2 of the Public Service Regulations 1999). That guidance is in Circular 2016/2: Use and disclosure of employee information. The guidance sets out principles underpinning appropriate use and disclosure of information under section 103 of the Regulations:

> *4. Section 103 provides agencies with significant flexibility in the use and disclosure of personal information, including very sensitive personal information, of their employees. The personal information of employees should be used or disclosed carefully. Generally, personal information should not be used or disclosed for a reason other than that for which it was collected.*
> [...]
> *6. The use and disclosure of employees' personal information requires careful, balanced consideration in each case. On one hand, employees have a right to expect that their personal information is held in confidence and only used or disclosed for proper, defensible reasons. On the other, APS agencies need to be able to:*
> *a. use information they hold about their employees to make employment decisions that are lawful, sensible and based on the available evidence, and*
> *b. disclose employee information to other APS agencies to support their decision-making.*

The further information and safeguards explained above recognise that the use and disclosure of personal information provided for by section 103 is not arbitrary, pursues a legitimate object, and is effective and proportionate to achieving that objective.

Yours sincerely

[redacted]

Katy Gallagher

7. 7. 23

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC23-001857

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

Dear ~~Chair~~ Josh

Thank you for your letter of 15 June 2023 drawing my attention to comments made by the Parliamentary Joint Committee on Human Rights (the committee) in Report 6 of 2023 relating to Appropriation Bill (No. 1) 2023-2024; Appropriation Bill (No. 2) 2023-24; Appropriation (Parliamentary Departments) Bill (No. 1) 2023-24; Appropriation Bill (No. 3) 2022-2023; Appropriation Bill (No. 4) 2022-2023; and Appropriation (Parliamentary Departments) Bill (No. 2) 2022-2023 (the Appropriation Bills). The committee requested my advice as to whether the Appropriation Bills are compatible with Australia's human rights obligations.

As set out in the statements of compatibility with human rights in explanatory memoranda to the Appropriation Bills, given the limited legal effect of the Appropriation Bills, they do not engage or otherwise affect the rights or freedoms relevant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). This position is consistent with that of successive Governments as previously expressed to the committee.

The detail of proposed Government expenditure and the Budget generally, appears in the Budget Papers rather than Appropriation Bills, with more specific detail provided in the Portfolio Budget Statements prepared for each portfolio and authorised by the responsible Minister. This allows the examination of proposed expenditure and budgetary processes through the Senate Estimates process.

The annual Appropriation Acts do not generally provide legislative authority for Commonwealth expenditure on particular activities. This authority is provided in other legislation or legislative instruments. It is more appropriate that an assessment of the impact of proposed Commonwealth expenditure on human rights, including those of vulnerable groups, be incorporated in explanatory documentation accompanying that other legislation, as per the current practice.

It is neither practicable nor appropriate for explanatory memoranda to the Appropriation Bills to include an assessment of overall trends in Australia's progressive realisation of economic, social and cultural rights; the impact of budget measures on vulnerable groups; and an assessment of human rights compatibility for key individual measures.

Thank you for bringing the committee's comments to my attention.

Yours sincerely

[redacted]

Katy Gallagher

26.6.23