Ministerial responses — Report 9 of 2023[1]

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Ministerial responses, *Report 9 of 2023*; [2023] AUPJCHR 97.

SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT

MS23-001200

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

human.rights@aph.gov.au

Dear Chair

I write in response to your correspondence of 3 August 2023 requesting further information in relation to proposed amendments to the *Biosecurity Act 2015* (the Biosecurity Act) contained in the Biosecurity Amendment (Advanced Compliance Measures) Bill 2023 (the Bill).

I supply the following responses to the committee's request for further information to assist the committee's consideration of the amendments:

Accessing information to assess biosecurity risk

a) whether, in practice, the measure may disproportionately impact people based on their ethnicity or national or social origin;

The proposed subsection 196(3A) would enable the Director of Biosecurity (the Director), or a delegate (for example, a biosecurity officer), the power to require a person who intends to enter, or enters, Australian territory on an incoming aircraft or vessel, to produce their passport or travel document(s) to the Director. The Director may then scan that person's passport or travel document for the purpose of assessing the level of biosecurity risk associated with the person and any goods the person has brought with them into Australian territory, as well as for future profiling, or assessment of, biosecurity risks.

The Department of Agriculture, Fisheries and Forestry (the department) uses data to develop profiles of passengers who may carry a higher risk of non-compliance, to enable biosecurity officers to identify such passengers for screening. This is a legitimate purpose as it is intended to protect Australia, its plant and animal health, its economy and environment. The purposes for which this information is collected and used are reasonable, necessary and proportionate for the legitimate objective of protecting Australia's unique biosecurity status. The information collected and used to develop profiles to manage biosecurity would be based on an assessment of objective information (e.g. prior imports and non-compliance by persons of particular nationalities). This would only be used to intercept, question and search passengers on the basis of objective evidence of their nationality through their passport or travel documents. This would allow the department to build better profiles which identify travellers who are more likely to be carrying goods in contravention of import conditions, reducing inspections of compliant travellers.

The proposed amendments are intended to ensure that the data collected in relation to biosecurity interventions with all incoming travellers can be consistently recorded and analysed to support a more intelligence and evidence-based approach to predicting and managing the biosecurity risk posed by future traveller cohorts. As such, the requirement to provide a passport or other travel document to a biosecurity officer upon request will necessarily apply to all persons, regardless of their ethnicity or national or social origin.

b) *what personal information would be visible to a biosecurity worker or other officer who has scanned a person's travel document pursuant to this measure;*

The personal information to be collected from the production or scanning of a person's passport or travel document under proposed subsection 196(3A) may include a person's name, place of birth, date of birth, date of issuance, date of expiry, document number, photo and signature. It is intended that some or all of this personal information may be used.

The personal information collected under proposed subsection 196(3A) will be considered 'relevant information', defined under section 9 of the Act as information that has been obtained or generated by a person in the course of, or for the purposes of, performing functions, duties or exercising powers under the Biosecurity Act, or assisting another person to do so. This information will therefore be subject to the information management provisions set out in Division 3 of Part 2 of Chapter 11 of the Biosecurity Act. Each provision in Division 3 provides an authorisation for the purposes of the *Privacy Act 1988* (the Privacy Act) and other laws.

Proposed subsection 196(3A) will not enable the collection of any additional personal information beyond the personal information contained within a passport and travel document. The collection of any sensitive information as defined in section 6 of the Privacy Act is protected information under the Biosecurity Act and an offence or civil penalty may apply if the protected information is used or disclosed and no exception applies.

c) *whether the department already has legislative authority to access information about a person's travel document, or whether this bill seeks to establish that authority;*

Section 196 of the Biosecurity Act currently enables the Director to require a person who intends to enter, or enters, Australian territory on an incoming aircraft or vessel, and is included in a prescribed class of persons, to provide information for the purpose of assessing the level of biosecurity risk associated with the person and any goods the person has with them. This information may include the details that a person includes in their incoming passenger card (IPC), some of which may be the same information from a person's travel document. Section 53 of the *Biosecurity Regulation 2016* provides that, for paragraph 196(1)(b) of the Biosecurity Act, persons who were, are or will be passengers on an incoming aircraft or vessel, members of the crew of an incoming aircraft or vessel or the person in charge of an incoming aircraft or vessel are prescribed.

Subsection 196(3A) of the Bill is intended to extend this authority to enable the Director to require information from each person included in a class of persons, as opposed to on an individual to individual basis.

By way of example, these proposed measures would allow the Director to include each person on a particular flight or a vessel originating from a place that has high biosecurity risk associated with it at a particular point in time, in a class of persons, and then to require every person in that class to provide information so the Director can assess the level of biosecurity risk associated with them and the goods they have with them, rather than having to require the provision of information from each person individually.

The flexibility to be able to require classes of persons to provide information for the purpose of assessing biosecurity risk, rather than just individuals, would be a significant and important addition to the current options used by biosecurity officers at the border to assess biosecurity risk, and where appropriate, manage any risk arising. These proposed amendments would allow for the more efficient and effective management of biosecurity risk in order to protect Australia's economy, environment, flora and fauna, and the agricultural sector from diseases and pests which could have a devastating effect should they enter Australian territory.

d) *whether the exercise of this power would result in the department collecting more information about individuals (for example, the dates of their travel or departure port, including where an assessment is made on the spot to not investigate them further);*

The technology used by the department to scan a person's passport relies on optical character recognition technology that reads the machine-readable zone at the bottom of the passport's biographical data page. This page contains some information that is not already provided by an incoming traveller on their IPC such as the date of issuance and the date of expiry of a passport. As such, the exercise of power under proposed subsection 196(3A) will in effect result in the department collecting more information about individuals.

The purpose of exercising the power under proposed subsection 196(3A) is to enable the collection of required information from a broader portion of the traveller cohort to support the analysis and management of biosecurity risks associated with incoming travellers and their goods. Further, the information to be collected under the proposed amendments will improve the effectiveness and efficiency of biosecurity screening activities at the Australian border and place a focus on high-risk entities.

Information relating to a person's last port of departure before arriving in Australia is already collected and used as part of a person's IPC.

e) *the meaning of 'the future profiling, or future assessment, of biosecurity risks', and whether it is intended that information gathered under this power be used to profile biosecurity risks in general;*

The department currently collects and analyses data in relation to biosecurity interventions that are undertaken in response to travellers who demonstrate non-compliance with biosecurity requirements at the Australian border. The analysis of this data is used to inform the development of traveller cohort profiles which enhance the prediction and management of the biosecurity risks posed by future traveller cohorts, as well as to modify and enhance biosecurity screening activities, at international airports and ports. These traveller cohort profiles are developed in collaboration with the Centre of Excellence for Biosecurity Risk Analysis.

The data is used to determine the likelihood that a cohort of travellers will fail to declare high biosecurity risk goods and prioritise these cohorts for biosecurity intervention. However, this involves the use of complex statistical processes to account for a lack of data for travellers who undergo biosecurity screening but are found to be compliant with biosecurity requirements, which is not currently incorporated into the datasets that are used to build the cohort profiles. The proposed amendments are intended to enable the department to obtain information from all travellers, instead of just those provided voluntarily or in relation to those who demonstrate non-compliance with biosecurity requirements, for the development of a reliable and complete dataset.

The proposed amendments are intended to ensure that the data collected in relation to biosecurity interventions with all incoming travellers can be consistently recorded and analysed, which will enable a more intelligence and evidence-based approach to predicting and managing the biosecurity risk posed by future traveller cohorts.

f) to whom information obtained under this measure may be disclosed; and

Any personal information collected in accordance with proposed subsection 196(3A) will only be disclosed if authorised under the Biosecurity Act.

The information management provisions are set out in Division 3 of Part 2 of Chapter 11 of the Biosecurity Act. Each provision in Division 3 provides an authorisation for the purposes of the Privacy Act and other laws. This includes, but is not limited to, disclosure to a Commonwealth entity or a law enforcement body.

g) how long information obtained under this proposed power would be held, and whether this would be subject to a legislative limitation.

The management of information and records is governed by a number of legislative requirements, international standards and guidance from the National Archives of Australia (NAA). The department has worked with the NAA to develop specific records authorities to cover the department's core business functions including assessing and managing biosecurity risks.

The collection and retention of travel documents for the purposes of section 196(3A) is intended to be managed in accordance with the department's relevant record authority. The information intended to be obtained in accordance with proposed subsection 196(3A) will be collated into an intervention record which is then retained for 12 years in line with the BIOSECURITY – Quarantine Clearance – Assessment record Authority (Record Authority and Disposal Class: 61242).

Compatibility of civil penalties with criminal process rights

I note the Committee's view that the proposed amendments in relation to increased civil penalty amounts in Schedule 3 of the Bill may raise the risk that these penalties are considered criminal in nature under international human rights law. I also note the Committee's recommendation that where civil penalties, which may apply to members of the public, are so severe such that there is a risk that they may be regarded as 'criminal' under international human rights law, consideration should be given to applying a higher standard of proof in the related civil penalty proceedings.

As discussed in the Statement of Compatibility with Human Rights, civil penalty provisions may engage criminal process rights under Article 14 of the ICCPR regardless of the distinction between criminal and civil penalties in domestic law. Having regard to the classification of the penalty provisions under Australian domestic law, the nature and purpose of the penalties and the severity of the penalties, the increase to the civil penalties in this Bill should not be regarded as elevating the civil penalties to be criminal in nature.

The Bill only seeks to increase the applicable civil penalties under the Act to reflect the seriousness of the non-compliance with Australia's biosecurity laws and the impact the contraventions may have on Australia's biosecurity status, market access and economy. This is necessary as the current penalty regime no longer serves as an effective deterrent against non-compliance.

The proposed increases to the civil penalty provisions are proportionate and appropriate in the regulatory context of the Act, to reflect the seriousness of contraventions, and the corresponding need for deterrence. Contraventions of the provisions proposed to be amended may have significant impacts on Australia's agriculture industry.

For example, the increased maximum penalty of 1,000 penalty units in subsection 46(2) of the Act for contravention of exit requirements by the operator of an aircraft or vessel reflects the serious consequences posed by the potential spread and transmission out of Australian territory of a listed human disease, and reflects that a lower penalty may not be a proportionate deterrent to non-compliance in the commercial context to which exit requirements apply.

On balance, in the context of this regulatory regime for industry participants, the penalties should not be considered severe, noting:

- They are all pecuniary penalties (rather than a more severe punishment like imprisonment)
- There is no sanction of imprisonment for non-payment of penalties
- The maximum amount of each civil penalty is no more than the corresponding criminal offence (except where applied to corporations)
- The penalties, for the most part, apply in a corporate context (to individuals and businesses such as commercial importers and biosecurity industry participants)
- The maximum civil penalty quantum for the provisions is set to provide a proportionate and reasonable deterrent, particularly for corporate entities in relation to the gaining of financial benefit from non-compliance and
- There is no mandatory minimum penalty and the court has the discretion to determine the appropriate penalty having regard to all the circumstances of the matter.

The current penalties are insufficient to effectively deter non-compliance with the Act. In the context of the commercial profits that can be made from the importation of goods in contravention of Australia's biosecurity framework, the increased penalties are a proportionate measure to deter non-compliance.

In civil proceedings, the standard of proof required is 'on the balance of probabilities'. This means that, for a person to be found liable, a contravention of a civil penalty provision must be proven on the balance of probabilities. The higher standard of proof of 'beyond reasonable doubt' is required in criminal proceedings, but this is because a finding of guilt in criminal proceedings may result in a conviction being recorded on a person's criminal record and may also result in a period of imprisonment being imposed.

As explained above, while the Bill increases the maximum civil penalties for some civil penalty provisions, there is no criminal conviction recorded and there is no period of imprisonment imposed for any contraventions of those civil penalty provisions. As such, I do not consider that it is necessary to apply a higher standard of proof in civil penalty proceedings that relate to provisions of the Biosecurity Act that are proposed to be amended by this Bill.

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

Yours sincerely,

MURRAY WATT 17 / 08 / 2023

Attorney-General

Reference: MC23-027704

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

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

Dear Chair

Thank you for your correspondence of 3 August 2023 regarding the Parliamentary Joint Committee on Human Rights (the Committee)'s request for further information (as set out in report 8 of 2023) on the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (the Bill).

The proposed amendments will protect the community from those who seek to spread hate and radicalise others to commit acts of terror. The Bill promotes a number of human rights, and to the extent that it limits other rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate aim.

I appreciate the time the Committee has taken to review the Bill, and have enclosed my response to the Committee's questions for its consideration.

I thank the Committee for bringing these matters to the Government's attention and I trust the response is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
21 / 8 /2023

Encl. *Response to the Committee's questions on the Bill*

Attachment A: Response to questions from the Parliamentary Joint Committee on Human Rights in relation to the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (Report 8 of 2023)

1. Criminalising the public display and trading of prohibited symbols

The questions answered below were published in the Parliamentary Joint Committee on Human Rights' Human Rights Scrutiny Report 8 of 2023. The paragraph references cited before each question refer to paragraphs of that report.

Paragraph 1.72(a): why current laws are insufficient to achieve the stated objective, noting that section 18C of the *Racial Discrimination Act 1975* appears to deal with some of the conduct sought to be criminalised

The measures in the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 (the Bill) would provide stronger protections for persons against racial hatred and vilification than are currently available under the *Racial Discrimination Act 1975,* in circumstances in which prohibited symbols are used to affect these harms. Section 18C of the *Racial Discrimination Act 1975* provides protection in the form of civil penalties if a person does an act that is likely to 'offend, insult, humiliate or intimidate' someone because of their race or ethnicity. The criminal penalties in the Bill (12 months imprisonment) is a more severe punishment than the civil penalties available for contravening section 18C of the *Racial Discrimination Act 1975*, due to its impact on an individual's personal rights and freedoms. The criminal penalty in the Bill is appropriate given the nature of the conduct warrants more severe punishment that would operate to deter the most serious offending.

The Bill would establish criminal offences, punishable by up to 12 months' imprisonment for the public display and trading of a prohibited symbol. This is a necessary measure as ideologically and religiously motivated violent extremists are finding new ways to promote hatred, instil fear and harass people within the community. Symbology is an effective tool that extremists are using to signal their ideology to a wide-reaching audience, to vilify members of the community, and to recruit and radicalise others. It is important that law enforcement is able to intervene at an early stage to protect the community by preventing the use of symbols to affect radicalisation, violence and the incitement of hatred, and that this conduct is met with a criminal justice response.

Paragraph 1.72(b) why each of the prohibited symbols are not defined in the legislation itself, including a written description of the symbols (such as that contained in the explanatory memorandum) and a graphic depiction of the symbols

New section 80.2E defines the term 'prohibited symbol' for the purposes of the offences in new sections 80.2H and 80.2J. Graphic depictions of the prohibited symbols were not included in the legislation because it would be contrary to the intent of the public display offence for the legislation itself to contain (and thereby display) the symbols. The Explanatory Memorandum provides a description of the three prohibited symbols.[1]

[1] Explanatory Memorandum, paragraphs 21, 25 and 29.

Paragraph 1.72 (c) why the bill does not contain a specific exception with respect to displaying the sacred Swastika in connection with Buddhist, Hindu and Jain religions

The Government acknowledges the significance of the sacred Swastika to Buddhist, Hindu and Jain communities as an ancient symbol of peace and good fortune.

The public display offence would not apply to the use of the sacred Swastika in connection with religious observance. New paragraph 80.2H(9)(a) would provide that the public display offence does not apply if a reasonable person would consider that a person caused a prohibited symbol to be displayed in a public place for a religious purpose. As provided in the Explanatory Memorandum, this would extend to the use of the sacred Swastika in connection with the practice of Buddhism, Hinduism or Jainism.[2] The sacred Swastika is an ancient symbol of peace and good fortune that holds immense significance to these faith communities.

Paragraph 80.2H(9)(a) is intended to apply to the public display of any of the prohibited symbols in connection with any religion, including Buddhism, Hinduism and Jainism. The exemption provision is intentionally non-prescriptive to ensure coverage is provided for all faith communities who may publicly display these symbols for religious purposes.

Paragraph 1.72 (d) what safeguards are in place to mitigate the risk that people of Muslim faith who are displaying the shahada for religious purposes are not inadvertently captured by the new offences, noting that the words of the shahada may constitute a symbol that so nearly resembles, or may be mistaken for, the Islamic State flag

The Bill does not criminalise the use or display of the Shahada. The amendments make clear that the Islamic State flag is prohibited – not the individual parts of that symbol, for example the text or creed.[3]

The Bill provides that a prohibited symbol includes a symbol that so nearly resembles the Islamic State flag that it is likely to be confused with, or mistaken for, an Islamic State flag (new paragraphs 80.2E(a) and (d)). This recognises that there may be some variations in the way in which the Islamic State flag is depicted, and is intended to avoid situations in which an individual could seek to avoid criminal liability under new legislation by slightly altering an Islamic State flag before engaging in otherwise prohibited conduct. These amendments would not, for example, result in criminal liability for publicly displaying the Shahada.

The Government acknowledges the importance of education to address these concerns, and has commenced early work to consider public awareness raising and education initiatives to support the implementation of these measures, should the Bill pass. The Government will ensure that clear and appropriate public messaging is disseminated, particularly to ensure that the new offences operate effectively to address the harms caused by the conduct they target. This will be particularly important in relation to communities which the prohibited symbols measures are designed to protect, including communities of faith.

[2] Explanatory Memorandum, paragraph 87.

[3] The Explanatory Memorandum describes the prohibited symbol in the following terms:

> The Islamic State flag is a rectangular, black emblem with white Arabic writing, and below the white Arabic writing is a white circle containing black Arabic writing. The white writing is an Islamic creed declaring 'There is no God but Allah, and Muhammad is his messenger'. The black writing translates to three words: 'God, messenger, Muhammad' (para 21).

Paragraph 1.72 (e) whether the meaning of 'displayed in a public place' would extend to documents (including photographs and images) posted on social media, including private accounts (for example, would a photograph posted on a private social media account of a group of people, with some wearing a Nazi costume, be taken to be displayed in a public place)

The Bill would insert a definition of 'public place' into the Dictionary of the *Criminal Code Act 1995* (Cth) (Criminal Code).

The term 'public place' would include any place to which the public, or a section of the public, have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to a place.

It is intended that this would extend to online spaces. The statutory note under new subsection 80.2F(3) includes an example to clarify that if a thing is included in a document that is publicly available on a website, then the thing is displayed in a public place.

Paragraph 1.72 (f) with respect to the requirement in subsection 80.2K(8) that a direction to cease displaying a prohibited symbol specify a reasonable time by which the direction must be complied with:

(i) why the legislation does not include the factors that the issuing police officer must have regard to when determining what is reasonable in the circumstances; and

(ii) whether a person has access to review with respect to the time period specified in the direction. For example, if a recipient of a direction did not receive the direction until after the time specified in the direction had lapsed, would they be able to rely on any defence for non-compliance with the direction or seek review of the time period specified in the direction

New subsection 80.2K(8) provides that a direction issued under subsection 80.2K(1) must specify the time by which the prohibited symbol must cease to be displayed in a public place, and that the time must be reasonable. This would ensure the person to whom the direction is issued can clearly understand what is being required of them in order to comply with the direction.

The requirement that the time be reasonable acknowledges that there are circumstances in which it may take time to comply with a direction to cease the display of a prohibited symbol in a public place. For example, if a direction is issued to an occupier of a property that has a prohibited symbol displayed on its front lawn and there is no one at the premises, the occupier would need to arrive at home before the direction could be complied with. Another example may be where the prohibited symbol is painted on a wall that is visible to the public and the directed person needs to obtain paint or some other means to cover the symbol. In other circumstances, it may be reasonable for the direction to stipulate that the prohibited symbol must be taken down immediately, for example, where someone is holding a poster.

The legislation does not set out specific criteria about what a police officer must have regard to when considering a reasonable time. It is intended that the police officer has the discretion in selecting a time period that is reasonable in the circumstances, having considered the practicalities of complying with the direction as well as the harm being caused by the continued display of the prohibited symbol.

New paragraph 80.2L(2)(b) provides that a direction may only be given if the police officer suspects on reasonable grounds that there are steps the person can take to cause the prohibited symbol to cease to be displayed in a public place. This requirement acts as a safeguard to ensure that a police officer cannot direct a person to take steps where it would not be possible for a person to take those

steps. It would also ensure that the most appropriate person is directed by the police officer, having considered the practicalities of removing the prohibited symbol from display.

The legislation does not include a review mechanism. Police officers exercising these powers will be subject to existing accountability mechanisms, which include review mechanisms, and will be required to record the use of these powers in accordance with existing procedures and requirements.

Additionally, the requirement in new subsection 80.2K(8) that the time period specified is reasonable serves as a further safeguard to ensure the police officer turns their mind to the specific circumstances in which the direction is issued.

If a person was charged with an offence under section 80.2M because they did not comply with a direction, the Court may consider whether the police officer gave the direction in accordance with the requirements of subsection 80.2K(1), including whether the time period specified in the direction was reasonable. A person may also rely upon a defence set out in paragraph 80.2M(5)(b) if there were no reasonable steps that they could take to cause the prohibited symbol to cease to be displayed in a public place.

Paragraph 1.72(g) whether there is any guidance regarding what would constitute 'reasonable steps' in the context of a person causing the prohibited symbol to cease to be displayed (as per paragraph 80.2M(5)(b)). For example, what would constitute reasonable steps to cause the symbol to cease to be displayed in the following circumstances:

(i) where a person has a tattoo depicting a prohibited symbol on a part of their body that is generally visible to the public, such as their hand, neck, face or ankle (including where the tattoo predated the commencement of this bill);

(ii) where a symbol is displayed by tenants and the landlord is issued with a direction as the owner of the premises;

(iii) where the symbol is on premises as a result of graffiti that is difficult to remove

New paragraph 80.2L(2)(b) provides that a direction may only be given if the police officer suspects on reasonable grounds that there are steps a person can take to cause the prohibited symbol to cease to be publicly displayed. This ensures that the police officer would consider the practicalities involved in removing the symbol from public display, and that the most appropriate person is issued the direction.

What constitutes reasonable steps will depend on the circumstances and context in which the direction is issued. When considering what is reasonable, a Court may consider the actions that a person took to cause a prohibited symbol to cease to be displayed, and any constraints or potential risks.

It would not be appropriate for the Government to provide advice as to whether or not specific circumstances will fall within the elements of the offences.

Paragraph 1.72(h) why the exceptions to the offence of publicly displaying a prohibited symbol in subsection 80.2H(9) do not extend to citizen journalists where their intention is to display the prohibited symbol only in the context of genuine dissemination of an event (for example, where a citizen journalist filmed neo-Nazis and posted that video online for informational purposes);

Read together with new paragraph 80.2H(1)(d), new paragraph 80.2H(9)(b) would have the effect that the public display offence does not apply if a reasonable person would consider that a person

caused a prohibited symbol to be displayed in a public place for the purpose of making a news report, or a current affairs report that is in the public interest, and is made by a person working in a professional capacity as a journalist. This paragraph would exempt bona fide journalism from the offence, recognising the critical role that the dissemination of news plays in our democratic society. For example, if a news programme was live broadcasting at a protest at which people held signs publicly displaying the Nazi hakenkreuz, it would be inappropriate for journalists and broadcasters reporting fairly and accurately on this event to have to censor their report in order to avoid criminal liability under new section 80.2H.

The public interest requirement and the requirement that the journalist or broadcaster is working in a professional capacity are intended to operate to exclude the displaying of prohibited symbols for the purpose of, for example, inciting violence or promoting hatred, while purporting to be journalism.

Paragraph 1.72(i) what other safeguards beyond the exceptions and defences to the offences are in place to ensure the proposed offences do not unduly restrict a person's freedom of expression (for example, will police be issued with training and guidance about how to exercise their directions power)

The exceptions and defences in the Bill play a critical role in safeguarding against undue restrictions on the right to freedom of expression. They were specifically designed to protect the right to freedom of expression in recognition of circumstances in which the public display or trade of prohibited symbols are legitimate.

New paragraph 80.2H(1)(c) would require the prosecution to establish one or more of the 'matters in subsections 80.2H(3), (4) and (7) in order to satisfy a court that the public display offence has been committed. These matters are that:

- a reasonable person would consider that the public display of the prohibited symbol involves dissemination of ideas based on racial superiority or racial hatred, or could incite another person or a group of persons to offend, insult, humiliate or intimidate targeted individuals or groups, because of the targeted individuals' or group members' race (new subsection 80.H(3))
- the public display of the prohibited symbol involves advocacy of hatred of a group of persons distinguished by race, religion or nationality (a targeted group), or a member of a targeted group; and involves advocacy that constitutes incitement of another person or group of persons to offend, insult, humiliate, intimidate or use force against the targeted group or a member thereof (new subsection 80.H(4)), or
- the public display of the prohibited symbol is likely to offend, insult, humiliate or intimate a reasonable person who is a member of a group of persons distinguished by race, colour, sex, language, religion, political or other opinion or national or social origin, because of the reasonable person's membership of that group (new subsection 80.H(7)).

This requirement is designed to ensure that the public display offence only restricts individuals' freedom of expression in circumstances where their expression would violate the rights of others under Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (new subsection 80.H(3)) or Articles 20 or 26 of the *International Covenant on Civil and Political Rights* (ICCPR) (new subsections 80.H(4) and (7)).

The Government has commenced work on public awareness raising and education initiatives to support the implementation of these measures should the Bill pass. This will include working with

the Commonwealth Director of Public Prosecutions (CDPP) and the Australian Federal Police (AFP) to ensure that prosecutors and law enforcement are equipped with appropriate guidance on matters, including the directions powers and protections and defences that will play a critical role in ensuring these new offences are fit for purpose and do not unduly encroach upon citizens' personal rights and freedoms.

Paragraph 1.72(j) why is it not required that police first issue a direction to cease displaying the symbol, and for that not to be complied with, before the offence of publicly displaying a prohibited symbol would apply

The power in new section 80.2K for a police officer to direct a person to remove a prohibited symbol from public display is intended to support the enforcement of the offence in new section 80.2H and minimise the harm occasioned by the public display of a prohibited symbol. It is not intended to serve as warning or precursor to a charge under new section 80.2H. The Government does not consider a warning or precursor mechanism to be necessary or desirable because the conduct described in new subsection 80.2H(1) is serious enough to warrant constituting a criminal offence in its own right. The offence in new section 80.2M for failing to comply with a direction to remove a prohibited symbol from public display is intended to serve a different purpose, which is to incentivise compliance with directions given by police officers in recognition of the harm that public display of prohibited symbols causes to the community.

Paragraph 1.72(k) why is it appropriate to subject children to criminal liability with respect to the offences of publicly displaying or trading in prohibited symbols or failing to comply with a direction to cease displaying a symbol

Publicly displaying and trading in goods that bear prohibited Nazi or Islamic State symbols causes significant harm to many Australians. These prohibited symbols – the Nazi hakenkreuz (or hooked cross), the Nazi double sig rune (the Schutzstaffel insignia or 'SS bolts') and the Islamic State flag – are widely recognised as representing and conveying ideologies of hatred, violence and racism which are incompatible with Australia's multicultural and democratic society. Extremists also use these symbols to recruit and radicalise vulnerable Australians to violence.

Given the significant harm engendered by the public display or trade of these symbols, it is appropriate that criminal liability apply if the prosecution establishes that any person, regardless of age, has engaged in the relevant conduct set out at section 80.2H.

Where children are involved in the alleged or the commission of offending, the AFP, its partner agencies within the Joint Counter Terrorism Teams and the CDPP have discretion about whether to progress a matter for investigation or prosecution. The AFP with their partners will consider diversionary tactics where appropriate. The AFP works collaboratively with state, territory and Commonwealth partners in considering the most appropriate support services available to law enforcement for children. Investigative decisions may also involve engagement with children and their parents or guardians to deter them from committing further offences or prevent further radicalisation, rather than progressing charges. This has the potential to curb further offending and issuing a caution may induce a more positive outcome for the young person rather than treating them as an alleged criminal. The Government considers that these safeguards will minimise the risk of inappropriate charging and prosecution of minors in relation to the new offences.

Paragraph 1.72(l) why, at a minimum, the Attorney-General's consent is not required prior to commencing proceedings against a child defendant, noting that this safeguard is included with respect to offences relating to the use of a carriage service for violent extremist material; and

The Attorney-General's consent to prosecute is required in certain circumstances to ensure there is appropriate oversight of a prosecutorial process that is particularly sensitive. These circumstances include where national security concerns require Ministerial oversight (see, for example section 83.5 of the Criminal Code), where matters could affect Australia's international or foreign relations (see, for example, section 268.121 of the Criminal Code) or when an alleged offender is under the age of 18 years (see, for example, section 270.7B of the Criminal Code).

The Attorney-General's consent is not required prior to commencing proceedings against a child defendant for the public display and trade offences because these are lower level offences when compared to the violent extremist material offences. This is reflected in the respective penalties for the offences. The public display or trade offences have a maximum penalty of 12 months' imprisonment, whereas the violent extremist material offences have a maximum penalty of five years' imprisonment.

Paragraph 1.72(m) whether the ban on trading goods containing a prohibited symbol is a proportionate limit on the right to a private life.

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. The right to privacy may be limited where the limitation is lawful and not arbitrary. In order for any interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in particular circumstances. The United Nations Human Rights Committee has interpreted reasonableness in this context to imply that any interference with privacy must be proportionate to the end sought and be necessary in the circumstances of any given case.

The trading offence is reasonable, necessary and proportionate to achieve the legitimate objectives of protecting national security, public order, and the rights and freedoms of others. Prohibited symbols represent hateful and violent ideologies. Trading in goods which bear those symbols supports the further dissemination of these ideologies as well as the continuation of an economy which allows for profiting from extremist and hateful ideologies. Accordingly, banning the trade in goods bearing prohibited symbols supports other rights including the right to life and security; the right to freedom of thought, conscience and religion; and the right to freedom of expression.

The trading offence is also appropriately limited because it does not apply to the private ownership of goods that bear prohibited symbols. The scope of the trading offence is also limited through defences and exemptions, which would provide legitimate avenues to trade such items, including for religious, academic, educational, artistic, scientific or literary purpose or public interest journalism. The trading offence would also not apply if the goods that are traded contain commentary on public affairs, the prohibited symbol appears in the commentary and making the commentary is in the public interest; the trading is necessary for, or of assistance in, enforcing, monitoring compliance with or investigating a contravention of the law, or for the administration of justice; and the trading is done by a public official or a person assisting a public official, in connection with the performance of the official's duties or functions, and the trading is reasonable in the circumstances for that purpose.

Accordingly, the limitation on the right to privacy would be permissible as it is a reasonable, necessary and proportionate means of achieving a legitimate objective to protect national security, public order and the rights and freedoms of others.

2. Criminalising the accessing or possession of 'violent extremist material'

Paragraph 1.97(a) whether a person would be likely to be found guilty of an offence in the following circumstances:

(i) accessing a blog post written by a member of a Ukrainian citizen army who describes the serious disruption of electronic systems used by the Russian army, with the intention of advancing the political cause of Ukrainian independence from Russia and encouraging persons to associate with their organisation, which assists in the intimidation of the Russian government;

(ii) sharing a link on social media of footage of protestors in Iran depicting serious damage to government property that is intended to advance the political cause of the protestors and the footage is intended to encourage others to associate with the organisation the protestors are part of;

(iii) possessing on a computer an article written by a member of the Provisional Irish Republican Army (IRA) from the 1970s that describes violent actions by the IRA, where the article was intended to advance the IRA's political cause and encourage others to join the IRA – in circumstances where the person possessing the article downloaded it onto their computer before these offence provisions commenced and did so for personal interest (rather than academic or historical research)

Counter-terrorism investigations are conducted by the AFP through Joint Counter Terrorism Teams (JCTT) with state and territory police, the intelligence community and international law enforcement partners. The investigations are required to meet a certain threshold and are subject to internal oversight bodies. The proposed offences would be investigated in line with the standard JCTT operational practices.

Any referral of conduct demonstrating support for, or a tendency towards, violence would be assessed on a case-by-case basis to determine whether there was sufficient evidence to establish the elements of the offence (or whether the conduct contravened any alternative offences). This gives law enforcement maximum discretion to consider any relevant matters in making their assessment. The elements that would need to be made out for each offence can be found in the Bill (see subsections 474.45B(1) and 474.45C(1)).

The AFP would determine potential charges based on the evidence available, in consultation with the CDPP, to form comprehensive pathways in a criminal investigation. It would not be appropriate for the Government to provide advice as to whether or not specific circumstances will fall within the elements of the offences.

Paragraph 1.97(b) whether a person would be considered to have 'accessed' violent extremist material in the following situations:

(i) where a person views violent extremist material on a social media platform, in a situation where the material automatically appears on a person's feed; and

(ii) where a person views material (that is not an official news source) as a result of searching for news content with respect to an unfolding situation overseas, such as the war in Ukraine;

For an offence under section 474.45B to be made out, the prosecution must establish that the person intended to access the material, or cause the material to be transmitted to the person,

transmit, make available, publish, distribute, advertise, promote or solicit material, or any of the prior conduct in relation to a link that can be used to access the material (paragraphs 474.45B(1)(a) and (2)(a)); the person used a carriage service to do so (paragraph 474.45B(1)(b)); and the person must be reckless that the material is violent extremist material (paragraphs 474.45B(1)(c) and (2)(b)). This means that a person who accidentally comes across violent extremist material on the internet without any warning from the context would not engage the offence, because they would not have intended to access the material. A person would also not be considered to have 'accessed' violent extremist material if a defence in section 474.45D is established.

Paragraph 1.97(c) why it is necessary for the definition of 'serious violence' in the context of the new offences to encompass all acts that currently constitute a terrorist act, noting that some acts would not fall within the ordinary meanings of 'violent' and 'extremist', such as serious electronic interference with financial systems;

The definition of 'serious violence' in subsection 474.45A(2) is action that falls within subsection 100.1(2) of the Criminal Code. This ensures that violent extremist material includes only material that deals with conduct so serious as to engender public harm purely through its possession or distribution. The definition of 'serious violence' of the purpose of the new offences has been modelled on the definition of that term in the broader definition of 'terrorist act' to ensure that harmful material, including instructional terrorist material and terrorist recruitment material, is appropriately covered.

In relation to the specific example identified by the Committee, electronic interference may also be addressed through other existing offences including offences in the *Criminal Code Act 1995* for unauthorised modification of data and creation and distribution of malicious software (Parts 10.7 and 10.8).

Paragraph 1.97(d) whether viewing or sharing material relating to the advocacy of regime change or the planning of civil disobedience or acts of political protest, even if possibly contentious or extreme, would be captured by the proposed offences

Paragraph 474.45D(1)(h) would provide a defence to the offences in new subsections 474.45B(1) and 474.45C(1) where the conduct is for the purpose of advocating a lawful procurement of a change to any matter established by law, policy or practice in any Australian jurisdiction or in a foreign country (or part thereof), and the conduct is reasonable in the circumstances for that purpose.

This could include, for example, material published by a civil society body for the purpose of denouncing the laws, policy or practice that enabled the conduct recorded or streamed in that material.

Paragraph 1.97(e) with respect to the journalist defence, why is it necessary to exclude citizen or independent journalists working in good faith but not strictly in a professional capacity

The defence in new 474.45D(1)(e) would exempt bonda fide journalism from the effect of the offences in section 474.45B and 474.45C. The public interest requirement and requirement that the journalist is working in a professional capacity are intended to operate to exclude material that has been published by individuals or organisations for the purpose of, for example, inciting violence or promoting hatred, but which purports to be journalism.

Paragraph 1.97(f) with respect to the defence of action done for 'scientific, academic or historical research', would this apply to people conducting research in a non-professional context but out of personal interest

In order for the defence in paragraph 474.45D(1)(d) to apply, the Court must consider that the conduct was reasonable in the circumstances for the purpose of conducting the research. The legislation does not require the research to be done in a specific context, rather that the conduct is reasonable for the purpose for which the research is undertaken.

Paragraph 1.97(g) what other safeguards beyond the defences to the offences are in place to ensure the proposed offences do not unduly restrict a person's right to freedom of expression

Together with the defences, the definition of violent extremist material would ensure that the new offences for using a carriage service to deal with this material would only restrict a person's right to freedom of expression to an extent that is reasonable, proportionate and adapted for the purpose of protecting national security, public order and the rights and freedoms of others. In order to constitute violent extremist material:

- the material must depict or describe, provide instruction on engaging in, or support or facilitate serious violence (new subsection 474.45A(1)(a))
- a reasonable person would need to consider that, in all the circumstances, the material is intended to, directly or indirectly, advance a political, religious or ideological cause (new subsection 474.45A(1)(b)), and
- a reasonable person would need to consider that, in all the circumstances, the material is intended to assist, encourage or induce a person in relation to an intimidatory act (new subsection 474.45A(1)(c)).

It is appropriate that the offences restrict a person's ability to use a carriage service to seek, receive and impart material that meets the above criteria, as this is necessary and reasonable to achieve the objective of preventing the use of violent extremist material to encourage and instruct individuals in the commission of violent acts, and radicalise vulnerable individuals to violent extremist ideologies.

Paragraph 1.97(h) what other, less rights restrictive approaches have been considered and why are they not appropriate to achieve the stated objectives

Commonwealth counter-terrorism investigations often identify individuals viewing and sharing violent extremist material, which the AFP consider can be a precursor or catalyst for an escalation to violence, criminal offending or acts of terrorism. Such material can contribute to a person engaging in conduct consistent with violent ideologies, planning attacks and mobilisation of groups. For example, the broad dissemination of violent extremist material online allows groups to magnify their impact.

The Government considered less rights restrictive approaches in the development of the Bill but determined they were not able to achieve the policy intent.

Paragraph 1.112(e) how the measure is compatible with the rights of the child, noting that the statement of compatibility does not provide an assessment with respect to these rights.

The Convention on the Rights of the Child provides that States parties should establish a minimum age of criminal responsibility of at least 14 years of age and, where appropriate and desirable and in a manner that respects human rights, deal with children accused of a crime without resorting to judicial proceedings, such as by way of diversionary programs. The violent extremist material offences limit the rights of the child by subjecting children to judicial proceedings. This limitation is

necessary and reasonable to achieve the legitimate objective of preventing the use of extremist material to encourage and instruct individuals in the commission of violent acts, and radicalise vulnerable individuals (including children) to violent extremist ideologies.

Under the *Crimes Act 1914* (Cth) (Crimes Act), the minimum age of criminal responsibility for Commonwealth offences is 10 years of age, meaning that a child under the age of 10 years old cannot be liable for an offence against the law of a Commonwealth. Children that are older than 10 years but under 14 years of age can only be liable for an offence against a law of the Commonwealth if the child knows that his or her conduct is wrong. The burden of proving that the child has sufficient capacity to know that the act was one they ought not to do or make is on the prosecution. A number of Australian jurisdictions are actively considering, or have committed to, raising the minimum age of criminal responsibility.

The Bill includes a safeguard that the Attorney-General consent to the prosecution of a person under the age of 18. This provides an opportunity for the Attorney-General to consider the appropriateness of the prosecution's consideration of all the circumstances of the case, including the context of the conduct, the particular circumstances of the child, and the need to protect the broader community from the impacts of violent extremist material.

Where children are involved in the alleged or the commission of offending, the AFP with their partners will consider diversionary tactics where appropriate. The AFP works collaboratively with state, territory and Commonwealth partners in considering the most appropriate wrap-around support services available to law enforcement for children.

Paragraph 1.97(i) why is it appropriate to subject children to criminal liability with respect to the offences relating to the use of a carriage service for violent extremist material, noting the position under international human rights law that non-judicial alternatives should be implemented, and the minimum age of criminal responsibility should be at least 14 years of age.

The Government notes paragraphs 21 to 25 of the AFP submission to the Parliamentary Joint Committee on Intelligence and Security's review of the Bill, which noted the increasing prevalence of young people being investigated for terrorism offences. The submission also discusses youth radicalisation and how the AFP manages this risk, including by pursuing avenues other than criminal liability.[4]

It is appropriate to subject children to criminal liability with respect to these offences given this increasing prevalence. By attaching criminality to the nature of material possessed, the offences would reflect the harm that is inherent in violent extremist material. Violent extremist material is harmful because it facilitates radicalisation, and may encourage and assist in planning violent acts. Without these offences, law enforcement will be limited in its ability to prosecute people for dealing with violent extremist material. These offences would facilitate law enforcement intervention at an earlier stage in an individuals' progress to violent radicalisation and provider greater opportunities for rehabilitation and disruption of violent extremist networks.

A number of Australian jurisdictions are actively considering, or have committed to, raising the minimum age of criminal responsibility. Under the Crimes Act, the minimum age of criminal responsibility for Commonwealth offences is 10 years of age, meaning that a child under the age of 10 years old cannot be liable for an offence against the law of a Commonwealth.

[4] Australian Federal Police submission 102, Submissions – Parliament of Australia (aph.gov.au).

Children that are older than 10 years but under 14 years of age can only be liable for an offence against a law of the Commonwealth if the child knows that his or her conduct is wrong. The burden of proving that the child has sufficient capacity to know that the act was one they ought not to do or make is on the prosecution.

Where children are involved in the alleged or the commission of offending, the AFP and the CDPP have discretion about whether to progress a matter for investigation or prosecution. The AFP with their partners will consider diversionary tactics where appropriate. The AFP works collaboratively with state, territory and Commonwealth partners in considering the most appropriate support services available to law enforcement for children. Investigative decisions may also involve engagement with children and their parents or guardians to deter them from committing further offences or prevent further radicalisation, rather than progressing charges. This has the potential to curb further offending and issuing a caution may induce a more positive outcome for the young person rather than treating them as an alleged criminal.

The Government considers that these safeguards will minimise the risk of inappropriate charging and prosecution of minors in relation to the new offences.

3. Expanding the offence of advocating terrorism

Paragraph 1.112(a) why the measure is necessary and in particular, why the existing legislation is insufficient to achieve the stated objective, noting that there are a number of existing offences in the Criminal Code that appear to capture the conduct sought to be criminalised by the measure.

The glorification of terrorism and violent extremism through praise has been of increasing concern to Commonwealth law enforcement and intelligence agencies in recent years. For example, following the March 2019 Christchurch mosque shooting, numerous individuals used the internet to share video footage of the atrocity, and the perpetrator's manifesto – idealising the perpetrator and his actions and ideologies. New paragraph 80.2C(3)(c) is necessary as it recognises that conduct of this nature could lead a person to engage in terrorism, and where it occurs in circumstances where there is a substantial risk of this, it is justifiably criminal.

Paragraph 1.11(b) whether there will be any guidance provided with respect to the interpretation of key terms in the measure, including 'instruction', 'praises' and whether there is a 'substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence'.

The terms 'instruction' and 'praises' are not defined and would take their ordinary meaning. These terms are undefined to ensure that they capture a rage of conduct by which a person could provide instruction on, or praise, the doing of a terrorist act or commission of a terrorist offence. For example, instruction could include providing or distributing a guide or manual on how to carry out a terrorist act; filming a video stepping out how to perform a beheading; or guiding someone on how to obtain material in order to engage in a terrorist act.

The Bill is intentionally silent on the contexts in which the qualifier that a substantial risk that praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence would apply. This would be considered on a case-by-case basis to give the courts maximum discretion to consider any matters it considers relevant in making an assessment about whether the elements of the offence are satisfied.

Paragraph 1.112(c) what other safeguards exist to ensure the measure does not unduly restrict a person's right to freedom of expression.

The right to freedom of expression is limited proportionately as the Bill would only criminalise praising the doing of a terrorist act or commission of a terrorism offence where the praising has occurred in circumstances where there is a substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence. Where such a risk exists, restricting a person's right to freedom of expression by criminalising this praising serves the legitimate objective of preventing the commission of terrorist acts or offences, which can have extremely grave consequences including causing deaths, and promotes other rights. Where there is no such substantial risk, the praising of terrorist acts and offences would not be caught by the offence.

Paragraph 1.112(d) what other, less rights restrictive approaches have been considered and why are they not appropriate to achieve the stated objectives.

The measure that has been introduced in this Bill is the least rights-restrictive option considered that would achieve the stated objectives. The alternative options considered were:

- Criminalising the praising the doing of a terrorist acts or the commission of a terrorism offence without the qualifier that there must be a substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence.
- Establishing a standalone offence for the glorification of terrorism.

Neither of these options were pursued because the approach taken in the Bill was identified as a less rights-restrictive means of addressing the significant concerns identified by law enforcement regarding the glorification of terrorism and violent extremism.

Senator the Hon Penny Wong
Minister for Foreign Affairs

MC23-005281

16 AUG 2023

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

Dear Chair

Thank you for your email of 3 August 2023 regarding the human rights compatibility of the International Organisations (Privileges and Immunities) Amendment Bill 2023.

I enclose a response to the request for information from the Parliamentary Joint Committee on Human Rights (the Committee), as set out in the Committee's Report 8 of 2023.

Should you require further information, the responsible officer for this matter in my Department is Mr Ben Milton, Assistant Secretary, Corporate Legal Branch, who can be contacted on (02) 6261 3075.

I trust this information is of assistance.

Yours sincerely

PENNY WONG

Encl.

Response to request for information from the Parliamentary Joint Committee on Human Rights (the Committee) in its Report 8 of 2023 in relation to the International Organisations (Privileges and Immunities) Amendment Bill 2023 (the Bill).

The Committee has sought the Minister's advice in relation to:

a) which classes of persons are likely to receive personal immunity by way of regulations;

b) if there any safeguards to limit who can be accorded personal immunity;

c) whether requesting an international organisation to waive immunity to enable investigation and prosecution of an individual accused of torture, rather than having a statutory exception to allow such investigation, prosecution or extradition, is consistent with Australia's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention); and

d) does Australia currently have any obligations under international law, other than under the Framework Agreement with *the Organisation for Joint Armament Cooperation (Organisation Conjointe de Coopération en Matière d'Armement* (OCCAR), to confer privileges and immunities on organisations of which it is not a member, and if so, what are the sources of those obligations.

I welcome the opportunity to provide this response to the Committee as part of its scrutiny of the Bill.

Background

It is well recognised in Australia and the international community that international organisations require privileges and immunities to function effectively. The freedoms and protections provided by States to international organisations allow those organisations to operate independently without fear of coercion or interference.

Conferral of personal immunities on representatives of international organisations

The proposed amendments will improve the implementation of Australia's international obligations.

At present, Australian must 'match' the category of officials to whom we have agreed to grant privileges and immunities to the predetermined categories contained in the Act, and these do not always align. This issue has arisen in the context of the tax concessions accorded to the officials of international organisations, whereby a very small number of officials have not received the concessions Australia has agreed by treaty to grant.

Given there are only 70 officials accredited to 14 international organisations in Australia at present, this issue arises rarely but nonetheless warrants rectification. The amendments will enable future regulations to use the same terminology as in the relevant treaty. This will minimise the gaps between our international obligations and implementation.

Further, the amendments will enable the Government to choose specifically which of the existing privileges and immunities available under the Act are appropriate in the individual case, rather than being tied to a particular schedule of immunities in the Act. This will increase Australia's ability to ensure that only those privileges and immunities that are necessary and reasonable are granted, having regard to the applicable treaty. It will also ensure closer alignment of the privileges and immunities agreed by Australia in treaty and those accorded under the Act.

It is also important to note that personal jurisdictional immunity (immunity for acts performed in a personal as well as an official capacity) is only conferred on a very limited class of persons in Australia, namely 'high officers' of international organisations. Only the most senior officers of an

international organisation are accredited as 'high officers' for the purposes of the Act. There are currently only three people accredited as such in Australia – the Executive Secretaries of:

- The Commission for the Conservation of Southern Bluefin Tuna, headquartered in Canberra;
- The Secretariat to the Meeting of the Parties to the Agreement on the Conservation of Albatrosses and Petrels, headquartered in Hobart; and
- The Commission for the Conservation of Antarctic Marine Living Resources, headquartered in Hobart.

Other international organisations with a presence in Australia which are granted privileges and immunities do not have officers of sufficiently high rank to be accredited as 'high officers'.

The Act accords personal jurisdictional immunity on 'high officers' by conferring like privileges and immunities as are accorded to a diplomatic agent (Schedule 2 to Part 1 of the Act). This includes immunity from criminal jurisdiction and from civil and administrative jurisdiction, with certain exceptions relating to actions for private immovable property, succession and professional or commercial activity exercised outside of official functions. Lower ranking 'officers' of international organisations only enjoy functional immunities under the Act. This means that they only have immunities from legal process for acts done and things said in the exercise of their official functions. The scope of a person's official functions is limited by reference to the functions of the international organisation in question, which are generally set out in the relevant treaty.

As explained below, the mechanism for granting privileges and immunities also requires regulations to be made, ensuring that as a limitation on human rights, any privileges and immunities are based on domestic legislation and there is a high degree of parliamentary oversight of which persons in an organisation will be conferred which privileges and immunities.

Procedural safeguards

The processes for conferring privileges and immunities on an organisation incorporates robust safeguards, including parliamentary scrutiny.

Under the Act, conferral of privileges and immunities on an international organisation and its officials occurs by way of regulations made by the Governor-General. The Bill in no way affects this process. This means that regulations implementing the Bill will be required to be tabled in Parliament and will be disallowable in each case. Parliament will have the opportunity to consider each set of regulations and either House of Parliament may stop their operation by a vote. At present, the decision to grant privileges and immunities will be a decision for the Australian Government, with the highest level of government oversight and subject to parliamentary scrutiny.

This safeguard increases consistency with human rights, ensuring privileges and immunities are based on domestic legislation, considered by the Government to be appropriate to pursue legitimate aims, and closely align with applicable international obligations.

As a matter of general practice, privileges and immunities are also only conferred where Australia has agreed to do so. International agreements requiring Australia to accord privileges and immunities are subject to the treaty making process under Australian law, which includes ministerial and parliamentary scrutiny (by the Joint Standing Committee on Treaties) of the proposed treaty and its domestic and foreign policy impacts.

Consistency with obligations under the Convention

Australia has an unwavering commitment to the absolute prohibition against torture and cruel, inhuman or degrading treatment or punishment, for all people and in all circumstances. Australia is a party to the Convention and acts consistently with its international law obligations under the

Convention. Australia regularly advocates against torture bilaterally, multilaterally and through the Universal Periodic Review mechanism.

The purpose of privileges and immunities is not to shield the individual, but rather to protect them in the fulfillment of their functions. The proposed amendments will not increase the immunities available in Australia to representatives of international organisations or promote the conferral of personal jurisdictional immunities to categories of officials other than as are currently conferred under the Act. Rather, as set out above, these amendments will provide greater flexibility and efficiency to the process of conferring the existing suite of privileges and immunities in the Act to officials, overcoming the divergences between rigid classifications contained in the Act and the variety of different designations and structures adopted by the many organisations that exist in the multilateral environment.

Australia will at all times continue to act consistently with its international human rights obligations, including under the Convention.

Obligations under international law to confer privileges and immunities on organisations

The granting of privileges and immunities to international organisations is a commonly accepted practice in international law. Australia is bound under a number of multilateral and bilateral treaties to confer privileges and immunities on various international organisations and their officials.

One of the purposes of the Bill is to enable Australia, in accordance with its national interests, to enter into treaties with organisations which require the conferral of privileges and immunities to that organisation, and meet the obligations contained in those treaties. This scenario, whereby the privileges and immunities capable of conferral under the Act do not strictly align with the treaty, is demonstrated by the current OCCAR example. We anticipate other scenarios of this nature will arise as Australia expands its international cooperation.

The proposed changes to the Act will help broaden and deepen Australia's engagement with the international community, including international organisations of which Australia is not a member. They will benefit Australia's international engagements in the commercial, defence, humanitarian, scientific and other fields. They will open up opportunities for industry engagement, attracting international expertise and promoting the exchange of information, knowledge and ideas.

Where Australia accepts obligations to confer privileges and immunities with an organisation by entering into an agreement, this will be subject to the treaty process (including parliamentary and Vice-Regal consideration) outlined above. Additionally, whether such organisations are ultimately conferred privileges and immunities will be subject to parliament's agreement do so, as this will require the creation of regulations which will be subject to parliamentary scrutiny and Vice-Regal action.

THE HON ANDREW GILES MP

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MS23-001794

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

Dear Mr Burns

Thank you for your correspondence of 3 August 2023 on behalf of the Parliamentary Joint Committee on Human Rights concerning the Migration Amendment (Strengthening Employer Compliance) Bill 2023 and the Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/016) 2023 [F2023L00609].

In its Report 8 of 2023, the Committee requested further information about human rights issues in relation to the above legislative instruments. Please find attached for the Committee's consideration the responses to the Committee's questions.

I appreciate the extension until 21 August 2023 in which to provide the response.

Thank you for raising these matters.

Yours sincerely

ANDREW GILES
28-08-2023

Response to the Parliamentary Joint Committee on Human Rights

Report 8 of 2023 – Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/016) 2023 [F2023L00609]

In Report 8 of 2023, the Parliamentary Joint Committee on Human Rights (the Committee) sought further information from the Minister in relation to the Migration (Granting of contributory parent visas, parent visas and other family visas in financial year 2022/2023) Instrument (LIN 23/016) 2023 [F2023L00609] (legislative instrument).

The legislative instrument determines the maximum number of visas that may be granted for certain classes of visas in the financial year from 1 July 2022 to 30 June 2023.

Capping numbers of parent visas

Committee view

1.194 The committee notes that capping the number of parent visas and other family visas for the 2022–2023 financial year engages and may limit the right to protection of the family and the rights of the child. Noting that the instrument is not accompanied by a statement of compatibility (as this is not required as a matter of law), the committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

(a) whether setting a cap on the number of parent and other family visas seeks to achieve a legitimate objective for the purposes of international human rights law;

(b) whether the cap on the number of visas is a reasonable and proportionate measure to achieve the stated objective;

(c) whether any children under 18 years would be likely to be separated from their parents as a result of caps imposed on the numbers of parent visas granted;

(d) whether there is any discretion to ensure family members are not involuntarily separated as a result on the cap of the number of parent and other family visas;

(e) what is the average length of time for visas capped under this legislative instrument to be finally processed, and are these timeframes consistent with the right to protection of the family and the rights of the child; and

(f) whether the right to the protection of the family and the rights of the child were considered when these capped numbers were determined.

Minister's response

(a) whether setting a cap on the number of parent and other family visas seeks to achieve a legitimate objective for the purposes of international human rights law

(b) whether the cap on the number of visas is a reasonable and proportionate measure to achieve the stated objective

Australia's Family Migration Program facilitates the reunification of family members (including Parents and Other Family) with Australian citizens, permanent residents or eligible New Zealand citizens. The requirement not to arbitrarily or unlawfully interfere with the family unit under Articles 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR) does not amount to a right to enter Australia where there is no other right to do so. While there is no absolute right to family reunion at international law, the Australian Government recognises that it is an important principle and it is facilitated where possible.

It has been the long-standing practice of successive governments to manage the orderly delivery of the Migration Program against planning levels. This is a legitimate state objective. Each year, the Australian Government sets Migration Program planning levels following consultations with state and territory governments, business and community groups and the wider public.

The Department of Home Affairs (the Department) manages the allocation of resources to deliver the Family Program, including Parent and Other Family visas, in line with the planning levels and priorities set by the Government.

Furthermore, section 85 of the *Migration Act 1958* (the Act) allows the Minister to determine the maximum number of visas which may be granted in each financial year in certain visa categories, including Parent and Other Family visas. If a visa class has been 'capped' this means that if the number of visas granted within that financial year have reached the maximum number determined by the Minister, no more visas of that class may be granted in that financial year. Those visa applications will be 'queued' for further processing in the next financial year.

The 'cap and queue' power allows the annual Migration Program to be managed more efficiently by:

- limiting the number of visas that may be granted under a specific class, while queueing additional applications which satisfy the criteria for grant; and
- ensuring that applications which do not satisfy the criteria for a visa can be refused and do not remain in the queue for years before a decision is made on their application.

The number of Contributory Parent, Parent and Other Family visa application lodgements continue to exceed the visa places allocated each financial year by the Australian Government. In order to facilitate the orderly and equitable processing of visa applications in these categories, Parent, Contributory Parent and Other Family visas are capped at their respective planning levels via a legislative instrument under annual Migration Program arrangements that have been in place for over ten years. The cap on the number of visas remains a reasonable and proportionate measure to manage the orderly delivery of the Migration Program.

(c) *whether any children under 18 years would be likely to be separated from their parents as a result of caps imposed on the numbers of parent visas granted*

(d) *whether there is any discretion to ensure family members are not involuntarily separated as a result on the cap of the number of parent and other family visas*

While the Australian Government recognises that family reunion is an important principle and will be facilitated where possible, as noted above, rights in relation to family reunion, including those under Articles 17 and 23 of the ICCPR, and Article 10 of the *Convention on the Rights of the Child*, are not absolute rights at international law and do not amount to a right to enter Australia where there is no other right to do so.

The capping of Parent and Other Family visas made under section 85 of the Act facilitates the orderly and equitable processing of all visa applications in these categories, including those involving children under 18 years of age.

In addition to Australia's permanent Family Migration Program, the Australian Government also facilitates short-term family reunification through temporary visas, which allow for a temporary stay in Australia. Family visa applicants, including those awaiting an outcome of their permanent Parent visa, may be able to reunite with family members in Australia, subject to meeting the visa eligibility criteria. Visa options include:

- Visitor visas are available for the purposes of a short-term stay in Australia, including family visits, and can be used by applicants to temporarily visit family members in Australia while awaiting the outcome of a permanent visa application, provided the requirement for a genuine temporary stay in the interim is met. Visitor visas include the Electronic Travel Authority (ETA) (subclass 601) and eVisitor visa (subclass 651), which are available to particular citizenships only for stays of up to three months at a time; and the Visitor visa (subclass 600), which is available for a stay of up to 12 months.
- The Visitor visa (subclass 600) includes the Sponsored Family stream, which enables Australian citizens and permanent residents, aged at least 18 years, to sponsor a relative for short-term stays in Australia. Visitor visa policy also allows for parents of Australian citizens or permanent residents to be granted Visitor visas (subclass 600) with visa validity periods greater than the standard 12 months.
- The Sponsored Parent (Temporary) Visa (subclass 870) (SPTV), which opened to visa applications on 1 July 2019, provides an alternative pathway for parents to reunite with their adult children in Australia, and has been capped at 15,000 places per program year. The SPTV allows parents of Australian sponsors (who are at least 18 years of age) to visit Australia for up to three or five years at one time, for a combined maximum stay of up to 10 years.

(e) *what is the average length of time for visas capped under this legislative instrument to be finally processed, and are these timeframes consistent with the right to protection of the family and the rights of the child*

The average processing times for visas capped under the legislative instrument are impacted by a range of factors, including the number of places allocated to the program each year within the broader Migration Program and the level of demand for the visas. High volumes of visa application lodgements for some programs, including Parents, which for a number of years exceeded annual migration planning levels, have impacted on processing times and the number of on-hand applications within these categories.

The Home Affairs website provides information on processing times for visas capped under the legislative instrument, including key processing milestone dates, which can be accessed at:

Parent visas queue release dates: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates

Other family visas queue release dates: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/other-family-visas-queue-release-dates

In addition to Australia's permanent Family Migration Program, the Australian Government also facilitates short-term family reunification through temporary visas as detailed above, which allow for a temporary stay in Australia and have significantly shorter processing times. Family visa applicants, including those awaiting an outcome of their permanent Parent visa, may be able to reunite with family members in Australia, subject to meeting the visa eligibility criteria.

(f) whether the right to the protection of the family and the rights of the child were considered when these capped numbers were determined

When developing policies and drafting legislation related to the Family Program, the Department carefully considers compliance with Australia's international human rights obligations.

Response to Parliamentary Joint Committee on Human Rights

Report 8 of 2023 – Migration Amendment (Strengthening Employer Compliance) Bill 2023

In Report 8 of 2023, the Parliamentary Joint Committee on Human Rights (the Committee) sought further information from the Minister in relation to the *Migration Amendment (Strengthening Employer Compliance) Bill 2023* (the SEC Bill).

The SEC Bill seeks to address the misuse of migration rules to exploit temporary migrant workers and strengthen employer compliance with obligations under the *Migration Act 1958* (the Migration Act). The Bill complements the protection of workplace rights under the *Fair Work Act 2009* (the Fair Work Act), which provides the framework for Australia's national workplace relations system, including a safety net of minimum terms and conditions of employment.

In order to achieve its objectives, the Bill proposes new criminal offences and increased penalties to address serious and deliberate contraventions of the *Migration Act*. It also proposes new compliance tools to support employers to meet their obligations under the *Migration Act*.

The SEC Bill also proposes measures that will help to ensure migrant workers are confident they can make a complaint and seek support without jeopardising their immigration status. These measures also seek to help to ensure that employers cannot use migration rules to abrogate their obligations to provide safe and fair working conditions.

In addition, the SEC Bill includes measures that seek to protect temporary migrant workers from unscrupulous employers. The primary intent is that those employers engaged in serious, repeated or deliberate non-compliance of specified laws (including certain offences under, or breaches of, the Migration Act, the Fair Work Act and the *Criminal Code Act 1995* (the Criminal Code)) will be prohibited from allowing any additional temporary migrant workers to begin work for a specified period. The prohibition decision includes, and is informed by, a natural justice process.

The measures proposed in the SEC Bill provide for a graduated approach to compliance and enforcement. Combined, these measures strengthen the regulatory framework available under the *Migration Act* to improve employer compliance; they implement recommendations 19 and 20 of the Report of the Migrant Workers' Taskforce; and they help to remove known barriers to reporting employer non-compliance. These measures form a critical part of a broader package of reforms to address migrant worker exploitation.

Employer Sanctions for Coercive Practices

Committee view

The committee considers that establishing new mechanisms to prevent exploitative work practices, to protect vulnerable migrant workers, promotes the rights to just and favourable conditions of work, equality and non-discrimination and the prohibition against slavery and servitude. The committee considers the statement of compatibility should reflect that the measures would promote the right to equality and non-discrimination.

The committee notes that expanding the application of the inspector's investigatory powers may also engage and limit the right to privacy. The committee notes that the statement of compatibility does not identify the engagement of this right, and therefore seeks the minister's advice as to whether the measure constitutes a permissible limit on the right to privacy, including the presence of safeguards, the circumstances in which information gathered by the inspector may be disclosed, and relevant oversight and review mechanisms.

Minister's response

The SEC Bill expands the compliance tools available under the *Migration Act* by providing enforcement officers with the power to accept and enforce undertakings under the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) or issue a Compliance Notice. The Bill would also allow inspectors to utilise existing investigative powers available under the Migration Act in an additional circumstance, that is, to investigate whether a person who is or was an approved work sponsor has acted in contravention of a compliance notice. As the Committee has noted, enabling the inspector to enter premises, ask questions and require the provision of documentation in order to enforce compliance notices would facilitate the enforcement of provisions intended to protect workers, and the Migration Act constrains the circumstances in which, and purposes for which, an inspector may exercise their investigatory powers.

It is intended that the processes for inspectors exercising their existing powers in this additional circumstance will be consistent with all relevant laws, as well as the current policies and practices in relation to the use of such powers and information sharing.

In terms of use of powers, these are guided by policies and procedures developed under the Home Affairs Policy and Procedure Control Framework, which includes extensively consulted procedures to ensure conformity with the law as well as an assurance and control matrix to support ongoing compliance with those policies and procedures. Enforcement officers also require appropriate training in order to use the enforcement powers.

In terms of oversight, there are a range of mechanisms in place to detect, investigate and resolve issues of non-compliance, including the Home Affairs Integrity & Professional Standards strategy and resources which include avenues for referral to the National Anti-Corruption Commission (previously the Australian Commission for Law Enforcement Integrity). In addition, complaints could potentially be made to the Australian Human Rights Commission, the Commonwealth Ombudsman or, where there is concern about a breach of law, state and territory law enforcement (including police).

The Department is subject to a number of legislative provisions that restrict the disclosure of information. If disclosure of the information is authorised under section 140XJ of the Migration Act, it will be a disclosure authorised by law and permitted under paragraph 42(2)(c) in Part 6 of the *Australian Border Force Act 2015* (the ABF Act) and Australian Privacy Principle (APP) 6.2(b) in Schedule 1 to the *Privacy Act 1988* (the Privacy Act). All officers and contracted service providers

dealing with these kinds of information must be aware of the Department's obligations under the APPs in the Privacy Act. The Privacy Act determines how officers must handle personal information, and covers the collection, accuracy, storage, access, modification, use and disclosure of the information.

If enforcement officers require advice on whether information may be lawfully disclosed under the ABF Act or the Privacy Act, they are advised in internal procedural instructions to contact the Department's Privacy and Information Disclosure Section.

As noted above, all enforcement actions are restricted by the powers conferred under the Migration Act, and (where relevant) the details approved in the warrant for the activity. The disclosure of information obtained during an activity would occur where it is lawful, including to refer suspected breaches of law to the relevant enforcement agency. This may include referrals to the Fair Work Ombudsman (for suspected breaches of the Fair Work Act), the Police (for criminal offences, including the identification of possible indicators of human trafficking).

Publication of information about prohibited employers

Committee view

The committee considers that establishing new mechanisms to prevent exploitative work practices against non-citizens in Australia, including by prohibiting certain employers from employing further non-citizens, are directed towards the important objective of protecting vulnerable migrant workers. The committee notes that these proposed measures would promote the right to just and favourable conditions of work, the absolute prohibition against slavery and servitude, and the right to equality and non-discrimination.

The committee notes one aspect of these proposed measures would be the publication of declarations that a person is a prohibited employer. The committee considers that the publication of this information may also promote those human rights, insofar as it may protect temporary migrant workers from employers found to have breached workplace laws. The committee considers that this also engages and limits the right to privacy. The committee considers that further information is required to assess the compatibility of this measure with this right, and as such seeks the minister's advice in relation to:

(a) why information identifying a prohibited employer, and the grounds for their prohibition, needs to be published online in order to achieve the stated objectives;

(b) why it is proposed that regard may be had to migrant worker sanctions issued in the previous five years, and not a shorter period;

(c) what is the maximum period for which a person may be declared to be a prohibited employer;

(d) whether an employer would be permitted to make submissions relating to the potential length of a prohibition declaration, and whether such a submission would be relevant to an assessment of how long a declaration may remain in force;

(e) why the minister does not have the discretion to determine that an employer may not be required to provide additional information in the twelve months after a prohibition declaration has ended, or that this requirement may be otherwise altered in certain circumstances;

(f) why the bill would not require the minister to correct inaccurate or misleading information relating to a prohibition declaration; and

(g) whether other, less rights restrictive alternatives (such as providing relevant information to the public on a request basis, or facilitating access to the information only to non-citizens as part of the visa application process) would be ineffective to achieve the stated objective of the measure.

Minister's response

(a) why information identifying a prohibited employer, and the grounds for their prohibition, needs to be published online in order to achieve the stated objectives

The prohibition is a protective and general deterrent measure. By publishing the details of the prohibition, existing and prospective employees can make an informed decision about whether to work for that employer. Publishing this information will also support enforcement of the prohibition measure as it allows third parties to report concerns to Home Affairs if they believe the employer is acting in breach of the prohibition and deters employers from engaging in exploitative work practices where they see there are consequences for doing so in terms of prohibition and adverse publicity for their business.

This is in line with the existing registers, including:

- The *Register of sanctioned employers* on the Australian Border Force website, which lists details of sponsors who have breached their sponsorship obligations, and

- The register of *Disciplinary decisions* on the Office of the Migration Agent's Registration Authority (OMARA) section on the Home Affairs website, which details disciplinary decisions made by the OMARA.

(b) why it is proposed that regard may be had to migrant worker sanctions issued in the previous five years, and not a shorter period

While the Government will seek to consider imposing a prohibition as soon as reasonably practicable, not all proceedings for workplace-related contraventions are brought by the Commonwealth – cases may be brought privately, including by a non-government entity, such as a union or community legal centre. In addition, some matters will involve the imposition of a sanction by the Fair Work Commission under the Fair Work Act, or by a Court, without the involvement of the Department of Home Affairs. Therefore, not all 'migrant worker sanctions' will be immediately known to the Department of Home Affairs and it may take some time for the Department to gather the information that is needed for the consideration of imposing the prohibition declaration, including natural justice processes and review processes available to the employer. In this context, it is appropriate to allow a reasonable period of time before an employer is no longer in scope for the prohibition.

The prohibition initiative is both a protective measure and general deterrent safeguarding the interests of temporary migrant workers. Given its intent (to protect temporary migrant workers from employers who have engaged in serious, repeated or deliberate non-compliance involving migrant workers), the timeframe for making a prohibited employer declaration draws from the existing framework for 'spent convictions' which permits most convictions to no longer be disclosed after a period of good behaviour, in effect reflecting that the person is considered 'reformed'. Under Commonwealth law, a conviction is generally deemed 'spent' after 10 years, making 5 years an appropriate mid-point after which it is considered to no longer be appropriate for the Minister to make the employer prohibition declaration.

(c) what is the maximum period for which a person may be declared to be a prohibited employer

The Bill does not specify a minimum or maximum period for which the person may be declared to be a prohibited employer and the duration of the prohibition will depend on the circumstances of the case. It should be noted that in Canada, for example, there are employers who have been permanently banned from hiring temporary workers. Recognising that the prohibition measure may be triggered by some of the most serious offences of exploitation under the Criminal Code (including cases of modern slavery), the Minister may consider an extended prohibition appropriate in the most serious and small number of cases (such as human trafficking or modern slavery). Mandating any minimum or maximum period could adversely affect the Minister's discretion to act or not to act in individual circumstances of a particular matter and for this reason are avoided.

It is noted that under current employer sponsorship provisions, employer prohibitions are generally issued for a period of a few years.

(d) whether an employer would be permitted to make submissions relating to the potential length of a prohibition declaration, and whether such a submission would be relevant to an assessment of how long a declaration may remain in force

As noted by the Committee, the prohibition measure includes a 'show cause' process under which the Minister provides persons subject to a migrant worker sanction with an opportunity to outline any extenuating circumstances to inform the Minister's decision. An employer can use this submission to put forward a case on the potential length of the prohibition. The Minister must take into account any written submissions made by the person as part of this process. For clarity and completeness, the Minister could specify in this invitation the proposed duration of the prohibition in order to provide the persons subject to the migrant worker sanction an opportunity to make a case for the duration to be shorter, if the prohibition were to be imposed.

It should be noted that the Minister's intention is that migrant worker sanctions will be imposed where there are demonstrable cases of serious, deliberate or repeated non-compliance, usually involving a court finding about the non-compliance or non-compliance that is in breach of an enforceable undertaking or compliance notice. In effect, the prohibition declaration will follow a process through which the person will have already had an opportunity to appeal a court finding or contest a sanction.

The Minister's decision to declare a person to be a prohibited employer is also subject to merits review.

Under section 43 of the *Administrative Appeals Tribunal Act 1975*:

> (1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:
>
> (a) affirming the decision under review;
>
> (b) varying the decision under review; or
>
> (c) setting aside the decision under review and:
>
> (i) making a decision in substitution for the decision so set aside; or

(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

In effect, the Tribunal has all of the powers of the original decision maker and could, for example, make a decision that imposes a different prohibition period than that imposed by the original decision-maker.

(e) why the minister does not have the discretion to determine that an employer may not be required to provide additional information in the twelve months after a prohibition declaration has ended, or that this requirement may be otherwise altered in certain circumstances

The proposed additional reporting period is intended to re-establish trust that employers found to have engaged in serious, deliberate or repeated non-compliance will comply with their obligations. The reporting is not onerous, and is necessary for reinforcing the importance of compliance.

(f) why the bill would not require the minister to correct inaccurate or misleading information relating to a prohibition declaration

Under Australian Privacy Principle (APP) 13 – correction of personal information, the Department of Home Affairs (as an APP entity) must take reasonable steps to correct personal information as defined in section 6 of the Privacy Act to ensure that, having regard to the purpose for which it is held, it is accurate, up-to-date, complete, relevant and not misleading. The requirement to take reasonable steps applies in two circumstances: where an APP entity is satisfied that personal information it holds is incorrect, or at the request of an individual to whom the personal information relates.

Home Affairs' privacy policy sets out how an individual can seek correction of personal information held by the Department. Policies and procedures will be developed to support implementation of this measure in line with the Australian Privacy Principles. In line with the Policy and Procedure Control Framework, these policies and procedures will include a robust assurance and control matrix.

(g) whether other, less rights restrictive alternatives (such as providing relevant information to the public on a request basis, or facilitating access to the information only to non-citizens as part of the visa application process) would be ineffective to achieve the stated objective of the measure

The prohibition is aimed at protecting migrant workers from unscrupulous and exploitative work practices by employers. Transparency about the prohibition, and prohibited employers, is essential for achieving the objectives of the measure. Appropriate disclosure will help temporary migrant workers and other existing and prospective employees to be informed about any previous exploitative actions of the employer, allowing them to decide whether or not to work for that employer.

Publication will also help to hold the employer to account, supporting monitoring of prohibited employers as third parties will be able to report suspected breaches of the prohibition.

Finally, publication of prohibited employer information should also deter employers from engaging in exploitative practices.

These objectives could not be achieved through more limited disclosure of the information.

The proposed publication of this information is also consistent with existing practices under the Register of sanctioned employers on the Australian Border Force website.

The Hon Ged Kearney MP
Assistant Minister for Health and Aged Care
Member for Cooper

Ref No: MC23-014901

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

Dear Chair

I refer to your correspondence of 3 August 2023 to the Minister for Health and Aged Care, the Hon Mark Butler MP, regarding the Parliamentary Joint Committee on Human Rights' (Committee) Report 8 of 2023, seeking advice in relation to the National Occupational Respiratory Disease Registry Bill 2023 (Bill). This matter has been referred to me as the Assistant Minister for Health and Aged Care.

I appreciate the important role of the Committee in scrutinising the implications of legislation on human rights, and respect the commitment of members in articulating concerns and seeking further information in the discharge of their duties. In my capacity as the Assistant Minister for Health and Aged Care, I am focused on ensuring the health of the Australian community is protected and acknowledge the need to balance this against human rights.

The Bill engages Article 12 of the 'International Covenant on Economic, Social and Cultural Rights' by supporting the enjoyment of the highest attainable standard of physical and mental health, by all appropriate means, as a right to all. The Bill assists the advancement of this human right by establishing the National Occupational Respiratory Disease Registry (National Registry). The National Registry is designed to support the identification of industries, occupations, job tasks and workplaces where there is a risk of exposure to respiratory disease-causing agents, which will enable the application of timely and targeted interventions and prevention activities to reduce worker exposure and disease.

(a) why the Bill does not define key terms (including listing silicosis as an occupational respiratory disease, and define categories of medical practitioner and minimum and additional notification information to which the registry would apply)

The Bill seeks to achieve an appropriate balance between embedding the obligations and processes for the National Registry in primary legislation while ensuring operational detail that may need to be amended to ensure currency of the National Registry, is set out in disallowable legislative instruments.

The Bill embeds the fixed policy parameters recommended by the National Dust Disease Taskforce for notification of the diagnosis of an occupational respiratory disease to the National Registry by prescribed medical practitioners. The operational elements of the National Registry will be set out in the supporting rules and determinations to allow for adjustments when responding to new developments where appropriate.

The Bill provides the Minister for Health and Aged Care or delegate with the power to make rules prescribing which occupational respiratory disease diagnoses require notification.

As indicated in the Explanatory Memorandum to the Bill, silicosis is intended to initially be the only prescribed occupational respiratory disease, consistent with the recommendations of the National Dust Disease Taskforce. This reflects concerns about the continued exposure to silica dust in the workplace and the limited information currently available on silicosis, to inform further action to protect workers. However, the Bill will provide for other occupationally caused or exacerbated respiratory diseases to be prescribed by the Minister for Health and Aged Care, after consultation with the Commonwealth Chief Medical Officer and state and territory authorities through their respective Health Ministers has occurred, in accordance with clause 33 of the Bill. This will allow the National Registry to evolve and adapt to new and emerging risks to the respiratory health of workers.

Providing for the prescribing of occupational respiratory diseases in the rules ensures the National Registry can respond in a timely manner to threats to workers' respiratory health as they arise in future. The ability to quickly mandate the notification of a disease will ensure information on incidence, exposure, task, job and occupation can be made available to inform decision makers. This will ensure governments can take informed action to reduce or eliminate further exposures in the workplace and protect the health of Australian workers.

Similarly, the Bill provides the Minister for Health and Aged Care or a delegate with the power to make rules prescribing the kinds of medical practitioners that can make notifications to the National Registry.

The kinds of medical practitioners to be prescribed in the rules are intended to be reflective of the necessary skills and experience required to ensure accurate diagnoses of occupational respiratory diseases. This definition of a prescribed medical practitioner will need to remain representative of the varied medical expertise required to diagnose prescribed occupational respiratory diseases, particularly those of a novel nature.

The Bill also allows the Commonwealth Chief Medical Officer to determine the scope of minimum and additional notification information that will be captured in the National Registry. This will allow for changes to the type of information notified to the National Registry, when appropriate, and ensure it remains capable of supporting further investigation of emerging issues and research into occupational respiratory diseases.

(b) why information which identifies a person is necessary to be provided to the register in order for it to achieve its stated objective

The collection, use and disclosure of personal information is necessary to allow the National Registry to accurately record the incidence of occupational respiratory diseases in Australia and assist in preventing further worker exposure to respiratory disease-causing agents.

The National Registry must allow for a clear distinction to be made between the notifications made in respect of each individual diagnosed with an occupational respiratory disease. For new or emerging diseases, the number of diagnoses may initially be low and the potential for duplicate reporting would significantly undermine the utility of the data to inform policy decision making with respect to addressing the risks of occupational respiratory disease. The handling of information which identifies a person will allow the Department of Health and Aged Care, through the operator of the National Registry, to ensure the accuracy of national statistics and provide confidence in the data held in the National Registry.

The handling of personal information is also required to ensure state and territory agencies can effectively act on notifications to investigate the occurrence of occupational respiratory disease within a workplace. This information will ensure agencies, if necessary, can seek additional information directly from the individual to ensure they appropriately assess the risks of occupational exposure with respect to disease development. States and territories will only receive personal information relating to individuals diagnosed, residing or exposed to disease causing agents in their jurisdiction.

With this information, these agencies will be able to consider controls or actions to ensure further worker exposure does not occur, reducing the likelihood of another individual developing the disease.

The collection, use and disclosure of personal information is also necessary for the National Registry to operate effectively, including meeting certain purposes of the Bill, by:

- allowing physicians to demonstrate they have met their obligation to notify the diagnosis of a prescribed occupational respiratory disease
- ensuring a treating medical practitioner can be provided with access to a patient's records to provide health care for the relevant occupational respiratory disease, or to check whether a previous diagnosis had been notified to the National Registry.

(c) why the bill does not establish a mechanism by which the patient (or their relevant physician) may request they not be required to provide all or some information to the registry

The Bill requires mandatory notification to the Commonwealth Chief Medical Officer of minimum notification information only when an individual is diagnosed with a prescribed occupational respiratory disease. As indicated in the Explanatory Memorandum to the Bill, the scope of minimum notification information covers information to identify the individual, the respiratory disease, the individual's lung function and the workplaces where the individual considers the last and main exposures occurred. This information is necessary to allow an accurate record of the incidence of occupational respiratory diseases in Australia and to assist in preventing further worker exposure to respiratory disease-causing agents.

The notification of any other information (e.g. additional notification information and the notification of non-prescribed occupational respiratory diseases) will require the individual's consent. A person may withhold or withdraw consent to the collection, recording, use or disclosure of any additional notification information or information on non-prescribed occupational respiratory diseases, or information on occupational respiratory diseases diagnosed prior to the anticipated commencement of the *National Occupational Respiratory Disease Registry Act 2023,* that is their personal information.

Information notified pursuant to the Bill and the relevant subordinate legislation is intended to reflect data collected by both the New South Wales Dust Disease Register and the Queensland Notifiable Dust Lung Disease Register. These registers are existing state-based mandatory notification systems established to monitor and analyse the incidence of particular occupational respiratory diseases, and both involve the handling of personal information.

If the National Registry did not require mandatory notification of diagnoses of prescribed occupational respiratory diseases, it is reasonable to expect both jurisdictions would retain their state-based registers, resulting in a duplicative reporting obligation for medical practitioners. If mandatory reporting on a national level was not required by the Bill, diagnosing medical practitioners in New South Wales and Queensland would still be required by state law to provide this information, but it may not be captured in the National Registry. This would compromise the efficacy of a national reporting system in providing an understanding of the nature, extent and potential causes of occupational respiratory diseases in Australia.

Medical practitioners making notifications to the National Registry will do so through an online portal currently being developed on the Department of Health and Aged Care ICT infrastructure. This portal prompts medical practitioners to enter the information needed to make a notification and seeks confirmation that patient consent has been provided where necessary.

When making a notification, a medical practitioner must provide details that:

- identify the patient
- identify the occupational respiratory disease
- identify the state or territory in which the last and main exposures were believed to have occurred
- allow the patient to be contacted by state and territory work health safety agencies for additional information, if necessary, to ensure they can appropriately assess the risks of occupational exposure with respect to disease development.

For the remaining information set out in the minimum notification, a medical practitioner may indicate 'not stated or unknown' for several mandatory fields, recognising the patient may be unable or unwilling to provide this detail.

(d) whether individuals would be advised of how their information could be disclosed and used if they elected to provide additional notification information

As part of confirming consent to the collection of additional notification information, individuals will be advised of how their information will be handled for the purposes of the National Registry.

A privacy notice has been prepared to accompany the operation of the National Registry and will be made available to individuals prior to notification. This document will be available from the Department of Health and Aged Care's public National Registry website, in addition to being provided to patients by the diagnosing or treating medical practitioner.

The privacy notice sets out how the Department of Health and Aged Care will handle personal information and notes this information is protected by law, including the *Privacy Act 1988* and the Australian Privacy Principles.

The notice also outlines when personal information will be collected, what types of information will be collected (i.e. the scope of minimum notification information and additional notification information) and how this information will be used and disclosed. The privacy notice indicates that an individual's personal information notified to the National Registry may be shared:

- with their treating medical practitioner to improve the individual's health care (where consent is provided)
- with researchers for research purposes associated with occupational respiratory diseases
- with subcontractors engaged to assist in delivering services for the National Registry
- as otherwise authorised or required by law.

The privacy notice further indicates that only minimum notification information will be shared with relevant state and territory agencies and bodies. This information will be shared to enable those agencies to identify industries, occupations, job tasks and workplaces where there is a risk of occupational respiratory disease and to facilitate intervention and action to prevent future worker exposure.

In consenting to the notification of additional notification information, patients are asked to confirm their understanding that this information may be used or disclosed as described in the privacy notice, including to support research into occupational respiratory diseases. The patient's medical practitioner is required to confirm that consent has been provided prior to notifying additional notification information.

(e) why the bill does not provide flexibility to provide only limited information where, for example, a doctor considers it to be in the best interests of the patient

The Bill requires the collection, use and disclosure of personal information necessary to allow the National Registry to accurately record the diagnoses of occupational respiratory diseases in Australia and assist in preventing further worker exposure to respiratory disease-causing agents.

To fulfil the objectives of the National Registry, the Bill requires medical practitioners to provide for limited fields of information in making notifications. A medical practitioner must provide details that:

- identify the patient
- identify the occupational respiratory disease
- identify the state or territory in which the last and main exposures were believed to have occurred
- allow the patient to be contacted by state and territory work health safety agencies for additional information, if necessary, to ensure they can appropriately assess the risks of occupational exposure with respect to disease development.

The scope of this information has been significantly informed by the existing requirements of the New South Wales Dust Disease Register and the Queensland Notifiable Dust Lung Disease Register, and feedback from key stakeholders throughout the development of National Registry, including medical peak bodies, worker representative organisations and state and territory agencies.

Stakeholders have expressed concern that medical practitioners are unlikely to provide information which is not mandatory. The current set of minimum fields have been determined as critical for accurately recording incidence of occupational respiratory diseases in Australia and preventing further worker exposure to respiratory disease-causing agents.

While the notification of prescribed occupational respiratory diseases will be mandatory, medical practitioners have been provided with a degree of flexibility to indicate 'not stated or unknown' for several mandatory fields. This flexibility recognises that the patient may at the time of diagnosis be unable or unwilling to provide such information.

(f) the process by which information on the registry would be accessed, and whether persons required to provide information to the registry, or those empowered to access the registry, would be able to see the content on the registry generally

Direct access to information held in the National Registry is limited through the online portal to prescribed medical practitioners and state and territory agencies.

The Commonwealth Chief Medical Officer will also publish de-identified statistical information on notifications made to the National Registry each year and provide for other de-identified information on occupational respiratory disease to be publicly released.

Medical practitioners will be verified to access the National Registry via MyGov. Diagnosing and treating medical practitioners may only access content held in the National Registry for relation to patients they have diagnosed or are treating for an occupational respiratory disease when consent requirements have been met.

An individual may also request a copy of information about them held in the National Registry from their medical practitioner or via the Registry Operator.

Officers nominated by state and territory work health and safety agencies will be verified to access the National Registry via MyGov. Once verified, relevant state and territory officers will have access to minimum notification information via a separate agency portal.

For notifications relating to individuals diagnosed, residing or whose last or main exposure occurred in the relevant jurisdiction, relevant state and territory officers will be provided detailed extracts showing information identifying patients, workplaces and medical practitioners. Relevant state and territory officers also have access to de-identified summary reports which do not identify patients, workplaces or medical practitioners.

(g) what oversight and review mechanism of the proposed scheme, and decisions made in relation to it, would apply

The continued operation of the National Registry and assessment of whether it continues to meet its objectives will be overseen by the Minister for Health and Aged Care, with the support of the Commonwealth Chief Medical Officer, the Secretary of the Department of Health and Aged Care and relevant Senior Executives in the department.

Additionally, the ongoing operation of the National Registry will be supported by the establishment of a departmental operational advisory group to inform the ongoing development of the National Registry over time, taking into consideration feedback from key stakeholders.

I trust this information will assist the Committee in its consideration of these matters.

Thank you for writing on this matter.

Yours sincerely

Ged Kearney

15 / 8 / 2023