

## **Ministerial response — Report 8 of 2024<sup>1</sup>**

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**Senator the Hon Murray Watt**  
Minister for Employment and Workplace Relations

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

Dear Chair *Josh*

Thank you for your correspondence of 16 May 2024 to the Hon Tony Burke MP, concerning the Work Health and Safety (Operation Sovereign Borders) Declaration 2024. On 28 July 2024 the Prime Minister appointed me to serve as the Minister for Employment and Workplace Relations and your correspondence to Minister Burke has been provided to me.

The Parliamentary Joint Committee on Human Rights sought information on a number of matters relating to the declaration. I note that the *Work Health and Safety (Operation Sovereign Borders) Declaration 2024* was made by the Chief of the Defence Force under subsection 12D(2) of the *Work Health and Safety Act 2011*. Furthermore, as the matters raised by the Committee relate to the explanatory materials prepared by the Department of Defence and operational matters, the enclosed response to the Committee has been prepared by the Department of Defence.

Further questions relating to this instrument and the explanatory materials are best directed to the Minister for Defence.

I trust this information is of assistance to the Committee and thank the Committee for its work on this matter.

Yours sincerely

MURRAY WATT

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RESPONSES TO PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS  
QUESTIONS ON *WORK HEALTH AND SAFETY (OPERATION SOVEREIGN BORDERS)*  
*DECLARATION 2024*

a) **Whether and how the legislative instrument is compatible with the rights to life and security of the person?**

The instrument provides that certain provisions in the *Work Health and Safety Act 2011* (WHS Act) do not apply to Operation Sovereign Borders (OSB) activities: the interception, boarding, control or movement of a vessel suspected of carrying an Unauthorised Maritime Arrival (as defined in the *Migration Act 1958*), or of a person suspected of being an Unauthorised Maritime Arrival. These are inherently dangerous activities, requiring OSB personnel to make decisions and act quickly in a uniquely challenging environment; where there are risks to their own safety as well as the safety of people on board vessels seeking to arrive in Australia that cannot be completely mitigated.

The effect of the instrument is that individual workers cannot be prosecuted under the WHS Act for failing to take reasonable care of their own and others' safety, in these dangerous circumstances. This ensures these personnel can act quickly, including to protect themselves or others, without second-guessing whether their actions may be perceived as failing to take reasonable care in the aftermath.

Importantly, the instrument only excludes very limited aspects of the WHS Act. For example, the Commonwealth's primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers and other persons, remains. Officers' duties to exercise due diligence to ensure that duty is met are unchanged. Workers are still required to comply with reasonable instructions. Deaths, serious injuries and dangerous incidents must be notified to Comcare, which can investigate and prosecute breaches of these duties.

Other frameworks also apply. For example, under the *Maritime Powers Act 2013*, a maritime officer (including ADF members) must not place or keep a person in a place unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place. ADF members are also subject to service offences under the *Defence Force Discipline Act 1982*, including offences for negligence in performance of a duty and dangerous conduct.

This instrument engages the rights to life and security of the person, as the actions (and inaction) of OSB personnel can have an impact on their own and others' safety. However, the instrument is compatible with these rights, noting that the Commonwealth's primary duty to ensure the health and safety of workers and other people is not affected, and is supported by other duties in the WHS Act and other frameworks.

b) **whether and how the legislative instrument is rationally connected (that is, effective to achieve) the stated objective. In particular:**

- i. **how disapplying parts of the WHS Act would be effective to protect national security (including evidence which has demonstrated that the disapplication of these duties to these boat interception activities has changed the behaviour of workers, impacted the frequency of safety incidents during boat interceptions, or otherwise influenced the overall outcomes of the activities);**

Australia's security and prosperity depend on robust border policies, including activities under OSB to combat people smuggling and irregular migration. This is essential to save lives, ensure the integrity of our borders and maintain public confidence in Australia's migration program. The primary deterrent to any resumption of significant people smuggling networks is robust border policies, including boat turn-backs and other activities under OSB.

This instrument is intended to ensure that personnel can conduct the full range of activities necessary to achieve this national security outcome, while protecting their own and others' safety in a uniquely dangerous environment, including:

- boarding operations on wood, metal and fibreglass vessels ranging in size from 10m–50m, in day and night, in a wide variety of sea states and weather conditions
- operations which consist of holding individuals securely on board a Defence vessel or on the vessel that was boarded
- boarding operations on vessels whose crew may be belligerent
- holding operations on a vessel, where the people on board may be belligerent
- transferring people, inexperienced in the maritime environment, between a vessel (small foreign fishing type), to a tender (rigid hull inflatable boat), to a Defence vessel (patrol boat) and possibly back to a smaller vessel (similar to a small foreign fishing vessel)
- directing/assisting people to move to a location on a boarded vessel, for safety and/or security reasons
- intervening in situations where violence is used against ADF members or against other people for whom the ADF members have a duty of care
- boarding and transferring operations in sea states that are challenging
- operations wearing protective equipment such as body armour, increasing the possibility of heat related injuries
- being embarked in a ship's tender while being launched or recovered from the ship, while wearing and carrying equipment required for personal safety during a boarding operation
- working extended hours to facilitate a boarding, search, making safe and follow on security requirements of the boarded vessel
- vessel destruction where the crew or passengers deliberately set fire to the foreign vessels, which may then lead to retrieving persons from the water.

**ii. how turning back people seeking asylum in Australia is effective to protect national security**

It is axiomatic that a nation's security is fundamentally linked to its capacity to effectively control its own borders, including the flow of people and goods across those borders. The activities of OSB are essential to this by combatting maritime people smuggling and irregular migration. The OSB model has effectively suppressed – for a decade – maritime people smuggling targeting Australia. The primary deterrent remains robust border policies, which are demonstrated through turn-backs (to the country of departure where safe to do so), take backs (to the country of origin with the cooperation of the government of that country), and transfer to regional processing (for the consideration of any protection claims) an integral element of that response. This layered effect denies an irregular maritime pathway to settlement in Australia, and prevents people smugglers from generating business.

OSB policies have achieved a significant and sustained reduction in maritime people smuggling activity targeting Australia since 2013, and the Joint Agency Task Force has remained in place continuously since then with ongoing support from successive Australian Governments. It has now been 10 years since the last known death at sea (December 2013) from maritime people smuggling ventures en-route to Australia.

Despite the success of the OSB mission, it is imperative that all OSB contributing agencies remain vigilant. Any significant changes to push and pull factors for irregular migration in the Indo-Pacific region can trigger a rapid deterioration in the threat and risk environment.

**c) whether the measure is a proportionate means by which to achieve the stated objective;**

As outlined above, the effect of the instrument is that individual workers cannot be prosecuted under the WHS Act for failing to take reasonable care of their own and others' safety, in dangerous circumstances. This ensures these personnel can act quickly, including to protect themselves or others, without second-guessing whether their actions may be perceived as failing to take reasonable care in the aftermath.

The exemptions contained in the instrument are not novel, but rather continue existing exemptions that have been in force since 2013. Other obligations in the WHS Act are not affected, and other frameworks also operate to protect the safety of OSB personnel and others. In this context, the instrument is a proportionate means to achieve the objective.

**i. what specific safeguards apply to ensure that reasonable care is taken to protect the safety of operational personnel involved in Operation Sovereign Borders;**

The instrument only excludes very limited aspects of the WHS Act, and other frameworks also apply (detailed above). In addition, all Defence personnel are trained in WHS from initial training through to mandatory annual awareness training. As part of the induction process of personnel into OSB, they are required to undertake

extensive Reception, Staging, Onward Movement and Integration training. This specialised training deals directly with matters related to the safety of personnel and the people they engage with.

- ii. **what safeguards apply to ensure that operational personnel take reasonable care to ensure their acts or omissions do not adversely affect the health and safety of other persons, particularly those on the vessels being turned back;**

The training outlined above covers not just Defence personnel but obligations and duties to the health and safety of others. Personnel involved in OSB primarily operate under the *Maritime Powers Act 2013*. As outlined above, under this Act, a maritime officer (including ADF members) must not place or keep a person in a place unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place. Other domestic legal frameworks also apply. ADF members are subject to service offences under the *Defence Force Discipline Act 1982*, including offences for negligence in performance of a duty and dangerous conduct. Under the WHS Act, operational personnel are also required to comply with reasonable instructions.

- iii. **noting that it appears likely that boat interceptions occur on the high seas, what legal and regulatory frameworks would apply in relation to actions undertaken on and in relation to intercepted boats, including where a person's right to safe working conditions, or the rights of persons to life and security of the person, have been affected during these activities;**

The central legislation governing maritime operations is the *Maritime Powers Act 2013*. The *Maritime Powers Act 2013* represents an amalgamation of powers previously found in several different Acts. The maritime powers can be used by maritime officers to give effect to Australian laws. The exercise of maritime powers is appropriately constrained by international law (such as that contained in the United Nations Convention on Law of the Sea (UNCLOS)).

OSB operates in compliance with domestic law and international obligations in their interactions with people smuggling vessels and people who undertake irregular maritime journeys. For matters related to international human rights law, refugee law and the law of the sea, the Department of Home Affairs relies on advice of the Attorney-General's Department (AGD) and the Australian Government Solicitor (AGS), consistent with the *Legal Services Directions 2017*. In relation to on-water activities, OSB utilises the *Maritime Powers Act 2013* for the interception, boarding and searching of vessels. OSB operates under various other legislation, primarily the *Migration Act 1958* and the *Customs Act 1901*, within the geographic and jurisdictional boundaries that apply.

- iv. **whether the exercise of Operation Sovereign Borders powers is subject to independent oversight and review; and**

As outlined above, any notifiable incident under the WHS Act is notified to Comcare, who is the Commonwealth safety regulator.

Operational efforts in support of OSB are subject to ministerial oversight and scrutiny, and measures and safeguards are in place to ensure actions and activities are undertaken in a manner consistent with Australian domestic law and Australia's obligations under international law.

- v. **why other less rights restrictive alternatives (including not disapplying these provisions in relation to all activities during boat interceptions, or giving workers guidance so they know how to apply their training within the confines of being required to exercise reasonable care) would be ineffective to achieve the stated objective of the declaration.**

As outlined above, there are a range of duties, offences, frameworks and training that apply to OSB, notwithstanding this instrument. They are sufficient to ensure safety, as far as possible, in this dangerous environment. The instrument should be considered in that broader context. The exemptions set out in the instrument are necessary to ensure that individuals can act confidently and quickly in the diverse and unpredictable circumstances that might arise in the operational environment. It is not preferable for there to be any uncertainty in the mind of an individual regarding whether they may incur individual liability as a result of discharging their duties when performing these activities.