The Hon Tony Burke MP
Minister for Home Affairs
Minister for Immigration and Multicultural Affairs
Minister for Cyber Security
Minister for the Arts
Leader of the House

Ref No: MC24-033996

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Dean

Thank you for the correspondence of 20 November 2024 from the Secretary of the Senate Standing Committee for the Scrutiny of Bills, concerning the Committee's consideration of the Cyber Security Bill 2024 and the Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Bill 2024.

I appreciate the time the Committee has taken to consider these Bills. My response to the matters raised by the Committee in its Scrutiny Digest 14 of 2024 is provided at Attachment A.

I trust this information is of assistance to the Committee in its further consideration of the Bills.

Yours sincerely

TONY BURKE

25 / 11 / 2024

Attachment A

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Scrutiny Digest 14 of 2024

Cyber Security Bill 2024

Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Bill 2024

The Senate Standing Committee for the Scrutiny of Bills (**the Committee**) has requested advice from the Minister for Home Affairs and Minister for Cyber Security in relation to the Cyber Security Bill 2024 **(the Cyber Bill**) and the Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Bill 2024 (**the ERP Bill**). The Committee's initial scrutiny of the Bill is set out in the Committee's *Scrutiny Digest 14 of 2024* (pp. 6-8 for the Cyber Bill; pp. 51-52 for the ERP Bill).

General remarks

These two Bills, alongside the Intelligence Security and Other Legislation Amendment (Cyber Security) Bill 2024, make up the Government's Cyber Security Legislative Package. This suite of legislative reforms implements seven initiatives under the 2023-2030 Australian Cyber Security Strategy, and in doing so collectively strengthens national cyber defences and builds cyber resilience across the Australian economy.

The Cyber Bill establishes a framework that addresses whole-of-economy cyber security issues, which positions government and industry to respond to new and emerging cyber threats. The measures in the Cyber Bill will help ensure individuals can trust the products they use every day; enhance understanding of the threat of ransomware and cyber extortion; enhance protections for individuals experiencing a cyber incident to encourage engagement with government; and enable government and industry to learn key lessons from cyber security incidents that have had a significant detrimental impact.

The ERP Bill contains a number of measures that build upon previous reforms to the *Security of Critical Infrastructure Act 2018* to uplift and enhance the security, resilience and agility of critical infrastructure in the face of an increasingly hostile and complex threat and risk landscape.

Responses to the Committee's specific questions

CYBER SECURITY BILL 2024

The committee requests the minister's advice as to whether documents incorporated by reference under subclause 14(3) will be made freely available to all persons interested in the law.

Any proposed rules intended to be made to prescribe matters under Part 2 of the *Cyber Security Act 2024* (the "proposed Cyber Security Act", subject to passage and enactment) are subject to a mandatory consultation period of at least 28 days under proposed subsections 87(3)-(4) of the Act.

The current intention is that the first security standards to be prescribed will be based on, and informed by, the first three principles of the "ETSI EN 303 645 Standard - Cyber Security for Consumer Internet of Things: Baseline Requirements". However, this standard will not be incorporated by reference; rather, the content of the security standards would be prescribed in the rules. As such, the security standards would therefore be freely available on the Federal Register of Legislation to all persons interested in understanding the security standards in force.

For future standards, including where those standards are required to be incorporated by reference, the Government will take into account the Committee's view, that as a matter of general principle any member of the public should be able to freely and readily access the terms of the law (and again, with any proposed rules also informed by consultation as required under subsections 87(3)-(4) of the proposed Cyber Security Act, once enacted).

In addition to the rules, the Department of Home Affairs will publish guidance material on its website relating to the operation of any new prescribed security standards for relevant connectable device. This material will be freely available, and provide additional detail and context about consultation on rules to establish security standards.

The committee requests the minister's advice as to why the final review report of the Cyber Incident Review Board in relation to its proposed reviews into cyber security incidents is not appropriate for tabling in the Parliament.

Proposed section 46 of the proposed Cyber Security Act provides that the Cyber Incident Review Board may only undertake a review of a cyber security incident that meets certain criteria of significance or interest. As such, matters subject to review of the Cyber Incident Review Board (CIRB) are likely to be serious in nature, and subject to interest to the broad Australian economy.

A crucial function of the CIRB is to make recommendations to government and industry about actions that could be taken to prevent, detect, respond to or minimise the impact of, future incidents that are similar to the incident being reviewed, and to report publicly on the review. As outlined in proposed subsection 52(6), the CIRB must publish a final review report, excluding any information that is required to be redacted under proposed section 53. It is fundamental to the purpose of the CIRB to ensure that the final review reports produced under proposed subsection 52 are made freely and, readily available, to all those who may be interested, or could benefit from its dissemination. Publication of a final review report on a public-facing Board website will ensure a large cross-section of society—including industry, government and the Parliament—have this access and can utilise the recommendations to enhance our collective cyber security resilience.

Importantly, the Parliament will also receive detail on the CIRB's activities and reviews in the Home Affairs Portfolio annual report, including the number of reviews commenced, completed and discontinued in the reporting period, as well as a brief description and other details of the reviews. Each of these reviews will be made readily available for public scrutiny and may be easily accessed and referenced by Parliament as required.

SECURITY OF CRITICAL INFRASTRUCTURE AND OTHER LEGISLATION AMENDMENT (ENHANCED RESPONSE AND PREVENTION) BILL 2024

The committee requests the minister's advice as to:

- **why an immunity from civil liability for entities responsible for a critical telecommunications asset is included in proposed subsections 30EB(4) and 30EF(6);**

The practical effect of these provisions is to provide a responsible entity for a critical telecommunications asset with a broad protection from any liability to a third party for any damage caused by negligence or breach of contract arising in the course of performing its duties under the obligation to protect their asset. The provisions provide similar protection to a responsible entity from any liability to a third party for any damage arising from the cessation of carriage services pursuant to a direction given by the Minister.

Providing civil immunity in this manner is an important incentive for entities who need to comply with their legal obligations under the amended SOCI Act, or comply with a legal direction from the Minister. In such circumstances, prompt action is often required from the entity that may, for example, require them to breach a contract. It would be untenable for them to have to face a situation where they are required to comply with their obligations or a direction, and also face potential liability for meeting those obligations or complying with a direction. In this regard, immunity from civil liability will help ensure that entities can comply quickly and efficiently without hesitation.

Although the immunity would not prevent third parties from commencing an action or proceedings for damages, the entity or individual would be able to rely on the protections under these provisions to defend against an alleged liability.

It should also be noted that the immunity offered under proposed subsections 30EB(4), 30EB(5), and 30EF(6) and 30EF(7) in this Bill are not without precedent. These proposed subsections replicate the operation of the existing protections in sections 313(1A) and 313(2A) of the *Telecommunications Act 1997* (Telecommunications Act), whilst subsections 30EF(6) and 30EF(7) replicate the operation of the existing protections in section 315A of the Telecommunications Act.

- **what recourse is available for affected individuals, other than by demonstrating a lack of good faith by the entity; and**

While recourse for affected individuals in relation to potential liability that arises under these provisions is limited to where an entity acts in bad faith, this is proportionate given that subsection 30EF is intended to be used only in the most extreme circumstances – where the continued operation of the services would result in such serious consequences that the entire service needed to cease operating. This would include the protection of the Commonwealth, States, and Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, or acts of foreign interference, as well as the protection of Australia's border integrity.

The threshold for exercising the power is that the risk is prejudicial to security and requires an adverse security assessment (as defined in Part IV of the *Australian Security Intelligence Organisation Act 1979*) in respect of the carrier or carriage service provider (for instance, where a critical telecommunications asset is being used to aid efforts to interfere in Australia's democracy or to extract sensitive data about Australians in support of espionage against Australia). In these circumstances, given the high threshold for exercising the power and the nature of security risks it seeks to mitigate, the limitation on available recourse for affected individuals is necessary and proportionate.

It should be noted that a direction under proposed section 30EF can only relate to a carriage service generally. It cannot describe or prohibit the provision of carriage services to a particular person, particular persons, or a particular class of persons. This ensures that the power cannot be used to prejudice or harm individuals or groups or to deprive them of fundamental rights.

Furthermore, prior to issuing a direction under proposed section 30EF, the Minister will need to consult with the affected entity. As part of this consultation process, the entity may raise the impacts of a potential direction on individuals. As the Minister must consider any relevant response from the entity, the Minister would also need to consider the impacts on affected individuals before issuing a direction.

- **whether affected individuals will be able to seek recourse from the Commonwealth or whether it is intended that the immunity from civil liability will extend to the Commonwealth as a whole.**

The immunity in these provisions applies only to a responsible entity (and its officers, employees and agents) for a critical telecommunications asset, not the Commonwealth. This is another limitation on the extent of the immunity to ensure that it is proportionate and appropriate.

The Hon Tony Burke MP
Minister for Home Affairs
Minister for Immigration and Multicultural Affairs
Minister for Cyber Security
Minister for the Arts
Leader of the House

Ref No: MC24-033992

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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by email: scrutiny.sen@aph.gov.au

Dear Chair Dean

Thank you for the correspondence of 20 November 2024 from the Secretary of the Senate Standing Committee for the Scrutiny of Bills, Ms Anita Coles, concerning the Committee's consideration of the Migration Amendment Bill 2024.

I appreciate the time the Committee has taken to consider the Bill. My response to the matters raised by the Committee in its *Scrutiny Digest 14 of 2024* is provided at Attachment A.

I trust this information is of assistance to the Committee in its further consideration of the Bill.

Yours sincerely

TONY BURKE

25 / 11 / 2024

Attachment A

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Scrutiny Digest 14 of 2024

Migration Amendment Bill 2024

The Senate Standing Committee for the Scrutiny of Bills (the Committee) has requested advice from the Minister for Home Affairs in relation to the Migration Amendment Bill 2024 (the Bill). The Committee's initial scrutiny of the Bill is set out in the Committee's *Scrutiny Digest 14 of 2024* (pp. 13-35). The information below is provided to assist the Committee in its further consideration of the Bill.

Responses to the Committee's specific questions

1.42 The committee considers this measure grants extremely broad administrative powers to the Commonwealth to take actions relating to entering into arrangements with a foreign country for the removal of certain individuals, which may unduly trespass on personal rights and liberties, particularly the right to be free from arbitrary detention. The committee therefore seeks the minister's advice as to:

- **why is it considered necessary and appropriate to establish a new basis for the cessation of a Subclass 070 (Bridging (Removal Pending)) visa;**

Cessation of a Subclass 070 (Bridging (Removal Pending) visa (BVR) under proposed section 76AAA would occur in circumstances where removal to a foreign country has become reasonably practicable for the BVR holder under a third country reception arrangement – and where the BVR holder has been granted permission (such as a visa) to enter and remain in that country. Providing under proposed subsection 76AAA(4) that a BVR ceases immediately after the BVR holder is given the notice ensures both that:

- the BVR holder is appropriately notified that section 76AAA applies to them; and
- the BVR ceases, with the non-citizen then liable to be detained under current section 189 of the *Migration Act 1958* (Migration Act), and to be taken into immigration detention while removal is arranged. This ensures the BVR holder does not become an unlawful non-citizen in the community.

- **why is it considered necessary and appropriate to provide legislative authority for the Commonwealth to take action in relation to third country reception arrangements;**

The Migration Act currently provides express statutory authority and capacity for the Commonwealth to enter into arrangements with a person or body in relation to the regional processing functions of a country (section 198AHA of the Act). The Bill includes amendments that replicate that approach in relation to third country reception arrangements. If the Government chooses to enter into a third country

reception arrangement, this provision will provide the executive with the capacity and authority to take action or make payments contemplated by those arrangements. This will avoid needing to determine if such authority otherwise exists in connection with each individual action or payment.

- **what is likely to constitute 'permission' by a foreign country for a person to enter and remain in that country, and could this permission be granted without there being an entitlement for immediate entry;**

The term 'permission' is used in order to ensure flexibility about the type of mechanism used by various countries to regulate the entry and stay of non-citizens. Most countries grant a 'visa', and where this is the case, the 'permission' would be constituted by the grant of the visa. The details concerning when entry is actually permissible would be fact-specific.

- **the appropriateness of excluding natural justice from the giving of a notice under proposed subsection 76AAA(2), and whether this would impact on the procedural rights of an individual who does not believe they are capable of doing one or more things required by a foreign country;**

Notification under proposed section 76AAA serves the purpose of advising a person of the existence of a fact, namely the grant of 'permission' by the third country. Once the person receives, or is taken to have received, the notification, there is a clearly ascertainable point for the cessation of their BVR.

The permission granted by the third country may be unconditional or may be subject to the person doing one or more things required by the foreign country that the non-citizen is capable of doing before entering the country (proposed subsection 76AAA(6)). Where an individual does not as a matter of fact have capacity to do the thing required, there would be no power to cease the visa. A lack of capacity could also have a bearing on whether, following cessation, the person can be detained under current section 189 of the Migration Act – i.e. if a non-citizen is NZYQ-affected due to a relevant lack of capacity, they could not be detained.

The Minister may wish to grant a further bridging visa if the non-citizen is unable, for whatever reason, to meet the requirements of the reception country.

- **is it likely that an individual would be detained for a significant period of time before being removed to a third country, and if so, is this a proportionate limit on the common law right to liberty;**

The non-citizen would be detained in accordance with section 189 of the Migration Act, and the obligations under section 198 to remove the non-citizen as soon as reasonably practicable would operate in the same way for these individuals as they do presently for any other unlawful non-citizen.

- **what type of 'things' is it envisaged that a foreign country may require an individual to do if the permission is conditional (apart from providing identity documents), and why are these not specified in the bill;**

At present, there are no third country reception arrangements with foreign countries. This is a forward-looking provision taking into account possible requirements from a foreign country which will not be known until an arrangement is reached. Examples of requirements could include signing an entry form or attending an appointment at a specified time and place; however, it would depend on the domestic requirements of individual countries.

- **if an individual did not do one of the 'things' required of them by the foreign country that they are capable of doing, would they be subject to indefinite immigration detention in Australia, and if so, is this a proportionate limit on the right to liberty;**

The non-citizen would be detained in accordance with section 189 of the Migration Act and the obligations in section 198 to remove the non-citizen as soon as reasonably practicable would operate in the same way for these individuals as they do currently for any other unlawful non-citizen. Broadly, the recent High Court decision in *ASF17 v Commonwealth of Australia* [2024] HCA 19 confirms the lawfulness of detention in such circumstances.

- **is it envisaged that a foreign country would indefinitely detain individuals sent to it under this proposed power, and if so, what involvement would the Commonwealth likely have in that arrangement;**

No. Any proposed arrangements would not provide for detention in the foreign country. The provision authorising the Commonwealth to take action or undertake expenditure in relation to third country reception arrangements (proposed section 198AHB) expressly excludes authorising the Commonwealth exercising 'restraint over the liberty of a person'.

- **why it is appropriate to delegate to the executive broad powers to take action in relation to third country reception arrangements or functions and could the bill be amended to specify some limits on this power.**

The third country reception arrangements will necessarily be implemented by the Executive. As such, it is appropriate for the Migration Act to be amended to confirm that the Executive has the capacity and authority to take the necessary action.

1.47 The committee seeks the minister's advice as to:

- **why the proposed immunity is expressed so widely, and why it is necessary to provide an immunity to all actions by an officer or the Commonwealth (including, for example, an action which caused the death of, or serious injury to, a person during removal);**

The Australian Government should not be held liable in damages for something that occurs to a person once they have been removed to another country. Enactment of the proposed civil liability immunity provisions in the Bill would operate to affirm this view of the current common law position.

- **whether all the actions taken by an officer which are granted immunity must have complied with guidelines as to conduct or other internal regulatory procedures (including those in a foreign or regional processing country);**

As a threshold matter, the Department notes that non-compliance with guidelines or regulatory procedures does not, in itself, give rise to any legal liability.

Similarly, the proposed immunities are not contingent on compliance with internal guidelines and other regulatory procedures. Accordingly, such non-compliance would not invariably mean that the immunities are inapplicable.

However, the proposed immunities are contingent on an officer acting in good faith and in the exercise of their powers or the performance of their functions or duties under sections 198 and 198AD. Non-compliance with internal guidelines and other regulatory procedures may be relevant to whether that criteria has been met. Whether that is so will be highly fact-specific.

- **why there is no requirement that any action taken by another country, or a person in another country, be taken in good faith, in order for the immunity to apply;**

Any such claim would face a number of obstacles under existing general law principles. However, the proposed immunity makes the legal position clear by providing that the Commonwealth and its officers are not liable for the acts of other countries or persons in other countries irrespective of whether those acts were done in good faith.

By way of example, an affected person might be physically assaulted by a resident of another country in that country. Such an act would clearly not have been taken in good faith. If the immunity does not extend to acts taken in bad faith by persons other than the Commonwealth or its officers, the Commonwealth or its officers may be exposed to potential civil liability in respect of such acts.

- **why it is necessary and appropriate for the immunity to extend to the Commonwealth as a whole; and**

Extending the immunity to the Commonwealth responds to the risk of vicarious liability. Many individuals might be involved in actions taken in respect of the acceptance or receipt by a foreign country, or ongoing presence in a foreign country, of a person removed from Australia. Not all of those persons will be 'officers' within the meaning of the Migration Act.

The immunity as presently drafted is intended to ensure that no vicarious civil liability risk arises for the Commonwealth from actions taken by any Commonwealth officer in respect of the acceptance or receipt by a foreign country, or ongoing presence in a foreign country, of a person removed from Australia. If it were otherwise, the Commonwealth would be exposed to potential liability.

- **what recourse is available to affected individuals who have their right to bring a claim abrogated as a result of the immunity, including in relation to fundamental common law claims of habeas corpus.**

The proposed immunities only concern civil liability. As such, the proposed immunities prevent an affected person being awarded damages as a result of a civil claim brought against an officer or the Commonwealth. In other words, the proposed immunities provide a statutory defence that may be pleaded in response to a damages claim coming within the scope of the immunity.

The proposed immunities do not prevent an affected individual's right to seek other forms of relief by way of, for example, injunction or the writ of habeas corpus.

1.64 The committee considers the disclosure of criminal history information and personal information relating to an individual may unduly trespass on the right to privacy. As such, the committee seeks the minister's advice as to:

- **why it is necessary and appropriate for proposed section 501M to authorise disclosure of criminal history information to any person or body, and for those persons or bodies to further disclose the relevant information to any person or body;**

It is important that delegates of the Minister and bodies like the Community Protection Board are able to lawfully consider all criminal history information including information about charges, findings of whether a person has committed an offence, spent convictions and other results of the prosecution of an offence to address any risks regarding the protection and safety of the Australian community.

The amendments authorise delegates of the Minister and officers of the Department to collect, use or disclose to a person or body, criminal history information for the purpose of informing, directly or indirectly, the performance of a function or the exercise of a power under the Migration Act and the *Migration Regulations 1994* (Migration Regulations).

This ensures that using criminal history information when exercising powers under the Migration Act and the Migration Regulations is lawful and not in breach of the *Crimes Act 1914* (Cth) and other related State and Territory legislation (such as the *Criminal Records Act 1991* in NSW).

- **why it is necessary and appropriate for proposed section 198AAA to authorise the disclosure of personal information to any government of a foreign country, including at any level (such as local government);**

It is reasonable and appropriate for the government of a foreign country that has agreed, or is considering agreeing, to allow an individual to enter and remain in their country to request information about that individual. Proposed subsection 198AAA(1) ensures that the Minister or an officer of the Department has a lawful basis to disclose personal information to the government of the foreign country, for the purposes mentioned in proposed subsection 198AAA(2).

The authority for disclosure is limited by the purposes for which the disclosure can be made. Those purposes are limited to a confined list. It is necessary for the definition of 'government of a foreign country' under proposed subsection 198AAA(6)

to encompass agencies at various levels to ensure the disclosure of personal information to the relevant level or entity of government will be authorised.

- **why it is necessary and appropriate to allow for disclosures that are indirectly connected to the performance of a function or exercise of a power under the Migration Act or Regulations, or are incidental or conducive to the purposes for which disclosures may be made, to the government of a foreign country;**

Proposed subsection 501M(1) authorises the disclosure of criminal history information so that the recipient may provide assistance relevant to the performance of a function or an exercise of power under the Migration Act or Migration Regulations. This is necessary and appropriate because an officer of the Department may need to provide a person (such as a psychiatrist providing a report) with an non-citizen's criminal history information so that the person can provide advice to the disclosing officer about a particular issue relating to that non-citizen, which will in turn be used by the officer to inform direct advice or recommendations to the decision-maker who will exercise the power or perform the function under the Act or Regulations (for example, the power to impose a condition on the non-citizen's BVR).

Authorising disclosures that are conducive to the purposes specified in proposed subsection 198AAA(2) is necessary and appropriate because officers of the Department may be required to disclose personal information so that further disclosures for one of those purposes can occur. Authorising disclosures that are incidental is necessary and appropriate because it ensures that a disclosure that occurs as a consequence of a disclosure for one of those purposes will be lawful.

- **how the terms 'incidental' and 'conducive' in the context of proposed subsection 198AAA(2) should be understood, and whether any guidance or examples can be provided;**

'Incidental' and 'conducive' should be given their ordinary meaning. A collection, use or disclosure would be incidental if it was caused or required by another collection, use or disclosure that was for one of the purposes described in proposed subsection 198AAA(2). For example, using personal information to make a record of the steps taken to facilitate the removal of an individual would be a use for a purpose incidental to proposed subsection 198AAA(2)(c).

A collection, use or disclosure would be conducive if it would assist the Minister or an officer of the Department to take action or make payments of a kind described in proposed paragraph 198AAA(2)(c), for example, collecting information about costs incurred by the foreign country or using personal information to brief an officer that must approve the payment being made.

- **what safeguards are applicable to protect against overly-broad disclosures of personal information, noting in particular when information is disclosed to a government of a foreign country it is not possible to control how the information may be further disclosed;**

The disclosure of personal information would only be authorised if it was for one of

the purposes specified in proposed subsection 198AAA(2). Disclosure to the foreign country is also discretionary and an officer of the Department may therefore decline to provide all or some of the personal information requested by the foreign country if they form the view that an excessive amount of personal information would be disclosed.

The *Privacy Act 1988* (Cth) would apply to the disclosure and the Department's handling of personal information, which includes the safeguards regarding the security and integrity of personal information. An affected individual who believes that the Department has mishandled their personal information may exercise their rights under the Privacy Act, including but not limited to making a complaint to the Office of the Australian Information Commissioner.

- **why it is necessary and appropriate that information in relation to spent convictions, offence charges and findings as to offences may be disclosed as part of 'criminal history information'; and**

It is important that delegates of the Minister and bodies like the Community Protection Board are able to lawfully consider all relevant information about a person's character and past behaviour to address any risks regarding the protection and safety of the Australian community.

The amendments do this by authorising delegates of the Minister and officers of the Department to collect, use or disclose to a person or body, criminal history information for the purpose of informing, directly or indirectly, the performance of a function or the exercise of a power under the Migration Act and the Migration Regulations.

This ensures that using criminal history information when exercising powers under the Migration Act and the Migration Regulations is lawful and not in breach of the *Crimes Act 1914* (Cth) and other related State and Territory legislation (such as the *Criminal Records Act 1991* in NSW).

- **how the term 'findings' is intended to be understood and whether this can include judgments from civil proceedings;**

On occasion, courts will make "findings" where the outcome is not a conviction. This would be clearly expressed in a judgment as a finding. If a court in a civil proceeding were to find a person had committed an offence (as opposed to, for example, finding a person had engaged in particular conduct), this would be included in the definition.

1.65 The committee also expresses concerns that the bill seeks to retrospectively validate the disclosure of criminal history information (suggesting such disclosures were occurring without a lawful basis), and seeks the minister's advice as to:

- **why it is necessary and appropriate that disclosures of personal information in relation to lawful or unlawful non-citizens be retrospectively validated;**

The collection, use and disclosure of criminal history information is subject to various Commonwealth, State and Territory laws. Due to differences in legislative provisions and their application, uncertainty may arise as to whether a person or body has, at

all times, lawfully collected, used or disclosed criminal history information. This uncertainty can arise, for example, in relation to a criminal conviction that later becomes spent.

The amendments in the Bill put beyond doubt that criminal history information collected, used or disclosed is, and is taken always to have been, valid and lawful if it would have been lawful to collect, use and disclose under the new authorising provision at the time it was collected, used or disclosed. This also extends to a thing done or purported to be done that would otherwise have been wholly to partly invalid or unlawful if not for the authorised collection, use or disclosure of criminal history information.

This has the effect that there is no uncertainty as to the lawfulness of the collection, use or disclose of criminal history information by the Minister, an officer of the Department or another person or body (such as the Community Protection Board); or of the validity of a thing done, or purported to be done in relation to that criminal history information (such as a section 501 (character) decision made under the Migration Act) with reference to the above collection, use or disclosure of that information.

- **what detrimental impact the disclosure of personal information, including criminal history information, occurring without a lawful basis would have had on lawful or unlawful non-citizens; and**

The proposed amendments will mitigate legal risks associated with the collection, disclosure and use of criminal history information for the purpose of informing directly or indirectly, the performance of a function or the exercise of a power under the Migration Act or the Migration Regulations. If that information was collected, disclosed or used without these amendments, there is a risk that any decisions made by the Minister's delegate or officer could be challenged in a court and deemed invalid or unlawful.

- **whether there are any criminal or civil cases that have been concluded, or are currently before the courts, relating to the disclosure of criminal history information that would be validated by item 4 of Schedule 3. If there are any cases that have concluded, what effect would subitem 4(4) have on those proceedings (would any person be liable to refund any damages payable etc).**

It is not possible to say with any degree of certainty the impact, if any, the amendments would have had on any proceedings that have been concluded. It would be necessary to comprehensively analyse the criminal history relied upon in a particular case, at each relevant point in time, in light of the legislation governing the jurisdiction providing the information, to ascertain if it was, for example, information about 'spent convictions' and, if so, whether that State or Territory's legislation permitted the use or disclosure, or not. It is also the policy of the Commonwealth not to comment upon cases currently before the courts.

1.89 The committee reiterates its concern as to the significant trespass on personal rights and liberties posed by the imposition of monitoring and curfew visa conditions, without the requirement for procedural fairness and based on the risk of future offending, the breach of which is punishable by a mandatory minimum sentence of one year imprisonment.

1.90 The committee notes it raised these concerns when the bill providing for these powers was introduced a year ago and requested detailed information from the minister in relation to these scrutiny concerns. The committee expresses its disappointment that the minister (and former minister) has failed to provide a response to these concerns which has now been overdue for 10 months. The committee notes that its scrutiny function can only be performed effectively with cooperation from the executive government. The committee considers that the lack of engagement on this matter is particularly alarming given the significant and undue trespass on personal rights and liberties posed by this scheme. The committee reiterates its request for a response in relation to matters previously raised.

The amendments in Schedule 6 to the Bill, and particularly in items 2, 3 and 4 of the Schedule, operate to ensure that procedural fairness is appropriately afforded to a BVR holder following a decision to grant a BVR that is subject to one or more of the conditions prescribed for the purposes of subsection 76E(1) of the Migration Act. Where the Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence, and one or more of the community safety conditions is imposed on the BVR, it is appropriate that the imposition of the conditions is not delayed, ensuring the available tools to manage community safety risks are applied immediately.

The test under subsection 76E(4) of the Migration Act as amended would mirror the test for imposition of the community safety conditions on a BVR at time of decision, as introduced by the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* on 7 November 2024. The amendments of section 76E ensure that the post-grant review is undertaken on the same basis as the grant of the BVR with those conditions imposed.

1.91 The committee requests that an addendum to the explanatory memorandum be tabled in the Parliament as soon as practicable providing an explanation as to how the amendments introduced by item 2 of Schedule 6 align with the High Court's judgment as to a legitimate non-punitive purpose that may justify the imposition of monitoring and curfew conditions, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

An addendum to the Bill's explanatory memorandum will be prepared and tabled to provide further detail in relation to the amendment of section 76E of the Migration Act in item 2 of Schedule 6 to the Bill, having regard to the purpose of section 76E and informed by the responses provided in relation to the matters raised under paragraph 1.92 of the Scrutiny Digest (set out below).

1.92 The committee requests the minister's advice as to:

- **why procedural fairness is not afforded to BVR holders to allow them to make submissions prior to the conditions being imposed and how the minister is currently able to effectively undertake an individualised assessment of future risk without hearing from the affected individual or their representative;**

Where the Minister decides to impose one or more of the community safety conditions, because the Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence, it is appropriate that the imposition of those conditions is not delayed and that the available tools to manage community safety risks are applied immediately.

In these circumstances it is appropriate that natural justice does not apply to that decision, and instead procedural fairness is afforded after the conditions are imposed. The BVR holder has an opportunity to make representations in accordance with section 76E of the Migration Act.

- **why a negative test continues to be imposed by proposed paragraph 76E(4)(b) of the bill, noting that the relevant standard for the minister's satisfaction is on the balance of probabilities which may still result in any doubt or uncertainty being resolved in the favour of the imposition of conditions;**

The effect of the test being expressed in the negative is that if the Minister is not satisfied of the relevant matters, the Minister must grant a new visa not subject to the condition(s). This test, including the reference to the balance of probabilities, mirrors the test for imposition of the conditions on a BVR introduced by the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* on 7 November 2024.

- **why the proposed test is to assess a 'substantial' risk, rather than 'unacceptable' risk (as is required by the courts when imposing curfew or monitoring conditions);**

This test, including the reference to substantial risk, mirrors the test for imposition of the conditions introduced by the *Migration Amendment (Bridging Visa Conditions) Regulations 2024*.

- **why there is no timeframe by which the minister must make a decision under subsection 76E(4);**

It is not unusual for a provision not to specify a timeframe for the making of a decision. This allows for appropriate flexibility with administrative decision-making. In the absence of a specified period of time, a reasonable timeframe would apply.

- **why is it necessary and appropriate for the definition of 'serious offence', and the order in which conditions may be imposed, to be set out in delegated legislation; and**

This will ensure that the definition of 'serious offence' and the order of imposition of prescribed conditions remains consistent with the definition and order applied at the

time of BVR grant. This ensures that the section 76E post-grant review is undertaken on the same basis as the grant of a BVR with those conditions imposed.

- **whether the retrospective application of Schedule 6 of the bill may have a detrimental impact on any BVR holders, noting that without the legislative amendments proposed by Schedule 6 the High Court's judgment rendered the imposition of monitoring and curfew conditions by the executive government invalid.**

The application provisions will have a beneficial effect for BVR holders whose section 76E review rights remain available. It means that the section 76E post-grant review process will be conducted with reference to the post-*YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 higher threshold for the imposition of conditions, in those cases where a visa was granted with conditions according to that higher threshold (under the Migration Regulations as amended by *Migration Amendment (Bridging Visa Conditions) Regulations 2024*) but ahead of these amendments to section 76E of the Migration Act.

1.96 The committee notes its concern as to whether this bill will be afforded adequate time for proper parliamentary scrutiny. While the procedure to be followed in the passage of legislation is ultimately a matter for each house of the Parliament, the committee reiterates its consistent scrutiny view that legislation, particularly legislation that may trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny.

The Committee's concern is noted. In addition to responding to the matters raised by the Committee in its *Scrutiny Digest 14 of 2024*, the Senate Legal and Constitutional Affairs Legislation Committee (LCAL Committee) is also conducting an inquiry on the provisions of the Bill. The Department made a submission to the inquiry and attended a hearing on 21 November 2024 to further assist the LCAL Committee. The LCAL Committee is due to report on the Bill on 26 November 2024; the Government is committed to considering and responding to any recommendations made by the LCAL Committee in its report.

1.97 The committee draws to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation the making of regulations that are inconsistent with existing primary legislation.

The Department and the Government do not consider there to be any inconsistency between the regulations and the primary legislation. This is because there is no requirement under the Migration Act that the test in section 76E, which provides procedural fairness following the grant of a BVR with one or more of the prescribed conditions imposed, matches the test for imposition of the conditions in the Migration Regulations (which operates at time of BVR grant). The application provisions in the Bill are intended to deal with the period of mismatch in a manner that is beneficial to BVR holders.

THE HON CLARE O'NEIL MP
MINISTER FOR HOUSING
MINISTER FOR HOMELESSNESS

Ref: MC24-019823
25 November 2024

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600
scrutiny.sen@aph.gov.au

Dear Senator Smith Dean

Thank you for your correspondence of 20 November 2024 concerning the Help to Buy Bill 2023 [No. 2] and the mechanisms in place to report to the Parliament on any expenditure authorised by the appropriation contained in the Bill.

Subject to the passage of the Bill, amounts spent under the new special appropriation will be reported in Budget Paper 4 within the agency resourcing and special appropriation tables. Resourcing and budget estimates for the program will be included in the Portfolio Budget Statements and also the Portfolio Additional Estimates Statements that explain changes in the resourcing by outcomes since the Budget. Actual transactions and balances will appear in the Treasury Annual Reports after the program has commenced.

The Portfolio Budget Statements and Budget Papers are tabled in the Parliament on Budget Night and the Portfolio Additional Estimates Statements are typically tabled in Parliament in mid-February each year. The Treasury Annual Reports are tabled in Parliament by 31 October each year. These documents are intended to assist the Senate Standing Committees of the Commonwealth Parliament with their examination of the Government's Budget, including expenditure on this special appropriation. Outlays under the appropriation result in the Commonwealth holding an interest in residential housing to improve housing outcomes for Australians.

Thank you for raising this matter.

Yours sincerely

26/11/2024

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