



Mrs Giulia Jones MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly

CC: Mr Max Kiermaier, Secretary

[By email scrutiny@parliament.act.gov.au]

Dear Mrs Jones

Crimes (Child Sex Offenders) Amendment Regulation 2017 (No 1) - SUBORDINATE LAW No SL2017-31

The Human Rights Commission seeks to contribute to the Committee's consideration of the Crimes (Child Sex Offenders) Amendment Regulation 2017 (No 1). The Commission considers that the amendment regulation gives rise to serious issues of incompatibility with the *Human Rights Act 2004* (HR Act), and wishes to draw these concerns to the Committee's attention.

The amendment regulation was notified on the Legislation Register on 26 October 2017 and is currently awaiting commencement. Once commenced, it will authorise the Chief Police Officer (CPO) to disclose personal information from the Child Sex Offenders Register about a reportable offender to the Commonwealth Minister responsible for administering the *Australian Passports Act 2005* (Cth) and the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth).

The relevant Commonwealth laws were recently amended by the *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017* (Cth). Those changes, which are due to commence next month, will mean that the Minister for Foreign Affairs must deny or cancel the person's Australian passport (or order the surrender of the person's foreign travel document) upon request by a 'competent authority', such as the CPO.¹ There is no right of merits review of a decision made by the Minister for Foreign Affairs to cancel or refuse to issue a passport, because once a competent authority, such as the CPO, makes a request the Minister's decision is mandatory.

The Parliamentary Joint Committee on Human Rights (PJCHR) expressed significant concerns about the Commonwealth amendments.² The PJCHR was not satisfied that the changes were compatible with the right to freedom of movement, the right to a fair hearing and the right to protection of the family. In response to those concerns, the Minister for Foreign Affairs stated that:

Ultimately, decisions about a child sex offender's ability to travel will be made by a competent authority. In denying the child sex offender a passport, the Minister will only be acting on the advice of a competent authority. This is appropriate, given the competent authority's expertise, its familiarity with the circumstances of the offender and the fact it is better placed to assess the risk they pose to children overseas than the Minister.³

¹ A 'competent authority' is defined in the *Australian Passports Act 2005* (Cth) as including a person with responsibility for, or powers, functions or duties in relation to, reportable offenders.

² PJCHR, [Report 10 of 2017](#), pp 54-69.

³ *Ibid*, p 61.

We are therefore concerned that the amendment regulation contains no requirement for the CPO to be satisfied that a reportable offender in fact poses a risk to children overseas. On the contrary, the amendment regulation will permit the CPO to make requests to the Department of Foreign Affairs and Trade (DFAT) in relation to all reportable offenders without any restriction and without any consideration of the risk each individual poses or their individual circumstances. This could even include low-risk offenders such as young people who have been placed on the register for consensual 'sexting'.

There is no question that the protection of children overseas from sexual exploitation by Australian citizens is vitally important. However, the amendment regulation and the underlying legislative framework contain insufficient safeguards to ensure that the proposed power will be exercised compatibly with the HR Act, that is, for any limitations on rights to be reasonable, necessary and proportionate in accordance with s 28 of the Act. In our view, given the absence of safeguards in the Commonwealth legislation, it is essential to ensure that the ACT amendments provide for sufficient checks and balances before information is shared for these purposes.

We have accordingly written to the Minister for Police and Emergency Services and the Attorney-General to advise of these concerns and to recommend that the amendment regulation should not be commenced before the following matters are given further attention:

- Inclusion of appropriately defined threshold criteria to be applied by the CPO when deciding to make a refusal/cancellation request in relation to a reportable offender, and the requirement to consider individual risk factors before making a request; and
- Clarification as to whether a reportable offender can to seek independent merits review of a decision by the CPO to make a refusal/cancellation request to DFAT in relation to the reportable offender, or to refuse a reportable offender's request to travel 'for good reasons'.

A short delay in commencement to address these matters is relatively low-risk, compared to the significant impact on individuals should the powers be exercised indiscriminately. We have also advised the Government that the failure to address these issues could heighten the risk that referrals made by the CPO to DFAT may breach obligations under s 40B of the HR Act for public authorities to act and make decisions compatibly with human rights. Discretionary powers must be exercised compatibly with the HR Act unless there is a clear legislative purpose to the contrary.

We note that the explanatory statement for the amendment regulation is silent on its human rights implications and does little to help members of the Legislative Assembly and the public to understand the effect, background, and precise nature of these changes. We respectfully ask that the Committee consider the option of placing a protective notice of motion of disallowance on the amendment regulation to enable these concerns to be fully aired.

Please let us know if you would like to discuss these issues further.

Yours sincerely,



Dr Helen Watchirs OAM
President and Human Rights Commissioner

28 November 2017