Appendix 1

Correspondence

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MC14/18405

Senator Dean Smith
Chair
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Dear Chair Dean

Thank you for your letter regarding the Parliamentary Joint Committee on Human Rights' report on the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014.

The Committee raised a number of concerns about measures contained in the Bill. My advice in relation to these concerns is set out below.

Schedule 1 – New Psychoactive Substances

1.47 The committee seeks the advice of the Minister for Justice as to whether the reverse burden offence in proposed section 320.2 is compatible with the right to be presumed innocent, and particularly:

- *whether there is a rational connection between the limitation and the legitimate objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

Proposed section 320.2 is compatible with the right to be presumed innocent.

For a person to be found guilty of an offence of importing a psychoactive substance under proposed section 320.2, the prosecution bears the onus of proving beyond reasonable doubt that the person has imported the substance, and that the substance is a psychoactive substance.

Proposed subsection 320.2(2) sets out a range of substances which are not caught by the offence, even if they may be psychoactive. These are legitimate use exemptions. It is only if the defendant wishes to rely on one of these exemptions to avoid liability under the offence, that he or she is subject to a 'reverse burden'. In these circumstances, the burden operates to require the defendant to adduce or point to evidence to suggest a reasonable possibility that the substance is captured by one of the listed exceptions.

It is reasonable and proportionate to require an importer who wishes to claim a legitimate use exemption to point to evidence which substantiates his or her claim that the goods are captured by that exemption. Without this burden, it would be possible for a defendant to assert that a psychoactive substance was a legitimate import, captured by one of the many existing legislative schemes that control which goods come into the country, without being required to point to anything to substantiate that claim. Prosecutors would be required to conclusively prove that the substance did not fall within each of enumerated exemptions before an offence could be made out. This would be a difficult, costly and inefficient exercise, ill-suited to identifying and resolving the real issues in the prosecution.

Further, placing the evidential burden on the defendant to demonstrate that a substance falls within one of the exemptions enumerated in subsection 320.2(2) is consistent with the operation of the current border environment. There are a range of regulatory schemes operating at the border to ensure that dangerous goods are not imported into Australia, at least not without appropriate permissions and safeguards. An importer who wishes to rely on an exemption to avoid criminal liability is already required to comply with the regulatory scheme to which the exemption relates, by obtaining all relevant authorisations and permissions for the importation of the goods, and to be aware of the purpose for which they are importing the goods. It is reasonable to expect that a legitimate importer will have readily available from their personal or business records sufficient evidence to suggest a reasonable possibility that the substance is captured by the relevant exemption.

This burden must also be assessed against the serious ramifications of importing new psychoactive substances (NPS) for human consumption. NPS are dangerous and unpredictable, their potential for harming individuals is well documented and there is a legitimate impetus to protect public health. There is a rational connection between requiring importers to show evidence that the goods are captured by one of the existing regulatory schemes, and protecting public health by ensuring that the importer is not bringing potentially harmful substances into the country. Requiring importers to demonstrate that their import falls within one of the legitimate use exemptions ultimately prevents unknown, unassessed and potentially dangerous substances from entering Australia. This is particularly important considering that importers are in a unique position of power to make substances available to the public. Consequently, it is incumbent on them to be aware of the regulatory schemes that govern the importation of their goods, and to ensure that they are not bringing in substances that may be dangerous to public health.

1.51 The committee seeks the advice of the Minister for Justice as to whether the reverse burden offence in proposed section 320.3 is compatible with the right to be presumed innocent, and particularly:

- *whether there is a rational connection between the limitation and the legitimate objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

Proposed section 320.3 is compatible with the right to be presumed innocent.

For a person to be found guilty of an offence of importing a substance represented to be a serious drug alternative under proposed section 320.3, the prosecution bears the onus of proving beyond reasonable doubt that the person has intentionally imported a substance, that the presentation of the substance included an express or implied representation that the substance was a serious drug alternative, and that the defendant knew or was reckless as to whether the presentation of the substance contained or made such a representation.

Proposed subsection 320.3(3) sets out a range of substances which are not caught by the offence. It is only if the defendant wishes to rely on one of these exceptions to avoid liability under the offence that he or she is subject to a 'reverse burden'. In these circumstances, the burden operates to require the defendant to adduce or point to evidence to suggest a reasonable possibility that the substance is captured by one of the listed exceptions.

As set out above, it is reasonable and proportionate to require an importer who wishes to claim a legitimate use exemption to point to evidence which substantiates his or her claim that the goods are captured by that exemption. Without this burden, it would be possible for a defendant to assert that a substance represented to be a serious drug alternative was a legitimate import, captured by one of the many existing legislative schemes that control which goods come into the country, without being required to point to anything to substantiate or justify the claim. Prosecutors would be required to conclusively prove that the substance did not fall within each of enumerated exemptions before an offence could be made out. This would be a difficult, costly and inefficient exercise, ill-suited to identifying and resolving the real issues in the prosecution.

Further, and as set out above, placing the evidentiary burden on the defendant to demonstrate that a substance falls within one of the exemptions enumerated in subsection 320.3(3) is consistent with the operation of the current border environment. There are a range of regulatory schemes operating at the border to ensure that dangerous goods are not imported into Australia, at least not without appropriate permissions and safeguards, including with respect to their presentation and labelling.

The burden must also be assessed against the serious ramifications of importing a substance presented as a serious drug alternative. As set out in the Explanatory Memorandum, NPS are frequently sold or marketed with the representation that they are 'legal' alternatives to illicit drugs. This may encourage individuals, and particularly young people, to use these substances on the assumption that they have been tested and assessed as safe. This is incorrect. NPS are dangerous and unpredictable and their potential for harming individuals is well documented. There is a legitimate impetus to protect public health from goods presented as 'legal' and containing a misleading representation that they are safe.

There is a rational connection between requiring importers to show evidence that the goods are captured by one of the existing regulatory schemes, and protecting public health by ensuring that the importer is not bringing potentially harmful substances into the country. Requiring importers to demonstrate that their import falls within one of the legitimate use exemptions ultimately prevents unknown, unassessed and potentially dangerous substances from entering Australia. This is particularly important considering that importers are in a unique position of power to make substances available to the public. Consequently, it is incumbent on them to be aware of the regulatory schemes that govern the importation of their goods, and to ensure that they are not bringing in substances that may be dangerous to public health.

1.58 The committee requests the advice of the Minister for Justice on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes and whether article 15 of the ICCPR is engaged.

The measure, as currently drafted, meets the quality of law test for human rights purposes and does not engage article 15 of the ICCPR. The measure clearly sets out what conduct is permitted and what conduct is prohibited under the new offences.

The term 'psychoactive substance' is defined in section 320.1 of the measure as a substance which has the capacity to induce a psychoactive effect when consumed by a person. A psychoactive effect is also defined in section 320.1. There are two alternate limbs to this definition. The first deals with the physiological effects of a person consuming a drug, the second deals with the addictive effects of those drugs. A substance will have a psychoactive effect if it satisfies either of those limbs. I acknowledge that the term is broad. Seeking to ban these substances on the basis of effect was a deliberate move by Government to prevent criminals from evading existing controls on illicit drugs that operate by banning substances based on their chemical structure. Experience has shown that criminals have deliberately sought to evade traditional controls that target substances based on their specific chemical structure.

However, the list of exemptions to what is a 'psychoactive substance' is also very broad. As such, the measure operates to ban only very small portion of what is captured by the definition: those substances which do not otherwise have a legitimate use. The explanatory memorandum sets out in significant detail the kinds of substances which are and are not banned by the measure. Moreover, the list of exceptions contained in the legislation will provide importers with certainty, as it sets out precisely what is permitted to be imported, often through references to existing legislation which explains what can and cannot be imported. As set out above, this measure does not occur in a vacuum. It must be considered in light of the existing regulatory schemes at the border that govern the importation of goods. If a person is importing goods in a manner consistent with those schemes, they will not be affected by this measure.

The definitions in the Bill, and the details provided in the explanatory memorandum, are sufficiently certain and accessible that people will be able to understand the legal effect of their actions in advance.

Schedule 2 – Firearm Trafficking Offences

1.69 – The committee seeks the advice of the Minister for Justice as to whether the mandatory sentencing is compatible with the right to freedom from arbitrary detention and the right to a fair trial, and particularly:

- *Whether there is a rational connection between the limitation and the legitimate objective, and*
- *Whether the limitation is a reasonable and proportionate measure for the achievement of that objective*

The mandatory minimum sentence of five years' imprisonment being introduced for offences against Divisions 360 and 361 of the Criminal Code Act 1995 (the Code) is compatible with the right to freedom from arbitrary detention. Detention is not arbitrary where it is reasonable, necessary and proportionate to the end that is sought. In this case, the end being sought is to limit the number of firearms and firearm-related articles entering the illicit market which can later be used in the commission of serious and violent crimes. There are clear and serious social and systemic harms associated with firearms trafficking, and the entry of even a small number of illegal firearms into the Australian community can have a significant impact on the size of the illicit market. Failure to enforce harsh penalties on trafficking offenders could lead to increasing numbers of illegal firearms coming into the possession of individuals and organised crime groups.

The penalties associated with the new and amended offences will act as a rational and legitimate deterrent for people seeking to illegally import and export firearms and firearm parts into and out of Australia. They will also support current efforts to prevent the diversion of firearms into overseas illicit markets, and demonstrate Australia's commitment to our international obligations regarding the illegal trade of firearms.

The provisions include safeguards against arbitrary detention, including that they do not impose minimum non-parole periods and do not apply mandatory minimum penalties to children (those under the age of 18). These factors preserve a level of judicial discretion and ensure that custodial sentences imposed by courts take into account the particular circumstances of the offence and the offender. In appropriate cases, this may mean that there is a significant difference between the non-parole period and the head sentence. The Government believes the lack of a mandatory non-parole period will allow courts the discretion to take into account factors such as cognitive impairment and the public interest when setting the period offenders spend in custody. This level of judicial discretion is an appropriate protection against arbitrary detention. The Government believes that the mandatory minimum head sentence with no minimum non-parole period strikes an appropriate balance between putting in place a strong deterrent message and preserving judicial discretion. Given the serious nature of firearms trafficking and the consequences of supplying firearms and firearm parts to the illicit market, it is appropriate to adopt this approach to ensure the Government's response to gun-related crime is as effective as possible.

The mandatory minimum sentence is also compatible with the right to a fair trial, including the right to review by a higher tribunal as set out in article 14(5) of the ICCPR. The minimum term of imprisonment will only apply if a person is convicted of an offence as a result of a fair trial in accordance with such procedures as are established by law. The penalty does not prevent appeal of a conviction or of any sentence above the mandatory minimum.

1.79 – The committee seeks the advice of the Minister for Justice as to whether the strict liability and absolute liability elements of the proposed firearm offences are compatible with the right to be presumed innocent, and particularly:

- *Whether there is a rational connection between the limitation and the legitimate objective,*
- *Whether there is a reasonable and proportionate measure for the achievement of that objective*

The strict and absolute liability elements of the proposed firearm offences are compatible with the right to be presumed innocent.

Absolute liability applies to the element of the offence that the firearm or part was a prohibited import or export unless certain requirements had been met. This means that the prosecution will not have to prove that the defendant knew or was reckless as to whether the firearm or part was a prohibited import or export. Strict liability applies to the element of the offence that the person had not met all of the import or export requirements. This means that the prosecution will not have to prove that the defendant knew or was reckless as to whether they had met all of the import or export requirements. The absolute liability provision has been carefully drafted to ensure that a firearms trafficker could not rely on the defence of honest or reasonable mistake of fact, while the strict liability provision does make this defence available to the defendant.

In the case of absolute liability, there is a rational connection between the limitation of the right to be presumed innocent and the legitimate objective of prosecuting firearms traffickers. If absolute liability were not imposed, a defendant could attempt to avoid criminal liability for the offence by claiming they were unaware that there were import and export requirements which had to be met.

It is incumbent on those who are engaged in the import and export of articles into and out of Australia to make enquiries as to how to legitimately go about that process. This is the case for all manner of items, be they food, medical supplies or parts for manufacturing. The expectation that importers and exporters will seek information on the requirements they need to meet is a legitimate one, and is not unique to firearms and other prohibited goods. Additionally and with respect to firearms, given their highly controlled nature and history of regulation in Australia it is reasonable to expect that members of the community, particularly those involved in the movement of firearms, know that there are controls on importing and exporting firearms and firearm parts, or at least know enough to make enquiries.

In the case of the strict liability provisions, the connection between the limitation of the right and the objective is similar however differs slightly. Again, it is a legitimate expectation that those engaging in the movement of firearms and firearm parts into and out of Australia would be aware that regulations exist to control that trade. Given then that the defendant would be aware whether or not they had met the requirements for import or export, requiring the prosecution to prove beyond reasonable doubt that a person knew approval had not been obtained, or was reckless as to whether or not the requirements had been met, would be overly onerous. The limitation of the right to be presumed innocent is legitimate in that without it, the objective to deter people from firearms trafficking could be undermined if suspects could avoid conviction by arguing that they were unaware of import or export requirements. The limitation is also proportionate, as the defence of mistake of fact is available for the elements to which strict liability applies. Appropriately, this defence could be used if a person mistakenly believed that he or she had met the requirements for import or export of a firearm or firearm part.

Furthermore, and in both cases, the effectiveness of the new offences would be weakened if the prosecution were required to prove the elements to which strict and absolute liability have been applied, as it would be very difficult to obtain evidence showing the defendant's state of mind. To undermine the effectiveness of the offence would be to undermine the deterrent effect it seeks to achieve. In 2012, firearms were identified as being the type of weapon used in 25% of homicides in Australia. The entry of even a small number of illegal firearms into the Australian community can contribute to the risk of these and other gun-related crimes becoming more prevalent. Therefore, any limitation on the right to be presumed innocent by the application of strict and absolute liability is justified through the legitimate objective to reduce the number of illicit firearms and firearm parts imported and exported into and out of Australia.

Schedule 3 – International Transfer of Prisoners

1.87 The committee seeks the advice of the Minister for Justice as to whether the removal of the requirement for the Attorney-General to make a decision in 'unviable' applications is compatible with the right to a fair hearing, and particularly:

- *whether the proposed changes are aimed at achieving a legitimate objective;*
- *whether there is a rational connection between the limitation and that objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

The objective of the proposed amendment in relation to unviable applications is to address undue delay by facilitating more efficient processing of applications to provide a prisoner with a speedier response to their application. The current requirement that the Attorney-General make a decision on 'unviable' applications extends the delay in notifying the prisoner (or prisoner's representative) of the outcome of their application, and in progressing applications from other prisoners that are viable.

'Unviable' applications are applications that cannot proceed because one or more of the requirements set out in section 10 of the International Transfer of Prisoners Act 1997 cannot be met. The requirements are:

- all relevant parties consent to the transfer
- the prisoner is not subject to an extradition request
- the prisoner is an Australian citizen (in the case of an application for transfer to Australia) or a national of the country to which he or she wishes to be transferred (in the case of an application for transfer from Australia)
- the time left to serve being no less than 6 months
- neither the sentence of imprisonment nor the conviction is subject to appeal, and
- the offence for which the prisoner is serving their sentence constitutes an offence in the country to which he or she wishes to transfer.

Currently, where a prisoner does not meet one or more of the requirements in section 10, the Attorney-General may still be required to determine whether or not he or she consents to the transfer. However, in these cases, the only option open to the Attorney-General is to refuse consent due to one of the requirements not being met. Removing the requirement for the Attorney-General to make a decision in relation to an unviable application does not impact on a person's rights under the Act because there is no alternative decision that could be made, as such applications for transfer already cannot proceed.

The Committee sought further information as to how an assessment will be made as to whether a case would fall within proposed subsection 10A. The central authority for the international transfer of prisoners in the Attorney-General's Department is responsible for determining whether all of the requirements outlined above are met for each application. These are questions of fact – i.e. is the prisoner an Australian citizen, has the other country consented, is there an extradition request in relation to the person, etc. When one or more requirement is not met, the central authority will close the application as the application cannot proceed, and write to the prisoner notifying them of the closure. There is no scope to exercise discretion at this stage of the process as the outcome is dictated by the answer to the factual requirements outlined above. It does not involve a consideration of whether transfer is appropriate in the circumstances, which is a matter for the Attorney-General to consider in determining whether or not to consent.

Once an unviable application has been closed, the prisoner will be promptly notified and provided with the reasons for the closure. This will enable the prisoner to respond, if desired. While merits review is not available in relation to the closure of unviable applications, any decision taken under the Act is reviewable, including any decisions on the requirements set out above.

In summary, the proposed change is aimed at achieving a legitimate objective of facilitating a speedier resolution of applications that cannot proceed. This may be more beneficial to prisoners with unviable applications, as the proposed amendment would enable a prisoner to be informed of the outcome of their application in a more timely fashion. The potential limitation is very small as the measure would not alter the outcome of the applications. The measure is reasonable and proportionate for the purpose of achieving the objective outlined above.

1.91 The committee seeks the advice of the Minister for Justice as to whether the proposed limitation of administrative reviews is compatible with the right to a fair hearing, and particularly:

- *whether the proposed changes are aimed at achieving a legitimate objective;*
- *whether there is a rational connection between the limitation and that objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

Currently, if the Attorney-General would not consent to a transfer based on the transfer terms proposed by a transfer country, subsection 20(3) of the Act allows the Attorney-General to propose a variation to the terms if he or she would consent to transfer on a variation of the proposed terms.

In the time in which the ITP Scheme has been in place, it has become clear that many transfer countries are unable to accommodate a variation to terms. Many transfer countries have advised that their proposed terms of sentence enforcement are governed by domestic legislation and are not discretionary. This amendment would ensure that in these cases, the Attorney-General is not obliged to exercise his or her discretion to seek a variation of terms given doing so would prolong the period in which an application is open with no change in the outcome. The proposed amendment would assist in providing certainty to the prisoner and a speedier conclusion to their application in cases where it is clear that the transfer country would not agree to a variation to the terms (based on that country's domestic legislation and processes).

This amendment does not diminish the existing rights of a prisoner under the Act to seek review. In the event that the Attorney-General denies consent to the transfer and exercises his or her discretion to not seek a variation of the terms, it remains open to the prisoner to seek a review of this decision.

1.96 The committee seeks the advice of the Minister for Justice as to whether the proposed limit on reapplications is compatible with the right to a fair hearing, and particularly:

- *whether the proposed changes are aimed at achieving a legitimate objective;*
- *whether there is a rational connection between the limitation and that objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

The purpose of this amendment is to address situations where, as is often the case, reapplications are received despite no changes in circumstances or new information being available to give weight to the need for reconsideration, and within months of prisoners being informed that their earlier application had been refused. Currently, these reapplications must be reconsidered in full. The processing of these reapplications diverts resources that could otherwise be directed towards progressing viable and new applications.

While this amendment engages the right to a fair hearing, the amendment is aimed at achieving the legitimate objective of not requiring the Attorney-General to consider, and the Department to use resources processing, repeat applications where it is clear that the outcome would remain the same because there have been no significant changes in the circumstances of that prisoner's case.

The proposed amendment is reasonable and proportionate to achieving the stated objective because by not limiting reapplications, the processing of all other applications is subject to a slower processing due to the need to continue progressing repeat applications. By reducing the number of reapplications that are considered, the proposed section aims to increase processing efficiency and render a benefit to more applicants overall.

The approach is proportionate to this objective because the language of the proposed subsection 10A(2) is permissive, thus allowing the Attorney-General to consider reapplications within the one year limit where, for example, there has been a change of circumstances.

To assist prisoners and to facilitate consideration of reapplications where new circumstances or information does become available within the one year limit, application forms for the transfer of prisoners will be amended to enable prisoners to provide information outlining why an application should be considered within the one year timeframe. This will provide a basis for the prisoner to demonstrate a change in circumstances that would justify the reconsideration of their application.

It will still remain open to all prisoners to reapply after 12 months has passed if they would like their application to be reconsidered for any reason.

Schedule 5 – Validating airport investigations

1.114 The committee seeks the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the right to security of the person and freedom from arbitrary detention, and particularly:

- *whether the proposed changes are aimed at achieving a legitimate objective;*
- *whether there is a rational connection between the limitation and that objective; and*
- *whether the limitation is a reasonable and proportionate measure for the achievement of that objective.*

The Committee has asked for further advice on whether the retrospective validation of conduct by the Australian Federal Police (AFP) and special members is compatible with the right to security of the person and freedom from arbitrary detention under Article 9 of the International Covenant on Civil and Political Rights (ICCPR). In particular, the Committee has asked whether the proposed changes are aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and that objective, and whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

The main aim of Schedule 5 to the Bill is to ensure continuity in policing services at Australia's major airports, required as a result of an administrative error that led to certain investigatory powers not being available to AFP and special members in those airports for a short period of time.

The Commonwealth Places (Application of Laws) Act 1970 and the Commonwealth Places (Application of Laws) Regulations 1998 (1998 regulations) provided AFP officers with the ability to use investigatory powers under Part 1AA and Part 1D of the Commonwealth Crimes Act 1914 (relevant Crimes Act powers) to investigate state offences that occur at Commonwealth places which are designated state airports. This arrangement has been in place since 2011, following enactment of the Aviation Crimes and Policing Legislation Amendment Act 2011 which supported the 'all-in policing and security model', under which the AFP took responsibility for the policing and security of Australia's eleven major airports.

On 18 March 2014, the 1998 regulations which listed the 'designated state airports' were inadvertently repealed due to an administrative error as part of work on a recent omnibus repeal regulation, the Spent and Redundant Instruments Repeal Regulation 2014. The repeal of the 1998 regulations took effect on 19 March 2014 at which time the Crimes Act powers were no longer available to the AFP. Although alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*, the AFP was unaware of the need to confine itself to these powers for a portion of the repeal period. Upon realising the mistake, action was taken to re-instate this access through the making of the Commonwealth Places (Application of Laws) Regulation 2014 which came into force on 17 May 2014 and restored the prior definition of designated state airport.

Schedule 5 of the Bill is necessary to correct the anomaly that arose between 19 March 2014 and 16 May 2014, when the Crimes Act powers were inadvertently not available. These powers were available to the AFP for an extended period of time (approximately three years) prior to 19 March 2014, were intended to operate between 19 March 2014 and 16 May 2014 and have again been in force since 17 May 2014.

Retrospective validation of conduct to cover this limited time period is a reasonable and proportionate measure to ensure consistent application of appropriate security and policing at Commonwealth airports. The relevant Crimes Act powers would not be unknown to individuals or the Australian public. The measure would avoid the potential for inequitable outcomes within the criminal justice system, based on whether action taken by the AFP in a relevant airport occurred within the eight week period when the investigative powers used by the AFP were not in force.

1.121 The committee seeks the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the prohibition against retrospective criminal laws.

The Committee has asked for further advice concerning the retrospective validation of AFP and special members conduct and whether it is compatible with the prohibition against retrospective criminal laws in accordance with Article 15 of the ICCPR.
Schedule 5 of the Bill does not alter the content or operation of any State offences in respect of which a person may have been arrested, charged and subsequently prosecuted. As outlined in the Explanatory Memorandum, it will not interfere with the penalties which may be available to, and set by, a court. The provisions are necessary to address the anomaly that arises between 19 March 2014 and 16 May 2014, when relevant Crimes Act investigative powers were inadvertently not available. Notwithstanding alternative powers were available during the relevant time, (including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979)*, the AFP was unaware of the need to confine itself to these powers for a portion of the repeal period.

1.131 The committee therefore seeks the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment.

The Committee has also asked for further advice on whether the retrospective validation of conduct by AFP and special members is compatible with the right to life and prohibition on torture and cruel, inhuman or degrading treatment or punishment in accordance with Articles 6 and 7 of the ICCPR.

As outlined, retrospective validation under the Bill is necessary to address the anomaly that arises between 19 March 2014 and 16 May 2014, when relevant Crimes Act powers were inadvertently not available. Alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*.

In addition to protections on the use of force outlined in the Explanatory Memorandum, the AFP has robust administrative procedures in place to ensure this right is protected. Commissioner's Order 3, is a direction issued by the AFP Commissioner concerning the use of reasonable force. Commissioner's Order 3 must be complied with by all AFP members in all operations and activities, in addition to any legislative restrictions on the exercise of police powers. Failure to comply with Commissioner's Order 3 may constitute a breach of AFP professional standards and, depending on the seriousness of the breach, can result in loss of employment and/or criminal charges. These safeguards operate independently of the *Commonwealth Places (Application of Laws) Act 1970* and its regulations, and ensure that, in addition to relevant legislative protections, there are operational processes utilised by the AFP to prevent inappropriate use of force.

1.136 The committee therefore seeks the advice of the Minister for Justice as to whether the retrospective validation of conduct by AFP and special members is compatible with the right to an effective remedy.

The Committee has asked for advice concerning whether the retrospective validation of conduct by the AFP and special members is compatible with the right to an effective remedy under Article 2 of the ICCPR. The Committee has also asked for advice as to whether retrospective validation is compatible with Article 14 of the ICCPR which provides the right to a fair trial and fair hearing rights.

While Schedule 5, item 2 of the Bill may technically limit these rights in some limited circumstances, alternative powers were available during the relevant time, including applied state police powers arising under section 9 of the *Australian Federal Police Act 1979*.

To the extent that the Bill limits these rights, those limitations are reasonable, necessary and proportionate for the achievement of a legitimate objective. As outlined above, retrospective validation of conduct to cover this limited time period is a reasonable and proportionate measure to ensure consistent application of appropriate security and policing at Commonwealth airports. The relevant Crimes Act powers would not be unknown to individuals or the Australian public. The measure would avoid the potential for inequitable outcomes, based on whether action taken by the AFP in a relevant airport occurred within the eight week period when the investigative powers used by the AFP were not in force.

The Bill does not alter existing criminal processes which apply in relation to a person charged with an offence, nor does it alter civil claim processes. Schedule 5, Item 2 is specified to apply to a thing done to the extent that the doing of the thing would, apart from the item, be invalid or ineffective because the Commonwealth place was not a designated State airport. This does not remove a person's ability to question whether *Crimes Act 1914* powers were used correctly in their circumstances in the course of any future prosecution or claim.

Accordingly, Schedule 5 of the Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

I trust this information will assist the Committee in its inquiries.

Yours sincerely

Michael Keenan