Appendix 1

Correspondence

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

RECEIVED
DATE 24/10/14 BY PJCHR

Senator Dean Smith
Chair
Parliamentary Joint Standing Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Response to questions received from Parliamentary Joint Committee on Human Rights

Thank you for your letters of 23 September 2014 in which further information was requested on the following bill and legislative instruments:

- *Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622]*
- *Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00726]*

My response to your requests is attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
21 / 10 /2014

Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622]

Paragraph 1.164 – The committee therefore requests the Minister for Immigration and Border Protection's further advice on the compatibility of the repeal of the specified visa classes with the protection of the family, and particularly:

- **Whether the measure is aimed at achieving a legitimate objective;**
- **Whether there is a rational connection between the measure and that objective; and**
- **Whether the measure is proportionate to that objective.**

The Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 was disallowed by the Senate on 25 September 2014.

1.173 ***Accordingly, the committee seeks the Minister for Immigration and Border Protection's further advice on whether Schedule 2 to the regulation is a proportional measure, with regard to the requirement for identity document of the same value.***

The committee sought my advice regarding the right to privacy and this was provided to the committee. The committee has since stated that a passport is a foundational identity document and that the committee considers the requirements in relation to citizenship certificates to be more intrusive on an individual's privacy. I have provided my advice on why I am of the view that Schedule 2 of the regulation is a proportionate measure and I do not intend to provide comparative advice as to the rationale or requirements of a travel document, not subject to amendment by this regulation, used for different purposes and under the responsibility of a different portfolio.

1.178 ***As the guidelines are an important measure in protecting against discrimination, the committee seeks the minister's further advice on whether the regulations are consistent with the Australian Government guidelines on Recognition of Sex and Gender.***

The proposed regulations are consistent with the *Australian Government Guidelines on Recognition of Sex and Gender.* The regulations already allow for previous names and dates of birth to be printed on the back of an evidence of Australian citizenship, the proposed amendments simply expand the range of information to include the date of any notice of evidence of Australian citizenship previously given to the person.

The Guidelines recognise the importance of departments ensuring the continuity of the record of an individual's identity. In addition, the Guidelines state that "only one record should be made or maintained for an individual, regardless of a change in gender or other change of personal identity" (paragraph 33 "Privacy and Retaining Records of Previous Sex and/or Gender"). Printing the previous names and dates of birth of applicants on the back of an evidence of Australian citizenship complies with this requirement to ensure the continuity of record and to maintain one record for each individual.

The Guidelines refer to the importance of the Information Privacy Principles in managing use and disclosure of personal information possessed or controlled by the Department, stating that these principles should also apply to information relating to a person's sex and/or gender. Those principles have now been replaced by the Australian Privacy Principles. The proposed regulation complies with APP 6, concerning use and disclosure of personal information, and APP 11 concerning security of personal information.

As has been stated previously, persons holding a notice of evidence maintain control over who or what organisation they disclose the notice to and for what purpose. In addition, the Australian Citizenship Instructions provide that officers have the discretion not to include previous names and/or dates of birth, for example if they are satisfied that the inclusion of a particular name will endanger the individual or another person connected to them.

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ATTORNEY-GENERAL

CANBERRA

14/12474

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair Dean

National Security Legislation Amendment Act (No 1) 2014

I refer to your Committee's Thirteenth Report of the 44th Parliament, as tabled on 1 October 2014, which included comments on the National Security Legislation Amendment Bill (No 1) 2014. That Bill was passed by the Parliament on 1 October and received the Royal Assent on 2 October.

I note that your Committee raised three matters in relation to the (then) Bill (now Act), comprising a request for my advice in relation to the compatibility of certain measures with human rights, and two recommendations for amendments to the provisions of Schedule 3 (protection for special intelligence operations).

My responses to these matters are enclosed, which may be of assistance in clarifying the issues your Committee has raised, particularly with respect to established practice in the drafting of Statements of Compatibility with human rights in accordance with the objectives of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Yours faithfully

(George Brandis)

Encl: Responses to matters raised in the 13th Report of the 44th Parliament, 1 October 2014.

Enclosure

National Security Legislation Amendment Act (No 1) 2014

Responses to the Parliamentary Joint Committee on Human Rights

Thirteenth Report of the 44th Parliament (tabled 1 October 2014)

Compatibility of measures in Schedules 2-6

Committee comment (p. 11)

The Committee therefore seeks the advice of the Attorney-General as to whether each of the measures in Schedules 2, 3, 4, 5 and 6 of the Bill are compatible with Australia's international human rights obligations, and for each individual measure limiting human rights:

- *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.*

Attorney-General's response

The Government is firmly of the view that all measures in the Act are compatible with Australia's human rights obligations for the reasons set out in the Statement of Compatibility with Human Rights (Statement) accompanying the (then) Bill (now Act). All of the new or amended powers in the Act are accompanied by rigorous and appropriate safeguards, including independent oversight and reporting measures. These measures have been the subject of extensive Parliamentary scrutiny, including two reviews by the Parliamentary Joint Committee on Intelligence and Security and bipartisan support of the Parliament.

I am aware that the Committee has expressed a view that the Statement does not provide sufficient information for it to conduct any assessment of whether various provisions in the Bill (now Act) constitute permissible limitations on the rights engaged and, therefore, to reach a conclusion on whether the Bill (now Act) is compatible with human rights.

The Committee's principal concern appears to be that the Statement deals collectively with a number of related or 'like' measures that have been identified in the Statement as engaging identical rights in an identical or substantially similar way, and are consequently supported by an identical or substantially similar justification. (I note that this approach has been explained in the introduction to the Statement at p. 6 of the Revised Explanatory Memorandum.)

The Committee appears to have recently adopted a preference that Statements should include an itemised analysis of individual measures (per p. 9 of its report). The Committee further appears to suggest (at pp. 8-9 of its report) that its expectation in this regard is conveyed in *Practice Note 1* (issued by the Committee as constituted in September 2012) and in the guidance materials published by my Department, which supports me in administering the *Human Rights (Parliamentary Scrutiny) Act 2011,* under which the Committee is established.

While acknowledging that this is the Committee's preference based on its interpretation of these materials, I do not agree with its apparent suggestion that there is a formal requirement that Statements must include "a separate and detailed analysis of each measure that may limit human rights" (at p. 9 of its report). More particularly, I do not agree with the Committee's contention that such an itemised account is necessary in order for it to discharge, or to document in its reports any demonstrable attempt to discharge, its statutory mandate to undertake an analysis of the human rights compatibility of Bills introduced to the Parliament (especially those Bills which may limit human rights).

I note, in particular, that the guidance materials prepared by my Department, and endorsed in *Practice Note 1*, expressly provide that Statements "should describe, in general terms, the most significant human rights issues thought to arise on the Bill, together with the conclusions on compatibility". This is consistent with the intention, expressed in the Explanatory Memorandum to the Human Rights (Parliamentary Scrutiny) Bill 2010, that there is no prescribed form for Statements, which are "intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights" (at p. 4).

As the Minister administering the *Human Rights (Parliamentary Scrutiny) Act 2011,* I place on record my concern that this Committee's apparent insistence upon a formal requirement to this effect – as a precondition to discharging its statutory scrutiny functions – may serve to undermine the policy objectives of the Human Rights (Parliamentary Scrutiny) Act which include to inform the Parliament of the significant human rights issues in legislation through the provision of concise and accessible Statements of Compatibility.

An insistence on such a form requirement has not been the practice of the previous Committee. The adoption of such a practice would, in my view, represent a departure from established practice in the drafting of Statements, under which related measures which limit human rights have often been analysed collectively, and have been relied upon by previous Committees to support findings of compatibility. For example, I refer the Committee to Statements of Compatibility for the Biosecurity Bill 2012, the Regulatory Powers (Standard Provisions) Bill 2012 and the Agricultural and Veterinary Chemicals Legislation Amendment Bill 2013, and to statements of the former Chair, Mr Harry Jenkins.

The 38-page Statement accompanying the present Bill (now Act) provides, in my view, an adequate basis on which the Committee could have undertaken, or documented in its report a demonstrable attempt to undertake, an assessment of the compatibility of its substantive measures with those human rights obligations within its statutory remit.

I do not intend to revise, on a retrospective basis, the Statement accompanying the Bill (now Act) that is the subject of this correspondence. Similarly, I do not intend to impose upon Commonwealth departments or agencies responsible for preparing Statements accompanying Government Bills a general form requirement to the effect of that described at p. 9 of the Committee's report.

Special intelligence operations – definition of torture

Committee comment (p. 12)

For consistency with Australia's international obligations, the Committee recommends that the term 'torture' used in the Bill be defined by reference to the definition set out in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Attorney-General's response

The provisions of new Division 4 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) expressly exclude conduct constituting torture from the new scheme of special intelligence operations. In particular, subparagraph 35C(2)(e)(ia) provides that the Attorney-General cannot grant an authority to conduct a special intelligence operation involving conduct that constitutes torture.

As an additional safeguard, subparagraph 35K(1)(e)(ia) provides that the limited immunity from legal liability in relation to conduct engaged in as part of an authorised special intelligence operation does not apply to conduct constituting torture.

As I indicated to the Senate on 25 September 2014, and as recorded in the Revised Explanatory Memorandum to the Bill (at pp. 112 and 118), the Government is of the firm view that these prohibitions are declaratory of the existing legal position that no Australian agency or official can engage in torture under any circumstances. This is consistent with the established principle of legality in statutory interpretation.

As Gleeson CJ observed in *Al Kateb v Godwin* (2004) 219 CLR 562 at 577:

> *Courts do not impute to the legislature an intention to abrogate or curtain certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases. It is not new.*
>
> *A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.*

I further note the remarks of Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v R* (1994) 179 CLR 427 at 437 that, in order to accept an interpretation that a provision curtails a basic human right, it must be apparent that:

> *[T]he legislature has not only directed its attention to the question of the abrogation or curtailment of such basic human rights, freedoms or immunities, but has also determined upon abrogation or curtailment of them. The courts should not impute to*

> *the legislature an intention to interfere with fundamental rights. Such an intention must clearly be manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.*

The express exclusions in sections 35C and 35K have been inserted for the sole purpose of providing explicit reassurance of this position, as sought by some members of the Parliament. As I advised the Senate in the debate of the Bill on 25 September, ASIO cannot, does not, and has never engaged in conduct constituting torture.

There can, in my view, be no sensible suggestion that such conduct is in any way relevant to, or necessary for, the performance by ASIO of its statutory functions. As such, conduct constituting torture is not, as a matter of law, capable of being the subject of a valid authority to conduct a special intelligence operation issued under section 35C. As the limited immunity from liability in section 35K applies only to conduct that is authorised, in advance, under section 35C, it is has no application to conduct constituting torture.

As the Committee has noted, the term 'torture' is not defined for the purposes of sections 35C and 35K. As noted at p. 27 of the Statement of Compatibility, the term is undefined to ensure that it will be interpreted consistently with Australia's international human rights obligations to prohibit torture, in accordance with established principles of statutory interpretation.

I note that the Committee has stated (at p. 12 of its report) it is "concerned that torture ... would be a matter of statutory interpretation by the courts". In my view, the approach taken in the Act serves to enhance, rather than detract from, the compatibility of the Bill with Australia's international human rights obligations to prohibit torture, having regard to the principle of legality in my remarks above. The drafting of the provisions mean that it is open to a court, should a matter proceed to prosecution or litigation, to examine the term in light of Australia's human rights obligations and any relevant, contemporary international law jurisprudence. (Similarly, it would be open to other oversight or scrutiny bodies empowered to examine matters of human rights compliance – including the Inspector-General of Intelligence and Security, or the Australian Human Rights Commission – to apply such an interpretation.)

Further, the Explanatory Memorandum expressly provides, at pp. 112 and 118, that the term 'torture' as it is used in subparagraphs (e)(ia) of subsections 35C(2) and 35K(1) is intended to be interpreted consistently with the definition of that term in the Convention Against Torture. The commentary in the Explanatory Memorandum is relevant to the application of the principles of statutory interpretation set out in section 15AB of the *Acts Interpretation Act 1901* to sections 35C and 35K of the ASIO Act. (Subsection 15AB(1) provides that a court may have recourse to extrinsic materials, including an Explanatory Memorandum, to confirm the ordinary meaning of a provision, or to determine the meaning of a provision in the event of ambiguity or if it is considered that the ordinary meaning would produce a manifestly absurd or unreasonable result.)

In addition, I note that the Government's amendment to insert subparagraph (e)(ia) in each of subsections 35C(2) and 35K(1) received unanimous support when I moved them in the

Committee stage of debate in the Senate on 25 September 2014. The meaning of the term 'torture' was examined in detail at that time, and was expressly supported by the Opposition and members of the cross-bench. (See *Senate Hansard*, 25 September 2014, p. 117.)

Special intelligence operations – cruel, inhuman or degrading treatment

Committee comment (p. 13)

The Committee therefore recommends that the Bill be amended to ensure that the proposed immunity afforded to ASIO officers or affiliates involved in special intelligence operations does not extend to any acts of cruel, inhuman or degrading treatment.

Attorney-General's response

I note that the Committee has stated (at pp. 12-13 of its report) that it is concerned that:

> *Acts which may fall short definition of torture, but may nevertheless constitute cruel, inhuman or degrading treatment may therefore be permitted under the Bill. For example, a number of investigative techniques which cause psychological distress or physical pain may not be considered serious injury or torture, but may nevertheless constitute cruel, inhuman or degrading treatment. Such acts would be covered by the immunity provided in the Bill.*

The Committee's conclusion that conduct constituting cruel, inhuman or degrading treatment "would be covered by the immunity provided in the Bill" reveals a misunderstanding of the application of the limited immunity from legal liability in section 35K of the Bill, and the conduct capable of being authorised by the Attorney-General under section 35C.

In particular, it is incorrect to assert that the limited immunity in section 35K operates to "permit" any, or all, conduct that is not expressly excluded in subsection 35K(1)(d) or (e). Rather, subsection 35K(1) expressly limits the immunity to conduct that is the subject of a valid authorisation issued under section 35C. As I have noted above in relation to conduct constituting torture, the Government is of the firm view that conduct constituting cruel, inhuman or degrading treatment is not capable, as a matter of law, of being authorised under section 35C. Accordingly, it is not legally necessary to exclude such conduct from new Division 4.

ASIO's actions are limited to those activities that are relevant to its performance of its statutory functions. Conduct constituting cruel, inhuman or degrading treatment is in no way necessary for, or relevant to, the performance by ASIO of its statutory functions. As such, I do not accept that there are any circumstances in which it would be open to an Attorney-General to find that the authorisation criteria in subsection 35C(2) are satisfied in respect of a special intelligence operation that would involve conduct constituting cruel, inhuman or degrading treatment. Accordingly, the limited immunity in section 35K is incapable, as a matter of law, of applying to such conduct.

Moreover, an interpretation of s 35K to the effect of that advanced by the Committee would produce a manifestly absurd result. It appears to involve an assumption that the Parliament intended (notwithstanding the absence of clear or express language on the face of the provision) to contravene the fundamental human rights obligations to which Australia is subject in respect of prohibiting cruel, inhuman or degrading treatment.

This is contradictory to fundamental and well-established principles of legality in the interpretation of legislation. Such an assumption would also lead to the impracticable outcome that it would be necessary to make express reference to conduct that contravenes all of Australia's international human rights obligations in the exclusions in subparagraph 35K(1)(e).

As such, the Government is satisfied – as was the Parliament as a whole in passing the Bill into law – that new Division 4 of Part III of the ASIO Act is consistent with Australia's international human rights obligations in respect of prohibiting torture and other cruel, inhuman or degrading treatment. The Government, therefore, has no intention to introduce or support any amendments to these provisions of the Act.