Appendix 1

Correspondence

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

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 15 July 2014 in which further information was requested on the following bill and legislative instruments:

- *Migration Amendment (Protection and Other Measures) Bill 2014*
- *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
2/9/2014

Migration Amendment (Protection and Other Measures) Bill 2014

1.178 The committee therefore requests the advice of the Minister for Immigration and Border Protection on the compatibility of the proposed section 5AAA with Australia's non-refoulement obligations under the ICCPR.

The Committee acknowledges 'it is a general principle of international law' that the 'burden of proof' rests with the asylum seeker'. Consistent with the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, the government accepts there are certain cases, such as vulnerable applicants, where the 'burden of proof' rests with the applicant in principle, but the duty to evaluate and ascertain all relevant facts is shared between the applicant and examiner (para 196, p. 38, December 2011). The UNHCR states that these cases may occur "often" but the same guidelines later reinforce the rule that the applicant should "assist the examiner in full in establishing the facts of his case" and "supply all pertinent information ... in as much detail as is necessary" to enable relevant facts to be established (para 205, p. 40, December 2011).

The proposed section 5AAA and 423A of the Migration Act (the Act) articulates a responsibility on non-citizens who seek protection in Australia to present all claims and supporting evidence as soon as possible. An express legislative provision puts that responsibility beyond doubt and clearly communicates expectations to all people seeking protection in Australia. Section 5AAA supports the integrity of protection determination processes in Australia. Early and full presentation of claims allows refugees to be recognised at the earliest opportunity and the amendment therefore assists Australia to observe and determine its *non-refoulement* obligations under the International Covenant on Civil and Political Rights (ICCPR). In addition to merits review, people seeking protection in Australia have access to Australian courts.

The proposed section 5AAA makes it clear that the role of the departmental decision maker or Refugee Review Tribunal (RRT) member is not to advocate on behalf of a person seeking protection, but to decide whether there is an obligation to provide protection. At no point does this provision negate the decision-maker's own obligation to appropriately investigate a claim for protection. The duty to evaluate and ascertain all relevant facts is shared between the applicant and decision maker, consistent with the UNHCR guidelines. Decision-makers must evaluate each case on its individual merits with regard to circumstances in the home country or countries. Applicants have repeated opportunities to present or clarify claims and evidence as their application is processed.

People seeking protection in Australia will be advised of their responsibilities under the proposed section 5AAA through the departmental website, including the Protection Application Information and Guides (PAIG), and through initial, written communication with Protection visa applicants.

Proposed section 5AAA is consistent with Australia's non refoulement obligations under the ICCPR. Procedural guidance and training is provided to decision makers to ensure the dignity and rights of vulnerable people, including unaccompanied minors, are respected. The proposed section 5AAA does not affect the government's obligations to conduct an effective and thorough assessment of claims for protection. The Government considers that sufficient safeguards exist to ensure the claims of vulnerable people are fully assessed and that they will not be removed in contravention of Australia's non-refoulement obligations. The Government considers section 5AAA to be compatible with Australia's non-refoulement obligations under the ICCPR.

1.193 The committee therefore considers the proposed amendments in Schedule 2 of the bill to be incompatible with Australia's non-refoulement obligations under the ICCPR and CAT.

The Government notes the Committee's comments and, noting that international jurisprudence can be persuasive but is not binding, remains of the view that Schedule 2 of the Bill represents an interpretation which is open as a matter of international law and is compatible with Australia's *non-refoulement* obligations under the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The reasons supporting this view have been set out in the Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum for the Bill and the Government reiterates those reasons.

1.199 The committee therefore considers that proposed section 423A is incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

The Committee's consideration that the proposed section 423A is not compatible with Australia's *non-refoulement* obligations under ICCPR and CAT is based upon the Committee's understanding that this provision "would limit the RRT to facts and claims provided in the original application" (para 1.197) and the Committee's view that section 423A is incompatible with the fundamental and typical nature of merits review. However, the proposed section 423A does not prevent new claims and evidence being presented at the review stage. Applicants will continue to be able to introduce new claims and evidence to support their applications at the review stage. What the provision does require is that if the RRT is satisfied that there is not a reasonable explanation for not providing the information at the primary stage, the Tribunal will draw an inference unfavourable to the credibility of the new claims or evidence raised.

Section 423A does not allow or require the RRT to disregard new claims or evidence. All claims and evidence presented must be considered and evaluated. It is only once all claims have been considered that a Tribunal member can determine whether an applicant's explanation for presenting new claims or evidence is reasonable.

Where a reasonable explanation has not already been provided by the applicant, it is open to the RRT to seek such an explanation. The manner in which that explanation is sought is a matter for the Tribunal.

It is open to the Tribunal to determine whether or not a reasonable explanation is implicit in the new claims or evidence. For instance, there may have been a significant change in the home country after the primary decision was made, so it may not have been possible for the applicant to make the new claims or provide relevant evidence earlier. An applicant may also experience a direct and obvious change to their circumstances, for instance, the birth of a child who may have protection claims in their own right. In such cases, the Tribunal member may consider a reasonable explanation to be self-evident.

Clear notice will be given to applicants about the consequences of section 423A, in order to ensure a fair hearing. Non-citizens claiming protection in Australia will be advised of their responsibility to provide all claims and evidence as soon as possible through general public information, including that available on the departmental website and in the Protection Application Information and Guides (PAIG), as well as through initial written communication between the department and

applicants. It is in the interests of the applicant and the process as a whole that there be consistent and clear messaging about the provisions in question.

The RRT may reinforce this advice to applicants in any way it deems appropriate. For instance, applicants may be reminded of the requirements of section 423A through the tribunal website, in general information available to applicants (eg. the RRT form *Information on making an Application for review to the Refugee Review Tribunal*).

Application assistance is not required in order to apply for, or be granted a Protection visa in Australia, however, it is open to all protection visa applicants to arrange application assistance from a registered migration agent privately, at their own expense. Publicly funded application assistance is not available at the review stage; however, those who arrive lawfully and are disadvantaged or face financial hardship may be eligible for assistance with their primary application for a Protection visa through the Immigration Advice and Application Assistance Scheme (IAAAS). A limited amount of support will also be available to illegal arrivals who are considered vulnerable, including unaccompanied minors. The government is currently considering the most effective and efficient way to provide this support.

This measure is intended to encourage applicants to present all relevant claims and evidence at the earliest opportunity and, if necessary, to support the RRT in making adverse credibility findings with regard to new claims and evidence in those cases where the RRT is not satisfied that there is a reasonable explanation for their delayed presentation.

Given the above, the government is of the view that the proposed section 423A does not preclude the full consideration of applicants' claims in the assessment process and is therefore compatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

1.202 The committee therefore requests the advice of the Minister for Immigration and Border Protection on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes.

In paragraph 1.201 the Committee expresses the view that "what constitutes a 'reasonable explanation' for the purpose of the unfavourable inference not being drawn by the RRT is not well defined". This leads to the Committee questioning whether this provision meets the "quality of law" test. The Government's view is that there is no interference with human rights, the quality of law test does not arise.

A "reasonable explanation" has not been defined within the proposed section 423A because the general principles of administrative law and reasonable decision-making apply. A "reasonable explanation" is one that satisfies a Tribunal member that the new claims and evidence **could not** be presented earlier because the applicant was **unable** to do so. It is an explanation which is legitimate and appropriate. If required, the Tribunal may seek evidence to verify that the applicant's explanation is reasonable.

A reasonable explanation may include, but is not limited to:

- no reasonable opportunity to present the claim, eg. interpreting or translating error made in the primary stage of the application;

- a change in country situation affecting human rights after the primary decision was made;
- new information relevant to the purposes of the application not known earlier, eg. new documentary evidence of identity has been provided;
- a change in personal circumstances allowing presentation of new claims, eg. a new relationship (spouse or child) with a person who has protection claims in their own right;
- being a survivor of torture and trauma, where the ill-treatment has affected an applicant's ability to recall or articulate protection claims;
- language or cultural barriers with a material bearing on the applicant's ability to present their case for protection; or
- the applicant is considered most vulnerable, eg. a minor, mentally or physically disadvantaged person, who has a restricted ability to participate in the protection process.

The Explanatory Memorandum states the purpose of this measure is "encouraging asylum seekers to provide all claims and supporting evidence as soon as possible" (p. 2). As outlined in the Second Reading Speech this provision intends to ensure that "any claim that can be presented at the initial application stage is presented at that stage." This provision is appropriate to the seriousness of an application for a Protection visa. That application rests on the need for international protection due to a well-founded fear of persecution or risk of suffering significant harm, possibly including torture. Under those circumstances it is reasonable to expect that claims and supporting evidence be provided by an applicant as quickly as possible, and that a reasonable explanation is provided when claims and evidence are unduly delayed. The proposed section 423A does not prevent new claims and evidence being presented or evaluated, but clarifies the manner in which that should be done.

1.208 The committee therefore considers that the proposed amendments to section 91W and new section 91WA are likely to be incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

The Committee has expressed concern that the refusal powers in these measures may be inconsistent with effective and thorough assessment of claims for protection, particularly where a person may have genuine claims but fails to establish identity. To assist the Committee in considering whether sections 91W and 91WA are compatible with *non-refoulement* obligations, and explain why the Government maintains proposed sections 91W and 91WA are compatible with *non-refoulement* obligations under ICCPR and CAT, a brief explanation of the process for assessing identity and protection claims follows.

Where protection claims are made in a Protection visa application, those claims will be assessed by a decision maker before any decision to refuse under sections 91W or 91WA is made. Refusal under sections 91W or 91WA will not short-circuit the assessment of any protection claim. The primary assessment of a Protection visa application is subject to independent merits review.

It is possible for a person to be assessed as engaging Australia's protection obligations and then be refused a Protection visa under section 91W or 91WA. In these circumstances, *non-refoulement* obligations prevail and the person engaging those obligations will not be returned to their receiving country. Should the necessary documentary evidence of identity, nationality or citizenship become available subsequent to the refusal of a Protection visa, the Minister may consider the exercise of his non-compellable power under section 48A of the *Migration Act 1958* (the Act) to allow a further Protection visa application to be made. It is also open to the Minister to exercise his non-

compellable powers under sections 417 (following RRT review) or 195A of the Act to grant any type of visa. The combination of legislation, policy and practices will ensure that *non-refoulement* obligations are met.

1.217 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 5AAA with the best interests of the child, 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.**

A legislative body is required to consider the best interests of the child as a primary consideration. The Australian Government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the migration programme and the effective and efficient use of government resources.

The reality is that all actions taken by the Government will affect children in some way. Where decisions have major impact on children, a greater level of protection may be required. Compatibility with the obligation to treat the best interests of the child as a primary consideration does not necessarily require a full or formal process of assessing and determining the best interests of the child or to act in those interests after taking into account other primary considerations. The Government has provided comments regarding its approach to the treatment of the best interests of the child in the statement of compatibility for the Bill when I stated the following:

> 'Treating the best interests of the child as a primary consideration will take place on a case-by-case basis. Other considerations may also be primary considerations such as the integrity of the migration programme. The obligation in the CRC in relation to the best interests of the child does not amount to a right to remain in Australia if a person has no other lawful authority to stay, but should be taken into account when arranging removal.
>
> The Government has policies and procedures to give effect to this obligation and is committed to acting in a manner consistent with the CRC.'

As noted in the Statement of Compatibility, the Department will ensure that vulnerable persons, including children, will be given a meaningful opportunity and appropriate assistance to present their claims. The committee has noted at 1.216, that to demonstrate that a limitation is permissible, proponents of legislation must provide why the measures are necessary in pursuit of a legitimate objective. The government is of the view that section 5AAA does not limit the obligation to treat the best interests of children as a primary consideration.

1.223 The committee therefore requests the advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 423A with the obligations in relation to the best interests of the child, and particularly:

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

Section 423A does not prevent claims being assessed and the RRT will determine the most appropriate way of eliciting an explanation for new claims from applicants, including children.

The government is of the view that section 423A does not limit the obligation to treat the best interests of children as a primary consideration.

1.227 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 91W and section 91WA with the obligation in relation to the best interests of the child, and particularly:

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

As noted above, claims for protection will still be fully assessed, including in cases where the sections 91W and 91WA permit refusal of the protection visa application.

The government is of the view that section 91W and section 91WA do not limit the obligation to treat the best interests of children as a primary consideration.

1.232 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 1 of the bill with the obligation to consider the best interests of the child as a primary consideration and, particularly, how the measures are:

- **Aimed at achieving a legitimate objective; and**
- **There is a rational connection between the measures and the objective; and**
- **The measures are proportionate to the objective.**

The government is of the view that Schedule 1 of the Bill is compatible with the obligation to treat the best interests of children as a primary consideration.

This measure is intended to prevent and discourage the use of the onshore component of Australia's Humanitarian Programme as a means of family migration. It puts beyond doubt that when a family migration outcome is sought, the Protection visa process is not the appropriate stream. An applicant

who is a member of the same family unit as a Protection visa holder retains the right to seek the grant of a Protection visa on the basis of their own, specific protection claims.

As the Committee acknowledges in paragraph 1.231, there is no right to family reunification for recognised refugees under international law. Nor is there any prescribed mechanism for family reunification. This measure does not, therefore, limit existing rights of the child.

Consistent with the reasons already set out, section 91WB does not affect the rights of a permanent Protection visa *holder* to sponsor migration of members of their family unit under the appropriate family migration programmes. Family members outside Australia may also continue to apply for migration to Australia under the offshore Humanitarian Programme.

The Committee is concerned "that the Migration Act currently provides a number of measures that seek to preserve, where appropriate and reasonable, the family unity of those seeking protection in Australia" and that this bill "seeks to limit those rights" (Para 1.231). However, this measure upholds the principle of family unity for Protection visa *applicants*. Proposed section 91WB does not affect the definition of a member of the same family unit, and continues to allow family members to be included in a Protection visa application, or for members of the same family unit to combine separate applications. The purpose of section 91WB is not to change existing provisions regarding family unity within the Protection visa process, but to put their interpretation beyond doubt.

Furthermore, proposed section 91WB does not affect children born to Protection visa holders. These children are eligible for the grant of a Protection visa under section 78 of the Act. In addition, section 12 of the *Australian Citizenship Act 2007* continues to apply and allows for automatic acquisition of Australian citizenship for children born in Australia to a permanent visa holder. Current provisions of the Citizenship Act, and the Migration Act, maintain the principle of family unity, where appropriate and reasonable, for those seeking protection in Australia.

This measure also protects the rights of the child by discouraging family members of Protection visa holders from making dangerous boat voyages to Australia, or otherwise arriving in Australia illegally, in the expectation of being granted a Protection visa, on the basis of being a member of the same family unit of a Protection visa holder.

1.237 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the obligation to consider the best interests of the child and, particularly, how the measures are:

- **Aimed at achieving a legitimate objective; and**
- **There is a rational connection between the measures and the objective; and**
- **The measures are proportionate to the objective.**

A legislative body is required to consider the best interests of the child as a primary consideration. The Australian Government is also required to determine if these interests are outweighed by other primary considerations such as the integrity of the migration programme and the effective and efficient use of government resources.

The changes to the bars do not represent a policy shift. The expanded operation of the section 46A bar makes section 91K redundant for the purpose of managing unauthorised maritime arrivals in the

community, and the amendments will ensure section 91K no longer applies to unauthorised maritime arrivals.

The government is of the view that Schedule 3 of the Bill is compatible with the obligation to treat the best interests of children as a primary consideration, as, for the reasons already set out, the Government has considered those interests and has concluded that they are outweighed by the policy objectives of preserving the integrity of the migration programme and encouraging lawful migration pathways.

1.247 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of Section 5AAA with the rights to equality and non-discrimination.

As previously stated, section 5AAA does not impose new responsibilities on non-citizens seeking protection in Australia, but rather, expressly states it is the responsibility of the person seeking protection to establish their claims.

The Committee is concerned about possible discrimination under this provision, which may compromise equality before the law or rights to equal protection of the law. Specific concerns are raised regarding possible discrimination on the basis of disability and gender, particularly the difficulty for women to obtain documentary evidence of harm experienced. However, proposed section 5AAA does not insist on the provision of documentary evidence. It calls for a person seeking protection in Australia to state "all particulars of his or her claim" and provide "sufficient evidence to establish the claim". The role of the decision maker, as previously discussed in response to 1.178, is to evaluate that claim. In that process, a decision maker may ask questions, seek clarification and check that the person's claims for protection are consistent with generally known facts and the specific country situation in question. Where relevant, country information assists the consideration of whether the availability of documentation is gender specific. The department's *Procedures Advice Manual – Gender Guidelines* and *Refugee Law Guidelines* assist in assessing claims from vulnerable applicants, including women and applicants with an intellectual disability. Greater details regarding claims will, therefore, be sought and the veracity of claims will be established further during the process of evaluation.

Various forms of application assistance are available to people seeking Australia's international protection. People living with a disability may be entitled to publicly funded application assistance, depending on the nature of their disability.

1.250 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of section 423A with the rights to equality and non-discrimination.

The Committee is concerned that the proposed section 423A may have a disproportionate or unintended negative impact on persons with a disability and notes that a person experiencing particular disabilities may be less able to accurately provide evidence or repeat evidence. Accordingly, the Committee suggests that some people with disabilities who seek protection in

Australia may not provide their claims fully and in a timely manner due to circumstances beyond their control.

This situation has been taken into account in the proposed section 423A. The RRT will draw an inference unfavourable to the credibility of new claims or evidence only if the Tribunal is not satisfied that the applicant has a reasonable explanation to justify why they were not presented during the primary application stage. Where an applicant is unable to present all their claims and supporting evidence because of a proven disability, it is open to the RRT to determine whether a "reasonable explanation" is implicit.

1.255 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed RTT [sic] to dismiss an application is compatible with the right to a fair hearing in article 14 of the ICCPR, 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 reasonable and proportionate measure for the achievement of that objective.**

The purpose of this amendment is to clarify that if a review applicant fails to appear before the Migration Review Tribunal (MRT), in response to an invitation under section 360 of the Act, the MRT has the option of dismissing the application or making a decision on the review, as is the case under current subsection 362B(1). Proposed section 426A(1A) mirrors this amendment for the RRT.

The Government is committed to ensuring that MRT and RRT review applicants remain entitled to a fair hearing. The power to dismiss a review application for non-attendance is not intended to impact on procedural fairness already codified in the Act. It is intended to increase tribunal efficiency by providing for a quick resolution of a case where, following the usual accordance of procedural fairness, the applicant for review has not attended the hearing. Dismissal for failure to attend a hearing is one of three possible options the tribunals may consider for non-attendance by an applicant at a hearing. The other options are either to proceed to a decision on the review or reschedule the hearing.

If dismissal is chosen, the tribunals will have a power to reinstate an application where the applicant applies within a certain time period and the relevant tribunal considers it appropriate to reinstate the application.

Review applicants will be made aware in the invitation to hearing letter that, if they do not attend a hearing after being invited to do so, their application may be dismissed for failing to appear. The tribunals will be required to notify the applicant of the decision to dismiss the application for failure to appear. The notice will also include information that sets out how the review applicant can seek reinstatement of their review application within a specified timeframe. Where the tribunals reinstate a review application, the applicant will be notified that their application is taken never to have been dismissed and the review will continue.

The tribunals are required to afford procedural fairness in accordance with the Act. The Government notes that, in the migration and refugee context, there is a high incentive for merits review to be used by unsuccessful visa applicants and asylum seekers with unmeritorious claims to

delay their removal from Australia. The Government therefore considers that a power enabling review applications at the MRT and RRT to be dismissed for non-attendance at a scheduled hearing would allow the tribunals to focus resources away from matters that are not actively being pursued by the review applicant.

This proposed measure applies to all individuals within the MRT's and RRT's jurisdiction and will achieve the Government's legitimate objective of strengthening the administrative efficiency and processes of the tribunals to support the integrity of the merits review process. Proposed sections 362B(1A) and 426B(1A) do not limit a person's right to equality before the tribunals or the right to a fair hearing by a competent, independent and impartial tribunal established by law.

In light of the above and articulated previously in the statement of compatibility, the Government is of the view that ability for the MRT and RRT to dismiss an application in the above circumstances does not limit any rights.

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

1.543 The committee therefore requests the Minister for Immigration and Border Protection' 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.**

Noting the Committee's comments at 1.541 that it accepts the non-citizens do not have a stand-alone right to family reunification under international rights law', the decision to migrate to Australia involves the often very difficult decision to leave family and friends behind, however this is a matter of individual choice and brings with it no unfettered right to extended family reunification.

1.554 The committee therefore requests the Minister for Immigration and Border Protection's Advice on the compatibility of the repeal of certain carer visa classes with the right to health, 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.**

Is the measure aimed at achieving a legitimate objective?

The measure achieves a legitimate objective of removing visa subclasses that are not providing their intended objectives due to the long wait times for a decision on their application.

Is there a rational connection between the measure and that objective?

The Carer visa was only to be used when other forms of care cannot reasonably be provided by any other relative or obtained from welfare, hospital, nursing or community services in Australia. Yet it is expected that applicants currently wait up to six years for their carer to obtain a visa, while still requiring this same high level of care.

In addition, the majority of Carer visa places are granted to dependent applicants (spouse or de facto partner, minor children and adult dependent relatives). In the 2013-14 programme year 62.5% of visa grants were given to dependent applicants. This meant that only 37.5% of the available Carer visa places were used to provide an outcome that provided care for an Australian citizen, permanent resident or eligible New Zealand citizen.

Is the measure proportionate to that objective?

The repeal of the Carer visa does not prejudice access to health and welfare services that every Australian has. The repeal does not change the availability to family members outside Australia to apply for a visitor visa where they can show that the purpose of their visit is to assist with the short-term care needs of a seriously ill relative who is an Australian citizen or permanent resident.

Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014 (the Regulation) [F2014L00726]

1.563 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the ability to release information concerning a person's previous changes of name is compatible with the right to privacy.

Section 37 of the *Australian Citizenship Act 2007* provides that a person may make an application for evidence of the person's Australian citizenship. When given, that evidence must be in a form prescribed by the *Australian Citizenship Regulations 2007* (the Citizenship Regulations) and contain any other matter prescribed by the Citizenship Regulations.

Since 1 July 2011, the Citizenship Regulations have provided that the following information, among other matters, may be included on the back of a notice of evidence of citizenship:

- the applicant's legal name at time of acquisition of Australian citizenship, if different to the applicant's current legal name;
- any other name in which a notice of evidence has previously been given;
- any other dates of birth in which a notice of evidence has previously been given.

Schedule 6 of the Regulation amends Schedule 2 of the Citizenship Regulations by expanding the range of information that may be included on the back of a notice to include the date of any notice of evidence of Australian citizenship previously given to the person.

The provision of details of previous notice of evidence on the back of a notice of evidence assists in maintaining the integrity of Australia's identity framework. Identity integrity is essential in maintaining Australia's national security, law enforcement and economic interests. It is essential that the identities of persons accessing government or commercial services, benefits, official documents and positions of trust can be verified. False or multiple identities can and do underpin terrorist activities; impact on border and citizenship controls; finance crimes; and facilitate fraud.

The Attorney-General's National Identity Security Strategy states that 'if identity security risk is negligible to all parties, an individual should be able to remain anonymous or use a pseudonym if they choose. However, if risks to one of the parties are unacceptable, the identity of the other party must be confirmed. For government agencies, unacceptable risks include those that may lead to identity fraud'. Identity fraud has a significant impact on Australia's people and economy. According to the *Australian Bureau of Statistics Personal Fraud Survey 2010-11*, Australians lost $1.4 billion due to personal fraud (which includes credit card fraud, identity theft and scams). The survey estimated a total of 1.2 million Australians aged 15 years and over were victim of at least one incident of identity fraud in the 12 months prior to the survey interview.

Notices of evidence of citizenship are treated as a foundation identity document by many Australians and recording the particulars of previous notices of evidence on the back of a notice of evidence helps prevent misuse of identity. For example, where a person has multiple identities and only one is recorded on the evidence of citizenship, the following risks may present where the evidence of citizenship is presented as a primary form of identification:

- National police checks (including working with vulnerable people checks) may not include all identities, resulting in criminal charges not being detected and increasing risk to the

Australian public, government, business and care facilities – for example, a person with child sex convictions under one identity may gain a position in a child care centre under another identity.

- Security vetting for government positions of trust may not include all identities, increasing risk to national security – for example, a person who would be considered a national security risk under one identity receives a clearance under another identity and gains access to sensitive information, restricted areas or high risk jobs, such as at an Australian port of entry.
- A person may fraudulently collect benefits under multiple identities from state and federal government – for example, a person could collect Centrelink benefits under multiple identities.
- Credit checks may be incomplete, presenting a risk to financial institutions and business – for example, a person with a bad credit history under one identity may present a clear credit check and procure finance under another identity.

The provisions in Schedule 2 of the Citizenship Regulations aid in the mitigation of these risks, preventing and deterring identity crime and misuse (objective one of the National Identity Security Strategy) and offering increased confidence in the verification of identity of Australians born overseas, for government, business and the Australian public.

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with, among other matters, an individual's privacy. However, the right to privacy is not an absolute right. This means it does not apply in an unlimited or absolute manner and Australia can limit the extent of these rights, as long as it limits the right consistent with the principle of non-discrimination which outlines the test for legitimate differential treatment under international law. Limitations that are reasonable, necessary and proportionate in achieving a legitimate objective are permissible.

Schedule 2 of the Citizenship Regulations engages the right to privacy in that it allows for the inclusion on the back of a notice of evidence of citizenship information about when and in what identity a person has previously been issued with such a notice.

The legitimate objective of the recording of details of previous notices of evidence on the back of a notice of evidence is enhancing the integrity of the identity framework. The potential limitations on the right to privacy are:

- reasonable as they seek to reduce the opportunity for identity fraud and the consequent impact on the community;
- necessary as there is no other practical way to associate the details of previous notices of evidence with a current notice of evidence; and
- proportionate as they do not make the person's identity details available to the general public. Rather, notices of evidence are generally used when individuals are dealing with government or other bodies that have a need to establish the person's identity and citizenship status, therefore the extent of the limitation on privacy and need to disclose this information is limited. 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 if they are satisfied that the inclusion of a particular name will endanger the client or another person connected to them.

1.572 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the ability to release information concerning a person's change of name is compatible with the right to equality and non-discrimination.

The committee has stated that Schedule 2 of the Citizenship Regulations indirectly engages the rights of equality and non-discrimination in that it allows for the inclusion on the back of a notice of evidence of citizenship information about when and in what identity a person has previously been issued with such a notice, and that information may disclose that the person has undergone sex or gender reassignment.

The rights to equality and non-discrimination in articles article 2, 16, and 26 of the ICCPR are not absolute rights.

As noted above, the legitimate objective of the recording of details of previous notices of evidence on the back of a notice of evidence is enhancing the integrity of the identity framework. The potential limitations on the right to equality and non-discrimination are:

- reasonable as they seek to reduce the opportunity for identity fraud and the consequent impact on the community;
- necessary as there is no other practical way to associate the details of previous notices of evidence with a current notice of evidence; and
- proportionate as they do not make the person's identity details available to the general public. The person has control of the notice of evidence and over the disclosure of the information. Notices of evidence are generally used when individuals are dealing with government or other bodies and used as primary evidence to establish the person's identity and citizenship status, therefore while importance of the notice of evidence, the extent of the limitation on privacy and need to disclose this information is limited. 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 if they are satisfied inclusion of a particular name will endanger the client or another person connected to them.

The Hon Kevin Andrews MP
Minister for Social Services

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
Facsimile: (02) 6273 4122

RECEIVED
DATE 28/08/14 BY PJC+HR

MC14-009095

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

Dear Senator Smith

Thank you for your letter of 15 July 2014 about the Social Services and Other Legislation Amendment (2014 Budget Measures No 1) Bill 2014 and the Social Services and Other Legislation Amendment (2014 Budget No 2) Bill 2014.

I have noted the comments in the Committee's *Ninth Report of the 44th Parliament* and have provided my response to these comments in the enclosed documents.

Thank you again for writing.

Yours sincerely

KEVIN ANDREWS MP

Encl.

ATTACHMENT A: **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Social Services and other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*' report, has sought advice from the Minister for Social Services on whether certain measures included in the Social Services and other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 are compatible with human rights, as defined in the Act.

Specifically the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination, the right to social security and the right to an adequate standard of living. This document provides responses to the Committee's request for advice on compatibility of the measures identified with those rights.

Right to equality and non-discrimination

Statement of compatibility does not address potential indirect discrimination against women

All Schedules

1.337 The committee therefore requests the Minister for Social Services' advice on the compatibility of each schedule in the bill with the rights to equality and non-discrimination and, in particular, whether these measures are:

- aimed at achieving a legitimate objective;
- there is a rational connection between the measures and the objective; and
- the measures are proportionate to that objective.

The proposed changes affect all recipients, regardless of their gender and are aimed at ensuring that social security is targeted, sustainable and consistent over the long term.

The measures will help ensure ongoing assistance is targeted to those who need it most, and the impacts are sufficiently small as to be proportionate to the objective of preserving access to payments system over the long term.

Furthermore a per child single parent supplement will become available for single parent families on the maximum rate of FTB Part A when their children are aged between six and 12, as part of the Social Services and other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014, to provide additional assistance to this group.

Right to Social Security and Right to an adequate standard of living

Abolition of seniors supplement

Schedule 1

- **cease payment of the seniors supplement for holders of the Commonwealth Seniors Health Card or the Veterans' Affairs Gold Card from 20 June 2014.**

1.351 The committee therefore seeks the Minister for Social Services' advice as to whether the removal of the seniors supplement is compatible with the right to social security, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed abolition of the seniors supplement is aimed at ensuring that social security assistance to self-funded retirees remains sustainable over the longer term and is consistent with a well-targeted means tested income support system, which provides financial assistance to those most in need.

It should also be noted that the value of assistance to self-funded retirees has grown considerably over time. The original intention of the Commonwealth Seniors Healthcare Card (CSHC), which was introduced in 1994, was to provide concessions to low-income retired aged persons who were not eligible for the age pension (or service pension).

The Government's election commitment to index the CSHC income limits by the CPI from 20 September 2014 will increase the number of people qualifying for the card by 27,000 people by 2017-18. This will support their efforts to be independent.

The limitation is both reasonable and proportionate. Self-funded retirees who are not entitled to the Age Pension will continue to be entitled to the CSHC and Energy Supplement (currently $361.40 p.a. for singles and $273.00 p.a. for each member of a couple). These benefits are not available to Australians of workforce age with similar means.

Holders of a CHSC will remain entitled to the concessions attached to the CSHC such as the provision of Pharmaceutical Benefits Scheme (PBS) medicines at the concessional co-payment amount of $6.00 ($36.90 for non-concession card holders) and access the lower Medicare Safety net, which is currently $624.10 per year for concession card holders and $1,248.70 for non-concession card holders.

Ceasing indexation of the (clean) energy supplement

Schedule 2

- **Rename the clean energy supplement as the energy supplement, and permanently cease indexation of the payment from 1 July 2014.**

1.358 The committee seeks the Minister for Social Services' advice as to whether ceasing indexation of the energy supplement is compatible with the right to social security and the right to an adequate standard of living , 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 reasonable and proportionate measure for the achievement of that objective.

The proposed cessation of indexation of the (clean) energy supplement is aimed at returning savings to the Budget, while at the same time continuing to provide a benefit to families and income support recipients even though the original purpose of this compensation payment no longer exists i.e. the price impacts of the carbon tax have been removed due to its abolition. The renamed Energy Supplement will provide ongoing assistance to families and income support recipients with household expenses, including energy costs.

Price pressures due to the introduction of the carbon tax will be removed now that the carbon tax has been abolished and families and income support recipients will have greater disposable income. The ceasing of indexation of the Energy Supplement limits the payment to a rate that is current at the time this legislation is passed. The original purpose of this payment and the need to continue it in its entirety will have been extinguished with the repeal of the carbon tax, however, people will continue to receive a non-indexed Energy Supplement meaning their standard of living will be enhanced.

The limitation effect of ceasing indexation is very reasonable when accounted for in conjunction with the Repeal of the Carbon Tax legislation and proportionally people will be better off and the government will still achieve its savings objective.

Pausing indexation of income and asset thresholds for a range of benefits

Schedule 3

- **pause indexation for three years of the income-free areas and assets-value limits for all working age allowances (other than student payments), and the income test free area and assets value limit for parenting payment single from 1 July 2014.**

1.364 The committee therefore seeks the Minister for Social Services' advice as to whether the these measures in Schedule 3 of the bill are compatible with the right to social security and the right to an adequate standard of living, 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 reasonable.

The proposed pauses to indexation of income and asset thresholds for a range of payments are aimed at slowing growth in social security expenditure. The changes will help ensure Australia has a well-targeted means tested income support system that provides financial assistance to those most in need, while encouraging self-provision whenever possible.

The changes to the value of income and assets test free areas and thresholds for certain Australian Government payments assist in limiting growth in overall social security expenditure in the context of targeting payments according to need. This measure applies irrespective of gender.

The limitation is both reasonable and proportionate. Specific impacts for people depend on payment type and people's circumstances and will be experienced by people with sufficient private income/assets to be assessed under the relevant means test. Payments will not be reduced unless customers' circumstances change, such as their income or assets increasing in value.

Pausing indexation of the parenting payment single

Schedule 3

- **Index parenting payment single to the Consumer Price Index only, by removing benchmarking to Male Total Average Weekly Earnings from 20 September 2014.**

1.370 The committee therefore seeks the Minister for Social Services' advice as to whether changing the indexation of the parenting payment single from benchmarking against Male Total Average Weekly Earnings to the Consumer Price Index is compatible with the right to social security and the right to an adequate standard of living, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed pause of indexation of parenting payment single is aimed at standardising indexation arrangements across all social security payments and putting the income support system on a more sustainable footing by slowing down the growth of the Government's expenditure on social security. This measure applies irrespective of gender.

The measure is designed to reduce fiscal pressures on future budgets in the context of constrained budgetary circumstances. The measure does this by slowing down the growth in Government expenditure on social security.

The limitation is both reasonable and proportionate. The measure does not affect eligibility or qualification requirements for the payment and therefore access to social security support remains unchanged. At the same time, the measure achieves legitimate objectives of helping to constrain growth in social security expenditure, to assist the system to remain sustainable.

Pensions will continue to be indexed twice a year and purchasing power will be maintained through indexation to movements in prices.

Restrictions on eligibility for immediate social welfare payments

Schedule 6

- **Extend and simplify the ordinary waiting period for all working age payments from 1 October 2014.**

1.380 The committee therefore seeks the Minister for Social Services' advice as to whether changing the eligibility for immediate social welfare payments is compatible with the right to social security and the right to an adequate standard of living, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed restrictions on eligibility for immediate social welfare payments are aimed at ensuring access to income support is consistent across similar payments. The OWP that currently applies to Newstart Allowance and Sickness Allowance is designed to enforce a period of self-support and has existed since the first iteration of these payments commenced in 1945.

There are currently a number of income support payments available for working age people with full or partial capacity to support themselves through paid employment, or who are temporarily incapacitated. Eligibility for these working age payments, such as Youth Allowance (other), Parenting Payment (Partnered and Single) and Widow Allowance, has gradually changed in recognition that recipients of these payments generally have some capacity for self-support and often take advantage of the increased opportunities for flexible, part-time and casual workforce participation.

Therefore in order to meet the objective of consistency, this measure will extend the application of the OWP to new claimants of Youth Allowance (other), Parenting Payment (Partnered and Single) and Widow Allowance. This limitation is reasonable as it ensures more consistent access to similar working age payments while maintaining the longstanding principle of self-support. Claimants without the means to support themselves will have access to exemptions and waivers.

The proposed changes are also aimed at ensuring a sustainable and well-targeted payment system. Exclusion periods, such as the Income Maintenance Period and Liquid Assets Waiting Period, apply to certain working age income support payments to enforce self-support for a period which is based on the person's level of resources.

The changes to the concurrency rules in this measure ensure that income support payments are directed towards those in need. The tightening of the severe financial hardship waiver also acts as a discouragement for people to spend their resources on non-essential items in order to obtain income support payments. These limitations are reasonable as they ensure claimants use their own resources

first, while still enabling those who are in hardship due to extenuating circumstances to access payments immediately.

Restrictions on eligibility for immediate social welfare payments – quality of law test

Schedule 6

- **Extend and simplify the ordinary waiting period for all working age payments from 1 October 2014.**

1.384 The committee therefore requests the Minister for Social Service's advice on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes.

As the individual circumstances of people are many and sometimes complex, it is not possible to envisage or legislate specifically in the primary legislation to cover all circumstances. The use of legislative instruments provides the Secretary or the Minister with the flexibility to refine policy settings to ensure that the rules operate efficiently and fairly without unintended consequences.

The measure in Schedule 6 allows the Secretary (under the current Administrative Arrangements Order, this means the Secretary of the Department of Social Services) to prescribe, by legislative instrument, the circumstances which constitute a 'personal financial crisis' for the purposes of waiving the Ordinary Waiting Period. Such circumstances may include where a person has experienced domestic violence or has incurred reasonable or unavoidable expenditure.

This provision provides the Secretary with the flexibility to consider other unforeseeable or extreme circumstances which may be identified in the future where it would be appropriate for a person to have immediate access to income support. Using an instrument will enable this to occur in a timely manner without having to amend the primary legislation. This power can only be used beneficially and any instrument issued by the Secretary would be subject to Parliamentary scrutiny and disallowance.

Pausing indexation of Family Tax Benefits

Schedule 7

- **Pause indexation for two years of the family tax benefit Part A and family tax benefit Part B standard payment rates from 1 July 2014.**

1.390 The committee therefore seeks the Minister for Social Services' advice as to whether pausing the indexation of family tax benefit payments is compatible with the right to social security and the right to an adequate standard of living, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed pause of indexation of FTB is aimed at ensuring that the family payments system remains sustainable in the long term and is better targeted to support those who need it most. As noted in the

Statement of Compatibility, the United Nations Committee on Economic, Cultural and Social Rights has stated that a social security scheme should be sustainable. Ensuring the sustainability of the family payments system helps preserve the right to social security over the long term.

Only a small number of higher income families will lose access to the payment altogether as a result of income growth and the pause to standard payment rates. These families would only be receiving a nominal amount of payment, and would not rely on FTB to achieve an adequate standard of living.

Therefore the limitations on the right to social security imposed by this measure are reasonable and proportionate as they contribute to the sustainability of the family payments system.

Social Services and other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014

The Parliamentary Joint Committee on Human Rights, in its 'Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*' report, has sought advice from the Minister of Social Services on whether certain measures included in the Social Services and other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 are compatible with human rights, as defined in the Act.

Specifically the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination, the right to social security, the right to an adequate standard of living and the right to an education. This document provides responses to the Committee's request for advice on compatibility of the measures identified with those rights.

Right to Social Security and Right to an adequate standard of living

Changes to indexation of pension

Schedule 1

- **Provide that all pensions are indexed to the Consumer Price Index only be removing from 20 September 2017:**
  - **benchmarking to Male Total Average Weekly Earnings;**
  - **indexation to the Pensioner and Beneficiary Living Cost Index.**

1.403 The committee therefore seeks the Minister for Social Services' advice as to whether the changes to indexation of pensions are compatible with the right to social security, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed changes to indexation of pensions are aimed at standardising indexation arrangements across all social security payments and putting the income support system on a more sustainable footing by slowing down the growth of the Government's expenditure on social security.

The measure is designed to reduce fiscal pressures on future budgets in the context of demographic changes associated with an ageing population. The measure does this by slowing down the growth in Government expenditure on social security.

The limitation is both reasonable and proportionate. The measure does not affect eligibility or qualification requirements for the payment and therefore access to social security support remains unchanged. At the same time, the measure achieves legitimate objectives of helping to constrain growth in social security expenditure, to assist the system to remain sustainable.

Pensions will continue to be indexed twice a year and purchasing power will be maintained through indexation to movements in prices.

Pausing indexation of income and asset test thresholds for a range of benefits

Schedule 1

- **pause indexation for three years of the income free areas and assets value limits for student payments, including the student income bank limits from 1 January 2015;**
- **pause indexation for three years of the income and assets test free areas for all pensioners (other than parenting payment single) and the deeming thresholds for all income support payments from 1 July 2017.**

1.410 The committee therefore seeks the Minister for Social Services' advice as to whether the these measures in Schedule 1 of the bill are compatible with the right to social security and the right to an adequate standard of living, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed pause of indexation of income and asset test thresholds for a range of benefits is aimed at slowing the growth in social security expenditure. The changes will help ensure Australia has a well-targeted means tested income support system that provides financial assistance to those most in need, while encouraging self-provision whenever possible.

The changes to the value of income and assets test free areas and thresholds for certain Australian Government payments assist in limiting growth in overall social security expenditure in the context of targeting payments according to need.

The measure is reasonable and proportionate for the achievement of the above objectives. Specific impacts for people depend on payment type and people's circumstances and will be experienced by people with sufficient private income/assets to be assessed under the relevant means test. Payments will not be reduced unless customers' circumstances change, such as their income or assets increasing in value.

Removal of eligibility for Newstart allowance for 22-24 year olds

Schedule 8

- **extend youth allowance (other) from 22 to 24 year olds in lieu of the Newstart allowance and sickness allowance from 1 January 2015.**

1.416 The committee therefore seeks the Minister for Social Services' advice as to whether the removal of eligibility of 22-24 year olds for the Newstart allowance is compatible with the right to social security and the right to an adequate standard of living, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed extension of the youth allowance (other) eligibility age is aimed at achieving consistency across payments, as well as encouraging young people to undertake or participate in education or training to ensure that they are able to achieve long term sustainable employment outcomes. The

measure will provide unemployed young people with incentives and support to take advantage of the opportunities that Australia's labour market provides.

The changes to the Youth Allowance maximum age build on those already passed in the *Social Security and Other Legislation Amendment (Income Support and Other Measures) Act 2012.* These changes increased the maximum age of Youth Allowance (other), Sickness Allowance and ABSTUDY from 21 years of age to 22 years for young people.

Since 1998, there have been two different maximum ages for Youth Allowance – one for full-time students and one for young unemployed people. Once a young person reaches the maximum age for Youth Allowance as a job seeker, they transition to Newstart Allowance which is paid at a higher rate of payment.

Presently, around 78,500 unemployed youth aged 22-24 are paid Newstart or Sickness Allowance. Such a person would be advantaged by staying on Newstart Allowance instead of pursuing full-time study or employment, given the higher rate of these allowances. This measure removes this disincentive by placing all under 25 year olds on the same payment levels whether unemployed or studying full-time.

This proposal will affect new claimants from 1 January 2015, who will continue to receive Youth Allowance between the ages of 22 to 24 years. Grandfathering arrangements will apply to young people aged 22 years or over and in receipt of Newstart Allowance or Sickness Allowance as at 1 January 2015.

Youth Allowance is paid at a lower rate than Newstart Allowance however, a persons right to social security will remain. This is justified given the intent to ensure payment rates are aligned for young people in receipt of Youth Allowance aged under 25 years, regardless of their circumstances. Young people will continue to be supported, including a range of programs and other services provided by the Commonwealth and state governments, and grandfathering arrangements ensure that no young person will have their payment rate reduced as at 1 January 2015.

Twenty-six week waiting period for social security payments for under-30 year olds

Schedule 9

- **Require young people with the capacity to learn, earn or Work for the Dole from 1 January 2015.**

1.423 The committee therefore seeks the Minister for Social Services' advice as to whether the 26 week waiting period for social security benefits for those under 30 is compatible with the right to social security and the right to an adequate standard of living, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed 26 week waiting period for all new job seekers up to 30 years of age claiming Newstart Allowance, Youth Allowance (other) and Special Benefit who are considered to be job ready is aimed at increasing the level of young job ready people achieving gainful employment outcomes.

According to the *OECD Factbook 2013: Economic, Environmental and Social Statistics,* 'young people who are neither in employment nor in education and training are at risk of becoming social excluded

individuals with income below the poverty-line and lacking the skill to improve their economic situation.' This measure seeks to address youth unemployment by encouraging young people to accept jobs rather than relying on income support at risk of becoming disengaged – both socially and economically.

Income support data (March 2013) supports that the targeted job ready group of young people that the measure is aimed at are more likely to achieve positive employment outcomes. Newstart Allowance and Youth Allowance (job seeker) data shows that a majority of these job ready young people exit payment within 6 months of being granted (52.9% for Newstart Allowance and 34 per cent for youth allowance (job seeker)), are more likely to have parental support (66.2% considered to be dependent on their parents for youth allowance purposes) and therefore less likely not to have access to an adequate standard of living. The 2011 Census data also supports that 29% of young Australians aged 18-34 years are still living in the parental home.

During the 26 week waiting period young job seekers will have access to the full range of employment services to support their job search efforts. After a person's waiting period is served, job seekers will be eligible to receive income support. This will continue to be paid until a person has been participating in 25 hours per week of Work for the Dole for 26 weeks. After this time, a non-payment period will be imposed for 26 weeks; however a young person will have access to a wage subsidy[1] for potential employers and access to relocation assistance.

Exemptions will be available to certain groups with extra responsibilities or those that are not able to work or study. Exemptions from the new waiting period will be available for people who have a partial capacity to work less than 30 hours a week, parents receiving Family Tax Benefit for a child, part time apprentices, principal carer parents, a job seeker with significant barriers to employment under the current employment services arrangements (or the Remote Jobs and Communities Programme equivalent), Disability Employment participants and Farm Household Allowance recipients. Evidence suggests that this measure will be most effective if it is supported by an appropriate level of employment services, targeted at job seeker deficits.[2]

The specific targeting of this measure to those young people who are job ready without any barriers to prevent them from gaining employment will mitigate the risk of limiting a person's right to social security. Young people will have access to the full range of programmes and assistance under the employment service model to enable them to find employment and access to a Health Care Card which provides people with access to the Pharmaceutical Benefit Scheme and other state based concessions.

---

[1] Wage subsidy trials carried out in South Africa (*Stellenbosch Economic Working Papers: 02/14: Levinsohn/Rankin/Roberts/Schoer*) amongst young people showed that targeted wage subsidies are a powerful tool for getting job seekers into long term sustainable work. The key finding of the paper was that those who were allocated a wage subsidy were more likely (25%) to be employed both one year and two years, long after the subsidy had expired. Under this measure, the foregone income support payment is set aside to be used as a wage subsidy after 12 months of unemployment.

[2] Analysis commissioned by the New Zealand Government (*Actuarial valuation of the Benefit System for Working-age Adults as at 30 June 2013: Greenfield/Miller/McGuire*), which would be broadly applicable to the Australian system, shows that if young unemployed people are not provided with the right mix of programmes and support, there is a high chance that they will end up trapped on welfare for much of their lives. Work for the Dole evaluations shows that referral to Work for the Dole has a powerful 'tree shaking' effect, with job seekers exiting income support rather than commencing in Work for the Dole.

Change to eligibility criteria for the large family supplement

Schedule 10

- **Limit the family tax benefit Part A large family supplement to families with four or more children**

1.429 The committee therefore seeks the Minister for Social Services' advice as to whether the change to the eligibility criteria for the family tax benefit large family supplement is compatible with the right to social security and the right to an adequate standard of living, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed change to eligibility criteria for the large family supplement is aimed at ensuring that the family payments system remains sustainable in the long term and is better targeted to support those who need it most. As noted in the Statement of Compatibility, the United Nations Committee on Economic, Cultural and Social Rights has stated that a social security scheme should be sustainable. Ensuring the sustainability of the family payments system helps preserve the right to social security over the long term.

This measure will only impact on families with three or more children. No families will lose access to the family tax benefit system as a result of this measure, and all eligible families will continue to receive FTB Part A on a per child basis to assist with day to day costs.

The National Commission of Audit recommended abolishing the LFS as research into the direct costs of children has found that there are decreasing costs for each additional child.

The 2010 Henry Tax Review recommended that the LFS be reconsidered as the case for the payment was not strong. Reports by the National Centre for Social and Economic Modelling in 2002, 2007 and 2013 consistently found that additional children cost less than a first child. The reason for this is that families experience "economies of scale" in which fixed costs are spread among more children. After a first child many items have already been purchased and can be reused by subsequent children.

As the monetary impact on families affected will be relatively small, and the evidence base does not support the idea that LFS is necessary for larger families to achieve an adequate standard of living, the limitations on the right to social security imposed by this measure are reasonable and proportionate.

Reduced access to family tax benefit Part B

Schedule 10

- **Limit family tax benefit Part B to families with children under six years of age, with two-year transitional arrangements for current recipients with children above the new age limit.**

1.436 The committee therefore seeks the Minister for Social Services' advice as to whether the proposed reduction in access to family tax benefit Part B is compatible with the right to social security and the right to an adequate standard of living, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed reduced access to family tax benefit Part B is aimed at encouraging parents to re-enter the workforce when a child reaches school age. This recognises that there are significant social and economic benefits to children and families when parents are in paid employment.

From 1 July 2017, all families with a youngest child aged six and over would no longer be eligible for FTB Part B as a result of this measure. Families with a youngest child above the new age limit who are currently eligible for FTB Part B will be grandfathered under the current rules until 30 June 2017.

Targeting FTB Part B to families with children below primary school age aims to increase workforce participation incentives and encourage self-reliance for families once their youngest child enters primary school. Most primary carers in Australia already return to the workforce once their children are in school, which is reflected in FTB Part B population data. This measure aligns with other government payments to encourage participation, such as Parenting Payment, which is now only available to single parents with a youngest child aged less than eight years or couples with a child aged less than six. This signifies that this measure is based on objective and reasonable grounds, as it reflects broad trends in the wider population.

As noted in the Statement of Compatibility, care requirements for children are higher when children are very young. This measure retains assistance for families when children are not yet school age, ensuring families are supported to access an adequate standard of living when caring duties may present a barrier to work.

In addition, a per child single parent supplement will be available for single parent families on the maximum rate of FTB Part A when their children are aged between six and 12. Low income single parents may continue to face increased barriers to work when children are in primary school. The single parent supplement recognises that these families may continue to require additional assistance to access an adequate standard of living during this time.

Families with a youngest child aged six and over will continue to be eligible for the payment for two years under grandfathering arrangements, giving them time to adjust to the change.

As the benefits of workforce participation are significant, and assistance is retained where workforce barriers are most pronounced, the limitations on the right to social security imposed by this measure are reasonable and proportionate.

Increase to age pension entitlement age

Schedule 11

- **increase the qualifying age for the age pension and the non-veteran pension age to 70 (increasing by six months every two years from 1 July 2015).**

1.442 The committee therefore seeks the advice of the Minister for Social Services as to whether the increase in age eligibility for the age pension is compatible with the right to social security and the right to an adequate standard of living, 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 reasonable and proportionate measure for the achievement of that objective.

The proposed change to increase the Age Pension qualifying age to 70 is aimed at achieving savings that maintain the sustainability of the retirement income system into the future, and encourage increased workforce participation for senior Australians. The Australian income support system is a non-contributory, tax payer funded system and its ability to target income support to those most in need is key to achieving sustainability.

Australians are living longer, with an increasing proportion of the population over the current Age Pension qualifying age. Australian Bureau of Statistics (ABS) projections show that the proportion of people aged over 65 years is expected to increase from 14 % at 30 June 2012 (3.2 million), to between 22 and 25% by 2061 (between 9.0 million and 11.1 million). As the proportion of the population over the Age Pension qualifying age increases, so too will Age Pension expenditure, placing the sustainability of the system at risk.

While demographic change has resulted in an increasing proportion of people over Age Pension qualifying age, who are receiving payments for longer, there are also many people who are working longer or are able to support themselves financially after they retire. Measures of quality of life, as life expectancy increases, provide insights into the capacity of older Australians to work. Australian Institute of Health and Welfare (AIHW) analysis of life expectancy and disability status indicates that, between 1998 and 2012, 37% of the gains in life expectancy were disability free years for women, and 54% for men. Increasing the Age Pension qualification age provides an incentive for people to remain working for longer.

People unable to support themselves financially under Age Pension age are supported by Australia's social security safety net. This means they are still able to access social security and their right to an adequate standard of living. Social security payments such as Newstart Allowance and Disability Support Pension will continue to be available to those under Age Pension qualifying age.

Right to equality and non-discrimination

Residency requirements for the disability support pension

Schedule 2

- **generally limit the overseas portability period for disability support pension to 28 days in a 12-month period from 1 January 2015.**

1.449 The committee therefore requests the Minister for Social Services' advice on the compatibility of the proposed changes to residency requirements for disability support pension recipients with the right to equality and non-discrimination and in particular, whether these measures are:

- based on objective and reasonable grounds; and
- is a proportionate measure in pursuit of a legitimate objective.

Australia's social security system is based on residence and need. All working-age payments are designed to assist Australian residents with the cost of living in Australia and to assist people who are actively seeking work in Australia. Some working-age payments, such as Newstart Allowance, do not have general portability as the community reasonably expects recipients to be actively seeking work or participating in work-related activities in Australia. The proposed four week portability period is considered to be reasonable time to allow DSP recipients to deal with personal matters that may arise from time to time overseas.

The measure is based on the expectation that DSP recipients who have some capacity to work, including assisted employment, be available in Australia to engage in activities to maximise participation, such as work or training. Being outside Australia for extended periods of time reduces a person's availability and opportunity to be actively engaging in training and work-related activities and social participation in Australia.

Limiting the portability period to four weeks is also consistent with the proposed changes to introduce, where appropriate, participation requirements for DSP recipients who are under 35 years of age. They will need to actively participate in a program of support in Australia to build their skills and work capacity.

There will continue to be a number of exceptions that permit temporary absences longer than four weeks. For example, a person's portability period may be extended if they are overseas and cannot return to Australia due to unexpected events. There are also limited circumstances where a person may be allowed additional absences beyond the single four week absence in a 12-month period. These circumstances include attending an acute family crisis, seeking medical treatment not available in Australia or for a humanitarian purpose.

The Government does not consider the proposed changes to DSP portability to be directly or indirectly discriminatory in relation to DSP recipients, and the measure is not expected to have a disproportionate or unintended negative impact on DSP recipients compared to the general working-age payment population. Portability periods are set to suit the type of payment and the circumstances and may broadly be seen as on a continuum. For example, as mentioned Newstart Allowance has no general portability, DSP has mostly limited portability for temporary absences and Age Pension is portable indefinitely (noting that after an overseas absence of more than 26 weeks, the Age Pension is paid at a proportional rate based on the persons working life residence in Australia). The measure endeavours to ensure that DSP recipients who have some work capacity are available the great majority of the time in Australia to participate in training, work-related and social activities when opportunities arise.

DSP recipients who have been assessed as having a severe and permanent disability and no future work capacity, or those who have a terminal illness, will continue to be able to apply for indefinite portability of their pension. As with Age Pensioners, the community does not reasonably expect this group of DSP recipients to be actively looking for work.

Age criteria for Newstart allowance and exclusion periods

Schedules 8 and 9

- **extend youth allowance (other) to 22 to 24 year olds in lieu of the Newstart allowance and sickness allowance from 1 January 2015;**
- **From 1 January 2015, all new job seekers up to 30 years of age claiming Newstart Allowance, Youth Allowance (other) and Special Benefit who are considered to be job ready, will have a 26 week waiting period.**

1.453 The committee therefore requests the Minister for Social Services' advice on the compatibility of the proposed changes in schedules 8 and 9 with the right to equality and non-discrimination and in particular, whether these measures are:

- based on objective and reasonable grounds; and
- is a proportionate measure in pursuit of a legitimate objective.

The United Nations, for statistical purpose, defines youth as those persons between the ages of 15 and 24 years, without prejudice to other definitions by Member States. For the purposes of increasing the Youth Allowance (other) maximum age to 24 years, this is a case of aligning existing parameters for full-time students and full-time Australian Apprentices and adheres to the an internationally accepted definition of youth. Schedule 8 changes the qualification arrangements for Youth Allowance; however claimants in the affected groups will be maintaining access to social security.

For changes under Commonwealth law, the *Age Discrimination Act* states that treating individuals differently because of their age is allowed when in compliance with Commonwealth laws, including laws about taxation, social security and migration.

The Government is able to set these age limits when changing qualification and payability conditions under Social Security law. Whilst young people aged under 30 years will not immediately receive Newstart Allowance or Youth Allowance (other), their right to access social security has not been withdrawn, this is similar to the operation of existing waiting periods that are targeted towards specific groups. Affected young people will continue to have a right to an appropriate level of social security, set by Government. Young people will continue to have this access without illegitimate differential treatment and without affecting their other rights.

Reduced access to family tax benefit Part B

Schedules 10

- **Limit family tax benefit Part B to families with children under six years of age, with two-year transitional arrangements for current recipients with children above the new age limit.**

1.458 The committee therefore requests the Minister for Social Services' advice on the compatibility of the measure in Schedule 10 with the right to equality and non-discrimination and in particular, whether these measures are:

- based on objective and reasonable grounds; and
- is a proportionate measure in pursuit of a legitimate objective.

The objective of limiting access to FTB Part B to families with a youngest child under six is to encourage parents to re-enter the workforce when a child reaches school age. There are significant social and economic benefits to children and families when parents are in paid employment. The aim of the new allowance is to recognise that single parent families often have fewer resources to meet living costs, and have a reduced capacity to work because of their caring responsibilities.

The Committee notes that limiting FTB Part B to families with children under six years of age is likely to disproportionately affect women, as they are more likely to be single parent primary carers. Most primary carers in Australia already return to the workforce once their children are in school, which is reflected in FTB Part B population data. This signifies that this measure is based on objective and reasonable grounds, as it reflects broad trends in the wider population.

In addition, the introduction of an FTB Part A single parent supplement per child aged six to 12 may counteract the disproportionate economic impact of this measure on women, as it is likely to be received by more households headed by women than men.

As this measure is based on objective and reasonable grounds, and disproportionate economic impacts on women are counteracted with the introduction of a single parent supplement, these measures are compatible with the right to equality and non-discrimination.

Right to education

Removal of pensioner education supplement

Schedules 6

- **cease the pensioner education supplement from 1 January 2015.**

1.469 The committee therefore seeks the advice of the Minister for Social Services as to whether removing the PES is compatible with the right to education:

- 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 reasonable and proportionate measure for the achievement of that objective.

The proposed cessation of PES is aimed at ensuring the long term sustainability of the social security system by improving the Commonwealth's fiscal position by an estimated $281.2 million over five years from 2013-14 and simplifying the structure of the system, and in recognition of better targeted and individualised means of assisting vulnerable cohorts to participate in training or education that have to a large extent subsumed the original intent of the PES.

Since the introduction of PES, several policy changes have been introduced that reduce the amount of time that parents remain out the workforce. This includes introducing participation requirements and providing employment services to support recipients of Parenting Payment to improve their employability from when their youngest child is aged six.

The combination of the development of more individualised and focused support to assist pensioners and parents to engage in study and prepare for the workforce, and the ongoing provision of student payments, makes the removal of PES a rational response to achieving the objective of simplifying and improving the sustainability of the social security system.

The Australian Government also provides other assistance for students with the cost of their fees. Commonwealth Supported Places are offered for university level qualifications, vocational education and training qualifications and post-graduate level courses at university through HECS-HELP, VET-FEE HELP and FEE-HELP loans. These loan schemes assist eligible students to pay or defer paying the full cost of their tuition fees.

An individual's decision to undertake study, whether at university or at a vocational institution, is influenced by many factors, including family circumstances, previous educational history and career aspirations. It is not possible to isolate the impact of the removal of one Government payment on overall enrolments as this is an effect that cannot be predicted by the Department.

While the change may have a minor impact on a small, targeted group of people who access education at a particular point in time, it is consistent with Australia's human rights obligations as it is a reasonable, proportionate and necessary response to achieving a broader objective when considered in the context of the range and level of income support and other assistance available to pensioners and those undertaking study. Australia's underlying system of secondary and tertiary education remains robust and flexible.

Removal of the education entry payment

Schedules 7

- **cease education entry payment from 1 January 2015.**

1.476 The committee therefore seeks the advice of the Minister for Social Services as to whether removing the EES is compatible with the right to education:

- 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 reasonable and proportionate measure for the achievement of that objective.

The proposed cessation of EdEP is aimed at ensuring the long-term sustainability of the social security system by improving the Commonwealth's fiscal position by an estimated $65.4 million over five years from 2013-14 and simplifying the structure of the system, in recognition of significant enhancements to education-related assistance and support available to income support recipients and pensioners, including the Employment Pathway Fund (EPF).

EdEP was introduced in 1993 to provide financial assistance to eligible pensioners and unemployed Australians to assist with the up-front costs of study and help remove financial barriers to education. The

role of EdEP has to a large extent been subsumed by the broader regime of Government-funded study and training support, including for Australians who wish to undertake tertiary or vocational education.

The vast majority of allowance recipients and recipients of Parenting Payment with children aged over six years old are registered with a JSA provider and therefore have access to the EPF at their provider's discretion. The EPF can play a similar role offsetting some of the costs associated with commencing study or training, such as course materials, fees and essential equipment. In addition, the EPF provides better targeted and individualised assistance than the EdEP as it is based on the specific needs and barriers to employment of an individual job seeker.

Pensions, allowances, the EPF and student payments will continue unaffected by the removal of EdEP.

The Australian Government also provides other schemes to assist students with the cost of their fees. Commonwealth Supported Places are offered for university level qualifications, vocational education and training qualifications and post-graduate level courses at university through HECS-HELP, VET-FEE HELP and FEE-HELP loans. These loan schemes assist eligible students to pay or defer paying the full cost of their tuition fees.

The 2014-15 Budget also seeks to introduce additional measures to assist students with the costs of study, including the Commonwealth Scholarship scheme. Higher education institutions will be required to commit $1 in every $5 of additional revenue to a new Commonwealth Scholarship scheme to provide tailored, individualised support to students including needs-based scholarships to help meet costs of living, fee exemptions, tutorial support, and assistance at other critical points in their university career. Subject to the passage of legislation, these Commonwealth scholarships will be available from 1 January 2016.

The removal of EdEP is not anticipated to have any impact on rates of enrolment. EdEP is a small, annual, one-off payment and alternative and other ongoing support is available. It is a reasonable and proportionate measure to ensure the ongoing sustainability of the social security system because a wide range of better targeted support will continue to be offered to those who choose to undertake study.

RECEIVED
DATE 11/09/14 BY PJCHR

THE HON IAN MACFARLANE MP

MINISTER FOR INDUSTRY

09 SEP 2014

PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

MC14-003077

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

Dear Senator Dean

Thank you for your letters of 26 August 2014 concerning the Tenth Report of the 44th Parliament by the Parliamentary Joint Committee on Human Rights (the Committee) and advice you received from me about the *Student Identifiers Bill* and the *Trade Support Loans Act 2014* (TSL Act).

I note the Committee sought further information about the *Trade Support Loans Act 2014* and its interaction with the right to education, and the rights to equality and non-discrimination.

In addressing the right to education and its interaction with the TSL Act, the Committee has requested further advice on whether the Trade Support Loans Programme offers equivalent protection of human rights to the 'Tools for Your Trade Program'.

The Trade Support Loans Programme offers equivalent protection of human rights through its inclusion of similar eligibility criteria to those for the Tools For Your Trade personal benefit payment under the Australian Apprenticeships Incentives Programme. The criteria diverge in only one place, and that is that New Zealand citizens are not eligible under Trade Support Loans.

The removal of New Zealand citizens potentially impacts human rights under the Trade Support Loans Programme but it is important to note that the decision to exclude New Zealand citizens in the eligibility criteria was taken to ensure that those who benefit from Australian taxpayer funded Trade Support Loans are Australian citizens or permanent residents. In addition, because of the repayment requirements of the programme with repayments collected through the Australian taxation system, there would be New Zealand citizens who would not repay Trade Support Loan debts if they returned to New Zealand and did not continue paying tax in Australia. The successful continuation of the programme depends on the repayment of loans by those who reach the income repayment threshold.

In addressing the rights to equality and non-discrimination and their interaction with the TSL Act, the Committee has also requested advice on whether, in establishing and maintaining the Trade Support Loans Priority List, there will be appropriate policy safeguards or measures to ensure that the list does not, in practice, indirectly discriminate against women.

Phone: (02) 6277 7070 Fax: (02) 6273 3662

The purpose of the Trade Support Loans Programme is to ensure the ongoing supply of trade-qualified workers to the Australian economy to support Australia's future productivity and competitiveness. The programme particularly targets occupations that have long lead times and are important to the future economy. The eligibility criteria do not discriminate directly against women, as long as they are undertaking an apprenticeship in an occupation listed on the TSL Priority List and that they meet the residency criteria.

As the committee points out, the majority of those currently undertaking apprenticeships in occupations on the TSL Priority List are male (preliminary internal data for 2013-14 show 82% of commencements in apprenticeships in priority occupations are males). While the Government would agree that participation by women in the workforce is an important human rights issue, the addition of occupations that employ more women would distance the programme from its stated policy goal as outlined above.

In this period of fiscal constraint, it is important that the Government targets spending to achieve its goals and that the TSL Priority List supports this targeting of funds. Addressing the shortage of women in priority occupations on the List is a long-term goal that will come through cultural change and a multi-pronged approach by Government, employers and educators, and not in the short-term through broadening eligibility for the Trade Support Loans Programme.

It is important to note the Trade Support Loans Programme is only one of several measures that underpin this Government's agenda to support the ongoing supply of skilled workers to the economy. Among these are measures better aimed at supporting occupations that currently employ a majority of women. One of these is the Australian Apprenticeships Incentives Programme, which supports employment and training opportunities. In making recent changes to this programme, which included the removal of the Tools For Your Trade incentive paid to apprentices, the Government has been careful to maintain support for the priority areas of aged care, child care, disability care and enrolled nurses. As the Committee will be aware, the majority of employees in these occupations are women. Another measure is the Australian Apprenticeships Ambassadors Programme, which show-cases successful apprentices including a large number of women in non-traditional trades.

I hope the Committee finds this information of assistance.

Yours sincerely

Ian Macfarlane