Appendix 1

Correspondence

ATTORNEY-GENERAL

CANBERRA

MC14/21486

Senator Dean Smith
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17 FEB 2015

Dear Senator Dean,

Thank you for your letter of 28 October 2014 providing the report of the Parliamentary Joint Committee on Human Rights (the Committee), the *Fourteenth Report of the 44th Parliament,* concerning the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill). I apologise for the delay in responding. The Bill was passed by both houses of Parliament in the week of 27 October 2014 and received Royal Assent on 3 November 2014.

I thank the Committee for its robust consideration of the compatibility of the Bill with Australia's human rights obligations and provide the enclosed additional information in response to the Committee's recommendations. This information reflects the measures as passed in the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

The Committee may wish to note that both the Bill and the Explanatory Memorandum reviewed by the Committee were amended in response to the report of the Parliamentary Joint Committee on Intelligence and Security. The amendments included in the Act, as passed, and the additional information provided in the Explanatory Memorandum, including the Statement of Compatibility with Human Rights, may address some of the issues raised by the Committee in its report.

Once again, I thank the Committee for its consideration of the Bill and trust this additional information is useful.

Dear -
Once again, thank
you for your
consideration.

Yours faithfully

(George Brandis)

Encl. Response to the Parliamentary Joint Committee on Human Rights' *Fourteenth Report of the 44th Parliament,* concerning the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Protocol for declaring an area in a foreign country where a listed terrorist organisation is engaging in a hostile activity under the *Criminal Code*

Response to the Parliamentary Joint Committee on Human Rights' *Fourteenth Report of the 44th Parliament*, concerning the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

Parliamentary Joint Committee on Intelligence and Security consideration of the Bill
I note the Committee recommended a number of the measures contained in the Bill be referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) for review and report. I am pleased to advise the Committee that the Bill was referred to the PJCIS and, on 17 October 2014, the PJCIS tabled the report of its inquiry into the Bill. The PJCIS made 37 recommendations in relation to the Bill and the Government accepted all of them. In response to a number of those recommendations, the Government introduced amendments to the Bill, which were subsequently passed by the Parliament.

Right to equality and non-discrimination—indirect discrimination
The Committee has requested further advice as to whether the operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination, with particular attention to the issue of indirect discrimination. As acknowledged by the Committee, the legislation is not directly discriminatory. The legislation affects people who engage in activities contrary to Australia's national security and to criminal law. The enforcement of counter-terrorism laws is subject to the operations of a number of government agencies, including but not limited to the AFP, ASIO and the Australian Customs and Border Protection Service. These agencies operate and engage with the public in a broad range of environments, including within communities and in more secure environments such as at Australia's borders. Staff within these agencies receive training, including on cultural awareness, which supports the non-discriminatory application of the law within the environments in which they work.

Schedule 1
Sunset provisions and reviews of counter-terrorism powers
Of particular relevance to the Committee's recommendations in relation to Schedule 1 of the Bill, the Committee may wish to note that, on the recommendation of the PJCIS, the sunset periods for the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers have been reduced from 10 years to approximately 4 years, with all these powers ceasing to have effect on 7 September 2018.

In addition, the Bill was amended to require the Independent National Security Legislation Monitor to review the powers by 7 September 2017, and to require the PJCIS to undertake a further review by 7 March 2018. The timing of these reviews will allow for both the Monitor and the PJCIS to consider the operation of the powers as amended and to ensure that information is available to the Parliament to inform any proposal to further extend the powers beyond 2018. In the case of the ASIO special powers regime, these reviews will replace the PJCIS review previously required by 22 January 2016.

Legitimate objectives of the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers
I note the Committee has emphasised the importance of a legitimate objective to justify any proposed limitation on human rights and that this objective 'must address a pressing or substantial concern, and not simply seek to achieve an outcome regarded as desirable or convenient'. I support the Committee's emphasis of this statement and note that the powers provided to ASIO, the AFP and state and territory police by the ASIO special powers regime, control order regime, preventative detention order regime, and police stop, search and seizure powers all support the legitimate objective of preventing serious threats to Australia's national security interests and, in particular, preventing terrorist attacks.

That is, the prevention of a terrorist attack, and the resultant loss of human life, financial loss and potential loss of social cohesion, is not merely a 'desirable or convenient' outcome. In the current security environment, where Australians are travelling in greater numbers than ever before to participate in terrorist violence in overseas conflicts, the risk of a successful terrorist attack occurring in Australia is high and mitigating this risk is a paramount priority of Government. In September 2014, the Government raised the National Terrorism Public Alert System to 'high—terrorist attack is likely' on the basis of advice from security agencies. The arrests in Sydney and Brisbane in September 2014 and most recently in Sydney on 10 February 2015 are solemn illustrations that the terrorist threat is real.

Further, both members of the Government and from our law enforcement and security agencies have advised of the significant numbers of individuals engaging in terrorist activity in support of foreign conflicts. More than 90 Australians are currently engaged in fighting in Syria and northern Iraq and most of them are engaged with the listed terrorist organisations ISIL or Jabhat al-Nusra. More than 20 such people have returned to Australia and over 100 people are known to be supporting the conflict from within Australia. These are significantly higher numbers than have been seen in relation to Australians engaging in overseas conflicts in the past, such as the conflict in the former Yugoslavia, as raised in paragraph 1.36 of the Committee's report, and more relevantly, the conflict in Afghanistan.

The Committee may be interested to note that the Australian Government investigated 30 Australians who travelled to conflict areas (e.g. Pakistan and Afghanistan) between 1990 and 2010 to train or fight with extremists. Of these, 19 engaged in activities of security concern in Australia after their return, and eight were convicted in Australia of terrorism-related offences. Five of these eight are still serving prison sentences of up to 28 years. This past experience with foreign fighters has informed the Government's current approach, however the scale and intensity of the current situation warrants the amended powers provided for in the Act.

Additional information will be provided to the Committee to further address the issues raised about the ASIO special powers regime.

Delayed notification search warrant regime

The Committee has recommended that the delayed notification search warrant regime be amended to include, as a threshold requirement, that an application for a delayed notification search warrant must demonstrate that it is not possible to obtain the evidence in another way and that it is not possible to obtain that information by a search warrant under Part IAA of the *Crimes Act 1914*.

An application for a delayed notification search warrant currently requires: (1) that there are reasonable grounds to suspect that one or more eligible offences have been, are being, are about to be or likely to be committed; (2) that entry to and search of the premises will substantially assist in the prevention of, or investigation into, those offences, and (3) that there are reasonable grounds to believe that it is necessary for the entry and search of the premises to be conducted without the knowledge of any occupier of the premises. I am satisfied that when considering the third limb, the applicant would turn his or her mind to the reasons for the necessity for the warrant to be executed differently from an 'ordinary' search warrant, where the entry and search of the premise would be conducted with the knowledge of the occupier. I also bring the Committee's attention to the additional factors that an eligible issuing officer is required to consider when determining whether the delayed notification search warrant should be issued, which include whether there are alternative means of obtaining the evidence or information sought.

The Committee has similarly recommended that the proposed power to enter third-party premises to execute a delayed notification search warrant be amended to include, as a threshold requirement for its exercise, that an application must demonstrate that it is not possible to obtain the evidence in another way. I am satisfied that the current provisions appropriately limit the use of this power to circumstances where the issuing officer is satisfied that entry to neighbouring premises is reasonably necessary to avoid compromising an investigation. In assessing whether such entry is reasonably necessary the eligible issuing officer would consider whether it is possible to obtain the evidence without entering the third party premise or by undertaking an 'ordinary' search warrant under Part IAA of the *Crimes Act 1914*.

The Committee has requested further advice as to whether the period of delay for notifying an occupier of the execution of a warrant is compatible with the right to privacy. The delayed notification search warrant scheme engages the right to privacy by enabling law enforcement officers to enter a warrant premises, including a suspect's home or place of work, without the knowledge or consent of the occupier. However, the scheme serves the legitimate aim of assisting the AFP to effectively prevent or investigate Commonwealth terrorism offences and protect the community from harm. The AFP have indicated that allowing an occupier to be notified of a search warrant sometime after the warrant was executed or otherwise granted provides the AFP with the opportunity to gather evidence, identify additional suspects and locate further relevant premises and evidence. This will increase the opportunity for successful investigations of terrorism offences and enhance the ability of the AFP to gather information about planned operations with a view to preventing the commission of terrorist acts and, in turn, harm to the community. The Committee may also wish to note that, on the recommendation of the PJCIS, the period of delay permitted without seeking ministerial approval has been reduced from a maximum of 18 months to 12 months.

The Committee has requested further advice on whether the delayed notification search warrant scheme is compliant with the right to a fair trial, particularly due to the initial secrecy surrounding the warrant. Article 14 of the ICCPR provides that all persons shall be entitled to a fair trial and fair hearing rights in the determination of a criminal charge against them. I note the Committee has emphasised the importance of a legitimate objective to justify any proposed limitation on human rights and that this objective 'must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient'. As explained above, the delayed notification search warrant scheme will serve the legitimate aim of assisting the AFP to prevent or investigate Commonwealth terrorism offences. The initial secrecy surrounding the warrant is critical to the success of certain investigations by the AFP, particularly when carrying out investigations of multiple suspects over an extended period. If a suspect was aware of the execution of the warrant, that suspect could undertake counter-surveillance measures, change their plans to avoid further detection, relocate their operations, or relocate or destroy evidence of their activities. It would also provide a suspect with the opportunity to notify their associates, who may not yet be known to police, allowing the associates to cease their involvement with the known suspect, destroy evidence or avoid detection in other ways. The procedures by which this restriction on fair trial is permitted are authorised by law and are not arbitrary, with a strict two-stage authorisation process and rigorous reporting obligations. Accordingly, to the extent that the delayed notification search warrant scheme limits the right to a fair trial, those limitations are reasonable, necessary and proportionate for the achievement of a legitimate objective.

I also bring the Committee's attention to the requirement for a person to be notified of the execution of a delayed notification search warrant where a person has been charged with an offence and the prosecution is proposing to rely on evidence obtained under the warrant. This notice must be given as soon as practicable after the person is charged with the offence and no later than the time of service of the brief of evidence by the prosecution. This

recognises that it is important that any person charged with an offence is notified of the way in which evidence supporting the particular charge or charges has been obtained in order to enable them to challenge the evidence. I am satisfied that this ensures that the defendant is not placed at a substantial disadvantage to the prosecution.

Declared area offence provision

I agree with the Committee that deterring Australians from travelling to areas where terrorist organisations are engaged in a hostile activity may be regarded as a legitimate objective.

The new 'declared area' offence addresses two pressing and substantial concerns by deterring Australians from travelling to foreign conflict areas where terrorist organisations are engaging in hostile activities. The first concern is that Australians who enter or remain in conflict areas put their own lives at risk. ASIO has advised that over 20 Australians have died in the Syria and Iraq conflicts in the past year. The recently published United Nations Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria*, provides details of the extreme violence directed against civilians and captured fighters by the terrorist organisation[1].

The second concern is that foreign conflicts provide a significant opportunity for Australians to develop the necessary capability and ambition to undertake terrorist acts. ASIO noted in its submission to the PJCIS that it is aware of returnees from Syria and Iraq undertaking attacks in Europe.

The nature of the current terrorist threat is such that it requires a proactive and prevention-focused response. As noted above, it is only in the very recent past that Australia has prosecuted Australians returning from conflict areas desirous of committing terrorist acts on Australian soil. The Government has responded by taking steps to counter this significant threat.

Australia must also assist in the global effort to prevent a flow of fighters to ISIL and other terrorist groups. On 24 September 2014 the United Nations Security Council unanimously passed Resolution 2178 which condemns violent extremism and implores countries to address underlying factors including preventing and suppressing the recruiting, organising, transporting or equipping of individuals who travel to a foreign country for the purpose of participation in terrorist acts.

The elements of the offence are very clear. The conduct that has been criminalised is intentionally entering, or remaining in, a declared area where the person should know that the area has been declared. There are a number of offences in Australia that operate to restrict people from entering areas to either protect those located within the area or to deter a person from risking their own personal safety by entering, such as Indigenous protected areas. The declared area offence has been structured with the aim of achieving the legitimate objective of deterring people from going to an extremely dangerous location.

The Government understands the importance of appropriately designed safeguards, particularly in the development of human rights compatible legislation and practice. The Committee may wish to note that the Government readily included two additional safeguards, upon recommendation of the PJCIS, in the final version of the Bill. The legislation now provides for a PJCIS review of a declaration before the end of the disallowance period and that a declaration must not cover an entire country.

<[1] http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/HRC_CRP_ISIS_14Nov2014.pdf >

In response to the Committee's concern that the Minister would be able to "declare an area in cases where a terrorist organisation was engaged in only minor or transitory 'hostile activity'" I refer the Committee to the definition of 'engage in a hostile activity' as inserted by new section 117.1 of the Criminal Code. Under that section a person engages in a hostile activity in a foreign country if the person engages in conduct in that country with the intention of achieving one or more of the following objectives (whether or not such an objective is achieved):

(a) the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country);

(b) the engagement, by that or any other person, in action that:

(i) falls within subsection 100.1(2) but does not fall within subsection 100.1(3); and
(ii) if engaged in in Australia, would constitute a serious offence;

(c) intimidating the public or a section of the public of that or any other foreign country;

(d) causing the death of, or bodily injury to, a person who is the head of state of that or any other foreign country, or holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country);

(e) unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).

For the purposes of the declared area offence this conduct would be engaged in by a listed terrorist organisation—conduct that I believe could not be classed as 'minor'.

As I noted to the Senate, the Government is aware of the extraordinary nature of the offence and the intention is to use the declaration provisions for declaring areas sparingly, when necessary and in the interests of national security. Consistent with my Department's advice to the PJCIS, a protocol to guide and prioritise the selection of areas in foreign countries for declaration has been developed. Included in that protocol are non-legislative factors to which a Minister may have regard when deciding whether or not to declare an area for the purposes of the offence. One of those factors is the enduring nature of the listed terrorist organisation's hostile activity in the area. I believe that this addresses the Committee's concerns about a declaring an area where the 'hostile activity' is only transitory. I attach a copy of the protocol for the Committee's information.

I also note that the Committee has raised specific concerns that the offence may be incompatible with the right to a fair trial and the presumption of innocence, the presumption against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.

With regards to the right to a fair trial and the presumption of innocence, I note that a defendant bears no burden of proof unless they seek to raise facts constituting a defence. Should a defendant choose to rely on the defence, they bear an evidential burden to adduce or point to evidence that suggests a reasonable possibility that their travel was for a sole legitimate purpose or purposes. The prosecution retains the legal burden and must disprove any legitimate purpose defence raised beyond a reasonable doubt, in addition to proving the

elements of the offence. It is not unusual in criminal law for the person with a peculiar or unique knowledge of facts to be required to point to evidence of that fact. Bribing a foreign official and forced marriage are further examples of offences that contain offence specific defences. The Government is firmly of the view that the declared area offence is entirely compatible with the right to a fair trial and the presumption of innocence.

In response to the Committee's concern that the offence may lead to arbitrary detention, I note that imprisonment after conviction by a criminal court is a permissible deprivation of liberty. Prosecution of the offence, as with all offences in Division 119 of the Criminal Code, will be subject to a requirement to obtain the consent of the Attorney-General to prosecute, as well as the public interest consideration of the prosecutorial policy of the Commonwealth Director of Public Prosecutions. It is also appropriate and just for the Parliament to create a criminal offence with an appropriate penalty when the conduct to be criminalised has the potential to cause considerable harm to both individuals and Australia's national security interests.

To the extent that the offence may limit the right to freedom of movement I note that the limitation is lawful and proportionate. A limitation can be justified if it is in the interest of national security. As I have noted above, the risk of a successful terrorist attack occurring in Australia is high. The Government considers this to be a grave threat to the entire nation[2].

With regards to the Committee's comments in relation to the effect of the declared area offence on the right to equality and non-discrimination, I refer to my earlier comments about the legislative criteria including the definition of 'engage in a hostile activity' and the protocol to guide and prioritise the selection of areas in foreign countries for declaration.

Allowing foreign material to be adduced in terrorism-related proceedings

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* includes a number of safeguards relating to adducing foreign material in terrorism-related proceedings. This includes a broad judicial discretion to prevent material from being adduced if it would have a substantial adverse effect on the right of the defendant to receive a fair hearing; a requirement to exclude material obtained as a result of torture or duress; and a requirement that the court give an appropriate instruction to the jury about the potential unreliability of foreign evidence unless there is a good reason not to do so.

The Government strongly opposes the use of material obtained by torture or duress, by any country in any circumstance. In response to the recommendations in the PJCIS Advisory Report relating to foreign evidence, the Government moved, and Parliament passed, amendments to further strengthen the protections against material obtained by torture or duress. These included:

- ensuring the provision governing the exclusion of foreign evidence obtained by torture or duress applies where any person directly obtained material as a result of torture or duress (as opposed to material obtained by public officials);
- expanding the definition of 'duress' to include other threats that a reasonable person might respond to; and
- requiring the court to give an appropriate instruction to the jury about the potential unreliability of foreign evidence.

While noting the Committee's comments on the use of the word 'directly' in relation to material obtained by torture, the Government considers that the provision as passed ensures

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[2] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N P Engel, 1993, page 212, note 2.

that any material obtained as a result of torture or duress would not be admissible, given the definition of torture, and the fact that the exception to material obtained through duress will apply in a broad range of circumstances.

The mandatory exclusion of material obtained as a result of torture or duress at subsection 27D(2) of the *Foreign Evidence Act 1994* recognises the seriousness with which the Government views acts or threats of torture or duress and the inherent unreliability of material or information obtained in such a manner. The Government considers the provision as drafted adequately addresses these concerns. First, and appropriately, it is ultimately up to the Court to determine whether material was obtained as a result of torture or duress. Second, the provisions enable the defence to object to the admission of material. Finally, while the defence bears an evidentiary burden, if this is met, the prosecution must establish to the court's satisfaction that the material was not obtained as a result of torture or duress.

In response to the Committee's comment on the definition of torture, I can advise that the definition of torture at subsection 27D(3) of the Foreign Evidence Act is consistent with article 1(1) of the Convention Against Torture (CAT). It captures the relevant conduct defined under article 1 of the CAT, and also expands on the definition of torture by including conduct inflicted by any person (rather than only those acting in the capacity of a public official). Given the definition of torture for the purposes of the Foreign Evidence Act is a wider interpretation than that at article 1 of the CAT, the Government considers it is not necessary to explicitly reference the definition of 'torture' in the CAT. The Government considers that the amendments to the Foreign Evidence Act are consistent with, and uphold, Australia's international obligations under Article 15 of the CAT. These amendments operate in addition to the broad judicial discretion to prevent material being adduced that would compromise a fair hearing and the jury instruction, where requested by a party to proceedings, concerning potential unreliability of foreign evidence.

Suspension of passports

The Committee has requested further advice on the proportionality of the measure to suspend passports. The purpose of the suspension power is to provide a temporary preventative measure while further information is obtained to determine whether more permanent action should be taken (that is, the cancellation of a person's travel documents). The temporary suspension provision would be used in cases where ASIO has high concerns related to the travel of the individual, but needs more time to further investigate and seek to resolve those concerns. Activities to support this, which take between days and weeks, may include seeking formal release of intelligence from foreign partners to include in the assessment. New intelligence can also put older reporting in a new context (positive or negative), meaning there is a requirement for ASIO to review and re-evaluate its holdings, which takes time. Further, in some cases it may be that an in-depth intelligence investigation may be required, involving a range of activity.

While the suspension period is longer than the maximum 7-day suspension period proposed by the Independent National Security Legislation Monitor (INSLM), it is a reasonable and proportionate period which ensures the practical utility of the suspension period. The fourth annual report of the INSLM noted that the suggested 7 day timeframe was somewhat arbitrary and should be the subject of further discussion. In most circumstances the INSLM's proposed timeframe of up to 7 days would not allow ASIO sufficient time to assess whether to make a cancellation request and would not allow the Minister for Foreign Affairs appropriate time to consider whether to cancel a person's travel documents. In its report on the Bill, the PJCIS considered that the 14-day timeframe appropriately balances the need to allow sufficient time for a full assessment to be made by ASIO with the impact on the individual.

Introduction of advocating terrorism offence

The Committee has expressed concern that the new offence of advocating terrorism would likely be incompatible with the right to freedom of opinion and expression, as the Statement of Compatibility does not provide sufficient detail to establish that the new offence is in pursuit of a legitimate purpose. In raising this concern, the Committee has noted the existing incitement offences in the Criminal Code, under which it is an offence for a person to urge the commission of an offence with the intention that the offence will be committed. The Committee has also expressed concern about the proportionality of the offence, contending that the offence could 'apply in respect of a general statement of support for unlawful behaviour'. I draw the Committee's attention to the elements of the offence which may address these concerns.

First, a person only commits the offence if the person advocates the doing of a terrorist act or the commission of a terrorism offence. A terrorist act is defined in section 100.1 of the Criminal Code. The definition specifically excludes action that is advocacy, protest, dissent or industrial action and is not intended:

(i) to cause serious harm that is physical harm to a person; or
(ii) to cause a person's death; or
(iii) to endanger the life of a person, other than the person taking the action; or
(iv) to create a serious risk to the health or safety of the public or a section of the public.

A terrorism offence is defined in subsection 3(1) of the *Crimes Act 1914*. For the purposes of this offence the Crimes Act definition is limited to offences punishable on conviction by imprisonment for 5 years or more and excludes attempt (section 11.1), incitement (section 11.4) or conspiracy (section 11.5) to the extent that it relates to a terrorism offence or a terrorism offence that a person is taken to have committed because of complicity and common purpose (section 11.2), joint commission (section 11.2A) or commission by proxy (section 11.3).

Second, the offence applies the fault element of recklessness, which is also clearly defined in the Criminal Code. A person is reckless with respect to a result if he or she is aware of a substantial risk that the result will occur and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk. This is different to the incitement offences in the Criminal Code, for which intention is the fault element.

As noted in the Statement of Compatibility, the objective of this new offence is to protect the public from terrorist acts and the terrorism activities that the relevant terrorism offences are designed to deter. The offence captures behaviours that are particularly relevant to the current security environment, where individuals are being radicalised to engage in terrorist acts and commit terrorism offences, including by travelling overseas to participate in foreign conflicts, through a wide range of media. The 'radicalisers' operate both overtly, through broad messaging such as that seen on social media, and covertly, advocating in general that people should engage in terrorist acts and commit terrorism offences for their cause. Such radicalisers may not be satisfied that, following their advocacy, a terrorist act or terrorism offence will occur in the ordinary course of events (as required to prove the fault element of intention) but would be aware of a substantial risk that such a result would occur (required to prove recklessness). In pursuing the legitimate objective of protecting the public from terrorism, it is necessary to limit the freedom of opinion and expression of those whose advocacy of terrorism is likely to radicalise others at great risk to public safety.

In response to the Committee's concerns about proportionality of the offence, the application of clear definitions to the offence will ensure that the offence would be unlikely to 'apply in respect of a general statement of support for unlawful behaviour'. In respect of the example

presented by the Committee in paragraph 1.258, advocating regime change in a country perceived as undemocratic or oppressive would not fall within the offence unless the person advocated the doing of a terrorist act or commission of a terrorism offence as the means by which to achieve that regime change *and* was aware of a substantial risk that, as a result of that advocacy, a person would engage in a terrorist act or commit a terrorism offence. A campaign of civil disobedience or acts of political protest, as cited in the example, would be likely to fall within the excluded action that is advocacy, protest, dissent or industrial action.

Schedule 2—Cancellation of welfare payments

The Committee raised a number of concerns with Schedule 2 of the Bill (stopping welfare payments), particularly with respect to the Bill's compatibility with the right to social security and an adequate standard of living, the right to a fair trial and fair hearing rights, the obligation to consider the best interests of the child and the right to equality and non-discrimination. While the Committee acknowledged that the prevention of the use of social security to fund terrorism-related activities is likely to be regarded as a legitimate objective for human rights purposes it also sought further advice on whether the measures could be regarded as reasonable and proportionate to achieving this legitimate objective.

The Committee may wish to note that, on the recommendation of the PJCIS, the Bill was amended to include specific factors to which the Attorney-General must have regard when considering whether to issue a Security Notice to cancel an individual's welfare. The Attorney-General must consider the extent (if any) that any welfare payments of the individual who is the subject of the notice, are being, or may be, used for a purpose that might prejudice the security of Australia or a foreign country, and the likely effect of welfare cancellation on the individual's dependants. This amendment clarified the circumstances where the power may be exercised. In this way, the amendments to the Bill ensure the rights and interests of the child (where applicable) are appropriately factored into the decision-making process.

In relation to the Committee's concerns about the limitation on review rights, I note that the Bill was amended to remove the exemption under Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) so that section 13 of that Act will apply. This means that an individual may seek review of a decision to cancel welfare payments and may be provided with reasons for the decision where disclosure of those reasons would not prejudice Australia's security, defence or international relations. Where the disclosure of information is not possible because of security reasons the Attorney-General can certify that disclosure would be contrary to the public interest under paragraph 14(1)(a) of the ADJR Act. The Committee may also wish to note that, on the recommendation of the PJCIS, the Bill was amended to ensure that any decision to issue a Security Notice must be reviewed every 12 months.

Schedules 3, 4 and 5—Border protection measures

Schedule 3—Customs' detention power

The new detention power is aimed at achieving the legitimate objectives of protecting Australia's borders and promoting national security. A recent independent review of national security incidents at the border concluded that existing powers and processes were not sufficient to ensure such incidents could be prevented in future. The review recommended the recalibration of risk between law enforcement and protection on the one hand and facilitation on the other.

As the original statement of compatibility stated, a crucial element of the preventative measures undertaken to limit the threat of returning foreign fighters is to prevent Australians leaving Australia to engage in foreign conflicts in the first instance. The detention powers of the Australian Customs and Border Protection Service (Customs) officers constitute an

important preventative and disruption mechanism, and amendments in the Bill reflect the identified need for a broader set of circumstances in which a detention power can be exercised in the border environment. Preventing individuals travelling outside of Australia where their intention is to commit acts of violence in a foreign country assists in preventing terrorists acts overseas and prevents these individuals returning to Australia with greater capabilities to carry out terrorist acts on Australian soil. These powers can, of course, also be exercised in respect of foreign nationals arriving in our country who are a threat to national security. The expanded definition of 'serious Commonwealth offence' is also aimed at achieving the legitimate objective of assisting other law enforcement and Commonwealth agencies in the detection and investigation of Commonwealth offences by allowing officers of Customs to detain persons in respect of a wider range of Commonwealth offences relevant to national security, notably travelling on a false passport and failing to report movements of physical currency or bearer negotiable instruments.

As mentioned in the Explanatory Memorandum, the detention power is only a temporary power and its extension is aimed at Customs facilitating other law enforcement agencies to exercise their powers to address national security threats. The exercise of the powers is also subject to several important safeguards, which reinforce the reasonable and proportionate nature of the power and ensure that the human rights of the detainee are appropriately limited to promote national security considerations. Important qualifiers such as 'reasonable grounds to suspect', 'as soon as practicable', 'take all reasonable steps' and 'believes on reasonable grounds' ensure that application of the detention provisions is not arbitrary and are subject to certain thresholds which require Customs officers to consider whether use of the detention powers is appropriate in a given circumstance.

The detention power is also not indefinite and includes the requirement that a detained person be made available to a police officer as soon as practicable. The power also includes the right, in all but the most extreme situations, to notify a family member or others of their detention, and the requirement that if the officer detaining the individual ceases to be satisfied of certain matters, they must release the person from custody.

These elements in combination ensure that the detention power is a reasonable and proportionate response to the legitimate objectives outlined above.

Schedule 4—Cancelling visas on security grounds

As noted elsewhere in this response, the Australian Government's National Terrorism Public Alert Level was raised from 'Medium' to 'High' on 12 September 2014. This decision was based on advice from security and intelligence agencies that points to the increased likelihood of a terrorist attack in Australia. The enhanced visa cancellation powers introduced by this proposal are part of Australia's response to Australia's current security environment. In particular, the provisions will enable the Minister for Immigration and Border Protection to cancel the visas of any non-citizen who may pose a risk to the security of Australia in order to prevent their travel to Australia and, relevantly, to strengthen Australia's response to potential terrorist attacks. The measure is therefore necessary and proportionate for addressing Australia's heightened terrorism alert level.

In relation to the Committee's observations about jurisdiction, the Government's view is that its human rights obligations are primarily territorial. However, Australia has accepted that there may be exceptional circumstances where Australia's human rights obligations may apply extraterritorially (Australia's Written Reply to the Human Rights Committee's List of Issues, UN Doc CCPR/C/AUS/5, 19 January 2009). The Australian Government believes that a high standard needs to be met before a State could be considered as effectively controlling territory abroad, such as a situation of occupation, or where a State has actual physical control over persons outside of Australia's territory. As such, I do not agree with the

Committee's assertion that making a decision to issue or cancel a visa would necessarily involve the Minister or his delegate 'exercising jurisdiction over the affected individual', particularly if the person was outside of Australia's territory.

I also disagree with the Committee's observations with regards to Article 12(4) of the ICCPR and its application to the visa cancellation powers. It is the Government's position that a person who enters a State under that State's immigration laws cannot regard the State as his or her own country when he or she has not acquired nationality in that country.

With regard to the consequential cancellation of the visas held by family members, as noted in the Statement of Compatibility, that power is discretionary and will consider the individual circumstances of the family members on a case-by-case basis – including Australia's international obligations in circumstances where the visa holder is located in Australia's territorial jurisdiction. Any cancellation decision will therefore be complementary to Australia's international obligations and will be reasonable and proportionate to the circumstances of the individual.

Schedule 5—Identifying persons in immigration clearance

The Committee may wish to note that, on the recommendation of the PJCIS, the lawful ability for an authorised system to collect personal identifiers—other than a photograph of a person's face and shoulders—was removed from the Bill. The final version of the Bill only enabled an authorised system to collect an image of a person's face and shoulders.

The objective of collecting such a photograph is to enhance the government's ability to identify passengers travelling into and out of Australia. With this enhanced identification capability, the government is more able to identify persons who may present a risk to Australia's security. Having identified such risks, the photograph then enables the Government to take appropriate statutory action and address any associated national security risk which may be evident. In this regard, the taking of a photograph which details a person's face and shoulders is necessary and proportionate to the need to reduce risks to Australia's national security.

Australian Government
Attorney-General's Department

Protocol for declaring an area in a foreign country where a listed terrorist organisation is engaging in a hostile activity under the Criminal Code Act 1995

This protocol provides guidance on the process for the declaration of areas for the purposes of section 119.2 of the *Criminal Code Act 1995*. Section 119.2 makes it an offence for a person to enter, or remain in, an area in a foreign country if the area is an area declared by the Minister for Foreign Affairs under section 119.3.

The areas targeted by the 'declared area' provisions are extremely dangerous locations in which listed terrorist organisations are engaging in hostile activities. The declared area offence is designed to act as a deterrent to prevent people from travelling to declared areas. This is particularly the case given the risk individuals returning to Australia who have fought for or been involved with listed terrorist organisations present to the community.

It is a defence for a person to enter, or remain in, a declared area solely for a legitimate purpose or purposes. Legitimate purposes for travelling to a declared area are provided at subsection 119.2(3) and are limited to providing humanitarian aid, making a genuine visit to a family member, working in a professional capacity as a journalist, performing official government or United Nations duties, appearing before a court or tribunal, and any other purpose prescribed by the regulations.

Declaration of areas for the purpose of section 119.2

Under section 119.3 of the Criminal Code the Minister for Foreign Affairs may, by legislative instrument, declare an area in a foreign country for the purposes of section 119.2.

Legislative test for deciding to declare an area in a foreign country

Before declaring an area in a foreign country for the purposes of section 119.2, the Minister for Foreign Affairs must be satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country.

Listed terrorist organisations

Section 117.1 of the Criminal Code provides that a listed terrorist organisation has the meaning given by subsection 100.1(1). Subsection 100.1(1) provides that a listed terrorist organisation means an organisation that is specified in regulations for the purposes of paragraph (b) of the definition of terrorist organisation in section 102.1.

Listed terrorist organisations are set out in Part 2 of the *Criminal Code Regulations 2002*, available on the ComLaw website www.comlaw.gov.au.

The list of terrorist organisations and the current Statements of Reasons for each organisation are also available on the Australian Government National Security website www.nationalsecurity.gov.au.

Engaging in a hostile activity

Engaging in a hostile activity is defined at subsection 117.1(1) as engaging in conduct with the intention of achieving one or more of the following objectives (whether or not the objective is achieved):

- the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country)
- the engagement, by that or any other person, in action that:
  - falls within subsection 100.1(2) but does not fall within subsection 100.1(3) (see below); and
  - if engaged in in Australia, would constitute a serious offence
- intimidating the public or a section of the public of that or any other foreign country
- causing the death of, or bodily injury to, a person who:
  - is the head of state of that or any other foreign country; or
  - holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country)

- unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).

Action that falls within subsection 100.1(2) is conduct that:

- causes serious harm that is physical harm to another person
- causes serious damage to property
- causes another person's death
- endangers another person's life, other than the life of the person taking the action
- creates a serious risk to the health or safety of the public or a section of the public
- seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
  - an information system; or
  - a telecommunications system; or
  - a financial system; or
  - a system used for the delivery of essential government services; or
  - a system used for, or by, an essential public utility; or
  - a system used for, or by, a transport system.

Action that falls within subsection 100.1(3) is conduct that is advocacy, protest, dissent or industrial action; and is not intended to:

- cause serious harm that is physical harm to a person; or
- cause a person's death; or
- endanger the life of a person, other than the person taking the action; or
- create a serious risk to the health or safety of the public or a section of the public

is not conduct of engaging in a hostile activity.

A serious offence is defined at section 117.1 to mean an offence against a law of the Commonwealth, a state or a territory that is punishable by imprisonment for two years or more.

Areas that can and cannot be covered by a declaration

Subsection 119.3(2) provides that a single declaration may cover areas in two or more foreign countries if the Minister for Foreign Affairs is satisfied that one or more listed terrorist organisations are engaging in a hostile activity in each of those areas.

Subsection 119.3(2A) provides that a declaration must not cover an entire country.

Role of Commonwealth agencies

There are a number of Commonwealth agencies that will have a key role in the process of a declaration by the Minister for Foreign Affairs to declare an area in a foreign country.

The Australian Counter-Terrorism Centre (ACTC) is a multi-agency body including members from the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police (AFP), the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate, the Department of Defence, the Australian Geospatial—Intelligence Organisation, the Australian Customs and Border Protection Service, the Australian Crime Commission, the Department of Foreign Affairs (DFAT), the Department of Immigration and Border Protection and the Attorney-General's Department (AGD). The ACTC's role is to provide strategic direction to:

- set strategic counter-terrorism priorities
- drive counter-terrorism policy direction and coordination
- inform operational counter-terrorism priorities
- evaluate agencies' performance on priorities
- identify and fix impediments to effective coordination.

The ACTC has a role in identifying areas that may be suitable for declaration and coordinating key agencies (including but not limited to ASIO, ASIS, DFAT and AFP) to collect and provide relevant information and intelligence for inclusion in a Statement of Reasons.

The National Threat Assessment Centre (NTAC) within ASIO has the lead role in coordinating and collecting the relevant information and intelligence from key agencies and generating a Statement of Reasons nominating an area for declaration.

AGD has a lead role in providing support to the Attorney-General as the minister responsible for national security matters and the administration of the Criminal Code. DFAT has a lead role in providing support to the Minister for Foreign Affairs in relation to the declaration of an area, including advice on the foreign policy implications of such a declaration.

Role of the National Threat Assessment Centre

Nomination of an area for declaration

In considering the possible declaration, the NTAC will evaluate an area against the legislative requirements for declaration in subsection 119.3(1) of the Criminal Code.

To guide and prioritise the selection of areas in foreign countries for consideration the NTAC may also have regard to a range of other non-legislative factors. Key non-legislative factors are:

- links to Australia and Australians
- threats to Australian interests including the role of a particular area in the radicalisation of Australians and likely repercussions in Australia
- the enduring nature of the listed terrorist organisation's hostile activity in the area;
- the operational impact / utility of declaring the area
- factors relevant to Australia's international relations, including bilateral relations with countries including those in which an area may be declared, and engagement with international organisations such as the United Nations
- the listed terrorist organisation's ideology
- links to other terrorist groups
- engagement in peace or mediation processes.

Depending on available information, some factors may carry more weight than others in selecting an area for consideration. For example, information indicating links to Australia or threats to Australian interests may tend to prioritise consideration of declaring a particular area in a foreign country as a 'declared area'. However, a lack of information with respect to one or more factors will not preclude an area from being considered for declaration. In its nomination, NTAC will define the area within which the terrorist organisation is engaged in hostile activity as narrowly as possible.

Form of advice including description of the 'declared area'

The NTAC will consider and provide advice in the form of a Statement of Reasons that outlines that a listed terrorist organisation is engaging in a hostile activity in an area of a foreign country to AGD. AGD will provide the advice to the Attorney-General to consider. The Attorney-General will then provide it to the Minister for Foreign Affairs to consider.

The Statement of Reasons will outline why, in the NTAC's view, the area meets the legislative test for declaration as a 'declared area'. The Statement of Reasons may also include information that relates to any of the non-legislative factors outlined above. The inclusion of information relevant to the non-legislative factors is not required for the Minister for Foreign Affairs to be satisfied whether or not the area meets the legislative test for declaration. However, it may provide useful contextual information about the hostile activity the listed terrorist organisation is engaging in in that area of the foreign country for the Minister for Foreign Affairs and for the general public.

Whenever possible, the Statement of Reasons will be prepared as a stand-alone document, based on unclassified information about the hostile activity that a listed terrorist organisation is engaging in in

that area of the foreign country, which is corroborated by classified information. This enables the Statement of Reasons to be made available to the public, and provides transparency as to the basis on which the Minister for Foreign Affairs decision is made.

Key agencies may also provide a classified briefing to the Minister for Foreign Affairs.

The Statement of Reasons will include a description of the area recommended for declaration as a 'declared area'. Wherever possible the description will include a map showing the proposed 'declared area' and/or a detailed description that indicates clearly the area proposed to be declared. The area will be described in sufficient detail to ensure it is readily understood by members of the public.

Role of the Attorney-General's Department

The role of AGD is to provide support to the Attorney-General. AGD scrutinises the draft Statement of Reasons provided to it by the NTAC before it is provided to the Attorney-General. AGD also prepares the draft legislative instrument for the Minister for Foreign Affairs' declaration.

AGD prepares a submission to the Attorney-General asking that they consider and if appropriate, provide the Statement of Reasons and the draft legislative instrument under cover of a letter to the Minister for Foreign Affairs requesting that they consider declaring an area for the purposes of section 119.2 of the Criminal Code.

If the Minister for Foreign Affairs decides to declare an area and signs the legislative instrument, the legislative instrument is provided back to AGD which will lodge the instrument and its explanatory statement for registration on the Federal Register of Legislative Instruments (FRLI) as soon as practicable after it is signed.

Role of the Department of Foreign Affairs and Trade

The role of DFAT is to provide support to the Minister for Foreign Affairs. DFAT will facilitate the declaration process including providing advice to the Minister for Foreign Affairs on factors relevant to international relations and the foreign policy implications of a declaration, drawing on its network of overseas posts. DFAT also assists in ensuring the requirement to brief the Leader of the Opposition ahead of any declaration is met.

Once the Minister for Foreign Affairs has decided that an area in a foreign country meets the legislative criteria for declaration, DFAT will provide the legislative instrument to AGD for registration on the FRLI.

Monitoring and re-declaring declared areas and revocation of declaration

Monitoring declared areas

Intelligence and law enforcement agencies maintain a continuing focus on areas of high security concern. If circumstances arise which cause agencies to form a view that a declared area no longer meets the legislative test for declaration, advice from the NTAC, prepared in consultation with key agencies, will be provided to the Attorney-General who will subsequently advise the Minister for Foreign Affairs.

The Attorney-General or the Minister for Foreign Affairs may also ask the ACTC to task key agencies to provide them with a review of a 'declared area' including consideration of whether a declared area continues to meet the legislative test for declaration.

Re-declaring areas

Legislative instruments declaring an area cease to have effect three years after they take effect. This ensures that there is regular review and re-evaluation as to whether the area continues to meet the legislative criteria for declaration.

Before a declaration expires, the ACTC will coordinate key agencies to provide relevant information about the area to the NTAC for consolidation and evaluation. If the NTAC considers the area continues to meet the legislative criteria, the NTAC will prepare a new Statement of Reasons for the Attorney-General's and Minister for Foreign Affairs' consideration.

Revocation of declaration

If the Minister for Foreign Affairs ceases to be satisfied that a declared area meets the legislative criteria to remain declared, they must make a written declaration to this effect. The legislative instrument declaring that area will cease to have effect when that declaration is made.

Notification of decision to declare, re-declare or revoke declaration

When an area is declared, re-declared or a declaration is revoked the Attorney-General and/or the Minister for Foreign Affairs will issue a media release advising of this fact. The media release will

include a Statement of Reasons for the decision.

The declared area and the Statement of Reasons will also be available on the Australian Government National Security website www.nationalsecurity.gov.au.

The legislative instrument declaring an area will be available on the ComLaw website www.comlaw.gov.au.

Information about the declared area will also be available on the Australian Government Living Safe Together website www.livingsafetogether.gov.au and Smartraveller website www.smartraveller.gov.au.

Review and oversight

Disallowable instrument

Any legislative instrument declaring an area will be tabled in the Parliament and will also be subject to disallowance (veto) in full or in part by the Parliament for a period of 15 sitting days after they are tabled, and sunsetting, that is, automatic repeal three years after they commence, unless the Parliament or First Parliamentary Counsel acts to change the sunsetting date.

Reviews by the Parliamentary Joint Committee on Intelligence and Security (PJCIS)

After an area has been declared, the PJCIS may review the declaration, and report comments and recommendations to Parliament before the end of the parliamentary disallowance period. Should the PJCIS consider that there are insufficient grounds for an area to be declared or have other concerns with the declaration, it is open to the PJCIS to recommend that Parliament disallow the legislative instrument so that it ceases to have effect.

Review by the PJCIS provides openness, transparency and accountability in the declaration process. The PJCIS has expertise in reviewing security and intelligence matters and is well-placed to consider listing decisions, including where classified information may need to be examined.

Review by the PJCIS also provides an avenue for members of the public to raise any concerns and provide information to the PJCIS with respect to the declaring of particular areas. The manner in which inquiries are undertaken and advertised is a matter for the PJCIS.

Further information about the PJCIS is available on the Parliament of Australia website www.aph.gov.au/pjcis.

Judicial review by the courts

Judicial review of the legality of a decision to declare an area is available in the courts under the *Administrative Decisions (Judicial Review) Act 1977*, section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*. The general principles of administrative law require that the minister's decision be made on the basis of logically probative evidence. The decision must also be a proper exercise of power, not flawed by irrelevant considerations, improper purpose or exercised in bad faith.

Oversight by the Inspector-General of Intelligence and Security (IGIS)

The IGIS is an independent statutory office holder who monitors and reviews the legality and propriety of the activities of Australia's intelligence and security agencies.

The IGIS has own motion inquiry powers and can also conduct inquiries in response to complaints from any person or requests from ministers. Should the IGIS decide to conduct an inquiry into an intelligence or security agency's role in the declaration of an area, the IGIS would consider whether the agency had followed appropriate processes when considering the area for declaration and when providing advice to the ACTC, the Joint Counter-Terrorism Board, the Attorney-General and Minister for Foreign Affairs.

Further information about the IGIS is available at: www.igis.gov.au.

THE HON MICHAEL KEENAN MP
Minister for Justice

MC14/22728

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100, Parliament House
CANBERRA ACT 2600

Dear Senator Dean

Thank you for your letter regarding the Parliamentary Joint Committee on Human Rights' *Fifteenth Report of the 44th Parliament* on the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014.

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

Schedule 1 – New Psychoactive Substances

1.90 The committee requests the further advice from the Minister for Justice as to:

- *whether the term 'psychoactive substance' could be more specifically defined;*
- *whether more precise terms than 'significant disturbance' could be used in the definition of what constitutes a 'psychoactive effect', and*
- *whether non-exhaustive terms such as 'including' be could be omitted from the definition of what constitutes a 'psychoactive effect'.*

The Government does not propose to amend the definitions of 'psychoactive substance' or 'psychoactive effect'. The Government considers that the definitions are sufficiently certain for human rights standards and meet the standards of the quality of law test for human rights purposes.

As outlined in my letter of 30 September 2014, this measure is designed to capture so-called 'legal highs' or 'new psychoactive substances', which are those substances that are developed specifically to induce the same effect in humans as illicit drugs but are not captured by the existing criminal laws which proscribe substances by chemical structure. The United Nations Office on Drugs and Crime's *2013 World Drug Report* noted that, by mid-2012, the number of different new psychoactive substances detected throughout the world had exceeded the 234 substances currently controlled under international conventions. The number of previously undetected new psychoactive substances continues to rise. The Report also noted that there is an almost limitless array of these sorts of chemical combinations.

The Government acknowledges that there are a large number of substances with a legitimate use which could induce the same effect as an illicit drug when consumed by humans. However, these are specifically excluded from the measure. In particular, the measure excludes the following: foods, therapeutic goods, tobacco, plants, fungi, industrial chemicals, agricultural chemicals and veterinary chemicals. In a practical sense, these exclusions mean that the definitions of 'psychoactive substance' and 'psychoactive effect' will apply very narrowly to a small, specific and definite range of substances that do not have a legitimate use. If a person is importing a substance for a legitimate use, he or she will not have to be concerned about the definitions of 'psychoactive substance' or 'psychoactive effect'.

There is no alternative method of achieving the Bill's aims that will not involve similarly broad definitions. It is not possible to narrow or more specifically define the terms 'psychoactive substance' or 'psychoactive effect' without fundamentally undermining the purpose and utility of the legislation. Ireland and New South Wales have taken a similar route and used similar definitions of 'psychoactive substance' and 'psychoactive effect'. New Zealand has set up a mechanism under the *Psychoactive Substances Act 2013* that would ultimately allow the importation and sale of authorised psychoactive substances, but it does not define psychoactive effect and leaves it open to a broad interpretation.

The Australian Government has adopted a definition that excludes substances that have only a minor effect on a person's central nervous system—that is, substances that do not result in hallucinations, significant disturbances or significant changes to a person's motor function, thinking, behaviour, perception, awareness or mood. Beyond this, it is not possible to use more specific or precise terms to capture an amorphous and ever-changing set of substances whose only unifying feature is that they are intended to be consumed as alternatives to other illicit drugs.

Other jurisdictions have chosen different ways to ban psychoactive substances based on their intended use, rather than their effect. While a ban based solely on the presentation of a substance may offer greater certainty for importers, it would be inadequate to deal with the realities at the border. Typically, the Australian Customs and Border Protection Service (ACBPS) and Australian Federal Police (AFP) will encounter new psychoactive substances as unmarked or mislabelled pills, powders or liquids. In such circumstances, it will not be possible for the officer examining the substance to immediately and conclusively determine that it is intended to ultimately be used as an alternative to an illicit drug. An effect-based ban (like that in proposed section 320.2) must accompany a presentation or purpose-based ban (like that in proposed section 320.3) in order for ACBPS and AFP officers to be able to effectively stop, seize, and destroy new psychoactive substances and, if appropriate, prosecute the importers.

A broad definition of 'psychoactive substance' is necessary for the Bill to achieve its aim of preventing largely unknown and untested chemical substances being imported as alternative versions of illicit drugs. When put in the context of the exclusions in subsection 320.2(2), the law is sufficiently specific for individuals who import goods, particularly chemicals, to understand their obligations under it.

Schedule 2 – Firearm Trafficking Offences

1.98 The committee considers that the mandatory minimum sentencing provisions are likely to be incompatible with the right not to be arbitrarily detained and the right to a fair trial.

Consistent with my previous response, the Government considers that mandatory minimum penalties for firearms trafficking are reasonable and necessary to deter people from diverting firearms into the illicit market, where they can be accessed by criminals and used in the commission of serious and violent crimes. As the provisions do not impose a mandatory non-parole period, the actual time a person will be incarcerated will be proportionate to the offence they commit and is entirely at the discretion of the sentencing judge.

The introduction of mandatory minimum penalties for these provisions was an election commitment and reflects the seriousness with which the Government takes gun-related crime. The Australian Government is not the only government which has taken this view, with the Queensland and United Kingdom governments also introducing mandatory minimum sentences for firearms trafficking, and a number of other counties establishing mandatory minimums for other firearms-related offences (including illegal possession).

I note that the validity of mandatory minimum penalties for aggravated people smuggling offences in the Migration Act were upheld as constitutionally valid in the High Court matter of *Magaming v The Queen [2013] HCA 40*. The appellant's argument that the imposition of these penalties was 'arbitrary' and 'non-judicial' was not successful.

1.99 In the event that the mandatory minimum sentencing provisions are retained, the committee recommends the provision be amended to clarify to the courts that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence.

In response to concerns raised by the Committee in its *Tenth Report of the 44th Parliament*, I have agreed to amend the Explanatory Memorandum for the Bill to note that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'. This further demonstrates the Government's commitment to limiting any encroachment on judicial discretion.

Schedule 5 – Validating Airport Investigations

1.111 The committee requests the further advice of the Minister for Justice as to:

- *whether unauthorised powers were exercised (such that there is a need to retrospectively validate such powers);*
- *if so, what powers were exercised (to see whether that the general nature of the validation is proportionate); and*
- *what specific other powers existed at the time under which the conduct was or could have been carried out (to see if there is a need to retrospectively validate such power and if such validation is proportionate).*

.As outlined in my previous response, the *Commonwealth Places (Application of Laws) Act 1970* allows the Australian Federal Police (the AFP) to utilise investigative powers available under Part 1AA and 1D of the *Crimes Act 1914* to investigate state offences which occur at Commonwealth places that are designated state airports. As the *Commonwealth Places (Application of Laws) Regulation 1998* (the Regulations) was inadvertently repealed for a period of time, the AFP was unaware of the need to confine itself to alternative powers,

which may have been available, for a portion of the repeal period. Statistics are not available to identify the specific powers relied upon during this period.

Alternative powers were available to the AFP to investigate state offences at designated state airports, including under section 9 of the *Australian Federal Police Act 1979*. These alternative powers may give rise to a separate procedure and practice from the *Crimes Act 1914* powers. Since 2011 when the Regulations were amended to allow the AFP to use investigative powers under the *Crimes Act 1914* in designated state airports, the AFP has used these investigation powers notwithstanding the availability of alternative powers. Retrospective validation of the use of *Crimes Act 1914* powers between 19 March 2014 and 16 May 2014 would eliminate any uncertainty which may arise.

Accordingly, retrospective validation of certain powers for a limited time period under Schedule 5 of the Bill is a reasonable, necessary and proportionate measure to achieve a legitimate objective, so as to ensure consistent application of appropriate security and policing at Commonwealth airports. It is necessary to avoid the potential for inequitable outcomes within the criminal justice system, based on whether a person was arrested within the eight week period when the investigative powers used by the AFP were not in force.

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

Should you require any further information, the responsible adviser for this matter in my office is Tim Wellington, who can be contacted on 02 6277 7290.

Yours sincerely

Michael Keenan

11 DEC 2014

ATTORNEY-GENERAL

CANBERRA

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

Dear Senator Dean

The Parliamentary Joint Committee on Human Rights has sought information about the Federal Courts Legislation Amendment Bill 2014 (the Bill).

Specifically, the Committee has sought my advice about whether the conferral of jurisdiction on the Federal Circuit Court of Australia (the FCC) for tenancy disputes is compatible with fair hearing rights.

It is my view that the relevant provisions in the Bill are compatible with the right to a fair hearing. They provide tenants involved in a Commonwealth tenancy dispute with an appropriate forum to have those disputes heard and determined.

Jurisdiction is being conferred on the FCC in order to ensure that tenancy disputes involving the Commonwealth can be resolved in the least time-consuming and expensive way. State and territory law directs residential tenancy matters to state and territory tribunals. However, state and territory tribunals that are not 'courts' within the meaning of Chapter III of the Constitution cannot exercise federal judicial power, which can give rise to jurisdictional arguments when the Commonwealth is a party to a tenancy dispute.

Conferring jurisdiction on the FCC to hear certain Commonwealth tenancy disputes will provide an appropriate forum in a Chapter III court for these matters to be heard. The only current alternative to resolve residential tenancy disputes involving the Commonwealth would be for a tenant to bring action in a superior state court or, in some circumstances, the Federal Court, which is a much more costly and time-consuming endeavour for users, than the FCC.

I understand that concerns have been raised about application of the protections that exist for lessees under state and territory law. It is important to note that state and territory law will continue to govern tenancy arrangements where the Commonwealth is a lessor. This includes protection about unlawful and unjust eviction. This position is intended to be clarified through legislative instruments made under proposed paragraph 10AA(3)(b) of the Bill.

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The intention of the Bill is not to remove any of these important protections, but simply to introduce a new option for resolving Commonwealth tenancy disputes in a low-cost and easily accessible forum where jurisdictional arguments would not require consideration.

For these reasons, I am of the view that the provisions in the Bill relating to Commonwealth tenancy disputes are not only compatible with fair hearing rights, but indeed promote these rights in a low-cost, easily accessible trial court which has a national presence and circuits regularly to regional areas.

I thank you for seeking my advice in relation to this Bill and hope that this information assists the Committee.

Yours faithfully

(George Brandis)

THE HON STEVEN CIOBO MP

Parliamentary Secretary to the Treasurer

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
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17 DEC 2014

Dear Senator Dean Smith

Thank you for your letter, originally directed to the Treasurer, on behalf of the Parliamentary Joint Committee on Human Rights (Committee) regarding the Labor 2013-14 Budget Savings (Measures No. 1) Bill 2014 (Bill). I am responding on the Treasurer's behalf and apologise for the delay in doing so.

The Committee sought further information as to whether the Bill is compatible with the right to an adequate standard of living in article 11(1) of the International Covenant on Economic, Social and Cultural Rights.

The Bill repeals the second round of Carbon Tax-related personal income tax cuts that are due to start on 1 July 2015 because that is what Labor promised prior to the last election as a budget savings measure to help to repair the budget. Since the election Labor have failed to keep their promise to the Australian people so we are introducing legislation to allow the Labor Party to keep its promise to the Australian people to fix the budget.

Given the only consequence of the Bill is to preserve the currently applicable tax arrangements and it is no longer necessary to compensate taxpayers for the Labor's Carbon Tax, the Government is comfortable the proposed changes are compatible with human rights. I note the Government has scrapped Labor's carbon tax, saving the average household $550 a year.

I trust this information will be of some assistance to the Committee.

Yours sincerely

Steven Ciobo

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